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MEMORANDUM

TO: Labor& Industry Committee

FROM: Michael J. Torchia, Esq.

DATE: April 24, 2018

SUBJECT: Workplace Investigations of Sexual Harassment
Opening Remarks for Committee Hearing April 24, 2018

Thank you for inviting me here today to provide information about workplace investigations. I have been a labor and employment attorney for nearly 27 years, and have been conducting workplace investigations for a variety of employers both public and private for nearly the same period. I often lecture and write on the topic of workplace investigations and have been retained to train other investigators. Regarding sexual harassment particularly, I routinely provide harassment training and education, and the Committee may remember me from this past December when I provided such training to the House Republicans and House Democrats.[1]

Investigations of workplace complaints is a common practice across the Commonwealth and the country. Whether to investigate and how to investigate starts in most cases as soon as a complaint is made. Complaints in the workplace can come from many sources – from the victim himself or herself, a third-party (for example an employee who is told or observes some wrongdoing), observance by a manager or supervisor, an attorney demand letter, a charge of discrimination with one of the agencies, a lawsuit, or even an anonymous complaint.

Employers both public and private, have the responsibility to be proactive when a complaint of sexual harassment, discrimination or retaliation is made. Employers should not be reactive. That means employers should have policies explaining and forbidding harassment, discrimination and retaliation, arrange to provide appropriate training and education, and be prepared to investigate a complaint when made.

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[1] My curriculum vitae is included in the packet of materials provided for today's hearing.

Importantly, the policy needs to be clear about how an employee can complain. Does the employee contact his or her manager or supervisor? Human Resources? Or someone else?

When a complaint is made the employer should conduct a "prompt and thorough" investigation. This standard of a "prompt and thorough" investigation comes primarily from a pair of United States Supreme Court cases in 1998, commonly referred to as "*Faragher* and *Ellerth*" which set forth standards for addressing sexual harassment claims and clarified an employer's liability.

When a complaint is made, employer representatives and their attorneys must decide who will conduct the investigation, that is, assign it to someone inside or hire an outside investigator. There are pros and cons of each including neutrality, cost, the speed with which someone can begin the investigation and whether the communications with the investigator will be privileged, i.e., discoverable in court if there is a lawsuit.

There are no state or federal statutes explicitly requiring a workplace investigation, but the case law is clear that an investigation must be conducted. Otherwise, how would the employer know whether harassment occurred, and how would it would determine a proper remedy?

Similarly, there is no bright line definition of "prompt" or "thorough." Instead, there are many court cases that provide guidance about "how long is too long" to start, and what is considered to be a thorough and fair investigation under the circumstances.

For the past six months, I've been speaking frequently to various groups, including attorneys representing both employees and employers, about sexual harassment and the so-called "#metoo" movement. I believe it is imperative (not to mention in compliance with the law), for employers to take measures to keep all employees safe from harassment, discrimination and retaliation related to their employment.

The victims in the #metoo movement – many of which we all know because they are high profile claims against celebrities, politicians, and well-known business leaders – are women who allege they have been harassed by men. This is not, however, the entire group of victims out there, because the law puts no restriction on gender. So a women can be harassed by another woman, a man can

be harassed by a woman, a man can be harassed by a man, and sexual orientation – heterosexuality, homosexuality, transgender – has nothing to do with it.

So we find ourselves living in interesting times. Although in some circles it is not currently fashionable to question the victim, or frankly, to imply in any way the victim is lying, that is not reality, nor is accepting the victim's story at face value consistent with the case law. It is certainly not required by any rule, regulation or guidance that I have seen, and has never been suggested by the agencies charged with protecting employees such as the Human Relations Commission.

Although there is no legal requirement of "due process" for an alleged harasser like there would be in a court of law, I believe it is contrary to all notions of fairness to simply take the word of the victim and an enact remedial measures without conducting a thorough investigation, not to mention that would be extremely unusual as a practical matter. It's also possible the employer who doesn't conduct an investigation may find themselves with claims made by the alleged *harasser*, which could be complicated if the harasser is a man and women harassers had been treated differently in the past, or he has an employment contract or is a union member, as the employer's actions may be in breach of those contracts.

The investigator needs to have the time and the opportunity to interview witnesses, review relevant documents, and obviously provide the alleged harasser – man or woman – an opportunity to admit, deny or explain the allegations made. Only then can the employer determine what remedial steps, if any, should be taken.

Again, I appreciate the opportunity to provide information to the Committee today.

Sample Investigative Report
from workplace investigation

Michael J. Torchia, Esq.
Semanoff Ormsby Greenberg & Torchia, LLC
April, 2018[1]

[1] These materials were drafted and modified specifically for submission to the Pennsylvania House of Representatives Department of Labor and Industry Committee Hearing on April 24, 2018. There are various subjects left out of these materials regarding workplace investigations since they would be outside the scope of the Committee inquiry.

INVESTIGATIVE REPORT

January 8, 2018

MATTER/CASE NAME: **ABC Centers, Inc.**
(Complainant Krystal Jameson)

INVESTIGATOR:

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Attorney for ABC Child Centers, Inc.

LEGAL REPRESENTATION:

ABC Centers is represented by outside counsel, Michael D. Jennings, Esq., of Clark Lewis LLP, Philadelphia, Pennsylvania.

Krystal Jameson is represented by Jeffrey F. Catalano, Esq., of Catalano & Associates in West Chester, Pennsylvania.

DISCRIMINATION AND SEXUAL HARASSMENT POLICIES:

ABC Centers has an Equal Employment Opportunity antidiscrimination policy in effect that specifically prohibits discrimination based on "race, color, religion, sex, national origin, age, veteran status," and disability (as defined). The company also has a policy prohibiting sexual harassment and encourages employees to make a complaint if appropriate. The EEO and sexual harassment policies are attached as Exhibit A.

INTERVIEWS:

Total interviews: 8

Interviews were conducted on-site at ABC Centers' corporate headquarters, Paoli, PA.

Only the Investigator and the witness were present for each interview.
The interviews were not audio or video recorded.

Friday, November 17, 2017

9:05 – 11:20 am:	Krystal Jameson
11:35 – 1:10 pm:	Cindi Korger
1:30 – 2:15 pm:	Mindy Norder

Thursday, December 7, 2017

9:20 – 10:50 am:	Valerie Vicks
11:00 – 11:40 am:	Carole O'Grady
1:10 – 3:30 pm:	Harrison O'Grady

Friday, December 8, 2017

11:35 – 12:15 pm:	Marcia Cherube
12:30 – 1:25 pm:	Krystal Jameson (follow-up, off-site)

The Investigator may also have had follow-up communications with the witnesses via telephone or e-mail.

Total time of interviews: 10 hours, 35 minutes

ADDITIONAL WITNESSES:

At this time, no other witnesses are necessary to complete this Report.

RESTRICTIONS OF INTERVIEWS:

There were no restrictions placed on any interview in terms of scope of questioning or time

allotted for each interview, and no person was restricted from being interviewed. No witness terminated an interview or refused to answer any question.

AFFIDAVITS:

Each witness signed an affidavit, and had complete discretion to make any changes he or she wished. The affidavits were sent to the witnesses on December 11, 2017. The last affidavit was returned to the Investigator on December 22, 2017.

EXHIBIT LIST:

Exhibit A: ABC Centers EEO and Sexual Harassment Policies

Exhibit B: Krystal Jameson Affidavit and Unredacted Chronology

Exhibit C: Krystal Jameson Original Chronology (provided to Carole O□Grady)

Exhibit D: Krystal Jameson e-mail of November 18, 2017, to Carole O□Grady and response of November 20, 2017

Exhibit E: Cindi Korger Affidavit

Exhibit F: Mindy Norder Affidavit

Exhibit G: Valerie Vicks Affidavit

Exhibit H: Carole O□Grady Affidavit

Exhibit I: Harrison O□Grady Affidavit

Exhibit J: Marcia Cherube Affidavit

Exhibit K: Krystal Jameson Resignation Letter of December 3, 2017

Exhibit L: Sample Letter to Witnesses from the Investigator enclosing Affidavits and "Instructions to the Affiant"

PRELIMINARY STATEMENT:

The following Preliminary Statement was read to each witness in substantially the form that follows:

> **My name is Mike Torchia and I would like to read this statement before we begin. This is my business card.**
>
> **I am an attorney, hired by ABC Centers. I am here today to investigate claims of alleged improper conduct in the workplace.**
>
> **I do not represent ABC Centers, any ABC Centers affiliate or subsidiary, or any ABC Centers employee. I do not represent you. I am here as an independent investigator.**

I intend to ask you questions about certain complaints and concerns, and would like you to answer the questions honestly and completely. From your responses, I will prepare an affidavit or statement that you will have an opportunity to read and correct. You will be asked to sign your affidavit.

You should know that the information you provide is <u>not</u> completely confidential. Although I and the company will make every attempt to keep the information confidential, as should you, ABC Centers representatives and their attorneys will have access to the information, and your statement will become part of the investigative file and my final report.

I believe, as the investigator, that it is vital to protect confidentiality in the workplace and throughout this investigation, both for ascertaining the "truth" of the allegations, to prevent fabrication (lying), to preserve evidence, and for protecting the reputations of the complainant, the alleged harasser, and all of the witnesses. Therefore, at the conclusion of this interview, please do not discuss your statements or my questions with anyone.

Although I will take notes, I am not recording this interview. Are you recording it?

STATEMENTS OF THE WITNESSES:

A. Overview of the Claims and Persons Involved

This is a sexual harassment, hostile work environment claim. There also appears to be an indirect quid pro quo aspect as well.

Krystal Jameson complained of repeated inappropriate behavior of Harrison O'Grady, who is not an employee of ABC Centers. The relevant relationships are:

- Krystal Jameson was ABC Centers' Executive Director and reported to Cindi Korger, Senior Vice President.
- Cindi Korger reports to Carole O'Grady, President and CEO.
- Harrison O'Grady is Carole O'Grady's husband, but not an employee of ABC Centers. Instead, Mr. O'Grady's company, "Floors and More," has an independent contractual arrangement with ABC Centers to provide maintenance and repair services for ABC Centers' facilities.
- Mindy Norder is the administrative assistant, technically reporting to Carole O'Grady, but also has extensive contact with Cindi Korger.
- Valerie Vicks is the Director of the Plymouth Meeting facility (The Holland School) and reported to Krystal Jameson.
- Marcia Cherube is the Director of the Walton Road facility and reported to Krystal Jameson. Marcia will be taking over the expansion Devon facility.

Cindi, Krystal, and Mindy Norder worked together on the first floor of the corporate offices in Plymouth Meeting. Krystal Jameson spent much of her time traveling to and from various facilities. Carole O'Grady's office is on the second floor, which is also her and Harrison's personal residence.

B. Chronology of Events

Ms. Jameson prepared a detailed chronology of events, attached as Exhibit A to her Affidavit (which is Exhibit B to this Report).

Generally, Ms. Jameson complained of comments by Mr. O'Grady beginning in March, 2017. The inappropriate comments and actions restarted in August, and became increasingly frequent throughout September until Ms. Jameson complained to Mindy Norder and Cindi Korger on September 26, 2017.

Ms. Korger, Ms. Norder, and Ms. Jameson discussed how to handle the complaints for approximately the next four weeks (although there is some disagreement about the discussions, see below at pages 11–12, "Krystal's Complaints to the Company") until Ms. Jameson wrote to Ms. Korger on October 31, 2017, noting that nothing had been done about her complaints since she made them on September 26th.

On Wednesday, November 15, 2017, it was announced at a Director's Meeting that Marcia Cherube would be the Director of the new Devon facility. Ms. Jameson was upset with this and other previous work-related decisions. That evening, Ms. Jameson completed the chronology, creating a version with some redactions (Exhibit C to this Report), intending to bring it to work the next day to ask Cindi once again to get involved. Instead, the next day on Thursday, November 12, 2017, Ms. Jameson spoke with Valerie Vicks, Director of The Holland School facility (housed in the same building as the corporate headquarters and the O'Grady's private residence), and together they called Carole O'Grady from upstairs to come to Ms. Vicks' office. Ms. Jameson gave Ms. O'Grady the redacted chronology at that time.

There is no indication that Ms. O'Grady knew of Ms. Jameson's complaints prior to November 12th.

Ms. Jameson e-mailed Carole O'Grady, asking the status of her complaints on November 18, 2017, and Ms. O'Grady responded on November 20, 2017 (Exhibit D).

The Investigator was contacted by ABC Centers' counsel on Monday, November 20th, and, due to Ms. Jameson being on vacation, the Thanksgiving holiday, and the Investigator's schedule, the first interviews were scheduled for November 28th.

Ms. Jameson resigned her position with the company on December 3rd, after her first interview but prior to the follow-up interview of December 5th.

C. Ms. Jameson's Claims and Mr. O'Grady's Responses

The following are responses to Ms. Jameson's allegations relevant to this investigation as set forth in her unredacted chronology attached to her Affidavit (see Exhibit B to this Report). It is best to refer to that chronology when reading the following responses from Mr. O'Grady, which are summarized and paraphrased from his Affidavit (Exhibit I).

Generally, Mr. O'Grady admits to making many of the comments and having the conversations complained of by Ms. Jameson, but defends himself by saying (1) Krystal was a willing participant in these repeated conversations and (2) he was trying to mentor her about how to advance in the company. When asked why he would take on this mentoring role, Mr. O'Grady responded that Krystal was a "class act" and he was impressed with how she handled herself in his past dealings with her.

1. March 2017 (Mr. O'Grady prying into Ms. Jameson's personal life with her husband

Brian): Harrison responded that Krystal complained about Brian, and the two of them had several conversations about her marital relationship. Mr. O'Grady admits saying, "Have you ever thought about life without Brian?" and reported that Ms. Jameson responded, "I know, I can't afford it." Mr. O'Grady said Krystal suspected her husband was having an affair with another woman because her husband stayed out until the middle of the night at a woman's house. Harrison told Krystal she should seek out friends or other men so she could have "sex without strings," but denies he was suggesting that she have sex with him.

Krystal said she had no personal conversations with Harrison about her husband, and never told him she was concerned about Brian having an affair. She also did not recall the "sex without strings" comment. Krystal also said Harrison's "marital advice" was unsolicited and intruding.

2. August 3, 2017 (Mr. O'Grady squeezing Ms. Jameson's shoulders): Harrison recalls asking Krystal to come upstairs and sort the mail, which she did. He does not remember squeezing her shoulders. Harrison said that he is a certified massage therapist and will often squeeze ABC Centers employees' shoulders, telling them to sit up straight or that they look tense.

Mr. O'Grady denies that while Krystal was upstairs, he pulled out his wallet to show a large wad of cash and said, "See, this is what you could get," implying she could have money if she became romantically involved with him.

3. Late August (gas money): Krystal stated Harrison gave her $50 for gas money "because she had been driving back and forth to Springfield" and did *not* believe this was an attempt to flirt with her. Harrison said that, in fact, he gave her $100 to reimburse her for gas money and travel. He also said he has given others money if he felt they should be reimbursed.

4. September 6, 2017 (paying for sex comment): Mr. O'Grady acknowledges having a candid conversation about his relationship with his wife Carole, just as Ms. Jameson reported in her chronology.

Harrison acknowledges telling Krystal he had one close friend who told him that if he was not getting what he needed sexually he should "go find a pretty girl and pay her for it." Harrison said he did not mean Krystal should be that "pretty girl" nor was he implying he wanted to pay her for sex. During that same conversation, he also told Krystal, "I know I gave you a lot to think about. Just get back to me," but this was not referring to his comment about sex or the two of them becoming involved, this was referring to marital advice and Krystal's issues with Brian. He also spoke with Krystal on September 7th in the car on the way to the unemployment compensation hearing about her relationship with Brian.

5. Mid-September ("love ya" comment): Krystal alleged that when hanging up on at least one telephone call, Harrison said, "Bye—love ya!" Harrison denies using those words, admits he may have called her "sweetie," and other female ABC Centers employees "sweetheart" and "honey."

6. September 26, 2017 ("food and sex" comment): Mr. O'Grady acknowledges Ms. Jameson returned his telephone call and asked, "Do you need something?" Mr. O'Grady admits he responded, "What two things do guys need? Food and sex. I need the second one." Mr. O'Grady said he has made this comment to many people as a joke. Mr. O'Grady denies saying to Ms. Jameson, "I'm still interested, if you are let me know."

Krystal stated it was obvious Harrison did not make the "food and sex" comment referring to men generally, it was a comment about himself and he was directly soliciting Krystal for sex,

especially when taken with the last comment, "I'm still interested, if you are let me know."

7. October 1–5, 2017 (Krystal's bonus): Krystal alleged that Harrison called and told her he had helped get her a larger bonus and then said "I'll give you another bonus" in a way implying sex. Harrison explained that Carole and Cindi were upset with Krystal and were going to give her no bonus or a very small bonus. He said he told them it was not fair to give her nothing, Krystal should get something, and convinced Carole to give Krystal $750, increased from $250. Harrison does not recall saying to Krystal, "I'll give you another bonus" and if it was said, it was not meant to imply sex.

Carole O'Grady, in her interview, stated that Harrison has nothing to do with the bonuses generally and had nothing to do with Krystal receiving a bonus or a larger bonus.

8. October 9, 2017 ("you owe me" comment): Harrison admitted saying to Krystal on the telephone, "Don't forget you owe me," but denies there was any sexual implication or that it was related to him securing a higher bonus for Krystal. Harrison stated he was giving Krystal advice about how to handle Carole and get a job Krystal thought was more favorable (director at a new facility). Harrison said he wanted Krystal to "pay him back" by doing a good job in the position.

9. October 26, 2017 ("proactive rather than reactive" comment): Harrison admitted calling Krystal and wanting to speak with her about changes being made with her position. He told Krystal she had better watch her back with Cindi and told her he wanted to speak with her but not on the telephone. When he spoke with Krystal later that day, he talked about Devon. He also told Krystal he needed to be proactive rather than reactive about helping her get the position. Harrison denies his comment had any sexual or romantic implication.

10. October 27, 2017 (wedding of co-worker): Harrison said Krystal is correct that he was trying to talk to her about something at the wedding of a co-worker, but denies it was sexual or romantic in nature. Harrison said he wanted to make a comment about Pam, a former director who had left ABC Centers, and the fact that Pam should not have been at the wedding. Harrison pointed out, as did others, that during the wedding he sat next to Krystal's husband Brian and there was no indication of any friction.

CREDIBILITY OF THE WITNESSES/INVESTIGATOR'S OBSERVATIONS

In any investigation, the credibility of the complainant, witnesses, and the alleged harassers is important to place the statements in context. To assist the decision makers, the Investigator offers the following observations.

During the investigatory process, most employers look for evidence that points to a definitive conclusion, that is, "he did it" or "he didn't do it." It is often tempting to classify unresolved issues as a so-called "he said, she said" case implying a "tie" between the conflicting stories. There are, however, factors to consider that add weight to certain facts and the witness statements.

Krystal's Complaints Against Harrison

Cindi Korger, Mindy Norder, Carole O'Grady, and Marcia Cherube provided useful information about the company and Krystal Jameson and Harrison O'Grady generally. Not one of the four, however, witnessed any of Harrison's comments or actions of which Krystal complained, nor had anyone else apparently.

It is important to note that Mr. O'Grady did not deny making most of the comments,

although predictably he had a different explanation as to their context and meaning.

Harrison *admits*:

- Speaking to Krystal about her personal life and her relationship with her husband, and suggesting she seek sexual activity elsewhere;
- Speaking to Krystal about his personal relationship with Carole, including details about his sex life;
- Telling Krystal that a friend told him if he was not getting what he needed physically he should go find a pretty girl and pay her for sex;
- Referring to Krystal as "sweetie" and other female ABC Centers employees "sweetheart" and "honey";
- Making the "food and sex" remark to Krystal;
- Telling Krystal he was responsible for securing a larger bonus for her, and saying, "You owe me"; and
- Telling Krystal he needed to be "proactive rather than reactive."

Harrison *denies*:

- Suggesting or implying to Krystal that they have sex or become involved romantically;
- Squeezing Krystal's shoulders or saying, "See, this is what you could get" (although he admits he asked Krystal to come upstairs to sort the mail);
- That after the "food and sex" comment, he said, "I'm still interested, if you are let me know."
- His comment about finding a pretty girl and paying for sex was implying that he would pay Krystal for sex;
- That "I know I gave you a lot to think about. Just get back to me" was a solicitation for sex, but instead it referred to marital advice he was giving Krystal;
- Saying "love ya" to Krystal;
- Or at least does not recall, whether he said to Krystal, "I'll give you another bonus" but in any event, he was not implying sex;
- That "You owe me" was implying sex; and
- Telling Krystal he needed to be "proactive rather than reactive" referred to his pursuit of her, but rather it meant he needed to do more to assist with her job advancement.

Harrison's primary defense is that he was acting as a mentor and advocate, that is, someone with knowledge of the company and a certain measure of influence over bonuses, promotions, assignments, etc. This is curious because Harrison, far from being an executive with the company, at all relevant times, was not even an employee of ABC Centers. On the other hand, since he is Carole's husband, and given his history with the company, experience in the child care industry generally, and strong ties to ABC Centers as an independent contractor, it is not at all far-fetched for Krystal to believe he had a certain degree of knowledge and influence. Carole, however, stated Harrison had virtually no say or influence over the bonuses as an example, and commented that Harrison liked to play the role of executive even though he had no real power.

The real question here is, if Harrison was not pursuing Krystal romantically, why would he take on this mentoring and advocacy role on her behalf? During the investigation he was asked this several times in various ways, and his response was simply that he knew Krystal to be a "class act," was impressed with his dealings with her in the past, and that he respected her.

Although Harrison's statements could certainly be true, it seems he put much time and effort into surreptitiously assisting Krystal—that is, without directly approaching Cindi, or

indeed his wife—to make the case for Krystal taking a greater role in the company or to obtain the new position at Devon. Moreover, at the same time he was advocating for Krystal, Cindi and Carole were having serious reservations about Krystal's ability to perform her duties as Executive Director, much less having her take on a new and important assignment in an expansion facility. Harrison knew some or all of their concerns because it came up during the bonus discussions and in general conversation. Harrison also said he heard complaints and concerns from Krystal herself about her role in the company.

The point is, Harrison's stated reason of why he would go so far to assist Krystal seems thin, and adds weight to Krystal's interpretation of his comments and actions.

Krystal relays the story and Harrison's actions and comments with particularity, and her two interviews were consistent with each other and her written chronology. In assessing her credibility, the Investigator has no reason to believe Krystal fabricated the comments and actions out of whole cloth. In fact, none of the other witnesses had any reason to believe Krystal would lie. Ms. Jameson appeared credible in both interviews, except her blanket denial of discussing her husband Brian with other ABC Centers employees seems unlikely, that is, the Investigator believes there were conversations initiated, or at least voluntarily participated in by Krystal, about her relationship with her husband, especially considering that ABC Centers employees knew Brian from some brief computer work he was hired to do for the company.

Although Krystal's allegations generally ring true, that is not to say that each one of Harrison's comments and actions were necessarily unwelcomed by Krystal. The difficulty for the decision makers, in the Investigator's opinion, will be to determine the extent of the unwelcomed conduct Krystal experienced versus how much she welcomed or ignored it. If Harrison was providing Krystal with inside information and/or assistance with her career, even for an improper motive, Krystal may not have objected. Furthermore, as several of the interviewees pointed out, Krystal was allegedly experiencing this unwelcomed conduct for several months, yet apparently continued to initiate contact with Harrison via cell phone, and meeting him privately—for example, she agreed to meet with Harrison on October 26th, well after his "food and sex" comment and her complaints to Cindi and Mindy. Even the morning of November 15th when she divulged the complaints to Carole, Krystal contacted Harrison about making a donation to one of the centers. Krystal's response is that she was trying to remain professional and still needed to interact with Harrison to some degree to perform her job functions. It seems clear, however, that to some extent, Krystal was engaging in personal contact with Harrison that she could have avoided.

Harrison's Theory of Why Krystal Made the Allegations

Harrison's theory is that Krystal failed to be transferred to the new Devon facility, and that was the trigger causing Krystal to make the complaints against him. The timing does not fit, however.

There were statements by Cindi, Carole, and Krystal herself, that Krystal was unhappy with her job (and Cindi and Carole were unhappy with her) throughout the summer and into the fall. This unhappiness was rooted in Krystal feeling out of place in her position as Executive Director and unsure of her role in the company. This culminated with Marcia Cherube being chosen as Director of the new Devon facility as announced on November 14th.

Krystal, however, complained to Cindi and Mindy on September 26th, well before the November 14th Director's meeting. Although Krystal may not have been happy with Ms. Cherube being assigned to Devon, it was clearly not the motivation for making the initial

complaints against Harrison, since Krystal had done so seven weeks earlier.

Krystal's Complaints to the Company

Krystal informed Mindy Norder, and then her supervisor Cindi Korger on September 26th of her complaints against Harrison, directly following the "food and sex" comment and Harrison saying "I'm still interested, if you are let me know" (which Harrison denies). Krystal had a detailed conversation with Cindi on the telephone immediately after informing Mindy.

Following that initial complaint, Krystal became concerned that Cindi failed to take any action, and on October 31st wrote a letter complaining of the inaction and making additional allegations, which Krystal delivered on November 2nd to Cindi. This letter is incorporated into Krystal's chronology. Krystal stated on October 9th she asked Cindi when she was going to speak to Carole, but that Cindi decided the three of them should approach Carole together. Krystal told Cindi she did not feel comfortable with Carole knowing her identity, and asked Cindi and Mindy to speak with Carole but keep the identity of the complainant anonymous. On October 15th, Krystal asked Cindi about her conversation with Carole, and Cindi said she thought they would have no credibility if they approached Carole with anonymous complaints. Krystal stated that Cindi said to "just let it go and see what happens." Krystal stated that Cindi did not ask her for any written statement until *after* she gave Cindi the letter of October 31st, and told Krystal not to e-mail it, but provide a hard copy.

Cindi and Mindy paint a different picture. They stated they did take action after Krystal complained on September 26th, specifically, they discussed with Krystal different strategies of how to approach Carole with the complaints. On September 27th, Mindy contacted an attorney to discuss Krystal's legal rights generally. Cindi and Mindy had suggested they approach Carole anonymously, but Krystal did not feel comfortable doing that. Cindi said that from the time Krystal made the complaint on September 26th, they "begged" Krystal to provide to them her complaints in writing, so they would have something tangible to bring to Carole. Despite several requests, Krystal failed to provide any such writing until her letter of October 31st, which Cindi informed Krystal was insufficient because it did not provide enough detail. It was not until November 14th (so stated by Krystal) that Krystal prepared the detailed chronology of complaints (Exhibit B).

RECOMMENDATIONS:

As an independent investigator, I have not been asked to provide, nor have I volunteered any recommendations for action to any representative of ABC Centers or their attorneys.

COMPENSATION:

I have or will be compensated by ABC Centers or its attorneys and no other person.

THIS INVESTIGATIVE REPORT WAS COMPLETED ON JANUARY 8, 2018.

MICHAEL J. TORCHIA, ESQ.

OVERVIEW OF WORKPLACE INVESTIGATIONS

Michael J. Torchia, Esq.
Semanoff Ormsby Greenberg & Torchia, LLC
April, 2018[1]

Table of Contents

[1] These materials were drafted and modified specifically for submission to the Pennsylvania House of Representatives Department of Labor and Industry Committee Hearing on April 24, 2018. There are various subjects left out of these materials regarding workplace investigations since they would be outside the scope of the Committee inquiry.

I. THE LAW OF WORKPLACE INVESTIGATIONS IN PENNSYLVANIA

A. Introduction to Workplace Investigations

In the past decade, workplace investigations of harassment and discrimination complaints have been transformed from an occasional suggestion of management—used sporadically to support a difficult employment decision or to satisfy an employee complainant—to a procedure that could afford an employer an affirmative defense and, quite possibly, single-handedly protect an employer from liability under Title VII and other employment-related statutes. A multitude of labor and employment laws, coupled with innovative court decisions, offer employees abundant legal options when employers fail to use clear and calculated internal investigation techniques.

The importance of conducting a prompt, thorough, fair, and efficient investigation cannot be overstated, and is virtually mandated if an employer expects to prevent, resolve, or defend against claims of sexual harassment, discrimination, retaliation, and related claims of employee misconduct. In Pennsylvania there is no statute or regulation that explicitly obligates an employer to conduct a workplace investigation. Most questions surrounding whether an investigation is necessary, and the adequacy of that investigation, are resolved from a review of federal case law and at times, other sources. The absence of specific statutory direction, however, does not mean there is no obligation to investigate.

B. An Employer's Obligation to Conduct a Workplace Investigation—The *Faragher* and *Ellerth* Affirmative Defense

The United States Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), commonly referred to together as "*Faragher* and *Ellerth*," changed the rules of the game when it reestablished the standard for employer liability.

Faragher and *Ellerth* established three standards. First, if an employee proves that a supervisor subjected the employee to an adverse tangible employment action for the purpose of harassment, the employer is automatically vicariously liable for sexual harassment. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808. A "tangible employment action" is, for example, discharge, demotion, or an undesirable assignment. *Faragher*, 524 U.S. at 808.

Second, an employee can establish a sexual harassment claim if he or she can prove a hostile work environment created by a co-employee under a negligence standard. Under 42 U.S.C. § 2000e–2(a) a discrimination claim founded upon a hostile work environment is well-established. *See, e.g., Kokinchak v. Postmaster General of the United States,* 677 Fed. Appx. 764, 766 (3d Cir. 2017) (citing *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993)). To do so, the plaintiff must prove a

basis for vicarious liability. *See Porchia v. Cohen*, No. 98-3643, 1999 WL 357352 (E.D. Pa. June 4, 1999). Under this standard, "liability exists [only] where the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 293 (3d Cir. 1999) (citing *Andrews*, 895 F.2d at 1486); *see also Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 107 (3d Cir. 1994) ("under negligence principles, prompt and effective action by the employer will relieve it of liability" for sexual harassment).

Third, where *no tangible employment action is taken,* an employer can take advantage of an affirmative defense to a claim of sexual harassment if it can meet two elements:

- that it exercised reasonable care to prevent and promptly correct any harassing behavior; and

- that the alleged harassed employee unreasonably failed to take advantage of preventive or corrective procedures provided by the employer, for example, making a complaint to his or her supervisor.[2]

Although workplace investigations are not specifically mentioned in *Faragher* or *Ellerth*, the court defined the affirmative defense as, "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. The reference to "correct promptly" directly implies an investigation. Query how an employer would "correct promptly" a complaint of alleged sexual harassment in any meaningful way without an investigation, and there is authority supporting the employer's obligation to investigate. *See, e.g.*, EEOC Enforcement Guidance 915.002: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999); *see also* 29 CFR 1604.11(d) (an employer is responsible for sexual harassment in the workplace with respect to conduct between fellow employees unless it can show that it took immediate and appropriate corrective action); *Garrity v. John Hancock Mutual Life Ins. Co.*, No. 00-12143-RWZ, 2002 WL 974676 (D. Mass. May 7, 2002) (discussing legal requirement to commence an investigation once employer is aware of alleged harassment); *Keefer v. Universal Forest Products, Inc.*, 73 F. Supp. 2d 1053, 1056 (W.D. Mo. 1999) (*Faragher* and *Ellerth* require a reasonable investigation into allegations of harassment).

Courts are often asked to comment on the adequacy of workplace investigations. *See, e.g.*, *Walters v. Washington County,* 415 Fed. Appx. 374 (3d Cir. 2011) (affirming district court's determination that workplace investigation was adequate); *Richards v. Centre Area Transp. Auth.*, 414 Fed. Appx. 501, 503 (3d Cir. 2011) (same); *Fairclough v. Wawa, Inc.*, 412 Fed. Appx. 465, 469 (3d Cir. 2010) (same).

C. Investigations Beyond Sexual Harassment

Although both *Faragher* and *Ellerth* involved alleged sexual harassment in violation of Title

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2The *Faragher/Ellerth* affirmative defense is available only in a hostile environment situation and never available in a quid pro quo, tangible employment action case. *See, e.g., Casiano v. AT&T Corp.*, 213 F.3d 278, 284 (5th Cir. 2000).

VII, neither addressed whether the principles stated therein were to be applied beyond the realm of sexual harassment. The *Faragher* court, however, indicated that this may be the case when it stated, "Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment." *Faragher*, 524 U.S. at 787, n.1.

Although the court did not affirmatively state that *Faragher* and *Ellerth* apply beyond the realm of sexual harassment, the EEOC has made it abundantly clear it will apply *Faragher* and *Ellerth* to all forms of unlawful harassment:

> While the *Faragher* and *Ellerth* decisions addressed sexual harassment, the Court's analysis drew upon standards set forth in cases involving harassment on other protected bases. Moreover, the Commission has always taken the position that the same basic standards apply to all types of prohibited harassment. Thus, the standard of liability set forth in the decisions applies to all forms of unlawful harassment.

EEOC Enforcement Guidance 915.002: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999); *see also* 29 CFR 1604.11, n.1 ("The principles involved [with regard to harassment on the basis of sex in violation of Title VII] continue to apply to race, color, religion or national origin").

Despite the EEOC's clear position, subsequent to *Faragher* and *Ellerth*, courts have been confronted with the task of determining whether to apply *Faragher* and *Ellerth* to other forms of unlawful harassment. Federal courts have nearly unanimously held that the rule expressed in *Faragher* and *Ellerth* regarding an employer's vicarious liability for harassment by supervisors applies to other forms of harassment based upon race, color, sex, religion, national origin, protected activity, age, or disability. *See, e.g.*, *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 277 (3d Cir. 2001) (religion); *Cardenas v. Massey*, 269 F.3d 251, 266 (3d Cir. 2001) (national origin); *Allen v. Michigan Dep't of Corrs.*, 165 F.3d 405, 411 (6th Cir. 1999) (race); *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1158–59 (8th Cir. 1999), abrogated on other grounds by *Torgerson v. City of Rochester,* 643 F.3d 1031 (8th Cir. 2011) (age); *Wallin v. Minnesota Dep't of Corrs.*, 153 F.3d 681, 688, n.7 (8th Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999) (disability); *Richmond-Hopes v. City of Cleveland*, 168 F.3d 490 (6th Cir. 1998) (retaliation); *Gharzouzi v. Northwestern Human Servs. of Pa.*, 225 F. Supp. 2d 514, 538 (E.D. Pa. 2002) (national origin); *Phillips v. Heydt*, 197 F. Supp. 2d 207, 224–26 (E.D. Pa. 2002) (race); *Bradley v. City of Philadelphia*, No. 98-1551 (E.D. Pa. November 10, 1998) (race); *Vendetta v. Bell Atlantic Corp.*, No. 97-4838 1998 WL 575111 at *9 n.6 (E.D. Pa. September 8, 1998) (disability).

Given the clear indication by these many courts that the *Faragher* and *Ellerth* standard will be applied to discrimination matters, employers would be wise to make decisions concerning whether to conduct an investigation and how to conduct that investigation in a consistent manner, irrespective of whether the claim is one of discrimination or sexual harassment.

D. The Risk of an Ineffective or Delayed Investigation

The Third Circuit Court of Appeals has stated that, even if an employer's investigation into complaints of sexual harassment was lacking, the employer cannot be held liable for the hostile work environment created by an employee under a negligence theory of liability unless the remedial action taken by the employer after the investigation is also lacking. "In other words, the law does not require that investigations into sexual harassment complaints be perfect." *Knabe v. Boury Corp.*, 114 F.3d 407, 412 (3d Cir. 1997). Furthermore, an investigation and the requirement that the plaintiff participate in that investigation does constitute an adverse employment action. *Talbert v. Judiciary of the State of New Jersey,* 420 Fed. Appx. 140 (3d Cir. 2011); *see also Bouton v. BMW of North America, Inc.,* 29 F.3d 103, 107 (3d Cir. 1994) ("under negligence principles, prompt and effective action by the employer will relieve it of liability" for sexual harassment).

A poorly conducted, ineffective internal investigation, regardless of the employer's good intentions, too often negatively affects the company's bottom line and rarely yields results that the employer can use. In contrast, a properly conducted investigation provides information and guidance well beyond immediate discipline and discharge issues. Broader, deeper, longer-term issues unearthed by an investigation create and foster employee satisfaction and credibility, and dedication to company needs and wants. *See Rorrer v. Cleveland Steel Container Corp.,* 712 F. Supp. 2d 422, 435–36 (E.D. Pa. 2010) (Title VII liability may arise where employer merely investigates complaint of harassment without taking any remedial action, or investigation is so flawed that any remedial measures are destined to fail; here, employer told the alleged harasser to stay away from the victim, but did not separate them, had only short discussions with employees, and failed to take any meaningful steps to cease and prevent further harassment).

Workplace investigations are routinely reviewed in civil proceedings, and courts will occasionally mention the investigation if it's relevant to the outcome. For example, in *Weist v. Tyco Elec. Corp.,* 812 F.3d 319 (3d Cir. 2016), the Third Circuit Court of Appeals affirmed the district court's dismissal of plaintiff's retaliation claim under the Sarbanes-Oxley Act, finding that any adverse employment actions that may have occurred were unrelated to the employee's protected activity. The court detailed each step of the investigation, and stated:

> We conclude that Wiest has failed to offer any evidence to establish that his protected activity was a contributing factor to any adverse employment action that Tyco took against him. Specifically, the record is devoid of any evidence that Wiest's conduct frustrated personnel in management or that, even if he frustrated management personnel, any such individual was involved in the investigation and an ultimate recommendation to terminate his employment. Further, even if Wiest could satisfy those threshold requirements, Tyco has demonstrated that it would have taken the same actions with respect to Wiest in the absence of Wiest's accounting activity **given the thorough, and**

thoroughly documented, investigation conducted by its human resources director.

Id. at 321, 324-25 (emphasis added).

Courts in the Third Circuit have even held that a faulty investigation goes to whether or not the employer's stated reason for termination was made in good faith. Specifically, "the accuracy of the underlying investigation is probative of the employers' good faith." *Connearney v. Main Line Hosp., Inc.* No. 15-02730, 2016 WL 6440371 at *5. (E.D. Pa., Oct. 28, 2016) (citing *Kowalski v. L&F Prod.,* 82 F.3d 1283, 1290 (3d Cir. 1996) ("The facial accuracy and reliability of the report is probative of whether [the employer] actted in good faith reliance upon the report's conclusions; the less reliable the report may appear, the greater the likelihood that[employer's] reliance on it to justify his actions was pretextual).

The *Connearney* court continued, "Even if Defendants relied in good faith on their investigation and its conclusion, however, [Plaintiff] can still show pretext by presenting evidence that the investigation was tainted by a party who did in fact act with discriminatory animus. This is the so-called "Cat's Paw" theory." Connearney at *5 (citing *McKenna v. City of Phila.*, 649 F.3d 171, 179 (3d Cir. 2001) ("[I]t is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to termiante." (quoting *Ambramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 268 (3d Cir. 2001)); *see also Staub v. Proctor Hosp.,* 562 U.S. 411, 418-19 (2011) ("We. . .hold that if a a supervisor performs an act motived by . . .animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employement action, then the employer is liable. . . ."

The following cases outside of Pennsylvania demonstrate the consequences of ineffective internal investigations:

- *Zielinski v. SPS Techs. LLC*, No. 10-CV-3106, 2011 WL 5902214 (E.D. Pa., Nov. 22, 2011). The jury awarded the plaintiff $85,000 in back pay, $100,000 in front pay, $250,000 in emotional distress damages and $500,000 in punitive damages. The failure of SPS to show any evidence of meaningful investigation into multiple complaints of the plaintiff supported the award of punitive damages (which was more than 50% of the total verdict). The trial court said the investigation into the claims of race discrimination were "brief and, in some instances, non-existent." *Id.* at *6. Further the court said the jury "was permitted to further infer that SPS's failure to thoroughly investigate his complaints of discrimination and to discipline the alleged offenders was indicative of its unlawful motives. *Id.* (citing *Woodson v. Scott Paper Co.,* 109 F.3d 913, 923 (3d Cir. 1997) ("[A]n atmosphere of condoned racial harassment in a workplace increases the likelihood of retaliation for complaints in individual cases") (citation omitted)).

- *Cain v. Wellspan Health,* 419 Fed. Appx. 213 (3d Cir. 2011). In affirming the district court's decision to grant summary judgment to the defendant in a race and gender discrimination action, the Third Circuit touched upon how investigations need to be

consistent, and how disparate treatment could occur if investigations are conducted differently for different employees:

> Appellant also maintains that the District Court did not consider that her federal discrimination claims arose out of Wellspan's failure to "allow her to confront her accusers and have an opportunity to be represented by an attorney during the termination process." We disagree with appellant's characterization of the District Court opinion. The District Court *did* consider the "procedures employed by Wellspan to investigate the allegations of wrong doing by Cain" but found these procedures were relevant only if Cain "had produced evidence that Wellspan used some other procedures where similar complaints were lodged against Caucasian or male employees." However, Cain "has produced no such evidence, and, thus, her focus on the underlying investigation is merely a distraction." In short, Judge Rambo concluded that "[t]he record is devoid of any evidence that Wellspan approached other similarly situated allegations of dishonesty differently.

Id. at 214 n.2 (internal citations omitted). *see also Moussa v. Pennsylvania Dep't of Pub. Welfare,* 413 Fed. Appx. 484 (3d Cir. 2011) (investigation adequate, as plaintiff was not treated differently in the investigation than others).

- *Spagnola v. Morristown,* No. 05-577 (JLL), 2006 WL 3533726 (D.N.J. December 7, 2006). The employer was found liable for negligent misrepresentation after its outside counsel was hired to conduct a sexual harassment investigation, and told the complainant that no policy of the employer had been violated, in addition to attempting to intimidate the complainant and communicate that no action would be taken against the alleged harasser.

- *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 102 F.3d 869 (7th Cir. 1996). The EEOC sought class action status for sexual harassment claims of more than 300 female employees in one of Mitsubishi's Illinois plants. The female employees made numerous allegations, including off-premises sex parties, circulation of pornographic pictures, male employees' leaning against female employees and simulating sex with them, and male employees fondling themselves in front of female employees. The employer took no action regarding the sex parties until 14 months after the females had filed a harassment suit. Further, in response to a female employee's complaint that a male co-worker terrorized women, talked about oral sex, and said he wanted to kill women, the manager allegedly stated that he was a good worker and deserved a chance. The EEOC found the workplace had "spun out of control" because the employer:

  (a) lacked adequate policies and procedures to deter harassment
  (b) did not investigate complaints and did not respond to reports of

harassment

(c) failed to maintain meaningful progressive discipline in its policies

(d) responded reactively—instead of proactively—to charges, by, for example, shutting down its assembly lines and encouraging its employees to march on the EEOC's offices

(e) tolerated a sexually hostile work environment.

- *Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997). African-American employees of Texaco settled a class-action lawsuit in 1996 for $141 million after a botched investigation. A second-year associate in Texaco's legal department, appointed to coordinate discovery in a class-action harassment suit, was unaware that several Texaco departments were withholding information. The personnel manager secretly taped—and eventually released—conversations of high-ranking Texaco executives making alleged racial epithets and plotting to destroy evidence in the case. The tapes revealed that executives involved in the investigation process plotted to purge and shred documents to avoid unnecessary questions that might arise when the lawyers review the books. An independent investigatory report concluded that Texaco's treasurer had a cynical view of the discovery process as a whole and had decided that he, rather than the in-house lawyers, should decide what was relevant.

- *Kimzey v. Wal-Mart Stores, Inc.*, 907 F. Supp. 1309 (W.D. Mo. 1995), aff'd in part and rev'd in part, 107 F.3d 568 (8th Cir. 1997). A jury awarded a retail employee $50 million in punitive damages in a sexual harassment suit. The trial court noted Wal-Mart's failure to initiate an investigation after the plaintiff-employee reported the harassment to her supervisor.

- *Kestenbaum v. Pennzoil Co.*, 766 P.2d 280 (N.M. 1988), *cert. denied*, 490 U.S. 1109 (1989). A jury awarded $1 million in contract damages to a vice president discharged as a result of a faulty harassment investigation. The court cited the investigator's failure to distinguish between direct evidence and hearsay, failure to make credibility determinations, and failure to conform to professional investigation standards, and admonished the employer for not actively overseeing the investigation.

- *Sassaman v. Gamache*, 566 F.3d 307, 315 (2d Cir. 2009). The Second Circuit Court of Appeals held "we conclude that this evidence—[Defendant/Supervisor's] alleged comment on the propensity of men to engage in sexual harassment and defendants' arguable failure to investigate properly the charges of sexual harassment lodged against Sassaman—was sufficient to permit a jury to infer discriminatory intent."

- *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596 (W.D. Tex. 1988). An alleged harasser plaintiff who had been accused of sexual harassment alleged that his discharge was discriminatory on the basis of race. The court found in favor of the plaintiff, finding pretext based upon the poor investigation of the initial complaint, which the court noted was completed very quickly and vague allegations were not pursued in any detail.

E. Negligent Investigation Claim

Courts generally do not recognize the tort of negligent investigation in connection with allegedly wrongful termination. *Vice v. Conoco, Inc.*, 150 F.3d 1286 (10th Cir. 1998); *Wyatt v. Bellsouth, Inc.*, 176 F.R.D. 627 (M.D. Ala. 1998); *Rush v. United Technologies, Otis Elevator Div.*, 930 F.2d 453 (6th Cir. 1991); *Jones v. Britt Airways, Inc.*, 622 F. Supp. 389 (N.D. Ill. 1985); *Miller v. Ford Motor Co.*, 152 F. Supp. 2d 1046 (N.D. Ill. 2001); *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439 (7th Cir. 1964); *Butler v. Westinghouse Electric Corp.*, 690 F. Supp. 424 (D. Md. 1987); *Dickinson v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 431 F. Supp. 2d 247 (D. Conn. 2006); *Riley v. Dow Corning Corp.*, 767 F. Supp. 735 (M.D.N.C. 1991); *Stanley v. University of Texas Med. Branch,* 425 F. Supp. 2d 816 (S.D. Tex. 2003); *Quintanilla v. K-Bin, Inc.*, 993 F. Supp. 560 (S.D. Tex. 1998).

But see *Jones v. Costco Wholesale Corp.*, 34 Fed. Appx. 320, 322 (9th Cir. 2002) (citing *Cotran v. Rollins Hudig Hall Int'l,* 948 P.2d 412, 414, 424 (Cal. 1998)); *Silva v. Lucky Stores, Inc.,* 76 Cal.Rptr.2d 382, 387 (Cal. App. 1998) (under California law, improper investigation can lead to employer breach of implied contract to terminate his or her employment on the basis of good cause). *See also McFadden v. Burton*, 645 F. Supp. 457 (E.D. Pa. 1986) (under Pennsylvania and New Jersey law, an at-will employee has no right to insist on an investigation of his or her performance prior to discharge).

F. Benefits of an Effective Internal Investigation

Properly conducted investigations generate documentation and analysis needed to defend discipline or termination decisions, and they demonstrate the fundamental fairness demanded by juries. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In contrast to "poor investigation" cases, employers eliminate or reduce liability by internal investigation protocols displaying fundamental fairness to juries. *See Faragher*, 524 U.S. at 808-09 (although affirmative defense that employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior is generally available, the city defendant had failed to disseminate its antidiscrimination policy, as well as failed to establish a complaint-reporting procedure that allowed employees to bypass harassing supervisors).

The following are selected decisions in Pennsylvania and within the Third Circuit:

- *Peace-Wickham v. Walls,* 409 Fed. Appx. 512 (3d Cir. 2010) (employer took adequate remedial measures in response to racial harassment by co-workers, which included conducting timely investigations, reprimanding employees, transferring employees as needed, arranging for mandatory diversity training, and requiring employees to attend anti-harassment classes).

- *Young v. Temple Univ. Hosp.*, 359 Fed. Appx. 304 (3d Cir. 2009) (actions in response to harassment complaints by an employee were promptly taken and reasonably calculated to

end the harassment).

- *Tarr v. FedEx Ground,* 398 Fed. Appx. 815 (3d Cir. 2010) (employer had no respondeat superior liability regarding former employee's Title VII claims of harassment; employee conceded in his deposition that there was no harassment after employer investigated his harassment claim).

- *McCloud v. United Parcel Serv., Inc.,* 328 Fed. Appx. 777 (3d Cir. 2009) (employer not liable under Title VII or Pennsylvania Human Relations Act for racially harassing conduct (insults written on an orange cone) as employer investigated incident within 24 hours of employee informing his supervisor, interviewed all employees possibly involved, obtained handwriting samples from each of them, consulted handwriting expert, and instructed supervisors to meet with and inform employees such conduct was not tolerable; although no employee was punished because investigation was inconclusive, investigation and required meetings were reasonably calculated to prevent further harassment).

- *Morrison v. Carpenter Technology Corp.,* 193 Fed. Appx. 148 (3d Cir. 2006) (following African-American employee's discovery of large cardboard drawing of man who had upraised noose around his neck, employer took prompt and adequate remedial action that stopped the alleged harassment, precluding employee's hostile work environment claim under Title VII and Pennsylvania Human Relations Act; employer undertook extensive investigation involving interviews of dozens of employees and several departmental meetings at which management reviewed company's policy against harassment).

- *Taylor v. JFC Staffing Assocs.,* 690 F. Supp. 2d 357 (M.D. Pa. 2009) (actions taken by employer once it became aware that co-worker had given racially offensive birthday card to African-American employee were reasonably calculated to stop further harassment, precluding employer's liability for hostile work environment under Title VII and Pennsylvania Human Rights Act, where, on next business day after employee informed his supervisor about card, employer had begun investigation into what transpired, employer concluded, after its investigation, that co-worker's actions were not taken with intent to discriminate or harass employee, and, six days after alleged harassment occurred, co-worker was disciplined by receiving written warning and counseling session about employer's anti-harassment and anti-hostile work environment policies).

- *Preston v. Bell Atlantic Network Servs., Inc.*, No. 96-3107, 1997 WL 20853 (E.D. Pa. January 16, 1997) (employer escaped liability for an allegedly hostile work environment by establishing and following a clear sexual harassment policy and implementing "energetic measures" to thwart sexual harassment, including an investigation procedure, with protection against retaliation (citing *Gary v. Long,* 59 F.3d 1391, 1398 (D.C. Cir. 1995))).

- *Weston v. Pennsylvania*, 251 F.3d 420, 426 (3d Cir. 2001) ("After the Supreme Court's

Faragher/Ellerth decisions, employers must do more that [sic] merely take corrective action to remedy a hostile work environment situation. Employers also have an affirmative duty to prevent sexual harassment by supervisors"), abrogated on other grounds as recognized by *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53 (2006); *see also Clark v. Phildelphia Housing Auth.*, 701 Fed. Appx. 113, 117 (3d Cir. 2017).

Often overlooked, effective investigations also provide other benefits:

- The complaint may quickly resolve, avoiding a formal charge of sexual harassment with the state agency or EEOC, arbitration, or civil action in court.
- A policy of effective investigation convinces employees that the employer is serious about maintaining a safe, harassment- and discrimination-free working environment, leading to a generally more positive workplace. This is especially true if the alleged harasser is disciplined or terminated. The employer could enjoy cost savings through lower employee turnover and training costs, reduction in the disruption of the working day, lowered administrative and human resources costs, and ability to recruit better employees.
- Workplace productivity is increased.
- The need to constantly address minor problems is reduced.
- The investigation could be used for the *Faragher* and *Ellerth* affirmative defense to show that the employee's refusal to participate in the employer's corrective procedures was unreasonable, since the employer has a history of conducting a fair investigation, and taking appropriate action.
- Investigations help the employer ward off potential future wrongdoing by discovering a pattern of complaints and identifying a recurring person, group, or department involved in such complaints, allowing the employer to resolve or eliminate the problem before it recurs or worsens.
- The investigation could prevent claims by other employees.
- The investigation makes clear to dishonest, vengeful, or exaggerating employees that action will not be taken against an alleged harasser until after a thorough and complete investigation.
- Investigations help assess legal defenses and liability.
- An employer that conducts an effective investigation displays jury-required good faith.
- The employer regains control of the work force.

- A potential "publicity nightmare" is prevented through early detection and cure.
- Breach of contract, defamation, or disparate treatment liability in terminations or demotions is mitigated.
- Investigations preserve evidence for use at trial or hearing.
- Exposure to punitive damages is eliminated or reduced.

G. Benefits of a Written Investigation Policy

As a result of *Faragher* and *Ellerth* and the legal and practical realities of sexual harassment claims, many employers have adopted standing policies on workplace investigations, recognizing that the relatively small investment of time, energy, and money may provide enormous savings of each. Employers who adopt and follow a formal investigation policy are able to begin an investigation immediately and logically to achieve benefits such as:

- **Promptness and adequacy of efforts.** "In most cases, the focus will be on the timing and nature of the employer's response. We have found an employer's actions to be adequate, as a matter of law, where management undertook an investigation of the employee's complaint within a day after being notified of the harassment, spoke to the alleged harasser about the allegations and the company's sexual harassment policy, and warned the harasser that the company does not tolerate any sexual comments or actions." *Andreoli v. Gates*, 482 F.3d 641, 644 (3d Cir. 2007) (citing *Knabe v. Boury Corp.*, 114 F.3d 407 (3d Cir. 1997)); *see also Griffin v. Harrisburg Property Servs.*, 421 Fed. Appx. 204, 209-10 (3d Cir. 2011) (citing *Andreoli*, above, which holds that commencing an investigation immediately, granting complainant's transfer, disciplining the alleged harasser, and instituting diversity training was adequate remedial action).

- **Education.** Participants learn more about prohibited behavior, the complaint-lodging process, and reporting/investigating duties. *See Peace-Wickham v. Walls,* above.

- **Title VII Compliance.** A standard policy addresses allegations regardless of race, color, religion, sex, or national origin and avoids "unintended" discrimination caused by treating complainants of different protected classes disparately.

- **Affirmative defense.** Implementation of an established employee investigation process can eliminate or reduce company liability. *Andreoli*, above; *Faragher*, above; *Meritor Sav's Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Tarr v. FedEx Ground,* 398 Fed. Appx. 815 (3d Cir. 2010) (employer had no respondeat superior liability regarding former employee's Title VII claims of harassment; employee conceded in his deposition that there was no harassment after employer investigated his harassment claim).

- **Time savings.** Nothing is more effective than early detection and cure.

- **Diligence.** Prompt investigation refutes any claim of acquiescence of the alleged harassment or discrimination. *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990).

II. CONDUCTING WORKPLACE INVESTIGATIONS

A. Introduction to Conducting the Investigation

Investigations are conducted in myriad ways depending on factors such as the time available for the investigation, the number and types of witnesses involved, the nature of the claim, the budget allotted for the investigation (if an outside investigator), and the scope of the investigation itself. An investigation of a shift supervisor in a small manufacturing plant in Elk County is likely to be vastly different than an investigation involving a company president of a large advertising firm in Pittsburgh.

The conduct of the investigation will also depend significantly on the investigator—specifically, his or her personality, experience, personal style, and skill and knowledge of investigative techniques. A successful investigator is usually a "people person," able to quickly assess a witness and establish rapport, and adjust to the varied emotions that emerge during an interview. Many investigators are professional or semi-professional interviewers such as attorneys, human resources personnel, or former law enforcement officers.

The techniques for conducting an interview are as varied as the interviewers themselves. Some investigators try to quickly establish a trust relationship, some empathize, and some cajole. Others will employ various tried and true investigative techniques such as feigning ignorance or knowledge, or sympathy, repetition, and badgering. The best investigators will use a combination of all these methods to obtain the most complete information from a given witness.

There are many sources of information on the subject of investigation techniques. The following are a representative sample:

- Charles Sennewald and John K. Tsukayama, *The Process of Investigation* (Elsevier Press, 4th ed. 2015)
- Association of Workplace Investigators, *Guiding Principles for Conducting Workplace Investigations* (2013) www.aowi.org.
- Cynthia B. Schroeder, *The Art and Science of Conducting Interviews and Investigations* (Pennsylvania Bar Institute 2002)
- Ragnar Benson, *Ragnar's Guide to Interviews, Investigations, and Interrogations: How to Conduct Them, How to Survive Them* (Paladin Press 2002)

- Amy Oppenheimer and Craig Pratt, *Investigating Workplace Harassment: How to Be Fair, Thorough, and Legal* (Society for Human Resource Management 2002)
- Stan B. Walters, *Principles of Kinesic Interview and Interrogation* (CRC Press, 2nd ed. 2002)
- David E. Zulawski and Douglas E. Wicklander, *Practical Aspects of Interview and Interrogation* (CRC Press, 2nd ed. 2001)
- William L. Fleisher and Nathan J. Gordon, *Effective Interviewing and Interrogation Techniques* (Academic Press, Inc. 2001)
- Paul J. Zwier and Anthony J. Bocchino, *Fact Investigation: A Practical Guide to Interviewing, Counseling, and Case Theory Development* (National Institute for Trial Advocacy 2000)
- Don Rabon, *Interviewing and Interrogation* (Carolina Academic Press 1992)
- Suzette Haden Elgin, *The Gentle Art of Verbal Self-Defense* (Dorset Press 1980)
- *"The Law of Workplace Investigations: Attorney Investigators and Related Privilege Issues,"* Janice Goodman, Practising Law Institute, Litigation and Administrative Practice Course Handbook Series, 662 PLI/Lit 783 (October 2001).
- *"Lawyers as Investigators: How Ellerth and Faragher Reveal A Crisis Of Ethics And Professionalism Through Trial Counsel Disqualification And Waivers Of Privilege In Workplace Harassment Cases,"* Jeffrey A. Van Detta, 24 J. Legal Prof. 261 (Spring, 2000)

B. When Is an Investigation Necessary?

Not all claims require a full-scale investigation. When an issue is raised, one of the most important tasks is to determine what kind of additional information is needed to resolve it. It is critical to recognize the kinds of issues that may be resolved informally, and those that require investigation. Company personnel are advised to always consult with the company's human resource department or counsel when dealing with issues that may either result in discipline of employees or expose the company to potential liability.

When making a decision to investigate, keep in mind potential retaliation claims made by the complainant or the alleged harasser. Nothing prevents employees from alleging that the investigation itself, or the manner in which the investigation is conducted, is retaliation for engaging in a protected activity. *See Schofield v. Metropolitan Life Ins. Co.*, 252 Fed. Appx. 500 (3d Cir. 2007). It is critical for all involved—the investigator, employer, complainant, alleged harasser, and the witnesses—to keep in mind that participation in the investigation is protected activity, having the same status, for example, as making the complaint itself. The United States Supreme Court has held that witnesses to an investigation are considered to be engaging in protected activity, and therefore can be subject to retaliation by their employers. *Crawford v. Metropolitan Gov't of Nashville,* 555 U.S. 271 (2009). *Crawford* is also an important case that defines the scope of what it means to "oppose" unlawful

discrimination. *See Mitchell v. Miller,* 884 F. Supp. 2d 334, 378 (W.D. Pa. 2012) (discussing scope of what it means to "oppose" discrimination); *Howard v. Blalock Electric Serv., Inc.,* 742 F. Supp. 2d 681, 705 (W.D. Pa. 2010); compare *Fulmer v. Commonwealth of Pennsylvania,* 460 Fed. Appx. 91 (3d Cir. 2012) (declined to extend *Crawford* to First Amendment claim).

1. Informal Resolution Without an Investigation

Issues that may be resolved informally, without investigation, may include a misunderstanding of policies or procedures, misinformation received by the employee, scheduling, payroll concerns, etc. If an employee issue can be resolved "on the spot," or with little effort, an investigation probably is not necessary.

2. What Makes an Issue Serious Enough to Warrant an Investigation?

An investigation is the collection of facts from people beyond the employee raising the issue or making the allegations. If additional information is necessary that can only be obtained by talking to other people or it is necessary to review documents to reach a conclusion or resolve the problem, it will be necessary to initiate an investigation. The following circumstances may warrant an investigation:

- An employee or employees are requesting or demanding an investigation.
- Company policy (or past practice) dictates that an investigation will be launched under the circumstances, or the employer is otherwise contractually obligated to investigate.
- The resolution will involve interviewing witnesses beyond the complaining employee and alleged harasser.
- The resolution will demand reference and interpretation of complicated policies and/or laws.
- A third party is involved and demands an investigation.
- The issue stems from more than a single, isolated incident.
- It is not the first time the complainant has complained about harassment, discrimination, retaliation, or the offense at issue.
- It is not the first time the alleged harasser has been accused of harassment, discrimination, retaliation, or the offense at issue.
- A highly placed, highly important, or highly visible employee or employees are involved.
- The incidents involved or the subject matter of the investigation are controversial, unique, provocative, and the lack of an investigation is likely to draw criticism.
- There is potential legal liability for the employer, or it is believed the complaint will result in a formal complaint or civil action, such as when the issue relates to:
- illegal harassment, discrimination, or retaliation
- whistleblowing (where the employee has complained of conduct on the part of the employer that violates law or public policy
- government agency investigations (e.g., EEOC charges, OSHA violations, FLSA violations, etc.)

- violation of company policies or employee contractual provisions
- allegations of criminal conduct (e.g., employee theft, embezzlement, assault, drug use, etc.)

3. The Risks of Not Investigating Internal Complaints

Claim for negligent retention—A risk of failure to investigate is a claim for negligent retention. The Pennsylvania Supreme Court has specifically recognized the tort of negligent retention. *See Hutchison v. Luddy*, 742 A.2d 1052 (Pa. 1999); *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418 (Pa. 1968). The cause of action for negligent retention is based upon the principle that an employer is subject to liability for harm resulting from the employer's negligence in retaining a dangerous employee who the employer knew, or should have known, was dangerous and likely to harm others. Negligent retention claims may arise when an employer retains an alleged harasser, a person known to engage in discrimination, and in many other circumstances where the employer is put on notice that the accused employee presents a danger of some sort.

Claim of employment discrimination—If some complaints are investigated while others are not, the employer runs the risk of employment discrimination based upon disparate treatment of similarly situated employees.

C. Choosing the Investigator

If the adequacy of the investigation is challenged, ultimately, a judge or an arbitrator will determine the issue, in part, based upon the credentials of the investigator and other actions taken by the employer. The following highlight the benefits of a satisfactory investigation and the liabilities of an inadequate investigation:

- *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287 (11th Cir. 2007) (court of appeals found employer's investigation of sexual harassment claims met minimum standards for *Faragher-Ellerth* purposes as it was conducted by the head of the Human Resources Department, who was experienced in such matters, and two other members of the department, interviews were conducted separately, although in the same location).

- *Nurse "BE" v. Columbia Palms West Hosp. Ltd. P'ship*, 490 F.3d 1302, 1310-1312 (11th Cir. 2007) (court of appeals reversed denial of judgment as a matter of law in favor of defendant employer who acted reasonably in investigating and responding to sexual harassment claim when, per hospital's sexual harassment policy, supervisors immediately relayed nurse's complaint to human resources (HR) director, HR director commenced investigation the following day, forwarded complaint to hospital's chief executive officer (CEO), and contacted physician's supervisor to arrange a meeting, nurse was granted a leave of absence and was removed from specified type of care so as to avoid further contact with physician, HR director advised physician that any further contact with nurse would be deemed inappropriate and passed her investigative report along to physician's supervisors, and nurse did not thereafter report any further incidents with physician).

- *Casiano v. AT&T Corp.*, 213 F.3d 278, 286-87 (5th Cir. 2000) (court of appeals affirmed summary judgment for defendant employer who suspended alleged harasser in part as a result of using two "E.O. Specialists" to conduct investigation);

- *Smith v. First Union National Bank*, 202 F.3d 234, 245-46 (4th Cir. 2000) (court of appeals reversed summary judgment for defendant employer finding inadequate investigation where investigator had never before conducted a sexual harassment investigation, investigation focused on alleged harasser's management style rather than complaints of sexual harassment, and investigator did not even mention the allegations of sexual harassment to the alleged harasser); and

- *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1209 (10th Cir. 2000) (employer's investigation was "inadequate, if not a complete sham" where the investigator not only conceded that she did not speak with the complainant, alleged harasser, or any other potential witnesses concerning the matter but also admitted that she did not know the identities of complainant or the alleged harasser and was unsure if she had ever been told the nature of specifics of the complaint).

After deciding that an investigation is necessary, the next decision is who should investigate—an outside investigator or someone inside the company. Consider the following characteristics when selecting an investigator:

- **Company familiarity.** An in-house investigator, more familiar with company policies, personnel, and the context and significance of facts, may be able to investigate more quickly, but investigations can often be emotional and involve embarrassing information.

- **Witnesses**. They may discuss the situation more freely with someone they know and trust rather than with an outsider, but they also may be more suspicious that an insider has preconceived ideas of the people involved or the situation (and they may).

- **Unbiased.** An internal investigation must do more than arrive at the truth. If the participants and work force in general suspect the investigation result is pre-ordained, the employer loses many long-term benefits of a thorough investigation. It is therefore imperative that the investigator be perceived as fair and impartial. *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) (human resources department that typically conducted internal investigations precluded from investigation when allegation involved a human resources staff member), overruled in part by *Saxton v. American Telephone & Telegraph Co.*, 10 F.3d 526, 533, n.12 (7th Cir.1993) (holding that "to the extent that our prior cases required proof that the harassment caused such anxiety and debilitation to the plaintiff that working conditions were

poisoned, they have been overruled") (internal quotations and citation omitted).

- **Trained.** The need for a trained investigator increases in proportion to the severity of the allegation. Supervisors and human resources representatives may conduct small-scale investigations, but thoroughly trained and experienced investigators might be preferable for large-scale or complex matters, or those where litigation is likely or that involve high-profile personnel.

Trained and experienced investigators, for example, should be able to more easily spot potential defamation, retaliation, and negligent hire/retention issues. This determination is often fact- or law-specific. If, for example, the allegation is fraud, an investigator must be experienced in accounting and accustomed to working with internal auditors and lawyers. But regardless of whether the employer uses an inside or outside expert, the investigator must follow generally accepted investigation techniques. *See Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995) (investigator's failure to review all records, to interview the accused's corroborating witnesses, and to credit contradicting evidence tainted an internal harassment investigation).

- **Timely.** The law demands timely action, so the investigator must conduct and complete the inquiry promptly, or at least be able to explain why there was a delay. Because an in-house investigator may have to juggle the inquiry with conflicting assignments, he or she may be unable to complete the investigation in a timely manner. An outside investigator unencumbered by other distractions may be better positioned to complete the investigation.

- **Professional.** The investigator must be able to obtain information from nervous, hostile, emotional, untrusting, and unwilling witnesses without exacerbating the problem in the process. Consider demeanor, appearance, speech patterns, experience, and presentation style when choosing an investigator.

- **Presentation as a witness.** The investigator must make a good witness if testimony is needed at a trial or arbitration. Consider how the investigator will appear to a jury or arbitration panel. The investigator's credibility and presentation will be very important if the matter is litigated.

Select the investigator who best fits the circumstances at hand.

Reasons for outsourcing your investigation include:

A senior manager or board member has been accused of harassment or other type of discrimination.

- A human resources employee has been named as a participating party in the complaint.
- The company has conducted an investigation without being able to draw conclusions.
- The company lacks internal expertise in conducting investigations.
- Legal counsel has recommended that the company use an outside investigator.

- There is a potential conflict of interest with an internal investigation.
- There is a perceived or actual inability of an internal investigator to properly investigate, either because of lack of resources, inexperience, availability, and/or bias.

With the above considerations in mind, consider the following, although there are assumptions made about each position that will not hold true in each instance:

Human Resources Manager: frequently a good choice

Pros: In-house; no direct added expense; presumed objective; can act quickly; familiar with harassment and discrimination claims and personnel issues generally; familiar with company and possibly complainant, alleged harasser, and witnesses; aware of past complaints or occurrences involving parties; possibly experienced in conducting investigations. Very good choice if company is large enough to have dedicated human resources personnel assigned to conduct investigations.

Cons: Possibly biased if prior history with complainant, alleged harasser, or witnesses; if conducting the investigation, any communications are discoverable (even if investigator is in-house counsel), therefore, must be kept completely isolated from decision-making team, and even then, decision makers could be forced to testify if they directed or participated in the investigation.

Department Head or Supervisor: frequently a poor choice

Pros: In-house; no direct added expense; can act quickly; familiar with company and possibly complainant, alleged harasser, and witnesses; possibly aware of past complaints or occurrences involving parties.

Cons: Rarely objective as a result of being "too close to the situation"; may make decisions based on what is best for department, not company generally; tend not to have time or patience to conduct thorough investigation; possibly biased if prior history with complainant, alleged harasser, or witnesses; often a fact witness; rarely familiar with harassment, discrimination, and personnel issues; rarely has received any training or conducted previous investigations; if conducting the investigation, any communications are discoverable, therefore, must be kept completely isolated from decision-making team, and even then, decision makers could be forced to testify if they directed or participated in the investigation.

Company Officer (CEO, President, Senior Vice President, etc.): frequently a poor choice

Pros: In-house; no direct added expense; can act quickly; authority to make decisions based on outcome of investigation; sends message to complainant and others that company is taking complaint seriously; familiar with company and possibly complainant, alleged harasser, and witnesses; possibly aware of past complaints or occurrences involving

parties.

Cons: Tend not to have time or patience to conduct thorough investigation; possibly biased if prior history with complainant, alleged harasser, or witnesses; tend to intimidate complainant, alleged harasser, and witnesses; rarely received any training or conducted previous investigations; if conducting the investigation, any communications are discoverable, therefore, must be kept completely isolated from other decision makers, and even then, other decision makers could be forced to testify if they directed or participated in the investigation; if primary decision maker (or close to it), there is no "cushioning" from decision; works, if at all, in small companies.

Neutral Manager (complainant and harasser outside reporting line): frequently a poor choice

Pros: In-house; no direct added expense; can act quickly; familiar with company; objective; tend to make decisions for benefit of company generally, not department.

Cons: Difficult to find neutral manager willing or able to conduct investigation—must be a true "team player"; must find other neutral manager to reciprocate if complaint in his or her department; tend not to have time or patience to conduct thorough investigation; rarely familiar with sexual harassment and personnel issues; rarely received any training or conducted previous investigations; if conducting the investigation, any communications are discoverable, therefore, must be kept completely isolated from decision-making team, and even then, decision makers could be forced to testify if they directed or participated in the investigation.

In-House Counsel: occasionally a good choice, especially for small to medium investigations

Pros: In-house; no direct added expense; can act quickly; authority to make decisions based on outcome of investigation; sends message to complainant and others that company is taking complaint seriously; understands overall goals of defending company if complainant files formal charge of discrimination; has specialized knowledge of relevant law and regulations; trained and/or has experience investigating and interviewing witnesses; can draw legal conclusions and spot secondary legal issues and concerns; familiar with company and possibly complainant, alleged harasser, and witnesses; possibly aware of past complaints or occurrences involving parties. Works best in companies with several or more in-house attorneys.

Cons: If not familiar with employment law, could overestimate ability to conduct investigation; if conducting the investigation, any communications are discoverable, therefore, must be kept completely isolated from other decision makers, and even then, other decision makers could be forced to testify if they directed or participated in the investigation; ethically bound *not* to be objective; attorney/client and work product privileges waived; could not render legal advice to company without being discoverable; notes and related documents discoverable; could be called to testify; could be disqualified from defending company at trial because a fact witness.

Current Outside Counsel (established attorney/client relationship): occasionally a choice, especially for small to medium investigations; however, attorney/client privilege issue could disqualify attorney and firm

Pros: Can usually act quickly; sends message to complainant and others that company is taking complaint seriously; understands overall goals of defending company if complainant files formal charge of discrimination; has specialized knowledge of relevant law and regulations; trained and/or has experience investigating and interviewing witnesses; can draw legal conclusions and spot secondary legal issues and concerns; familiar with company and possibly complainant, alleged harasser, and witnesses; possibly aware of past complaints or occurrences involving parties.

Cons: Increased expense; appearance of bias; ethically bound *not* to be objective; if conducting the investigation, communications are discoverable, therefore, must be kept completely isolated from other decision makers, and even then, other decision makers could be forced to testify if they directed or participated in the investigation; attorney/client and work product privileges waived; could not render legal advice to company without being discoverable; notes and related documents discoverable; could be called to testify; *entire firm could be disqualified from defending company at trial because investigator is fact witness.*

Outside Attorney Investigator: frequently a good choice

Pros: Can usually act quickly; completely objective; maintains attorney/client privilege with in-house and established outside counsel; no conflict with defending company and testimony; sends message to complainant and others that company is taking complaint seriously; has specialized knowledge of relevant law and regulations; trained and/or has experience investigating and interviewing witnesses. Very often labor and employment attorneys by training and experience.

Cons: Increased expense; all communications are discoverable; probably unfamiliar with company and witnesses; lack of bias in favor of company means unpredictable investigative report.

Outside Non-Attorney Investigator: frequently a good choice

Pros: Can usually act quickly; completely objective; maintains attorney/client privilege with in-house and established outside counsel; no conflict with defending company and testimony; sends message to complainant and others that company is taking complaint seriously; has specialized knowledge of relevant law and regulations; trained and/or has experience investigating and interviewing witnesses. Very often human resources personnel by training and experience.

Cons: Increased expense; all communications are discoverable; probably unfamiliar with company and witnesses; lack of bias in favor of company means unpredictable

investigative report.

D. Attorneys as Investigators

Consider the implications of privilege and representation in the case of either an in-house or outside attorney conducting the investigation.

1. Privilege

The investigation – if timely, thorough, and unbiased – is an affirmative defense to the employer's liability. But if an attorney acts as the investigator and later asserts the investigation as an affirmative defense (i.e., puts the investigation at issue), some courts have held that the work product and attorney/client privileges have been waived. Thus, records will be subject to discovery, and the attorney will be subject to deposition. *See EEOC v. Outback Steakhouse of Florida, Inc.*, 251 F.R.D. 603, 611 (D. Colo. 2008) (courts have interpreted an assertion of the *Faragher/Ellerth* affirmative defense as waiving the protection of the work-product doctrine and attorney/client privilege in relation to investigations and remedial efforts in response to employee complaints of discrimination because doing so brings the employer's investigations into issue); *see also Walker v. County of Contra Costa*, 227 F.R.D. 529, 535 (N.D. Cal. 2005) ("If [an employer] assert[s] as an affirmative defense the adequacy of [its] pre-litigation investigation into [an employee's] claims of discrimination, then [it] waive[s] the attorney-client privilege and the work product doctrine with respect to documents reflecting that investigation"). *See also Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084 (D.N.J. 1996); *see also Brownell v. Roadway Package Sys., Inc.,* 185 F.R.D. 19 (N.D.N.Y. 1999) (employer waived attorney/client privilege and work-product protection to prevent disclosure of statements during harassment investigation where employer raised adequacy of investigation as a defense).

2. Representation

The in-house attorney-investigator should be aware of the ethical concerns that result if he or she must later testify. Most ethical rules state that a lawyer and his/her law firm cannot represent a client in a proceeding or at trial in which the lawyer is likely to be a fact witness. The attorney-investigator will be torn between the duty to represent the client and the duty to testify. To avoid this, the employer should consider retaining outside counsel to oversee the investigation and provide legal advice, which would still be protected by privilege as it would not be conflated with the factual investigation. Under this scenario, the in-house attorney-investigator may conduct the interviews.

3. When to Seek Outside Assistance

Many issues that arise during an investigation will require outside help from those with special expertise. The employer should determine at the outset whether it will be more effective to handle the investigation internally, consulting outside when necessary, or whether the issue is so complicated that resources will be better allocated by having outside experts handle the investigation. Consider:

- *Legal issues involved.* Are local, state, or federal laws implicated?
- *Security issues.* Are there allegations involving theft, intimidation, or violence? If the potential exists for criminal charges against the employee for any alleged misconduct, contact an outside law enforcement agency to handle any criminal investigation.
- *Risk management issues.* Is this a potential workers' compensation, ERISA, or OSHA matter? Does the employer's insurance carrier need to be notified?
- *Internal audit and controllership issues.* Is a violation of key financial controls alleged? For example, is Sarbanes-Oxley implicated?

4. Determine Who Will "Be in the Loop"

Ascertain in advance who within the following areas will be privy to the internal disciplinary matter:

- management and human resources department (in cases of alleged harassment and/or discrimination, as well as for issues that may result in termination of long-time employees, HR should always be in the loop unless involved as a party in the investigation)
- legal counsel
- internal auditors
- union representative(s)
- support staff (preparing any written documents)

Before an investigation commences and/or discipline is imposed, persons who will not be included in the investigation and evaluation of an internal disciplinary matter should be informed that they will not be privy to sensitive information. Drawing the line before an incident occurs helps to avoid problems in the future when everybody wants access to confidential information.
Persons who *are* privy to confidential and sensitive information should be impressed upon in the strongest terms that they are to maintain confidentiality.

E. Engaging the Investigator

It is essential that there be an engagement letter between the investigator and the investigator's client or customer. If an employer hires the investigator directly, and there is not yet any attorney involvement, the engagement letter will be delivered directly to the employer. If the investigator is retained by outside counsel, from the investigator's point of view, it is better to have the referring law firm be the client. Often, outside counsel wants to be the hiring entity in case they want to argue later that the investigator is part of the defense team, akin to an expert witness, and have a chance to protect communications or the report.

It is common wisdom that it is easier to be paid by the referring law firm, which is usually solvent, as opposed to an unknown company that may or may not be pleased with the outcome of the report. Many times, as with other referrals, an investigation referral is made by a friend or colleague. In any event, investigators are advised to secure an appropriate retainer.

The investigator's fees are purely a matter of negotiation, but can be paid as an hourly fee, fixed fee, or "alternative fee." Investigators favor an hourly fee arrangement when conducting a "one-shot" investigation, that is, an unknown client with little chance of a repeat investigation for the employer or law firm.

Fixed fees can be financially dangerous for an investigator when dealing with an unknown employer, and have the usual potential abuses: expansion of the scope of investigation, adding issues or witnesses, and overly communicative clients who do not expect an increase in the fixed fee. One option is to quote a fixed fee for a certain number of interviews, hours, or days, with an hourly rate quote thereafter. Fixed fees should clearly define the scope of the services being performed, for example: the number of interviews, whether it includes the preparation of affidavits, in-person meetings to report on the findings, and the investigative report. If there are multiple investigations for the same employer or law firm, a fixed fee may be advantageous to both parties because the investigator will have some knowledge of the demands of the employer or law firm, and the employer or law firm will feel its costs for the investigation are predetermined.

An "alternative fee" can come in many forms, but some investigators will charge a fixed fee for a certain scope of work, then an hourly fee. For example, an investigator may charge X fee to prepare for the interviews and take six interviews, but if more than six are necessary, charge an hourly rate of Y per hour thereafter. And the same to testify—for example, a fixed fee for five hours of a deposition or testimony at trial, and an hourly rate (or additional fixed fee) if the time is exceeded.

The engagement should address issues, if appropriate, such as:

- when the investigation will begin
- whether the investigator will be paid for travel time and costs
- fee if investigator is called for deposition, arbitration, or trial
- payment is due regardless of the outcome of the investigation or underlying case
- whether investigator intends to conduct the investigation himself or herself or whether others may or will be used
- whether the investigator is being asked to render an opinion of whether harassment, discrimination, or retaliation occurred (usually that is not the case)
- caution that attorney/client privilege does not protect communications with the investigator

If the investigator is an attorney, the engagement letter must make clear that the investigator is *not* acting as counsel to the client, and specifically state that any communications are not covered by the attorney/client privilege.

F. Mechanics of Conducting the Interview

1. Preparing for the Interview

No matter whether the investigator is in-house or hired from outside, thorough preparation is needed prior to commencing the investigation. In-house or inside investigators are presumably familiar with the company, its work rules, organizational structure, and disciplinary policies. Outside investigators must learn about the company and how it functions. It is important to learn, as quickly and as completely as possible, everything about the personnel involved, the department, the general mentality of the work force, and the relationship between employees and management. Attorney-investigators should prepare for an investigation and interviews as they would for discovery depositions.

The investigator should outline areas of inquiry and list specific questions to be asked. A list of documents should be made and amended as new documents are discovered or mentioned. In preparation for the investigation, the investigator should obtain and review the following documents, if they exist:

- company policies, including, if relevant, sexual harassment, discrimination, retaliation, work rules, etc.
- company's disciplinary policies
- alleged harasser's personnel file
- alleged victim's personnel file
- previous complaints made by alleged victim or against alleged harasser
- internal correspondence, including e-mail, regarding the complaint
- videotape, audiotape, voice mail, or digital recordings regarding incident
- sworn documents regarding the complaint, including papers filed with the state administrative agency, EEOC, or union grievances
- previously prepared statements of any witness
- previously prepared notes
- employment contracts of alleged harasser and victim
- collective bargaining agreement

2. Location

The location of the interview is important. It should be conducted in a quiet, private room. Open offices or cubicles will not suffice. An office or small conference room without windows (or windows with shades) will usually suffice. Every effort should be made to avoid interruptions by both the interviewer and interviewee.

The interviews can be conducted on-site, that is, at the employer's location, or if the employer believes the investigation will be too disruptive, distracting, or there is no suitable interview location, an off-site location can be used. Many investigators use their own office facilities. Private rooms can also be reserved at hotels and offices of court reporters, for example.

The interviewer should plan ahead for the convenience of the witness. If the interview is likely to go more than a few hours, the interviewer should, as appropriate, take a break or stop for

lunch.

3. Preliminary Statement and Introduction

Keep in mind that, in addition to the alleged harasser and harassee, many witnesses will already know why they are being "called in" to speak with the investigator.
The person conducting the investigation has the big picture. The interviewee does not, and this may make him or her uncomfortable at the outset. An employee may ask questions about the process, such as:

- Am I in trouble?
- Will I get into trouble if I tell you _____?
- Will I get my friend into trouble if I tell you _____?
- Who will you share this information with?
- How long will you keep the information?
- Will what I tell you be kept in confidence?
- Will I get a copy of the report?

For an investigation to be effective, witnesses need to open up and speak candidly. To accomplish this, they need to feel comfortable. When the witness first comes in, the investigator should introduce himself or herself and read the preliminary statement. It is advisable to tell the witness that the interview is informal, but that it is necessary to read the following "formal" statement:

> My name is Mike Torchia and I would like to read this statement before we begin. This is my business card.
>
> I am an attorney, hired by ABC Company's attorneys. I am here today to investigate claims of alleged improper conduct in the workplace. Based on my preliminary investigation, it appears that you may have important or relevant information.
>
> I do not represent ABC Company, I do not represent Ms. Jones,[3] and I do not represent you. I am here as an independent investigator. I will also tell you that I have no relationship, personally or professionally, to any ABC Company employee. This is the first work of any kind I have performed for ABC Company.
>
> I would like to ask you about the claims and would like you to answer the questions honestly and completely. From your responses, I may prepare an affidavit that you will have an opportunity to correct. You will be asked to sign your affidavit.
>
> You should know that the information you provide is *not* completely confidential. Although I and the company will make every attempt to keep the information confidential, as

[3]It may not be appropriate to disclose the name of the complainant at this time.

should you, company executives and their attorneys will have access to the information and your statement will become part of the investigative file and my final report.

I believe, as the investigator, that it is vital to protect confidentiality in the workplace and throughout this investigation, both for ascertaining the "truth" of the allegations, to prevent fabrication (lying), to preserve evidence, and for protecting the reputations of the complainant, the alleged harasser, and all of the witnesses.

Therefore, at the conclusion of this interview, please do not discuss your statements or my questions with anyone except your attorney.[4]

Although I take notes, I do not record these interviews. Are you recording?

An attorney conducting an investigation on behalf of an employer – civil or criminal – must be extremely mindful of his or her role, that is, advocate and protector of the employer, not an independent investigator. In that instance, the investigator must make clear in the preliminary statement and throughout the investigative process that he or she represents the employer, not any individual and not the witness. The investigator must cmoply with the so-called *Upjohn*[5] warnings and make clear that (1) the attorney-client privilege over commlunications between the attorney and the employee (witness) belongs solely to the employer; and (2) the employer may chose to waive the privilege and disclose what the employee says to the investigator to a government agency or other third party.

There are a variety of initial standard questions that should be asked of the witness. It is essential to know:

- full name and nicknames
- job title, duties, and shift worked for the relevant time period
- start and end dates with employer
- family members, significant others, etc. who work at the same company
- supervisors' names and titles
- supervisees' names and titles
- whether the witness has previously been involved in an investigation or serious disciplinary procedure at the company
- what the witness has been told by others already interviewed
- what the witness has been told by others involved in the matter
- what the witness has been told by supervisors or management
- whether the witness is tape recording the interview (the investigator should confirm the interview is not being, and cannot be recorded)

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[4]There is some controversy about whether or not it is appropriate, indeed legal, under the National Labor Relations Act, to instruct a complainant, alleged harasser, or witness to keep the information confidential. *See* below discussing the *Banner Health* line of cases.

[5]*See Upjohn Co. v. United States*, 449 U.S. 383 (1981).

- whether the witness has been given or offered anything of value to provide or withhold certain testimony
- whether the witness has been threatened in any way to provide or withhold certain testimony

4. To Record or Not to Record?

It is often debated whether or not an investigative interview should be recorded at all, and if so, whether by audio, video, or digitally recording. Some suggest having a court reporter present at the interview to take a sworn statement.

Most witnesses feel uncomfortable being recorded, and will not be as forthcoming with information. They will be much less likely to implicate themselves, or explain the extent to which they witnessed an event. In short, most interviews proceed better when they are "off the record." Of course, there is no such thing as "off the record" in the investigative context, but witnesses have the illusion of confidentiality and informality when the investigator is "only" taking handwritten notes.

Tape recording also creates a cumbersome, yet discoverable record, but without the body language and physical inflection of the communication. These recordings inevitably lead to transcripts, which can make the entire investigative process expensive and ponderous.

Proponents of recording often point to the ease with which the investigator can recount what was said, pointing out that the investigator is less likely to be accused of bias, misinterpretation, or misconstruing a witness's statements when it has been recorded.

If it is decided to record the interview, many state laws regarding consent of tape recordings must be reviewed. Even if the witness initially consents to being recorded, it is advisable to take steps to avoid a claim under a state or federal law prohibiting such recording. *See, e.g.*, Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701–5782. Keep the recorder in plain view at all times. Make certain it is stated, with the recorder running, the date, time, and place of the interview, and the name of the interviewer and witness. Make sure the witness is recorded consenting to the recording. Acknowledge the recording at least once an hour, getting the witness to continue to consent. At the end of the interview, once again have the witness confirm that the entire interview was recorded and consent was given. The investigator should be the custodian of the original tapes or digital device, and special care should be taken to avoid inadvertently destroying the recording.

Lie detector tests are sometimes viewed by clients as the "perfect solution" when faced with a difficult credibility determination. Except in limited circumstances, however, it is a violation of federal law in conjunction with Pennsylvania law for an employer to force, or even request, an employee to take a lie detector test. *See* the Employee Polygraph Protection Act, 29 U.S.C. § 2001–2009; *see also Kroen v. Bedway Sec. Agency, Inc.*, 633 A.2d 628 (Pa. Super. 1993) (Pennsylvania Superior Court held that discharging an employee for refusal to take a polygraph test was a violation of public policy).

G. Allowing the Witness a Witness—*Weingarten* Rights

Members of a collective bargaining unit have a right to have a fellow bargaining unit member, or other union-designated representative, present during any questioning that has the potential to lead to disciplinary action against that employee. If there is no possibility that the interview could lead to disciplinary action against the interviewee, there is no *Weingarten* right, named after the case that first established the principle.

The Pennsylvania Supreme Court held that the *Weingarten* right of accompaniment belonged to the individual employee rather than to the union. The court reversed an earlier Commonwealth Court decision, and made clear that under the Public Employees Relations Act, the individual employee has the right to be accompanied by a union representative of his or her choice, as long as the representative is reasonably available. *Office of Admin. v. Pennsylvania Labor Relations Bd.*, 916 A.2d 541, 551 (Pa. 2007).

Previously, the National Labor Relations Board had extended the above rights to non-union employees in *Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. 676 (2000). However, the NLRB has since *reversed* this decision in *IBM Corp.*, 341 N.L.R.B. 1288 (2004).

An employer need not honor a *Weingarten* request that will unduly delay the employer's completion of an efficient disciplinary investigation. In addition, a *Weingarten* representative may not impede or delay the employer's investigation through his or her conduct.

A *Weingarten* right is not like a *Miranda* right in that the employer has no obligation to inform the employee of the existence of the right. From a practical perspective, however, it is helpful to ensure that the selected representative is present.

Absent express language in a collective bargaining agreement, participation in an internal investigation, either as the accused or as a *Weingarten* representative, does not entitle the employee to additional pay, such as call-in pay.

H. Order of Interviews

It is important to determine the order of the interviews to be conducted. Many times the order is predetermined by a witness's availability, which is affected by a variety of conflicts such as business trips, vacations, personal commitments, medical procedures, and the like.

The complainant should be interviewed first. It is often difficult and inefficient to interview others, including the alleged harasser(s), while being forced to guess or assume what the complainant would say. There are, however, circumstances when the complainant may not be the first interview:

- Complainant is unavailable.
- Complainant refuses to be interviewed, or interviewed first.
- There are cross-complaints with no clear "primary" complainant.
- Material witness or alleged harasser will shortly become unavailable and the investigator

feels it necessary to lock in the testimony.

- Concern that material witness or alleged harasser will be threatened, influenced to change statement, or will independently discover facts tending to change his or her statement, and the investigator feels it necessary to lock in the testimony.
- Alleged harasser is influential in the company and insists on being interviewed first.

Normally, the sequence of interviews is:

Complainant → Witnesses → Harasser → Complainant

Re-interviewing the complainant is almost always necessary, as the harasser, at least, raises issues and new facts directed to the complainant's behavior. Of course, it may be necessary to re-interview the harasser or witnesses if additional information is discovered that requires clarification, confirmation, or rebuttal.

I. Questioning Witnesses Generally

1. The Basics

There are a variety of questioning techniques. Generally, it is best to begin asking general, open-ended questions. For example, if the investigation centers around an incident on February 15th, it is better to ask, "Tell me the first time Mr. Smith harassed you" rather than "Tell me what happened on February 15th." Initially, don't lead the complainant, or any other witness, to give a response that you believe to be true, although as the investigation continues, the investigator may have to lead a witness to test the veracity of a statement. Also, many witnesses will complain about a person, their job, or the company generally, having nothing to do with the claims in the investigation, so cutting them off or refocusing them may be in order.

Be sure to ask all the "W" questions—who, what, when, where, and why—and inquire into all facts and circumstances of each complaint the complainant may have.

In addition to the general witness questions, every complainant must be asked the following:

- witnesses to incident(s)
- documents or physical evidence to support the complainant's version of the facts
  - whether there are audio, video, or digital recordings of any incident or event
  - whether harasser has taken the same action against others
  - whether the complaint was reported to anyone, and if not, why not
  - prior problems with harasser
  - prior relationship with harasser
  - prior complaints of sexual harassment or discrimination (whether or not at the same company)
  - if the witness was offered anything of value to speak to, or not to speak to, the investigator or to provide or withhold specific information
  - if the witness was explicitly or impliedly threatened to speak with, or not to speak with,

the investigator or to provide or withhold specific information

2. Asking Tough Questions

Asking the right questions is the key to conducting an effective investigation, and the right questions are often tough ones to ask. Many of the issues that will be investigated are uncomfortable ones to discuss in general, and an effective interview will not mince words, but rather will ask questions that directly deal with the issue. It is important to get these questions answered, and the following will help make sure the investigator's discomfort does not get in the way of conducting a thorough interview:

- Prepare questions in advance.
- Start out with broad, open-ended questions and end up with specific, narrow ones.
- Ask questions that reveal a chronology.
- Don't skip over the tough questions.
- Ask for clarification.
- End with unfriendly, uncomfortable, touchy, embarrassing, or sensitive questions.
- Do not relate any hint of an opinion of the issues or facts involved—do not judge the answers, but rather, record them and get more.

3. Asking Questions the Right Way

Even the more specifically directed questions must be asked in an open-ended way in order to get unfiltered and useful answers from the witnesses. Do not lead the witness into giving a certain expected answer, nor should the investigator ask the witness to speculate. For example:

Example 1

Wrong: "Why did the General Manager tear up the schedule?"
Right: "Did the General Manager indicate why she tore up the schedule?"

Example 2

Wrong: "I agree with you . . . that's inappropriate behavior; why do you think he's doing that?"
Right: "Did he say why he was doing that?"

Example 3

Wrong: "Now I want to be absolutely sure; do you really think Howard would have said, 'Every time I look at you, I pitch a trouser tent'? "
Right: "Did Howard say to you, 'Every time I look at you, I pitch a trouser tent'? "

Example 4

Wrong: "Oh, come on, Sara, I've heard that you tell a pretty nasty joke yourself, haven't you?"
Right: "Have you yourself made similar jokes?"

4. Sequence of Events

After giving the opening statement and answering any questions the employee may have about the process of the investigation, begin asking questions.

- Listen carefully to each answer, taking notes as the interview proceeds. It will have already been explained in the opening statement that notes will be taken throughout the interview.
- Follow up on any points that come up, even if it deviates from the prepared outline. Mark where the questioning deviated from the outline, and make sure to circle back.
- Review the statement and notes to make sure the information is complete and that all questions were answered.
- Ask additional questions in another interview if necessary.

5. Taking Notes and Maintaining Documentation

Throughout the investigation, take and maintain notes of all meetings, interviews, and telephone conversations.

Include only relevant facts in interview notes. The test of relevance is, "does this matter to the issues being investigated?" Do not include your own interpretations, subjective thoughts, feelings, or assumptions.

Wrong: I asked Susan if she signed her supervisor's name to the Kronos time sheet. She said no, but I think she's lying.

You may, and should, note a person's behavior and demeanor. These observations may help you later in evaluating the situation, but are inappropriate while still conducting the investigation.

Right: I spoke with Susan Jones, Accounts Receivable clerk, in my office on November 8, 2007, from approximately 4:00 p.m. to 4:30 p.m. John Smith, the accounting manager, was also present. I asked Susan if she signed her supervisor's name to the Kronos time sheet. She said, "No." She did not look at me or John when she responded, and she moved around in her chair. I asked her why she was not looking at us, and why she was moving around in her chair. She said, "I'm really nervous because I know who did sign the supervisor's name, but I said I wouldn't say anything.

6. Interviewing the Complainant

Interviewing the complainant is of primary importance in every workplace investigation. The interviewer should plan to spend several hours with the complainant, even for the simplest of complaints.

Complainants will be presented with the same preliminary statement as the other witnesses, which should reassure them that the investigator is objective. The complainant should also be told that the company has responded to the complaints and intends to conduct a prompt and thorough investigation.

Adhere to the following guidelines (but remember not to give legal advice):

- The complainant should be reassured that, to the extent possible, the investigation will be kept confidential, although several others will know the substance of his or her statements. Information will be shared only with others on a "need to know" basis.
- Be sensitive, neutral, and objective—do not minimize the incident or the employee's feelings.
- Do not offer opinions or conclusions.
- Assure the employee that the company takes these matters very seriously.
- Assure the employee that the company will conduct a fair and objective investigation, and that you will let him or her know the results. *Make no promises as to what the results will be.*
- Discourage the employee from taking matters into his or her hands.
- Reassure him or her that no adverse action will be taken against him or her because of this complaint.

Sometimes an employee does not complain to the company, but management becomes aware of a complaint from someone else, or through the "rumor mill." Even if the alleged victim would rather not pursue an investigation, an employer still may have an obligation to investigate. Explain to the reluctant employee that you have an obligation to the other employees who may confront a similar situation, or have these concerns. Also, when appropriate, explain that you are obligated by law to investigate.

Although it would seem that complainants would relish the opportunity to tell their story against an alleged harasser, there are myriad reasons why they can be reluctant to testify. Many complainants are concerned about retaliation, being disciplined, or losing their jobs, despite assurances to the contrary. Often complainants, even though they presumably made the complaint to make the harasser stop the conduct, "don't want to get him in trouble" and express genuine concern for what action the company may take against the alleged harasser. Complainants may also fear physical retaliation or abuse from the harasser, or being outcast by co-workers sympathetic to the harasser. Complainants represented by counsel are more likely not to fear retaliation and are generally more at ease criticizing the harasser.

If the complainant is totally uncooperative, the investigation should nonetheless continue, and the investigator should gather as much information as possible from witnesses and other sources. In this case, "hearsay" becomes more important, i.e., what the complainant told others about the complaint. The investigative report should reflect the fact that the complainant was uncooperative, citing his or her reasons if known. Normally, the investigator should inquire as to any relevant fact and totally ignore the evidentiary concept of "hearsay."

7. Interviewing the Alleged Harasser

a. Initial Statements to the Harasser

An alleged harasser is unlikely to say much of anything if he or she feels the investigator is biased or the outcome is predetermined. The alleged harasser must be assured the investigator is objective, no judgment or decisions have yet been made, and (if true), the investigator is merely reporting facts and will not make any recommendations to the decision makers.

The harasser should be reassured, to the extent possible, that the investigation will be kept confidential, although several others will know the substance of his or her statements.

The harasser needs to know there have been complaints brought against him or her, and the company is quickly conducting an investigation to discover facts.

As an interview technique, the identity of the victim can be kept from the harasser until certain open-ended questions are asked. As a practical matter, alleged harassers are very hesitant, to say the least, to rebut any allegations if the complainant is not identified.

Harassers should be confronted with each and every allegation against them, and in fairness, every defense explored, including whether any documents or physical evidence exists, and whether there are witnesses they believe support their version of the facts. Although tempting to do so, the investigator should not assume the harasser's answers. Assumption is the enemy of logic. The investigator must also not suggest answers before hearing the harasser's version of the facts. For example, the investigator should *not* say the following:

DO NOT ASK:

Q: Did you grab her leg or just happen to bump into her?

Q: Did you call her a "bitch" out of anger or were you just kidding?

Q: Did you just walk up and start massaging her shoulders or did she motion for you to come over?

Tell the harasser that retaliation against the victim or any witness will not be tolerated and will be reported in the investigative report.

Plan to spend significant time interviewing the harasser. Except for the complainant, this will take the most time.

b. Stereotypical Harassers

Chances are, you will know how the alleged harasser is approaching the investigation within the first few minutes of the interview. People who regularly conduct investigations or interviews begin to see distinct categories of reactions by someone being questioned or investigated. Although

stereotypes are, by definition, generalities (and numerous), an examination of several common approaches is instructive. Many harassers float in and out of the stereotypes during the investigation, some during the same interview.

Cooperative: The cooperative harasser will answer all questions and volunteer information. Usually a cooperative harasser will overcompensate and volunteer more information than you need or ask for. Cooperation can be genuine or feigned. Cooperative harassers are often overly apologetic and say things such as "I'd never do anything to hurt her," "I'll take a lie detector if you want," "I just want to apologize and make things right."

- If the cooperative harasser is evasive, the investigator's contrary technique is to be forceful, neutralizing the harasser's friendly approach and letting him or her know this is a serious affair. An alternative is to "play along," letting the harasser believe you appreciate how much he or she is telling you, while at the same time letting him or her talk to pick out the few relevant facts amidst the verbiage.

Practical: The practical harasser comes across as a no-nonsense type. They are guarded, will provide information but do not volunteer, seem concerned but detached at times, and will focus on the logistics of the investigation, asking questions such as "What happens now?" "Do I get to see the report?" "Are you making a recommendation?" and similar questions. Interviews with practical harassers tend to be shorter because of their disinclination to volunteer information.

- The investigator's contrary technique is to repeat the same question until answered or use flattery to develop rapport.

Silent type: The silent-type harasser is usually angry. It is the investigator's job to discover what he or she is angry about. The harasser may be angry because the allegations are false, or because they are true and he or she has been caught. Harassers may be angry because they think they should be angry, and you will be more likely to believe them. Silent-type harassers say almost nothing, and answer questions in few words. Many times they have been advised to answer questions in that manner from an attorney or union representative.

- The investigator's contrary technique is to stay friendly, and reassure the harasser you are objective and the process is not predisposed to finding him or her responsible.

Hostile: Like the silent type, the hostile harasser is angry, but lashes out at the investigator, the victim, and usually anyone else mentioned during the interview. The hostile harasser is likely to defend himself or herself with extraneous facts and arguments. Since emotions run high in some harasser interviews, an alleged harasser can start the interview perfectly calm and become a hostile harasser when the investigator begins to ask probing questions.

- The investigator's contrary technique is to stay calm, friendly, and professional, using humor to the extent possible. Most often, the harasser is likely to calm down and provide information.

Distracter: A distracting harasser will evade the questions and provide extraneous and irrelevant information to distract the investigator from the fact that he or she is not answering the question. Any good investigator will sift through the muck and obtain an answer, or simply ask the question again. Some distracters are very good, however, at making it appear as if they answer the question.

Consider the following exchange from an actual interview with a distracter harasser who finally answered the question after it was asked six times:

Q: As you know, I interviewed [complainant] yesterday.

. . .

She said you called her all sorts of names. Let's start with this. Did you ever call her any derogatory or insulting names?

A: Nope.

Q: When you came into the lunchroom last Thursday, did you call [complainant] a "skank"?

A: Jimmy G, he's the guy I told you about in packaging, knows [complainant] since he's a kid and says her whole family is trash.

Q: Let's focus on what you said in the lunchroom. Did you call [complainant] a "skank"?

A: Here's the thing. There's like, a hundred people in that lunchroom every day. Everybody is saying everything.

Q: Okay, but did you call her a "skank" last Thursday?

A: I'm dead either way, right? If I say no, she's just gonna say yes, and I'm dead, because she works up there in the office.

Q: No one is making any decisions here. Did you say . . .

A: . . . that whole family . . .

Q: . . . that to her? Did you?

A: *[hesitating]* Yeah, but it's true.

Q: What's true? What's a "skank"?

A: You know. Skank. She's skanky.

- The investigator's contrary technique is to focus the questions until the distracter answers, no matter how many times he or she attempts to distract.

Questioner: The questioning harasser will answer questions with questions. These harassers will attempt to avoid answering questions until they feel they know "where you are going" with the inquiry. Some will outright refuse to answer questions until you answer their questions.

- The investigator's contrary technique is to become forceful and insist; or you may employ the distracter technique and answer the harasser's question with minimal or nonresponsive information.

Educated: Some harassers believe they are (or actually may be) educated to the process of the investigation. This occurs when investigating, for example, an attorney, human resources manager, or upper-level manager. The educated harasser will try to shortcut your questions by getting to what

he or she thinks you are asking. For example:

Q: Have you completed an evaluation on the complainant since she made these allegations against you?
A: I didn't do anything to retaliate against her if that's what you mean.

or

Q: Did you ever ask her about her sex life?
A: *[rolls his eyes]* No, there's no way she can say she worked in a hostile work environment.

Educated harassers can be difficult to interview, especially if they are, in fact, educated to the process.

- The investigator's contrary technique is to keep the educated harasser off guard. Instead of asking about one incident, completing the inquiry, and moving on, get the information in bits and pieces. This will help distract the educated harasser from seeing a pattern in the questioning and making assumptions about the reasons for your questions.

8. Concluding the Investigation

After making certain that all pertinent information has been obtained, the interview can be concluded.

a. Concluding with the Witness

At the conclusion of each interview, the investigator should make clear to the witness that:

- The witness may be called back if necessary.
- The witness should not speak with anyone about the interview.
- The witness may receive a draft affidavit to review and sign.
- The witness should contact the investigator directly with additional knowledge, corrections to the statement, or recollections.
- The witness should contact the investigator directly if there are threats or reprimands for participating in the investigation.
- The investigator appreciates the witness's time.

b. Organizing the File

The file should be organized in a way that will make it easy to prepare the investigative report and for others to understand how the investigation was conducted. Assume the investigative report *and file* are entirely discoverable.

Make certain to have all copies of documentary evidence, including company documents such as sexual harassment policies, memoranda, employee evaluation and disciplinary reports, and the like. The investigator's notes should be neat and legible, and include the date.

The original file should stay in the custody of the investigator.

c. The "Preliminary" Results

At the conclusion of the investigation, the employer frequently asks the investigator what he or she "thinks." The employer is really asking, "did he do it," but will often qualify the question by saying, "I know you just finished and need time to review your notes, and I know this is only your gut feeling, but, did he do it?"

There is nothing improper with giving a verbal report about the status of the investigation. There is also nothing improper, per se, with the investigator giving an opinion about the credibility of the witnesses, including the complainant and alleged harasser. Keep in mind, however, that whatever is discussed is most likely discoverable. Also, remember the scope of the assignment, that is, if being hired by the employer, it may have asked specifically that you do *not* render an opinion about the ultimate question, i.e., "did he do it?" These conversations should also not be an attempt to influence the investigator in any way.

d. Investigative Report Deadline

Be certain to give the employer a time estimate of when the investigative report will be completed. Remember to allocate time for affidavits to be drafted, sent to witnesses, and returned, keeping in mind that witnesses, especially non-employee witnesses of the employer, may not comply with your deadlines.

9. Mechanics of Obtaining Signed Affidavits After the Interview

It may seem a relatively simple task to obtain a signed affidavit from a witness. This piece of administrivia, however, can prove to be maddening for an investigator faced with a deadline (and a budget) for completing the investigative report.

At the interview, the investigator will take notes (or record the interview) so that an affidavit can be prepared as an exhibit to the investigative report.

If deemed necessary, the investigator will prepare the affidavit some time after the interview, and will deliver a draft copy to the witness for review. The witness will naturally be concerned about keeping the affidavit confidential, especially since the witness will not know if it accurately reflects his or her statement until he or she reads it. The following is one recommended procedure for obtaining a signed affidavit, without compromising confidentiality:

a. As soon as practicable, prepare a draft affidavit from the interview notes. Do *not* identify the affidavit as "DRAFT."
b. Contact the witness to arrange how the draft will be delivered, although during the actual interview, when obtaining basic information, it is advisable to get either a private home address, a fax number, or more frequently, a confidential e-mail address.

c. Regardless of the delivery method, the draft affidavit must be accompanied by a letter identifying the affidavit as draft, and encouraging the witness to make any changes he or she deems appropriate. Also, remind the witness that the affidavit is *not* intended to reflect everything said at the interview, only those facts deemed relevant to the particular investigation.
d. If delivered by e-mail, verify e-mail address and request return receipt.
e. If by facsimile, verify fax number, use a cover sheet, and keep the transmission report.
f. The e-mail and fax delivery is only for the witness to review the draft affidavit and make changes. An original must be signed and returned.
g. If mailing the final affidavit, enclose a cover letter to the witness. Enclose a self--addressed, stamped envelope for its return. If e-mailed, ask the witness to print, sign, scan, and e-mail back.
h. If the affidavit is being mailed to the workplace, or being addressed to another for delivery to the witness, place the final affidavit in an envelope with a seal or sticker over the flap, so that tampering would be evident. The cover letter inside should reference the sticker so the witness will know if someone opened the envelope. Enclose a self-addressed, stamped envelope *and another sticker* so the witness can sign the affidavit, place it in the return envelope, and place the sticker over the flap. This way, the witness will have some assurance that it will not be opened before the investigator sees it. It is not unusual in larger investigations for a company representative to be in charge of distributing and collecting affidavits from company witnesses.
i. No matter what the delivery method, keep copies of all communications to all witnesses.

10. Obtaining Signed Statements During the Interview

Obtaining signed statements during the interview is a matter of personal preference and style.

Many investigators find it burdensome and distracting to record the comments of a witness in a form that can be instantly reviewed and signed, while at the same time trying to establish rapport, listen and gauge responses, and make sure all questions have been asked. That said, with some investigators it is a common practice, and there are reasons, such as the following, to have a witness sign a statement immediately after the questioning, before he or she leaves.

- The witness will be unavailable after the interview to review an affidavit or testify.
- The witness responds to the questions in such a way that leads the investigator to believe the witness may recant, or worse, later claim the investigator invented the responses.
- The subject matter is such that recording the responses into a statement is not difficult.
- The investigator is experienced and comfortable with recording the responses into a statement for immediate review, and has the tools, literally, to perform the task (e.g., computer with attached printer). Handwritten statements can also be completed by the witness, or prepared by the investigator and signed by the witness.
- Time or expense prohibits the preparation of affidavits, yet the investigator feels that verification of the responses is essential.

Another option would be to have a third person present to take notes so the investigator can focus on the questions and answers. This is efficient, but must be weighed against possible distraction or a chilling effect on the witness as well as cost.

11. The Investigative Report

The format of the investigative report will largely be a function of the scope of the investigation. It should, at a minimum, provide to an uninformed reader (1) the identity of the parties, (2) the nature of the complaint, (3) pertinent background information about the employer, department, business surroundings, company policies, etc., and (4) a summary of the facts and statements of the witnesses. It should also provide the parameters of the investigation, that is, the time frame in which it was conducted, whether or not counsel was present during the interviews, whether there were any restrictions on the investigation, and what additional information is required for a complete investigation, if any.

A "simple" investigation usually involves a single complainant, a single alleged harasser, and a small number of witnesses. If the complainant makes a subsequent claim, especially if the claim can survive on its own such as retaliation, a second investigation should be conducted and a separate report prepared.

A "complex" investigation can involve multiple complainants and/or multiple harassers, which usually leads to a variety of incidents, documents, and witnesses.
The following paragraphs provide answers to some common questions concerning the investigative report.

Why prepare a written investigative report?

Employers will almost always want to prove that they acted promptly and reasonably. They want to demonstrate that they took action, and spent the time and money to have an investigator conduct an investigation and prepare a report. Without a written report, the investigation appears haphazard and informal. Many times, the employer will want an "update" or "off-the-record" conversation with the investigator as the investigation proceeds, and before a report is prepared. There is nothing improper about such conversations, as long as the employer understands such communications are not protected by any privilege and are entirely discoverable, as are any "suggestions" the employer may make to the investigator about the content of the investigative report.

Who prepares the investigative report?

The investigator will prepare the investigative report, and is responsible for its contents, including attached exhibits. Since the report is likely to be the single most important document arising out of the investigation, it is recommended it be bound or otherwise prepared in professional manner. Sufficient copies should be made to provide to the client and, of course, the investigator should retain at least one complete copy. In many instances the company representative in charge of

the investigation (in-house, or possibly outside counsel) requires only an e-mailed version of the report, which they then distribute.

Is the investigative report confidential?

Not usually. The report will normally be delivered to the person who hired the investigator, most often a company or its representative. The report will likely be shared with other company representatives and its attorneys. If an action is filed, the plaintiff-employee most likely has a right to obtain a copy in discovery, although there have been known to be challenges to its discoverability.

At times, companies volunteer a copy of the investigative report to the employee or his or her attorney without a formal complaint being filed. Notwithstanding the Fair Credit Reporting Act controversy, the investigative report is not normally delivered to the alleged harassee directly from the investigator.[6]

Do witness names appear in the investigative report?

Yes. The investigative report is a complete record of the investigation and witnesses' names and statements will appear. The witnesses must understand that confidentiality will be maintained to the extent possible, but for the most part, their statements are *not* confidential. This should be disclosed in the preliminary statement. If there is a special circumstance, such as the possibility that the investigative report would be published in the press, or there is a bona fide concern about witness safety or retaliation, a witness's name can be redacted and replaced with "Witness 1," "Witness 2," or the like, but that causes numerous complications. For example, who will then have the "key" to the actual names? How will decision makers gauge the relevance of the testimony without knowing specifically who made the statement? Even if redacted, the witness names would be discoverable unless subject to a protective order. As a practical matter, in many investigations, the testimony of any given witness, even if shrouded, is easily decipherable.

Does the investigative report reflect whether witnesses are represented by counsel?

Yes. Anyone connected to the investigation must be listed, especially if they are present during the interviews.

Why give dates and times of the interviews?

Not only does the chronology provide an accurate picture of the investigation, but it may be important for the employee or the employer, or both, to know how long the investigation took. The employee may argue the investigation was unreasonable in length or that the employer stalled to avoid taking action. The employer will want to show how it acted promptly to address the complaint.

If there is a reason why the investigation was delayed, the investigator should note the reason in

[6] *See* section regarding the Fair Credit Reporting Act controversy.

detail.

Should restrictions on the interview process be stated?

Yes. If the employer is uncooperative about allowing certain witnesses to be interviewed or places unreasonable restrictions on the time for the interview, it should be noted. Remember, the report will be scrutinized by employer and employee alike, and the investigator will be cross-examined on how and why certain portions were drafted the way they were, why certain witnesses were not re-interviewed, and why this or that was not done. If there were restrictions, they must be acknowledged. In addition, noting restrictions on interviews (and everyone knowing that before the investigation begins) makes it less likely that restrictions will be imposed.

Does the investigative report contain recommendations, e.g., discipline of the harasser?

It would be unusual for the investigator to make such recommendations. Those decisions are most always left to the discretion of company decision makers and their attorneys. Once the investigator makes recommendations, there is significant risk he or she will then be considered to have rendered legal advice, and the objectivity of the investigator will have been destroyed.

Does the investigative report contain an opinion of the ultimate question, i.e., whether harassment or discrimination occurred?

No, not unless the client requests such a recommendation. Normally, the employer and its attorneys want to be able to interpret the report as they see fit, without having to deal with an investigator's opinion that may or may not agree with their own. Most employer's attorneys, therefore, will simply request an objective report with no ultimate findings or recommendations. Query whether the investigator's opinion, even if not requested, is admissible or relevant at trial.

Do you disclose compensation in the investigative report?

Yes, although there need only be an acknowledgment that the investigator was or will be paid by the client, usually the employer or its attorneys. It is not necessary to state the dollar amount. This is done in the spirit of full disclosure, and to avoid any appearance of impropriety upon cross-examination.

III. THE FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act, as amended, applies to outside investigations of employee misconduct. The FCRA sections 1681a(d)–(e) (definitions) *exclude* workplace investigative reports from the definition of a "consumer report" and "investigative consumer report," and section 1681a(f) excludes workplace investigators from being a "consumer reporting agency."

IMPORTANT: Even though an outside organization investigating an employee is not required to comply with the requirements of the FCRA, *section 1681a(y) obligates the employer to*

provide a "summary containing the nature and substance" of the report if adverse action is taken. This begs the question of the definition of "summary," which is undefined in the FCRA. Note that the request for the summary would almost always come from the alleged harasser, that is, the one who suffered adverse action.

It is safe to say that, if the employer were so inclined to provide it, the investigative report itself would qualify as a "summary." A one-line letter, saying there has been an investigation that found sexual harassment, would most likely not. In each circumstance, the employer (not the investigator) must determine how best to meet the disclosure requirements of the FCRA, but note that the FCRA provides the report to be excluded only if provided to a limited number of persons, such as the employer. Providing a copy of the report to the complaining party may actually bring it within the scope of an investigative "consumer report" and not subject to the exception, therefore triggering the full and complete disclosure requirements of the FCRA.

Employers should note that a negligent violation of the FCRA may lead to civil penalties, including an award of compensatory damages plus attorneys' fees. An award of compensatory damages may also include damages for emotional distress. A willful violation may trigger an award of punitive damages in addition to compensatory damages, plus attorneys' fees. Thus, employers who are unsure of FCRA disclosure requirements should consult with counsel before retaining outside assistance for the investigation of harassment allegations.

IV. DEFENDANT'S VIEW OF WORKPLACE INVESTIGATIONS

A. NLRA Violations[7]

NLRB Focuses on Employers' Internal Investigations

The National Labor Relations Board (NLRB), the federal agency charged with enforcement of the National Labor Relations Act (NLRA), has increased its focus on social media and employer/employee communications, regardless of whether the employee is represented by a union. Section 7 of the NLRA protects the rights of both union and non-union employees to engage in "concerted activities," which includes discussions about wages, hours, or terms and conditions of employment by and between employees.

In several recent cases in the last year, the NLRB determined that social media postings by employees about workplace issues qualified as protected concerted activity, and that employers violated the NLRA by taking adverse action against these employees for these postings. In these decisions, the NLRB has emphasized that employers may violate the NLRA simply by maintaining personnel policies that employees could reasonably interpret to be prohibiting protected concerted activities. This has resulted in employers revising their general policies to be more specific as to prohibited communications by employees and to include specific caveats that the policies do not

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intend to prohibit or in any way restrict legitimate employee communications protected by Section 7 of the NLRA.

Following this line of cases, in *Banner Health System d/b/a Banner Estrella Med. Ctr.,* 358 NLRB No. 93 (July 30, 2012), vacated and reinstated by *Banner Health System d/b/a/ Banner Estrella Med. Ctr. and James A. Navarro*, 362 NLRB No. 137 (June 26, 2015), the NLRB found that the employer violated Section 8(a)(1) of the NLRA by instructing employees not to discuss ongoing internal investigations of employee misconduct. Section 8(a)(1) provides that it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Before this decision, the standard practice for employers investigating various kinds of misconduct, including discrimination, theft, or harassment, is a request by the employer that employees maintain confidentiality while the investigation proceeds.

In *Banner Health,* the employer's human resources consultant used an "Interview of Complainant Form" when conducting an investigation of a complaint. This form was not given to the employee but it included an instruction that was verbally provided to the employee. The human resources consultant simply asked the employee to refrain from discussing the matter with his coworkers while the investigation is ongoing. The administrative law judge (ALJ) actually found that the instruction was for the purpose of "protecting the integrity of the investigation." Therefore, he found that the employer had a legitimate business reason for giving the instruction. The ALJ got it right. Unfortunately, in a 2–1 decision, the NLRB rejected the employer's argument (and the ALJ's reasoning) that its confidentiality instruction was necessary to protect the integrity of the ongoing investigation. The NLRB determined that the employer's "generalized concern with protecting the integrity of the investigation is insufficient to outweigh employees' Section 7 rights." Rather, the NLRB stated that to justify this type of instruction an employer must show a legitimate business need that outweighs an employee's Section 7 rights. The NLRB held that it was the employer's burden "to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up." In essence, the NLRB is now requiring that employers make sure that they can establish that the need for confidentiality is warranted under the facts of the particular investigation before a request for confidentiality can be made to the employee witness. Practically speaking, an employer may not know, at the onset of a workplace investigation, where the investigation may lead and whether a lack of confidentiality will somehow taint the investigation going forward. Although this requirement will certainly make investigations more difficult for employers, it is an obstacle that can be cleared by taking the appropriate steps.

Therefore, in light of the *Banner Health* decision, employers should review their policies and practices regarding internal investigations and eliminate from the process any component that includes a blanket instruction that complaining employees or other witnesses refrain from communicating about the issue with co-workers. If an employer believes that confidentiality is needed to protect the integrity of the investigation, as it should be for most investigations, it should protect itself by providing the witness with a specific, written reason why confidentiality must be maintained as the investigation proceeds. For example, in a sexual harassment investigation an employer can legitimately maintain that it is vital to protect confidentiality in the workplace, both for

ascertaining the "truth" of any harassment allegation and also for protecting the reputations of the alleged harasser and the victim.

In conclusion, although this decision reflects the NLRB's lack of understanding concerning workplace investigations in general and, specifically, that witness confidentiality is crucial to the success of same, a savvy employer can avoid running afoul of this new NLRB standard by taking the additional step of providing written justification for maintaining confidentiality as part of any witness interview.

B. Retaliation Claims by Complainant

Sexual harassment and discrimination complainants may file actions for discharge from employment in retaliation for the exercise of rights protected by Title VII, 42 U.S.C. § 2000e to 2000e-17. Section 2000e-3(a) prohibits an employer from discriminating "against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a).

A discharge allegedly in retaliation for the exercise of rights protected by Title VII naturally will occur in the context of the complainant's involvement in some form of activity protected by Title VII, such as filing an internal complaint or seeking assistance from an outside administrative agency. Thus, depending on the facts, the complainant may be able to join a claim of retaliatory discharge with a Title VII claim alleging harassment.

No retaliation analysis should be conducted, however, without reviewing *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53 (2006), and its progeny. Pursuant to *Burlington Northern,* a complainant can demonstrate retaliation by showing that a reasonable employee would have found the challenged action materially adverse, that is, harmful to the extent it would have dissuaded a reasonable worker from making or supporting a charge of discrimination. This action does not have to be the termination, demotion, or suspension of the employee. It may be, for example, no longer inviting the employee out to lunch with his or her supervisor, or changing the employee's desk or cubicle location.

Moreover, nothing prevents employees from alleging that the investigation itself, or the manner in which the investigation is conducted, is retaliation for engaging in a protected activity. *See Schofield v. Metropolitan Life Ins. Co.*, 252 Fed. Appx. 500, 504 (3d Cir. 2007), *abrogated on other grounds recognized by Porter v. Houma Terrebonne Housing Auth. Bd. of Com'rs*, 810 F.3d 940, 945 n.11 (5th Cir. 2015); *Crawford v. Metropolitan Gov't of Nashville,* 555 U.S. 271 (2009) (a witness to an investigation is engaging in protected activity and can sustain a retaliation claim).

1. Cooperation with Investigation

Another interesting question is whether the employer can discipline a witness, or indeed, the complainant, for failing to cooperate with the investigation. This issue arises whether or not the

employer has a policy outlining the expectations for employee cooperation.

An employee can be disciplined for refusing to participate in an employer's investigation or otherwise impeding it. *See Jones v. CVS Pharmacy,* No. 07-3878 (MLC), 2008 WL 5416394 (D.N.J. December 22, 2008) (granting summary judgment on employee's retaliation claim where employee could not rebut employer's evidence that adverse employment action was due to employee's walking out on an interview).

The more difficult issue is whether an employer may discipline a complainant for refusing to cooperate in an investigation. *See Ferguson v. Georgia Dep't of Corrs.,* 428 F. Supp. 2d 1339 (M.D. Ga. 2006); *Harris v. Fulton-DeKalb Hosp. Auth.,* 255 F. Supp. 2d 1347, 1355–56 (N.D. Ga. 2002). The *Harris* court explained,

> "There is no hint . . . that the Eleventh Circuit would give an employee a cause of action for retaliation where the employee makes a claim of discrimination, refuses to cooperate in an investigation of the claim and, thus, provokes the employer to fire her for insubordination. Indeed it would be a strange world where the law rewarded such insubordinate behavior. The retaliation clause of Title VII is not a license for insubordination."

2. Defenses

In actions alleging that the employer discharged the complainant from employment in retaliation for the complainant's involvement in activity protected under Title VII, the employer will not be liable where (1) the complainant did not engage in any protected activity, (2) the complainant was not discharged, and (3) there was no causal connection between the complainant's protected activity and his or her discharge from employment.

In addition, the employer may rebut the complainant's prima facie case of retaliation by articulating legitimate, nondiscriminatory reasons for the complainant's discharge. *Garvey v. Dickinson Coll.*, 775 F. Supp. 788 (M.D. Pa. 1991). The employer must, however, state specific and adequate reasons for the discharge.

3. Complainant's Job Performance

Most often, the employer's attempt to articulate a legitimate, nondiscriminatory reason for the complainant's discharge from employment will be based on evidence of the complainant's unsatisfactory performance on the job. Legitimate, nondiscriminatory reasons for termination of employment may include, for example:

- attendance problems
- disciplinary problems
- quality problems with work

- productivity problems
- violations of employer rules

4. Other Conduct by Complainant

The employer may be able to demonstrate a legitimate, nondiscriminatory reason for the complainant's discharge by evidence that the discharge resulted from the complainant's dishonesty or involvement in illegal activity on the job. There are various ways of showing dishonesty or illegal activity that may be sufficient to justify discharge, including evidence that the complainant:

- made false statements on an employment application
- falsified business records
- lied in connection with the employer's investigation of complaints of discriminatory treatment

5. How to Avoid Retaliation Claims

To avoid retaliation claims, institute a review process applicable to employment decisions affecting employees involved in a sexual harassment or discrimination action. This process may require the following:

- maintaining good company policies
- documenting disciplinary incidents and violation of work policies and rules
- approval of employment decisions by an independent manager or member of the human resources department
- consistent application of disciplinary action to all employees
- excluding the accused from any decision-making that will affect employees involved in the harassment action

Throughout the investigation, be certain to take the following actions:

- monitor the workplace for any retaliatory behavior
- stress to complainant, witnesses, and alleged harasser that they should report any retaliation immediately
- articulate the company's anti-retaliation policy to all involved

V. LITIGATION CONSIDERATIONS

A. Six Ways to Attack the Investigation

#1 BIAS (Personal Relationship)—The investigator could be biased for many personal reasons, including:

- The investigator is also a decision maker and has reason to make a finding one way or the other;
- The investigator has a familial relationship or some other close relationship with a

decision maker at the company;

- The investigator has a familial relationship or some other close relationship with someone at the company who would influence the outcome;
- The investigator used to be employed by the company;
- The investigator seeks to become employed by the company;
- The investigator knew the complainant or alleged harasser previously in an adverse role;
- The investigator is an attorney for the company or one of its principals.
- The investigator failed to adequately explain his role and/or give Upjohn warnings

#2 BIAS (Compensation)—The investigator may be biased by financial circumstances:

- The investigator is being compensated by the company;
- The investigator's compensation is dependent upon the outcome of the action, e.g., the investigator gets compensated, or more greatly compensated, if the complainant's case is dismissed;
- The investigator is biased to find a particular outcome with the hope of obtaining future investigations from the company or its attorneys.

#3 TIMING—The investigation was not conducted promptly, so:

- The complainant had no real opportunity to have his or her complaints rectified in a reasonable time;
- The complainant was subjected to additional unwelcomed conduct during the pendency of the investigation;
- Witnesses, documents, or other evidence became unavailable;
- The company acted contrary to its stated policies;
- The company acted in bad faith and/or retaliated by stalling the investigation.

#4 INSUFFICIENT INVESTIGATION—The investigation was not thorough in some way; possibly the investigator:

- Failed to interview material witnesses;
- Failed to sufficiently interview or understand the complaints;
- Failed to obtain, review, or consider key documents or other evidence;
- Conducted the investigation too quickly given the circumstances;
- Failed to retain related professionals (e.g., forensic accountants, IT experts to review e-mails, handwriting experts, etc.);
- Failed to keep adequate notes of interviews or otherwise record the testimony.

#5 INCOMPETENT INVESTIGATOR—The investigator was not competent to conduct the investigation because he or she:

- Failed to conduct a prompt investigation (see above);
- Failed to conduct a thorough investigation (see above);
- Failed to have sufficient, or any, experience conducting workplace investigations;
- Was biased or had a conflict of interest (see above);
- Became personally involved and advocated for one position (lost objectivity);
- Was materially negligent in a way that adversely affected the complainant's or alleged harasser's rights and/or the outcome or conclusions of the investigation;
- Engaged in misconduct or inappropriate behavior that adversely affected the

complainant's or alleged harasser's rights and/or the outcome or conclusions of the investigation.

#6 FCRA, 15 U.S.C. § 1681a(y)—The investigator (or employer) failed to provide a "summary" to the affected employee (usually the alleged harasser):

- Section 1681a(y) obligates the employer to provide a "summary containing the nature and substance" of the report if adverse action is taken. "Summary," however, is undefined in the FCRA.

B. The Investigator as Expert Witness

Pennsylvania courts do not require a different standard to qualify an employment investigator as an expert witness than they do for any other expert witnesses. An investigator, no different than other potential expert witnesses, is likely to be qualified as an expert witness if it can be demonstrated by subject matter, educational background, and/or work experience that the witness has specialized knowledge of the subject under inquiry.

The Pennsylvania Supreme Court defined the test to qualify a witness as an expert as whether the witness "has any reasonable pretension to specialized knowledge on the subject under investigation." *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995); *see also* Pa.R.E. 702. Other Pennsylvania courts have interpreted this rule to mean that to qualify as an expert, one must have "sufficient skill, knowledge, or experience in [the relevant] field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth." *Rodgers v. Breakiron*, 28 Pa.D.&C.4th 518, 524 (C.P. Delaware 1996) (McGovern, J.). Essentially, the witness must have demonstrable specialized knowledge or experience on the subject under inquiry.

In an employment action alleging sexual harassment and hostile work environment, a witness was qualified as an expert to testify on the common patterns and responses to sexual harassment and the necessary remedial steps. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505-06 (M.D. Fla. 1991). The court considered the witness's self-employment as a consultant who concentrated on issues regarding women and the workplace, and on the prevention of sexual harassment on the job. Further, the witness held a degree in social work and had been an instructor in sexual harassment courses and offered consultation services to employers to train supervisors and employers on sexual harassment. Id. at 1506. The court found that the witness's extensive experience qualified her as an expert to testify on the common patterns and responses to sexual harassment, as well as on the education and training needed to eliminate sexual harassment. Id.; *see also Dunn v. Mercedes Benz of Fort Washington, Inc.*, No. 10-1662, 2012 WL 424984 (E.D. Pa. February 10, 2012) (investigator qualified as expert witness for the plaintiff to testify about the insufficiency of investigation) (without opinion); *Blakey v. Continental Airlines, Inc.*, Civ. No. 93-2194, 1997 WL 1524797 at *3 (D.N.J. September 9, 1997) (witness who attended numerous seminars, symposiums, CLE classes, and conferences on sexual harassment in the workplace qualified as expert to testify to the general policies and practices a company may undertake to prevent and address allegations of sexual harassment).

In *EEOC v. Scolari Warehouse Markets, Inc.*, 488 F. Supp. 2d 1117, 1134 (D. Nev. 2007), the court outlined certain qualifications of the expert witness in workplace investigations:

> [T]his Court finds particularly instructive the expert, Michael Robbins's report. Notably, Mr. Robbins "has worked as an expert witness on more than 250 occasions," and he "has extensive experience conducting harassment, discrimination and employee misconduct investigations—having conducted over 200 workplace investigations." Many of his other accomplishments, such as his background in employment law, his publications in employment law journals and reports, his teaching and lecturing experience at various employment law centers and law schools, and his membership on the Executive Board of the Los Angeles County Bar Association's Labor & Employment Law Section, as well as others, leads this Court to view Mr. Robbins as a reputable source of expert testimony.

But compare, for example, *Charles Schwab & Co.,* Case 28-CA-19445, 2004 WL 3023761 (N.L.R.B. December 16, 2004), at n.13:

> At the hearing counsel for the Respondent called Amy Lieberman to testify. Ms Lieberman is an attorney with significant experience as a mediator, arbitrator, and lecturer, in the area of workplace liability avoidance, including harassment and discrimination, and in conducting effective workplace investigations. (Res. Exh. 23.) Counsel for the Respondent requested that I find Ms. Lieberman to be an expert witness. Counsel for the General Counsel and counsel for the Charging Party objected. I reserved ruling on the Respondent's request. While I found Ms. Lieberman to be an articulate, experienced, and knowledgeable attorney, I do not believe that she possesses the type of "scientific, technical, or other specialized knowledge" as contemplated in Rule 702 of the Federal Rules of Evidence. Accordingly, I am hereby declining to find her to be an expert witness. Therefore, while I certainly found her testimony and opinion interesting, I have given it no weight in rendering my decision in this case.
> It is common for expert witnesses in sexual harassment and discrimination cases to testify about vocational opportunities after termination, damages calculations, or medical and emotional issues. An investigator, however, could be called by the plaintiff or defendant to testify about the investigation itself, that is, whether the employer took usual and reasonable steps to conduct a prompt, thorough, impartial, objective, and effective investigation. A defendant would use an expert to prove the investigation was conducted properly and therefore, it should have the benefit of the *Faragher* and *Ellerth* affirmative defense. The plaintiff would use an expert to contradict the defendant's expert or the investigator witness, to show the investigation was flawed, biased, ineffective, inefficient, or otherwise conducted in good faith, so to rebut the defendant's attempt to obtain the advantage of the affirmative defense.

Investigator expert witnesses are subject to the same attacks as other experts, which typically include:

- challenge to status as an expert based on lack of subject matter, education, or experience

- challenge to the validity of the opinion based on lack of qualification to opine on the particular question
- challenge to the validity of the opinion based on lack of personal knowledge, e.g., opinion based on review of investigative report and notes, but expert "wasn't there" to inspect physical space and actually observe witnesses' body language, voice inflection, etc.
- challenge to validity of opinion based on general bias for employees or employers, possibly based on testimony in prior cases of primarily plaintiffs or defendants
- challenge to validity of opinion based on bias because expert is being paid by opposing party
- challenge to validity of opinion based on the fact that expert provided contrary testimony in a prior case
- presentation of contrary expert

Since a proper investigation could lead the defendant to obtain the benefit of the affirmative defense under *Faragher* and *Ellerth* and to otherwise demonstrate it acted in good faith and did not tolerate workplace misconduct, it is important to both the plaintiff and defendant to establish their respective positions about the nature of the investigation. Properly handled, both sides can benefit from the use of an investigations expert.

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(photograph and additional information available at www.sogtlaw.com)

LEGAL EXPERIENCE

Semanoff Ormsby Greenberg & Torchia, LLC, Huntingdon Valley, PA

A Managing Member, 2000-present
Partner, 1998-2000, Semanoff, Ormsby & Greenberg, LLP
Associate, 1995-98

Represents and advises businesses and individuals in all phases of civil litigation in state and federal court, administrative agencies and arbitration with a strong concentration in business, employment and commercial disputes

Firm is corporate counsel to many mid- and large sized regional businesses as well as Pennsylvania litigation counsel for national and international corporations

Received AV rating from Martindale-Hubbell which identifies a lawyer with very high to preeminent legal ability and highest professional and ethical standards

Organizes and presents seminars concerning a wide variety of employment-related topics including Workplace Investigations, at-will employment, hiring and firing; Title VII, Family and Medical Leave Act of 1993, The Americans With Disabilities Act of 1990, Fair Labor Standards Act, trade secrets and restrictive covenants, sexual harassment, discrimination, retaliation, etc.; consultant to Human Resources personnel for various companies; review and draft employee policies and handbooks

Rutgers University School of Law- Camden, Camden, NJ

Adjunct Faculty Member – Trial Advocacy (practicum) Fall 2013; Fall 2014; Spring 2016, Spring 2017

Clark, Ladner, Fortenbaugh & Young, Philadelphia, PA

Associate, 1991-95
Labor and Employment Section of Commercial Litigation Department.
Member Hiring Committee, 1993-1995
Represented business and individuals in all phases of civil litigation with a concentration in employment and labor law.
Organized and presented seminars concerning Title VII, sexual harassment, Fair Labor Standards Act, Family and Medical Leave Act of 1993, and

the Americans With Disabilities Act of 1990; review and draft employee handbooks

The Honorable Clarkson S. Fisher, Senior Judge
United States District Court, District of New Jersey (Trenton)
Summer Law Clerk, 1989

Independent Workplace Investigator/Expert Witness

Conducts independent workplace investigations nationwide of claims of sexual harassment, discrimination, retaliation, wrongful discharge, defamation and employee malfeasance for both public and private employers. Various clients including large international corporations, public entities, governmental agencies and departments and closely held businesses

Testified at Department of Labor and Industry Committee hearing of the Pennsylvania House of Representatives as expert in workplace investigations, April 2018

Author of Workplace Investigations portion of Chapter 6 and Employment At-Will portion of Chapter 7 in Pennsylvania Employment Law Deskbook (Peter J. Ennis, Editor) 2013 ed. and updates (2014, 2015)

Author of Pennsylvania Bar Institute books on workplace investigations for seminars

Prepares written Investigative Reports; testifies at deposition, arbitrations and trials as Investigator

Hired as Expert Witness in Workplace Investigations by both plaintiff and defendant to provide opinion on sufficiency of previously completed investigation

Testified and qualified as expert witness in workplace investigations at federal court trial of *Dunn v. Mercedes-Benz of Fort Washington, Inc.*, 10-CV-1662 (E.D. of Pa. 2012), April, 2012

Hired to train in-house investigators in Pennsylvania Commonwealth agencies

Conducted over 130 workplace investigations

Member: Association of Workplace Investigators

RECOGNITION

The Honorable Joseph M. Nardi, Jr. Distinguished Service Award, Rutgers Law School Alumni Association, 2017

Chosen as "Super Lawyer" in the field of Employment Law
as published in Philadelphia Magazine, 2008 – present
Martindale-Hubbell® AV rated 1997 - present
Martindale-Hubbell® Pre-eminent Attorney
in the fields of Employment Law and Commercial Litigation; 2003-present
Chosen as "Awesome Attorney" by Suburban Life Magazine, 2010
Chosen as "Leader in the Law" by Philadelphia Business Journal, 2007-2009, 2011, 2013

EDUCATION

LEGAL

Rutgers University School of Law-Camden, NJ, Juris Doctorate, 1991
Rutgers Law Journal, 1990-91
Third-Year Class President
Judge James Hunter III, Memorial Advanced Moot Court, Finalist 1989-90
Best Brief Overall and Top Ten Oralist (individual)
Award: 1990 Excellence in Civil Litigation presented by
The Center for Forensic Economic Studies
Honors: Best Oralist in First Year Moot Court; voted Most Likely to Become a Judge; voted Person You Would Most Want to Represent You in Court
First /Second Year Representative Student Bar Association, 1988-90
Teaching Assistant, Research and Writing, 1989-90

GRADUATE AND UNDERGRADUATE

Trenton State College, Trenton, NJ, Master of Arts, summa cum laude (4.0), 1988
New Jersey Certificate in Educational Supervision, 1988
Graduate project: "The Public School Supervisor and School Law"

University of Hartford (Hartt School of Music), Hartford, CT
B.Mus.Ed., cum laude, 1983

BAR ADMISSIONS AND POSITIONS

Chair, Montgomery County Bar Association, Employment Law Committee 2018-present
Montgomery County arbitrator 2007-present
United States District Court for the
Eastern District of Pennsylvania arbitrator 2007-present

Association of Workplace Investigators 2012-present

Licensed to practice law in Pennsylvania and New Jersey
Admitted to practice before Pennsylvania and New Jersey state courts, federal courts for the Eastern, Middle and Western Districts of Pennsylvania, New Jersey District Court, Colorado District Court, Third Circuit Court of Appeals and United States Supreme Court

Chancellor, Rutgers University School of Law (Camden) Alumni Association 1998-2000; First Vice Chancellor 1996-1998; Chancellor Emeritus 2000–present; Member Board of Directors 1991-present

American Bar Association, 1988-present
Bucks County Bar Association, 1993-present
Montgomery County Bar Association, 1995-present
Philadelphia Bar Association, 1990-present
New Jersey Bar Association, 1988-98; 2001-present
Bar Association for the Third Federal Circuit (founding member) 2009-present

Board of Directors, Bucks County Zoo 2010-2012

Selected Opinions

Socko v. Mid-Atlantic Systems of CPA, Inc., 2014 Pa. Super. 103 (May 13, 2014) (allocator granted) (affirmed trial court that Uniform Written Obligations Act and "intending to be legally bound" language is insufficient to defeat requirement of additional valuable consideration for a non-competition provision offered to an employee after the start of employment); *Socko v. Mid-Atlantic Systems of CPA, Inc.*, 126 A.3d 1266 (Pa. 2015) (Pennsylvania Supreme Court affirming Superior Court)

Accu-Fire Fabrication, Inc. v. S.S. Sprinkler Co., Inc. and Midlantic Fire, LLC, U.S.D.C. for the E. D. of Pa., Docket #2:11-cv-03367-JCJ (securing jury verdict in favor of plaintiff for unpaid goods and services, the jury finding successor liability and full damages requested)

Brandner v. Innovex, Inc., 2012-Ohio-462 (First District, Hamilton County, Ohio, Feb. 10, 2012) (securing summary judgment in favor of company and against plaintiff alleging various employment related claims, affirmed in appellate court)

Bioquell Inc. v. Feinstein, et al., Civ. No. 10–2205, 2011 WL 673746 (E.D. Pa., Feb. 16, 2011) (successfully defending company and two individuals against claims of violation of non-competition provision, breach of contract and related claims in preliminary injunction)

Griffin v. De Lage Landen Financial Serv. Inc., 219 Fed. Appx. 245, 100 Fair Empl. Prac. Cas. (BNA) 233 (3d Cir. Pa., Mar. 13, 2007) (directed verdict granted at trial to dismiss claims of gender discrimination and retaliation affirmed)

Integrated Health Services, Inc. v. Lee, 281 B.R. 231 (Bankr. D. Del. 2002) (represented employer against two key executives; court upheld the former employee's restrictive covenants and protected employer's trade secrets)

Bailey v. United Airlines, 279 F.2d 194 (3d Cir. 2002) (represented age discrimination plaintiff in successful appeal to reverse the grant of summary judgment)

Spierling v. First American Home Health Care Services, Inc., 737 A.2d 1250 (Pa. Super. 1999) (represented defendant in successful appeal, Superior Court holding no violation of public policy for an employer to discharge an employee for reporting Medicare fraud absent a statutory duty to do so)

Armbruster v. Unisys Corp., 32 F.3d 768 (3d Cir. 1994) (represented group of 14 age discrimination plaintiffs in successful appeal to reverse the grant of summary judgment)

Presentations and Articles[1]

"Drug and Alcohol Issues in the Workplace" presented in the seminar "Drug and Alcohol Issues in Civil Litigation"; Pennsylvania Bar Institute seminar, May, 2018 (CLE credit 1 hour)

Employment Law Institute (Pennsylvania Bar Institute two day seminar, Philadelphia) Course Planner Panel 2014-2018

"Employment Law Year in Review"; seminar co-presented at 2018 Pennsylvania Bar Institute seminar, Employment Law Institute, April 2018 (CLE credit 1 hour)

"Who's Next? What Employers Need To Do *Now* To Address Sexual Harassment Claims"; seminar co-presented at 2018 Pennsylvania Bar Institute seminar, Employment Law Institute, April 2018 (CLE credit 1 hour)

"Who's Next? What Employers Need To Do *Now* To Address Sexual Harassment Claims" seminar presented at Montgomery County Bar Association, Women in Law Committee, April, 2018 (CLE credit 1 hour)

[1] Numerous private seminars and training presentations to clients not included.

"What Non-Employment Lawyers Need To Know About Employment Law" seminar presented at Montgomery County Bar Association, April, 2018 (CLE credit 1 hour)

"Who's Next? What Employers Need To Do *Now* To Address Sexual Harassment Claims" seminar presented at Montgomery County Bar Association, Women in Law Committee, April, 2018 (CLE credit 1 hour)

"Who's Next? What Employers Need To Do *Now* To Address Sexual Harassment Claims" seminar presented at Proxus HR, January, 2018

"Who's Next? What Employers Need To Do *Now* To Address Sexual Harassment Claims" seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, December, 2017 (CLE credit 1 hour)

"Employee Compensation: What Employers Need To Know To Avoid Getting Sued" seminar presented at Streamline Payroll, December, 2018

"Preventing Sexual Harassment and Discrimination" seminar presented to House Republicans and House Democrats of Pennsylvania House of Representatives at State Capitol, Harrisburg, PA November, 2017 (CLE credit 1 hour)

"What Non-Employment Lawyers Need To Know About Employment Law" seminar presented at Bucks County Bar Association, October, 2017 (CLE credit 1 hour)

"Fire At-Will: Wrongful Discharge in Pennsylvania"; course planner, moderator, presenter; 2003, 2006, 2009, 2011, 2013, 2017 Pennsylvania Bar Institute seminar (Live presentations in Philadelphia, Mechanicsburg, Pittsburgh, Scranton-Wilkes Barre; videotaped for 15 video replays; simulcast and webcast) (CLE credit 3 hours)

"Employment Law 101: What Employers Need To Know To Avoid Getting Sued"; presented at Montgomery County Bar Association, July, 2017

"What Non-Employment Lawyers Need To Know About Employment Law" seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, June, 2017 (CLE credit 1 hour)

"Wage and Hour Update" presented at Southeastern Pennsylvania (SEPA) SHRM, June, 2017 for SHRM Training Credit

"Employment Law Overview for Accountants"; presented at Business Development University CPE seminar in Marlton, NJ to CPAs.

"Fire At-Will: Wrongful Discharge in Pennsylvania"; presenter and author; 2001-2007, 2011, 2014, 2015, 2017 Pennsylvania Bar Institute seminar, Employment Law Institute. (CLE credit 1 hour)

"There's No Place Like Home: Telecommuting and Remote Employees" seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, January, 2017 (CLE credit 1 hour)

"Employment Law 2016: Five New Changes You Can't Ignore"; presented at Semanoff Ormsby Greenberg & Torchia, LLC, November, 2016 (CLE ethics credit 1 hour)

"Off to a Good Start (Up)"; presenter and author of "Employment Matters" session; 2013, 2014, 2016 Pennsylvania Bar Institute seminar (CLE credit 1 hour)

"Manual of Steel: Updating Your Employee Handbook" presenter and author; 2016 Pennsylvania Bar Institute seminar, "A Day on Employment Law" (CLE credit 1 hour)

"Effectively Conducting Workplace Investigations"; course planner, moderator, presenter; 2016 Pennsylvania Bar Institute seminar (Philadelphia, Mechanicsburg) (CLE credit 3 hours)

"Nine Employment Law Issues Every Physician Should Know"; presenter, June, 2014 and June 2016, Pennsylvania Bar Institute seminar Representing Physician and Dental Practices (CLE credit 1 hour)

"Fire At-Will: Wrongful Termination in Pennsylvania" presented at Southeastern Pennsylvania (SEPA) SHRM, June, 2016 for SHRM Training Credit

"Hot Topics in Wage and Hour Law" presented at Semanoff Ormsby Greenberg & Torchia, LLC, May, 2016 (CLE ethics credit 1 hour)

"Manual of Steel: Updating Your Employee Handbook" presenter and author; 2016 Pennsylvania Bar Institute seminar, Employment Law Institute, April 2016 (CLE credit 1 hour)

Materials and process quoted in "The Process of Investigation," Charles Sennewald and John K. Tsukayama, Elsevier Press, 2015, 4th ed., p. 325, 328

"Employment Law Overview for Accountants" presented at Borislow, Factor & Kaufmann, LLC, November, 2015 (CPE credit 1 hour)

"Ethics 101" presented at Semanoff Ormsby Greenberg & Torchia, LLC, October, 2015 (CLE ethics credit 1 hour)

"Employee Handbooks – Time to Update!"; presented at Semanoff Ormsby Greenberg & Torchia, LLC, October, 2015 (CLE credit 1 hour)

"Nine Employment Law Issues Every Physician Should Know"; presenter, June, 2014 Pennsylvania Bar Institute seminar Physician and Dental Practices (CLE credit 1 hour)

"Recent Amendments to the Professional Rules of Conduct"; presented at Semanoff Ormsby Greenberg & Torchia, LLC, June, 2014 (CLE ethics credit 1 hour)

"Workplace Investigations: A Practitioner's View"; course planner, moderator, presenter; 2014 Pennsylvania Bar Institute seminar (Philadelphia, Mechanicsburg, Pittsburgh). (CLE credit 3 hours)

"There's No Place Like Home: Pros and Cons of Work At Home Policies" seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, April, 2014 (CLE credit 1 hour)

"10 Scary Things Every Businessperson Should Know About Employment Law"; seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, July, 2013 (CLE credit 1 hour)

"10 Scary Things Every Attorney Should Know About Employment Law"; seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, June, 2013 (CLE credit 1 hour)

"Pennsylvania Employment Law"; Pennsylvania Bar Institute, Paralegal Institute, May, 2013 (CLE credit 1 hour)

"You Talkin' To Me?": Individual Liability in Employment Law"; Pennsylvania Bar Institute seminar, Employment Law Institute, April, 2013 (CLE credit 1 hour)

"You Talkin' To Me?": Individual Liability in Employment Law"; seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, October, 2012 (CLE credit 1 hour)

Article: "Non-Competes Supported By 'Intending To Be Legally Bound?'"; September 14, 2012 as special contributor to The Legal Intelligencer

"Updates in Employment Law"; seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, April-May, 2012

"Employment Law Overview" presented to Strayer University Chapter of Society for Human Resources Management, April, 2012

"Do You *Fee* Like We Do?" (alternative fee agreements in employment litigation); author and co-presenter; Pennsylvania Bar Institute seminar, Employment Law Institute, April, 2012 (CLE credit 1 hour)

"All About Non-Competes"; seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, February, 2012

"The Nightmare of Employee Leave"; seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, November, 2011

"Landmines of Employee Compensation"; seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, September, 2011

"How to Hire and Fire Employees Without Getting Sued"; seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, August, 2011

"Conducting Effective Workplace Investigations" presented to the Philadelphia Bar Association Labor and Employment Section, January, 2010

"Very Recent Developments in Employment Law"; seminar presented at Temple University Ambler Campus, February, 2010

"Employment Law Landmines and Recent Developments"; seminar presented to The President's Club organization, February, 2010

"Understanding the Instant Impact of *Bimbo Bakeries USA, Inc. v. Botticella*, (3d Cir. July 27, 2010) on the Standard for Granting Injunctions Against Employment by a Competitor Due to Potential Disclosure of Trade Secrets"; presenter for ExecSense webinar September, 2010

"Conducting Effective Workplace Investigations" presented to Temple University Chapter of Society for Human Resources Management, October, 2010

"Workplace Investigations of Sexual Harassment Claims"; course planner, moderator, presenter; 2010 Pennsylvania Bar Institute seminar (Philadelphia, Mechanicsburg, Pittsburgh, Norristown). Co-author of PBI book

"The Good, the Bad and the Ugly of Progressive Discipline"; presenter; Pennsylvania Bar Institute Employment Law Institute seminar (Philadelphia), April, 2010. Co-author of PBI chapter (CLE credit 1 hour)

"Employment Law Overview" presented to Temple University Chapter of Society for Human Resources Management, November, 2009

"Employee Leave Considerations" ; seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, October, 2008

"Recent Developments in Employment Law"; seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, March, 2008

"Workplace Investigations of Sexual Harassment Claims"; course planner, moderator, presenter; 2008 Pennsylvania Bar Institute Employment Law Institute seminar (Philadelphia). Co-author of PBI chapter (CLE credit 1 hour)

"Ethical Issues in Workplace Investigations"; co-presenter, 2008 Pennsylvania Bar Institute seminar, Employment Law Institute. (CLE credit 1 hour ethics)

"Recent Developments in Employment Law"; seminar presented at Semanoff Ormsby Greenberg & Torchia, LLC, March, 2007

"Employment Law: Trends and Developments 2006" presented to Employment Law Committee of DELVACCA (association of in-house corporate counsel) (CLE credit 1 hour), May, 2006

Appeared on radio station WOGL 98.1 on the "Philadelphia Agenda" program hosted by Brad Siegel discussing employment law issues and workplace investigations, November, 2006

"Workplace Investigations of Sexual Harassment Claims"; course planner, moderator, presenter; 2002 Pennsylvania Bar Institute seminar (Philadelphia, Mechanicsburg, Pittsburgh) (CLE credit 3 hours)

"Workplace Investigations of Sexual Harassment Claims"; 2002, author of chapters: "Introduction to Workplace Investigations"; "Investigations Beyond Sexual Harassment"; "Conducting Workplace Investigations"; and "Ethical Considerations in Sexual Harassment Investigations." (CLE credit 3 hours)

"Table Talk" guest at Pennsylvania Bar Institute seminar, "Workplace Investigations" 2003-2005

Article: "Workplace Investigations" for Semanoff, Ormsby, Greenberg & Torchia, LLC website (introductory level), January, 2003

Appeared on radio station WJJZ 106.1 on the "Labors of Love" program to discuss sexual harassment, June 2000

Article: "*Spierling* Focuses on Public Policy Exception" November 20, 1999 as special contributor to The Legal Intelligencer

Numerous presentations to associations, private companies and clients on a variety of litigation and employment law topics.