"Workplace Investigations: A Practitioner's View"
2017
Michael J. Torchia, Esq.

SECTION 1: THE LAW OF WORKPLACE INVESTIGATIONS

A. Introduction to Workplace Investigations

In the 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 Employers 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 Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), commonly referred to together as "*Faragher* and *Ellerth*," changed the rules of the game when it re-established 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 harassing her, 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 806.

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. *See, e.g., Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999) (noting that *Faragher* and *Ellerth* did not disturb the "negligence standard govern[ing] employer liability for co-worker harassment"); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (describing the negligence standard). To do so, the plaintiff must prove a basis for vicarious liability. *See Porchia v. Cohen*, No. 98-CV-3643, 1999 WL 357352, at *5 (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 N. Am., 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:

> (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior; and
> (2) that the alleged harassed employee unreasonably failed to take advantage of preventative or corrective procedures provided by the employer, for example, making a complaint to her supervisor.[1]

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 802; *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-CV-12143-RWZ, 2002 WL 974676, *2 (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*, Nos. 09-CV-2212, 10-CV-1758, 2009 WL 793639, *10 (3d Cir. March 1, 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 F. App'x. 465, 469 (3d Cir. 2010) (same).

[1] The *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).

C. Investigations Beyond Sexual Harassment

Although both *Faragher* and *Ellerth* involved alleged sexual harassment in violation of Title VII, neither addressed whether the principles stated therein were to be applied beyond the realm of sexual harassment.[2] 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.

Notwithstanding the absence of an affirmative statement from the Court 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 C.F.R. § 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 position is clear, 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 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 College 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 Dept. of Corrections*, 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.

---

[2] These principles include the employer's obligation to set up a mechanism for a prompt, thorough and impartial investigation into alleged harassment. EEOC Enforcement Guidance 915.002: Vicarious Employer Liability for Unlawful Harassment By Supervisors (June 18, 1999); *see also* 29 C.F.R. § 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 Mut. Life Ins. Co.*, No. CIV. A. 00-12143-RWZ, 2002 WL 974676, at *2 (D. Mass. May 7, 2002) (discussing legal requirement to commence an investigation once employer is aware of alleged harassment); *Keefer v. Universal Forest Prods. Inc.*, 73 F. Supp. 2d 1053, 1056 (W.D. Mo. 1999) (*Faragher* and *Ellerth* require a reasonable investigation into allegations of harassment).

2011) (age); *Gipson v. KAS Snacktime Co.*, 171 F.3d 574, 578 (8th Cir. 1999) (race); *Meadows v. County of Tulare*, 191 F.3d 460 (9th Cir. 1999) (race); *Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 436 (2d Cir. 1999), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (race); *Wallin v Minnesota Dep't of Corrections*, 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); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (race); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 592-93 (5th Cir. 1998), *reh'g en banc granted, opinion vacated*, 169 F.3d 215 (5th Cir.) *and opinion reinstated on reh'g*, 182 F.3d 333 (5th Cir. 1999) (race); *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 Phila.*, No. 98-1551, 1998 WL 784238, at *3 (E.D. Pa. Nov. 9, 1998) (race); *Cully v. Milliman & Robertson, Inc.*, 20 F. Supp. 2d 636, 642 (S.D.N.Y. 1998) (race); *Vendetta v. Bell Atlantic Corp.*, No. CIV. A. 98-CV-4838, 1998 WL 575111, at *9, n. 6 (E.D. Pa. Sept. 8, 1998) (disability); *Disanto v. McGraw-Hill, Inc./Platt's Div.*, No. 97 Civ. 1090 JGK, 1998 WL 474136, at *5 (S.D.N.Y. Aug. 11, 1998) (disability); *Edwards v. State of Conn. Dep't of Transp.*, 18 F. Supp. 2d 168, 176 (D. Conn. 1998) (race and gender); *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 491 (S.D.N.Y. 1998) (national origin).

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 N.J.*, 420 F. App'x. 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 impacts 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*, 712 F. Supp. 2d 422, 435-36 (E.D. Pa. 2010) (Title VII liability may arise where an employer merely investigates a complaint of harassment without taking any remedial action, or the investigation is

so flawed that any remedial measures are destined to fail, as here where the 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).

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

1. *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*; see also Moussa v. Pennsylvania Dept. of Public Welfare,* 413 Fed. Appx. 484 (3d Cir. 2011) (investigation adequate as plaintiff was not treated differently in the investigation than others).

2. *Spagnola v. Morristown,* 05-CV-577 (D.N.J. Dec. 7, 2006) (employer 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).

3. *EEOC v. Mitsubishi Motor Mfg. of Amer., 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, "He is a good worker. He deserves 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. For example, the manager did not stop circulation of pornographic pictures because he "looked at them as the same as guys coming in after a hunting trip and showing pictures of the deer."

4. *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 which 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."

5. *Kimzey v. Wal-Mart Stores, Inc.*, 907 F. Supp. 1306 (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.

6. *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.

7. *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."

8. *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) (Oklahoma); *Wyatt v. Bellsouth, Inc.*, 176 F.R.D. 627 (M.D. Ala. 1998) (Alabama); *Rush v. United Tech., Otis Elevator Div.*, 930 F.2d 453 (6th Cir. 1991) (Michigan); *Jones v. Britt Airways, Inc.*, 622 F. Supp. 389 (N.D. Ill. 1985) (Illinois); *Miller v. Ford Motor Co.*, 152 F. Supp. 2d 1046 (N.D. Ill. 2001) (Illinois); *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439 (7th Cir. 1964); (Indiana); *Butler v. Westinghouse Elec. Corp.*, 690 F. Supp. 424 (D. Md. 1987) (Maryland); *Dickinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 431 F. Supp. 2d 247 (D. Conn. 2006) (Connecticut); *Riley v. Dow Corning Corp.*, 767 F. Supp. 735 (M.D.N.C. 1991) (North Carolina); *Stanley v. University of Tex. Med. Branch Galveston, TX*, 425 F. Supp. 2d 816 (S.D. Tex. 2003) (Texas); *Quintanilla v. K-Bin, Inc.*, 993 F. Supp. 560 (S.D. Tex. 1998) (Texas).

But see Jones v. Costco Wholesale Corp., 34 Fed. Appx. 320 (9th Cir. 2002) (*citing Cotran v. Rollins Hudig Hall Int'l*, 17 Cal. 4th 93, 69 Cal. Rptr. 2d 900 (1998)); *Silva v. Lucky Stores, Inc.*, 76 Cal. Rptr. 2d 382, 387 (1998) (under California law, improper investigation can lead to employer breach of implied contract to terminate his 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 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* (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 anti-discrimination 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 coworkers, 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 the employer investigated his harassment claim).

McCloud v. United Parcel Serv., Inc., 328 Fed. Appx. 777 (3d Cir. 2009) (employer was not liable under Title VII or Pennsylvania Human Relations Act for racially harassing conduct (insults written on a 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 Tech. 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 which 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 Assoc., 690 F. Supp.2d 357 (M.D. Pa. 2009) (actions taken by employer once it became aware that coworker 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 coworker's actions were not taken with intent to discriminate or harass employee, and, six days after alleged harassment occurred, coworker 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 Serv., Inc., No. 96-CV-3107, 1997 WL 20853, *10 (E.D. Pa. January 16, 1997) (An 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). Id. (citing *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995))).

Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001) abrogated on other grounds as recognized by *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) ("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").

Often overlooked, effective investigations also provide other benefits:

1. The complaint may quickly resolve, avoiding a formal charge of sexual harassment with the state agency or EEOC, arbitration, or civil action in court.

2. A policy of effective investigation convinces employees that the employer is serious about maintaining a safe and 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.

3. Increases workplace productivity.

4. Reduces need to address minor problems constantly.

5. 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.

6. Wards off potential future wrongdoing. Investigations help the employer discover a pattern of complaints and identify a recurring person, group or department involved in such complaints, and allows the employer to resolve or eliminate the problem before it recurs or worsens.

7. The investigation could prevent claims by other employees.

8. 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.

9. Could preempt costly administrative agency and court actions.

10. Helps assess legal defenses and liability.

11. Displays jury-required good faith.

12. Regains control of workforce.

13. Prevents potential "publicity nightmare" with early detection and cure.

14. Mitigates breach of contract, defamation, or disparate treatment liability in terminations or demotions.

15. Preserves evidence for use at trial or hearing.

16. Eliminates or reduces exposure to punitive damages.

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:

1. 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 Serv., Inc.*, 421 Fed. Appx. 204 (3d Cir. 2011) (citing *Andreoli supra*) (commencing an investigation immediately, granting complainant's transfer, disciplining the alleged harasser, and instituting diversity training was adequate remedial action).

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

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

4. Affirmative defense: implementation of an established employee investigation process can eliminate or reduce company liability. *Andreoli*, *supra*; *Faragher*, *supra*; *Meritor Sav. 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 the employer investigated his harassment claim).

5. Time savings: Nothing is more effective than early detection and cure.

6. Diligence: Prompt investigation refutes any claim of acquiescence of the alleged the harassment or discrimination. *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1996).

SECTION 2: 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 upstate New York will be vastly different than an investigation involving a company President of a large advertising firm in Houston.

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)

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 & 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 2d ed. 2002)

David E. Zulawski & Douglas E. Wicklander, *Practical Aspects of Interview and Interrogation* (CRC Press 2d ed. 2001)
William L. Fleisher & Nathan J. Gordon, *Effective Interviewing and Interrogation Techniques* (Academic Press, Inc. 2001)

Paul J.J. Zwier & 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)

See also Suzette Haden Elgin, *The Gentle Art of Verbal Self Defense*, (Dorset Press 1980)

Association of Workplace Investigators: Another excellent sources of information (and investigators) is the Association of Workplace Investigators. This organization provides a variety of information including its "Guiding Principles for Conducting Workplace Investigations." The AWI publishes "Guiding Principles for Investigators Conducting Impartial Workplace Investigations" which sets forth 11 "guiding principles" and for each contain "key factors to consider." More information can be found at www.aowi.org.

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 so 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*, 742 F. Supp. 2d 681, 705 (W.D. Pa. 2010); *cf. 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 to 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 employees are involved.

- 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:

    a. Illegal harassment, discrimination or retaliation

    b. Whistle-blowing (where the employee has complained of conduct on the part of the employer that violates law or public policy)

    c. Government agency investigations (e.g., EEOC charges, OSHA violations, FLSA violations, etc.)

    d. Violation of company policies or employee contractual provisions

    e. allegations of criminal conduct (e.g., employee theft, embezzlement, assault, drug use, etc.)

2. <u>The Risks Of Not Investigating Internal Complaints</u>

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. The following highlight the results of an inadequate investigation:

> *Casiano v. AT&T Corp.*, 213 F.3d 278, 286 (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 Nat'l Bank*, 202 F.3d 234, 245 (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 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:

a. 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 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 a preconceived ideas of the people involved or the situation (and they may).

b. Unbiased. An internal investigation must do more than arrive at the truth. If the participants and workforce 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*

Tel. & Tel. 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).

c. 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).

d. 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, she or he 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.

e. 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.

f. 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:

- Ø A senior manager or Board member has been accused of harassment or other type of discrimination.

- Ø A human resources employee has been named as a participating party in the complaint.
- Ø The company has conducted an investigation without being able to draw conclusions.
- Ø The company lacks internal expertise in conducting investigations.
- Ø Legal counsel has recommended that the company use an outside investigator.
- Ø A perceived or actual inability of an internal investigator to properly investigate, either because of lack of resources, inexperience, availability and/or bias.
- Ø There is a potential conflict of interest with an internal investigation.

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.

<u>Company Officer (CEO, President, Sr. Vice President, etc.)</u>: 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.

<u>Neutral Manager (complainant and harasser outside reporting line)</u>: 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.

<u>In-House Counsel</u>: 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; 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 good choice, especially for small to medium investigations; however, attorney/client privilege issue could disqualify attorney and the 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; 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 (depending on considerations of cost)

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 FL, Inc.*, 251 F.R.D. 603 (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 (N.D. Cal. 2005) (If [an employer] assert[s] as 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 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, if this is a public company, 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:

(a) 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)

(b) Legal counsel

(c) Internal auditors

(d) Union representative(s)

(e) 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 <u>are</u> privy to confidential and sensitive information should be impressed upon in the strongest terms that they are to maintain confidentiality.

G. <u>Engaging the Investigator</u>

It is essential 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 commonly believed 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. 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 pre-determined.

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 subpoenaed or 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.

Sample engagement letters from an attorney investigator and non-attorney investigator, respectively, follow:

Attorney Investigator Engagement Letter - Sample

[LAW FIRM LETTERHEAD]

June, 2016

VIA FACSIMILE
and REGULAR MAIL

[REFERRING COUNSEL]

RE: Investigation of Sexual Harassment Claims Against ABC Corporation

Dear Ms. :

It was a pleasure speaking with you on [date]. This letter shall confirm that [your firm] has engaged Semanoff Ormsby Greenberg & Torchia, LLC to investigate sexual harassment, discrimination and related claims made against your client, ABC Corporation. The following sets forth our agreement.

We agree to investigate claims made by [EMPLOYEE] against ABC Corporation and to provide a written report to you at the conclusion of the investigation. The investigation will be an objective fact finding process and the report will be an accurate reflection of discovered information. You have not, at this time, requested an opinion from us whether ABC has violated any law or regulation or whether we believe sexual harassment occurred. If any person fails to cooperate, that fact will be noted. At your request, this investigation will commence on-site at ABC as soon as possible. My first available day is [DAY].

We also agree to provide in-person testimony at a hearing, arbitration, deposition or trial, subject to scheduling, at the same hourly rates listed below.

We are not agreeing to legally represent ABC Corporation in this matter and specifically state that no attorney/client relationship exists between ABC and our firm. We are independent of ABC Corporation and your firm, and are not your agents. We will not render legal advice and will not respond to legal inquiries from your client. Therefore, any communication to any member of our firm by any member of your firm or ABC regarding this matter is not protected by the attorney/client privilege. In addition, any written communication to or from our firm is discoverable by adverse parties.

We will record our time at our standard hourly rates which increase at the beginning of each calendar year. Our charges for services are based upon difficulty and timing of the

investigation and the time spent by our investigators at hourly rates, which vary based upon experience and years of practice. To the extent we need to travel, you will be billed for travel time. For this investigation the hourly rate will not change for deposition or court testimony.

The hourly rates of the investigators in our firm range from $[hourly rates] per hour. I am the principal investigator working on this investigation and my hourly rate is $[rate] per hour. You will also be billed, in addition to the fee above, for all charges and out-of-pocket expenses, for example, filing fees, computer assisted research, courier services, faxing, long distance telephone calls, travel, mileage and tolls, photocopying, postage and the like. You will receive a monthly bill including fees and expenses and bills are due upon receipt. Your account will be charged 1% interest per month for accounts due past 30 days.

You will be responsible to pay our firm for any work performed, whether any report or testimony is actually used in litigation and regardless of the outcome of the matter. If, for any reason, [your firm] ceases to represent ABC Corporation in this matter, please notify me in writing of that fact and provide the name of replacement counsel. In the unlikely event we are required to institute collection proceedings for unpaid fees or costs, you agree to pay us attorneys' fees (as determined by the time spent by our attorneys or outside counsel) and costs incurred in that effort.

It is important to note that you may have insurance coverage for this or other matters, and it is your responsibility to determine whether or not a particular matter is covered. If a matter is covered, you agree to pay to our firm any legal fees or costs incurred not paid or reimbursed by the insurance carrier for any reason.

Our work will begin upon receipt of a refundable retainer of $[retainer], which should be made payable, and delivered to our firm. The receipt of the retainer will indicate your agreement with the terms of this engagement letter. The retainer is neither an estimate of the total cost for any matter nor a cap of the firm's fees.

We encourage you to share this letter with your client. Of course, you should feel free to contact me at any time if you have any questions.

SEMANOFF ORMSBY
GREENBERG & TORCHIA, LLC

By: Michael J. Torchia

Non-Attorney Investigator Engagement Letter - Sample

[COMPANY LETTERHEAD]

June, 2016

VIA FACSIMILE
and REGULAR MAIL

[REFERRING COUNSEL]

RE: Investigation of Sexual Harassment Claims Against ABC Corporation

Dear Ms. :

It was a pleasure speaking with you on [date]. This letter shall confirm that [your firm] has engaged [my company] to investigate sexual harassment, discrimination and related claims made against your client, ABC Corporation. The following sets forth our agreement.

[My company] agrees to investigate claims made by [EMPLOYEE] against ABC Corporation and to provide a written report to you at the conclusion of the investigation. The investigation will be an objective fact finding process and the report will be an accurate reflection of discovered information. You have not, at this time, requested an opinion from us whether ABC has violated any law or regulation, or whether we believe sexual harassment occurred. If any person fails to cooperate, that fact will be noted. At your request, this investigation will commence on-site at ABC as soon as possible. My first available day is [DAY].

We also agree to provide in-person testimony at a hearing, arbitration, deposition or trial, subject to scheduling, at the same hourly rates listed below.

We are not attorneys and, therefore, cannot and do not legally represent ABC Corporation in this matter. We are independent of ABC Corporation and your firm, and are not your agents. We will not render advice, legal or otherwise, and will not respond to inquiries for advice from your client. Any communication to any member of our company by any member of your firm or ABC regarding this matter is discoverable by adverse parties. In addition, any written communication to or from our firm is discoverable.

We will record our time at our standard hourly rates which increase at the beginning of each calendar year. Our charges for services are based upon difficulty and timing of the investigation and the time spent by our investigators at hourly rates, which vary based upon

experience and years of practice. To the extent we need to travel, you will be billed for travel time. For this investigation the hourly rate will not change for deposition or court testimony.

The hourly rates of the investigators in our company range from $[hourly rates] per hour. I am the principal investigator working on this investigation and my hourly rate is $[rate] per hour. You will also be billed, in addition to the fee above, for all charges and out-of-pocket expenses, for example, filing fees, computer assisted research, courier services, faxing, long distance telephone calls, travel, mileage and tolls, photocopying, postage and the like. You will receive a monthly bill including fees and expenses and bills are due upon receipt. Your account will be charged 1% interest per month for accounts due past 30 days.

You will be responsible to pay our firm for any work performed, whether any report or testimony is actually used in litigation and regardless of the outcome of the matter. If, for any reason, [your firm] ceases to represent ABC Corporation in this matter, please notify me in writing of that fact and provide the name of replacement counsel. In the unlikely event we are required to institute collection proceedings for unpaid fees or costs, you agree to pay us attorneys' fees (as determined by the time spent by our attorneys or outside counsel) and costs incurred in that effort.

It is important to note that you may have insurance coverage for this or other matters, and it is your responsibility to determine whether or not a particular matter is covered. If a matter is covered, you agree to pay to our firm any legal fees or costs incurred not paid or reimbursed by the insurance carrier for any reason.

Our work will begin upon receipt of a refundable retainer of $[retainer], which should be made payable, and delivered to our firm. The receipt of the retainer will indicate your agreement with the terms of this engagement letter. The retainer is neither an estimate of the total cost for any matter nor a cap of the firm's fees.

We encourage you to share this letter with your client. Of course, you should feel free to contact me at any time if you have any questions.

[COMPANY NAME]

By:

• • •

H. Mechanics of Conducting the Interview

1. Preparing for the Interview

No matter whether the investigator is in-house or hired from the 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 workforce, 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's 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 email, regarding the complaint
- videotape, audiotape, or voicemail regarding incident
- sworn documents regarding the complaint, including papers filed with the state administrative agency, or EEOC, and 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 there 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/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, people need to open up and talk 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 there 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.

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

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 <u>not</u> completely confidential. Although I and the Company will make every attempt to keep the information confidential, as 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?

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.

[4] Note 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* discussion below about the *Banner Health* line of cases.

- Whether the witness is tape recording the interview (the investigator should confirm the interview is not being, and cannot be recorded).
- 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 digital recording. Some suggest having a court reporter present at the interview to take a sworn statement. While these recording techniques have their place in litigation, generally, recording an investigative interview is disfavored.

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.[5]

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 the investigator is less likely to be accused of bias, misinterpretation or miscontruing a witnesses' statements when it has been recorded.

If it is decided to record the interview, 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. Cons. Stat. Ann. §§ 5701-5781 (West 2016). 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.

[5] An effective interviewing technique is to suddenly stop taking notes just before a particularly probing question. Make obvious gestures putting down paper and pen, and even push it away from you on the table to signal to the witness you are "off the record." They will confide in you more easily, and, of course, you can record what they say when you resume note taking.

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 an employee to take a lie detector test. *See Employee Polygraph Protection Act*, 29 U.S.C. §§ 2001-2009 (2016); *see also In 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).

I. 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.

a. If there is no possibility that the interview could lead to disciplinary action against the interviewee, there is no *Weingarten* right to a representative, named after the case that first established the principle.

b. Employee's Choice of *Weingarten* Representative: 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 Public Employees Relations Act, the individual employee has the right to be accompanied by a union representative of his/her choice, as long as the representative is reasonably available. *Commonwealth, Office of Admin. v. Pennsylvania Labor Relations Bd.*, 916 A.2d 541, 551 (Pa. 2007).

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

d. An employer need not honor a *Weingarten* request that will unduly delay the employer's completion of an efficient disciplinary investigation.

e. A *Weingarten* representative may not impede or delay the employer's investigation through his/her conduct.

f. 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.

g. 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.

J. Order of Interviews

It is important to determine the order of the interviews to be conducted. Many times the order is pre-determined by witness' availability which are 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 discovery 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 à Witnesses à Harasser à Complainant

Re-interviewing the complainant is almost always necessary, as the harasser, at least, raises issues and new facts. Of course, it may be necessary to re-interview the harasser or witnesses if additional information is discovered which 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 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 inquiry into all facts and circumstances of each complaint she 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 her version of the facts
- whether there are audio or video recordings of any incident of 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. <u>Asking tough questions</u>

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:

1. Prepare questions in advance.

2. Start out with broad, open-ended questions and end up with specific, narrow ones.

3. Ask questions that reveal a chronology.

4. Don't skip over the tough questions.

5. Ask for clarification.

6. End with unfriendly, uncomfortable, touchy, embarrassing, or sensitive questions.

7. 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 was doing that?"
EXAMPLE 3	WRONG:	"Now I want to be absolutely sure; do you really think Mike would have said, 'every time I look at you, I pitch a trouser tent?'"
	RIGHT:	"Did Mike 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, don'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. Facts are what a person says, sees, or hears. 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 down 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:

- The Complainant should be reassured that, to the extent possible, the investigation will be kept confidential, although several others will know the substance of 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/her know the results. **Make no promises as to what the results will be.**
- Discourage the employee from taking matters into his/her hands.
- Reassure him/her that no adverse action will be taken against him/her because of this complaint.

Sometimes an employee does not complaint 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 the Complainant was uncooperative, citing 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 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, the investigation will be kept confidential, although several others will know the substance of his statements.

The harasser needs to know there have been complaints brought against him, 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 know this is a serious affair. An alternative is to "play along" letting the harasser believe you appreciate how much he is telling you, while at the same time let him 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 discovery what he is angry about. He may be angry because the allegations are false, or because they are true and he has been caught. He may be angry because he thinks he should be angry, and you will be more likely to believe him. 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 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 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 and friendly, 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 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 everyday. 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 attempts to distract.

Questioner: The questioning harasser will answer questions with questions. He will attempt to avoid answering questions until he feels he knows "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 employ the distracter technique and answer his question with minimal or non-responsive 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 will 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' 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. Remember the investigative report and file are most likely 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 investigators notes should be neat, legible and dated.

The 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 <u>not</u> render an opinion about the ultimate question, i.e., "did he do it?"

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. <u>Mechanics of Obtaining Signed Affidavits</u>

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 he or she will not know if it accurately reflects their statement until they read 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 home address, a fax number, or more frequently, a confidential email 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 an returned.

g. If mailing the final affidavit, enclose a cover letter to the witness. Enclose a self addressed, stamped envelope for its return. If emailed, ask the witness to print, sign, scan and email 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.

A sample letter to the witness, or affiant, follows:

Letter to Affiant - Sample

[Investigator's Letterhead]

May 16, 2016

ABC Consultants, Inc.
123 Commerce Road
Philadelphia, PA 19103

RE: Sexual Harassment Claims of Karen Ibsen

Dear [Affiant]:

Enclosed with this letter is an Affidavit prepared for you based upon your oral statement given to me during your interview.

I have enclosed "Instructions to the Affiant" that you should read and follow carefully. If you have any questions or concerns, please do not hesitate to contact me or have your attorney contact me at any time.

Please return the signed and notarized Affidavit no later than Friday, May 27, 2016.

Very truly yours,

MICHAEL J. TORCHIA

Enclosure

Letter to Affiant – Sample With Mailed Hard Copy

INSTRUCTIONS TO AFFIANT

1. You should have two copies of the draft Affidavit. Maintain a copy so you will have a clean version of the Affidavit sent for your review.

2. Review the Affidavit carefully and note any changes. This is your sworn statement so change any spelling errors as well as incorrect facts.

3. If the changes are those which you feel you can correct in handwriting on the Affidavit, do so neatly. Initial any changes in the margin.

4. If the changes cannot be easily corrected by handwriting, note the changes and a new Affidavit will be prepared for your review incorporating your changes.

5. [OPTIONAL] If the Affidavit is satisfactory after you have reviewed it and made changes, sign and have it notarized. You must sign it in the presence of a notary.

6. Make a copy of the amended, signed and notarized Affidavit and return the original in the enclosed, self-addressed, stamped envelope no later than Friday, May 27, 2016.

If you have any questions, please call Michael J. Torchia, Esquire at 215-887-2042, mtorchia@sogtlaw.com

Letter to Affiant – Sample With E-Mailed Copy

INSTRUCTIONS TO AFFIANT

1. Your draft Affidavit is attached to this email. Do not delete this email, or print and keep a copy of what was sent to you before making any changes.

2. Review the Affidavit carefully and note any changes. This is your sworn statement so change any spelling errors as well as incorrect facts.

3. If the changes are those which you feel you can correct in handwriting on the Affidavit, do so neatly. Initial any changes in the margin.

4. If the changes cannot be easily corrected by handwriting, note the changes and a new Affidavit will be prepared for your review incorporating your changes.

5. [OPTIONAL] If the Affidavit is satisfactory after you have reviewed it and made changes, sign and have it notarized. You must sign it in the presence of a notary.

6. Make a copy of the amended, signed and notarized Affidavit and return the original in the enclosed, self-addressed, stamped envelope no later than Friday, May 27, 2016. [Alternative: scan and return the Affidavit to mtorchia@sogtlaw.com]

If you have any questions, please call Michael J. Torchia, Esquire at 215-887-2042, mtorchia@sogtlaw.com

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 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.

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, the identity of the parties; the nature of the complaint; pertinent background information about the employer, department, business surroundings, company policies, etc.; and 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. *See* Appendix A Sample Report: Simple Investigation – Sexual Harassment. 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. *See also* Appendix B Sample Report: Simple Investigation – Retaliation.

A "complex" investigation can involve multiple complainants, multiple harassers which usually leads to a variety of incidents, documents and witnesses. *See* Appendix C Sample Report: Complex Investigation – Sexual Harassment.

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, 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, so 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) require only an emailed 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 the Investigative Report would be published in the press, or there is a bona fide concern about witness safety or retaliation, a witnesses' 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 is the uninvolved reader supposed to 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

[6] See Section 3 regarding the Fair Credit Reporting Act controversy.

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 detail.

Do you state whether there were restrictions on the interview process? Absolutely. If the employer is uncooperative about allowing certain witnesses 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.

SECTION 3: THE FAIR CREDIT REPORTING ACT

A. The Vail Letter of 1999

On April 5, 1999, a staff attorney with the Federal Trade Commission ("FTC") in an advisory letter (commonly known as "the Vail Letter") indicated that if an employer turns to an "outside organization" to investigate claims of workplace misconduct, the employer would be subject to the significant notice and disclosure requirements of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. (the "FCRA") or face significant liability.

The Vail letter concluded that "once an employer turns to an outside organization for assistance in investigation of harassment claims . . . the assisting entity is a CRA [consumer reporting agency]" -- subjecting it to the requirements of the FCRA. The Vail letter continued: continued: "it would appear that the reports prepared by outside organizations performing

harassment investigations for employers are most likely 'investigative consumer reports' within the meaning of the FCRA . . . [and] employers who utilize consumer reports or investigative consumer reports have certain obligations under the FCRA to notify employees and/or supply a copy of the report to the employee."

B. The FCRA, as Amended, Applies to Outside Investigations of Employee Misconduct

For several years, employment attorneys and human resources professionals alike discussed, argued and planned how to deal with the Vail Letter and its implications. The debate was rendered moot when the FCRA was amended effective March 31, 2003.

Now, sections 1681a(d)-(e) (definitions) *exclude* workplace investigative reports from the definition of a "consumer report" and "investigative consumer report" and section 1681a(e)) excludes workplace investigators from being a "credit 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.

SECTION 4: DEFENDANT'S VIEW OF WORKPLACE INVESTIGATIONS

A. NLRA Violations

The following article was authored by Frank P. Spada, Jr. Reproduced with permission from Pennsylvania Employment Law, published by BusinessManagementDaily.com. Copyright 2012

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 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), 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. Claims Against the Employer Related to the Investigation

Claims against employers brought by accused, reprimanded or discharged employees are often threatened following employer action on sexual harassment complaints. Some claims against the employer come from the complainant or other witnesses. Although actual filing of such claims has increased in recent years, judges and juries have generally been unsympathetic to harassers, requiring a showing of pretext, employer bias or inadequate investigation prior to rendering judgment in their favor. Some theories under which these types of actions have been initiated include the following:

Defamation

Overall v. University of Pennsylvania, 412 F.3d 492 (3d Cir. 2004) (plaintiff, a university professor, applied for a tenured position and other professors were interviewed, one of which said he believed plaintiff misused grant money and lied about it when she received her doctorate. Plaintiff sued, alleging defamation; the Third Circuit allowed the case to go to trial,

holding no defamation immunity exists for statements made to internal employer committees).

Freeman v. Bechtel Constr. Co., 87 F.3d 1029 (8th Cir. 1996) (employer's written report and true oral statements at job site regarding sexual harassment investigation were not sufficient to support finding of defamation; affirming dismissal of plaintiff's complaint, court noted that plaintiff failed to show that written report met falsity requirement and failed to show that oral statements were published to non-privileged recipients).

Olive v. City of Scottsdale, 969 F. Supp. 564 (D. Ariz. 1996) (employer's publication of details of sexual harassment investigation to supervisory members of police department not involved in the investigation found not to constitute defamation; granting summary judgment for defendants of the defamation claim, court held that publication on an internal memorandum to those involved in the supervisory or investigatory process does not constitute impermissible excessive publication).

Tischmann v. ITT/Sheraton Corp., 882 F. Supp. 1358 (S.D.N.Y. 1995) employer's failure to deny specific questions asked by reporters regarding allegations of sexual harassment made against plaintiff were not sufficient to establish prima facie defamation case; motion for summary judgment on defamation claim granted in favor of defendant).

Age Discrimination

Augugliaro v. Brooks Brothers, Inc., 927 F. Supp. 741 (S.D.N.Y. 1996) (employee of 33 years claimed that his dismissal for allegedly sexually harassing a subordinate was pretextual and that the actual basis for his termination was age discrimination, however, court granted employer's motion for summary judgment because employee failed to present specific facts which would create a genuine issue of material fact regarding whether his discharge was pretext).

Godby v. Electrolux Corp., 66 Fair Emp. Prac. Cas. (BNA) 1704, No. 93-cv-0353-ODE, 1994 WL 777327, * 14 (N.D. Ga. Sept. 26, 1994) (discharged harasser claimed age discrimination, but court granted defendant's motion for summary judgment because plaintiff failed to produce sufficient evidence that pretext had been established), *aff'd*, 58 F.3d 641 (11th Cir. 1995), *cert. denied*, 516 U.S. 1120 (1996).

Race discrimination

Valdez v. Church's Fried Chicken, Inc., 683 F. Supp. 596 (W.D. Tex. 1988) (plaintiff who had been accused of sexual harassment alleged that his discharge was discriminatory on the basis of race; court held for plaintiff

finding pretext based upon the poor investigation of initial complaint which the court noted was completed very quickly and vague allegations were not pursued in any detail).

Ibarra v. Martin, 143 F.3d 286 (7th Cir. 1998) (public employee claimed that his suspension for alleged sexual harassment was pretextual, and that actual basis was his national origin under the equal protection clause; court affirmed summary judgment ruling for the employer).

Williams v. General Mills, Inc., 926 F. Supp. 1367 (N.D. Ill. 1996) (affirming summary judgment for employer, court held that black employee discharged on ground that he sexually harassed co-workers, could not establish that the actual reason for termination was race, and was unable to show similarly situated individuals were treated differently).

Sexual harassment

McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996) (court rejected plaintiff's claim of sexual harassment resulting from abusive investigation into anonymous allegations of sexual harassment against him).

Reverse discrimination

Bellairs v. Coors Brewing Co., 907 F. Supp. 1448 (D. Colo. 1995), *aff'd*, 107 F.3d 880 (10th Cir. 1997) (white male alleged reverse discrimination based on disparate treatment of non-white males accused of sexual harassment; affirming summary judgment against plaintiff where he could not establish that others were similarly situated).

Willoughby v. Potomac Elec. Power Co., 100 F.3d 999 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1197 (1997) (affirming summary judgment for employer where no evidence of animus against white males was proven).

Due process violation

Ibarra v. Martin, 143 F.3d 286 (7th Cir. 1998) (no violation of due process where public employee plaintiff was temporarily suspended from job as a police officer pending investigation of sexual assault charge by another employee).

Workman v. Jordan, 32 F.3d 475 (10th Cir. 1994), *cert. denied*, 514 U.S 1015 (1995) (sheriff's captain alleged deprivation of property right without due process after a letter of reprimand, a letter of termination, and a poor performance evaluation were placed in his personnel file following sexual harassment investigation; court revered denial of dismissal on the due process claim).

Olive v. City of Scottsdale, 969 F. Supp. 564 (D. Ariz. 1996) (denying summary judgment on public employee's due process claim after his removal from promotion eligibility list after sexual harassment investigation).

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) (due process requirements are minimal and may be satisfied by providing notice and an opportunity to respond).

Violations of a collective bargaining agreement

United Transportation Union v. Burlington Northern RR Co., 864 F. Supp. 138 (D. Or. 1994) (employer petitioned court to vacate referee's award requiring that discipline against admitted harasser be reversed because employer failed to ensure that provision requiring that all sexual harassment complaints be made in writing was followed; union moved for summary judgment to enforce the award; court granted employer's motion and denied union's motion).

Stroehmann Bakers, Inc. v. Local 776 Int'l Brotherhood of Teamsters, 762 F. Supp. 1187 (M.D. Pa.), *aff'd*, 969 F.2d 1436 (3d Cir. 1991), *cert. denied*, 506 U.S. 1022 (1992) (court vacated an arbitration award and remanded for hearing *de novo* before another arbitrator due to the obvious predisposition of first arbitrator in favor of grievant).

Claims for tortious interference with contract

Vice v. Conoco, Inc., 150 F.3d 1286 (10th Cir. 1998) (at-will employee terminated after allegation of sexual harassment failed to show that prior employer's request to subsequent employer to remove plaintiff from worksite was wrongful or malicious where victim was present at the site; affirming summary judgment for defendant the court noted that employee could not maintain an action for malicious interference with business relationship).

Delloma v. Consolidation Coal Co., 996 F.2d 168 (7th Cir. 1993) (plaintiff failed to show that prior employer's statement to possible future employer relating to claim of sexual harassment was malicious; affirming motion for summary judgment against defendant, court noted that prior employer's statements were conditionally privileged and they were true).

Lawson v. Boeing Co., 792 P.2d 545 (Wash. Ct. App. 1990), *review denied*, 811 P.2d 219 (Wash. 1991) (an investigation of a male employee accused of sexual harassment was conducted resulting in the employee's demotion; suit was filed alleging tortious interference with contract and court affirmed grant of summary judgment on behalf of employer based upon qualified privilege).

Other tort claims

Wrongful discharge

Houston v. Blockbuster Videos, Inc., 96-CV-4546, 1997 WL 102548, *9, (N.D. Ill. March 15, 1997) (investigation of sexual harassment charge did not amount to invasion of privacy and therefore did not support plaintiff's wrongful discharge in violation of public policy claim).

Evans v. Bally's Health and Tennis, Inc., 64 Fair Emp. Prac. Cas. (BNA) 33, 1994 WL 121479, *9 (D. Md. Jan. 25, 1994) (court refused to permit amendment of complaint to allege a wrongful discharge claim on grounds that "mere fact that plaintiff may have been unfairly accused of sexual harassment does not constitute a basis for a claim for wrongful discharge").

Intentional or negligent infliction of emotional distress

Perez v. Rexnord, Inc., No. 96 C 3514, 1998 WL 526571, *7 (N.D. Ill. Aug. 17, 1998) (plaintiff's claim that investigation of sexual harassment claim was "extreme and outrageous" failed, following plaintiff's failure to produce evidence of severe emotional distress; court granted the employer's motion for summary judgment).

Freeman v. Bechtel Constr. Co., 87 F.3d 1029 (8th Cir. 1996) (even if employer was suspicious of complaint's truthfulness, suspension of supervisors was not sufficiently outrageous to give rise to claim of intentional infliction of emotional distress; dismissal of plaintiff's claim affirmed).

Johnson v. J.C. Penney, Co., 876 F. Supp. 135 (N.D. Tex. 1995) (finding that even when employer's conduct rises to the level of illegality, except in the most unusual cases, it is not enough to constitute "extreme and outrageous conduct" necessary for intentional infliction of emotional distress; defendant's motion for summary judgment granted).

Breach of contract

Vice v. Conoco, Inc., 150 F.3d 1286 (10th Cir. 1998) (no breach of contract claim under Oklahoma law unless express or implied contract limits employer's power to discharge at-will).

Martin v. Baer, 928 F.2d 1067 (11th Cir. 1991) (failure to follow sexual harassment investigation policy did not support accused harasser's breach of contract claim).

C. 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-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, with 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 employees 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. October 30, 2007); *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).

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*, CIV.A. 07-3878 (MLC), 2008 WL 5416394 (D.N.J. Dec. 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 11th 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."

Defenses

In actions alleging that the employer discharged the Complainant from employment in retaliation of 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 a legitimate, nondiscriminatory reasons for the Complainant's discharge. *Garvey v. Dickinson College*, 775 F. Supp. 788 (M.D. Pa. 1991). The employer must, however, state specific and adequate reasons for the discharge.

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

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

How 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:

- approval of employment decisions by an independent manager or member of the human resources department;
- documenting disciplinary incidents and violation of work policies and rules
- maintaining good company policies and frequent review and revisions
- that disciplinary action be consistently applied to all employees;
- that the accused be excluded from any decision making that will impact employees involved in the harassment action.

Throughout the investigation be certain that the following occur:

- Monitor the workplace for any retaliatory behavior;
- Stress to complainant and witnesses that they should report any retaliation immediately;
- Articulate the company's anti-retaliation policy to all involved.

SECTION 5: LITIGATION CONSIDERATIONS

A. Six Ways To Attack the Investigation

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

- Ø The investigator is also a decision maker and has reason to make a finding one way or the other;
- Ø The investigator has a familial relationship or some other close relationship with a decision maker at the Company;
- Ø The investigator has a familial relationship or some other close relationship with a some one at the Company that would influence the outcome;
- Ø The investigator used to be employed by the Company;
- Ø The investigator seeks to become employed by the Company;
- Ø The investigator knew the complainant or alleged harasser previously in an adverse role.

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

- Ø The investigator is being compensated by the Company at an amount that may bias the outcome;

- Ø 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;
- Ø 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:

- Ø The complainant had no real opportunity to have her complaints rectified in a reasonable time;
- Ø The complainant was subjected to additional unwelcomed conduct during the pendency of the investigation;
- Ø Witnesses, documents or other evidence became unavailable;
- Ø The Company acted contrary to its stated policies;
- Ø 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:

- Ø Failed to interview material witnesses;
- Ø Failed to sufficiently interview or understand the complaints;
- Ø Failed to obtain, review or consider key documents or other evidence;
- Ø Conducted the investigation too quickly given the circumstances;
- Ø Failed to retain related professional (e.g., forensic accountants, IT experts to review emails, handwriting experts, etc.)
- Ø 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:

- Ø Failed to conduct a prompt investigation (see above);
- Ø Failed to conduct a thorough investigation (see above);
- Ø Failed to have sufficient, or any, experience conducting workplace investigations;
- Ø Was biased or had a conflict of interest (see above);
- Ø Became personally involved and advocated for one position (lost objectivity);
- Ø 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;

- Ø 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): Failure to provide a "summary" to the affected employee (usually the alleged harasser).

- Ø 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. Discovery Requests

The following interrogatories and document requests will assist in an inquiry into the sufficiency of an investigation. There is no per se interrogatory limit under the Pennsylvania Rules of Civil Procedure, but keep in mind the interrogatory limitations under the Federal Rules of Civil Procedure.

Assume Ms. Jones is the complainant, Mr. Smith is the alleged harasser and Mr. Torchia is the Investigator.

INTERROGATORIES

1. Describe in detail when, how and through what method the company first became aware that Mr. Smith engaged in activity that could be considered harassing to Ms. Jones.

2. When did Ms. Jones first complain to anyone in the Company about Mr. Smith's behavior which is the subject of this action?

3. Provide the names and job titles of every person to whom Ms. Jones complained of Mr. Smith's actions, and date and method of such complaint.

4. List each person contacted by the Company, and the date they were first contacted, to potentially conduct an investigation into Ms. Jones' complaints.

5. List each person who investigated Ms. Jones' complaints.

6. Provide each and every reason why Michael J. Torchia was chosen to conduct the investigation, including whether any potential investigator declined the investigation for any reason.

7. Describe in detail each communication, providing the subject matter, date, time and location of the communication, between Mr. Torchia and any agent or employee of the Company (including the Company's attorneys).

8. Describe Mr. Torchia's role, in determining the discipline taken against any Company employee, including but not limited to Mr. Smith or Ms. Jones.

9. Provide the names and job titles of any person who interviewed any person in connection with Ms. Jones' complaints.

10. Provide the names and job titles of each person interviewed by Mr. Torchia or any other investigator or from whom a statement was taken, whether written or oral.

11. Provide the names and job titles of any person who refused to be interviewed by Mr. Torchia or any other investigator.

12. Provide the names and job titles of any person who, despite being requested to be available for an interview, was unavailable to be interviewed by Mr. Torchia or any other investigator.

13. Provide the date when Mr. Torchia was engaged to conduct the Jones investigation.

14. Provide the date when Mr. Torchia completed the Jones investigation.

15. Other than the Jones investigation, describe in detail every matter for which the Company has engaged Mr. Torchia.

16. Was Mr. Torchia ever an employee of ABC Company or its affiliates, subsidiaries, parent company or predecessors?

17. Does Mr. Torchia have a familial relationship with any employee of ABC Company?

18. What was the total compensation paid to Mr. Torchia for his services conducting the investigation?

19. If called upon do to so, what will Mr. Torchia be paid to testify at a deposition, arbitration or trial in this matter?

DOCUMENT REQUESTS
(can also issue a subpoena to the Investigator)

1. The engagement letter between Mr. Torchia (or his firm) and ABC Company.

2. Every document and communication (previously defined) between Mr. Torchia and ABC Company regarding the Jones investigation.

3. Every draft of the Investigative Report.

4. The Final Investigative Report.

5. Every bill or invoice rendered to ABC Company related to the Jones Investigation from Mr. Torchia

6. Every document provided to the Investigator by ABC Company related to the Jones Investigation, whether or not the document was included in the Investigative Report.

7. Each Company policy that refers or relates to an investigation being conducted when there are claims of alleged improper conduct in the workplace.

8. Mr. Torchia's (the Investigator's) curriculum vitae provided to the Company.

9. Copies of all checks paid to Mr. Torchia related to the Jones Investigation.

10. All documents relied upon by Mr. Torchia in the preparation of the Investigative Report or any of the facts, statements, opinions or conclusions contained therein.

11. [Other "expert witness" requests, such as previous reports, list of previous investigations, and other documents that could be used to evaluate the consistency of the opinions expressed in the report.]

12. Complete personnel file of Ms. Jones.

13. Complete personnel file of Mr. Smith.

14. Complete personnel file of any employee interviewed in the Jones investigation.

15. All document related to any prior complaints of workplace misconduct against any employee interviewed in the Jones investigation, including Mr. Smith and Ms. Jones.

16. All documents related to any prior complaints made by any employee interviewed in the Jones investigation, including Mr. Smith and Ms. Jones.

Keep in mind that an agency investigation is rarely admissible into evidence at trial. Typical reasoning can be found in *EEOC v. Smokin' Joe's Tobacco Shop, Inc.*, No. 06-CV-1758, 2007 WL 2461745, at *7 (E.D. Pa. Aug. 22, 2007). Judge Stengel held that results of the EEOC investigation and determination letter do not come into evidence because:

> While I think that the EEOC report is admissible under Rule 803(8)(C), I will exclude it under Rule 403 as unduly prejudicial and cumulative. If the determination letter comes into evidence, it will be a sideshow that distracts the jury and lengthens the trial. The report is not binding on the jury. The defendant will have to spent a substantial amount of time discrediting the investigation, which will needlessly extend the trial. While plaintiff's case will parallel the ground covered by the EEOC report, plaintiff does not contend that evidence in the EEOC determination and investigation cannot be presented through first-person witnesses or other documents. Therefore, there is no prejudice to the plaintiff in excluding the information from trial. Even with a limiting instruction, it would be overly prejudicial to defendant to inform the jury that a governmental body found reasonable cause to believe that discrimination had occurred. I will therefore exclude the report.

C. <u>The Investigator As Expert Witness</u>

Pennsylvania courts do not require a different standard to qualify an employment investigator as an expert witness as 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 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. Evid. 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.C.P. Delco. 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, 1504 (M.D. Fla. 1991). The court considered the witness' 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' 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-CV-1662 (E.D. Pa., April 20, 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 (WGB), 1997 WL 1524797, *3-4 (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., Inc. and Marcela Johnson*, Case 28-CA-19445, 2004 WL 3023761, n. 13 (N.L.R.B. Dec. 16, 2004):

> 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. 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, presumably, 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 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 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.

SIMPLE INVESTIGATIVE REPORT

Sexual Harassment

INVESTIGATIVE REPORT

January 9, 2016

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

INVESTIGATOR:

Michael J. Torchia, Esq.
Semanoff Ormsby Greenberg & Torchia, LLC
2617 Huntingdon Pike
Huntingdon Valley, PA 19006
(215) 887-2042
Fax: (215) 887-5356

ATTORNEY CONTACT:

Michael D. Jennings, Esquire
Clark Lewis LLP
2000 One Liberty Place
Philadelphia, PA 19103
Tel: (215) 568-1500
Fax: (267) 568-4444
mjenning@clarklewis.com
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 anti-discrimination 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.

Wednesday, November 28, 2015

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

Monday, December 3, 2015

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

Wednesday, December 5, 2015

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

The Investigator may also have had follow-up communications with the witnesses via telephone or email.
Total time of interviews: 10'35"

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, 2015. The last affidavit was returned to the Investigator on December 21, 2015.

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 email of November 18, 2015 to Carole O'Grady and response of November 20, 2015

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, 2015

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 Center'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 Center or any of its affiliates, I do not represent Ms. Jameson 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 Center employee. This is the first work of any kind I have performed for ABC Center.

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 <u>not</u> completely confidential. Although I and the Company will make every attempt to keep the information confidential, as 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.

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

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, 2015. 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, 2015.

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 page 11-12 "Krystal's Complaints to the Company") until Ms. Jameson wrote to Ms. Korger on October 31, 2015 noting that nothing had been done about her complaints since she made them on September 26th.

On Wednesday, November 14, 2015 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, created 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 15, 2015, 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 15th.

Ms. Jameson emailed Carole O'Grady asking the status of her complaints on November 18, 2015, and Ms. O'Grady responded on November 20, 2015 (Exhibit "D").

The Investigator was contacted by ABC Centers' counsel on Monday, November 19th 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 was impressed with how she handled herself in his past dealings with her.

1. March 2015 (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 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, 2015 (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 employee's 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, 2015 (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 in 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, 2015 ("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 (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, 2015 ("you owe me" comment): Harrison admitted saying to Krystal on the telephone, "Don't forget you owe me," however, 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, 2015 ("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, 2015 (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 which 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 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 email 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 9, 2016.

MICHAEL J. TORCHIA, ESQ.

SAMPLE #2: Simple Investigation Retaliation

INVESTIGATIVE REPORT

RETALIATION CLAIM

July, 2016

MATTER/CASE NAME: **ABC Consultants, Inc.; Karen Ibsen complainant**

INVESTIGATOR: **Michael J. Torchia, Esq.**
Semanoff Ormsby Greenberg & Torchia, LLC
2617 Huntingdon Pike
Huntingdon Valley, PA 19006
mtorchia@sogtlaw.com
(215) 887-2042
Fax: 887-5356

ATTORNEY CONTACT: **Michael D. Jennings, Esq.**
Clark Lewis LLP
2000 One Liberty Place
1650 Market Street
Philadelphia, PA 19103-7301
(215) 241-5555

INTRODUCTION:

On December 13, 2015, the Investigator delivered an Investigative Report to Michael D. Jennings, Esq. after investigating sexual harassment claims made by Karen Ibsen. This second investigation and report is made after Ms. Ibsen made claims of retaliation against ABC Consultants, Inc., primarily Fran Mannon and Donald Schuster. This Investigative Report does not supersede the December 13, 2015 Report but, in fact, is intended to supplement it.

DELAY IN COMPLETING REPORT:

The Investigator was hampered in his efforts to complete this Report by the delay in scheduling the interview of Karen Ibsen, and to a lesser extent, Larry DeStefano. In addition, the Investigator attempted, many times, to obtain Ms. Ibsen's comments to the draft affidavit prepared for her. Despite several representations by Ms. Ibsen's attorney that a separate affidavit would be provided, and after the Investigator set a deadline and waited more than a week after the deadline expired, Ms. Ibsen never produced comments on the draft affidavit or provided a separate affidavit.

This Investigative Report, now being completed in July, 2016, is approximately four months later than intended. Initially, this Investigative Report was targeted to be completed at the end of March.

INTERVIEW SCHEDULE:

Total interviewees: 5

All interviewees are currently employed by ABC Consultants except Fran Mannon, who was terminated on or about May 2, 2016.

Monday, March 11, 2016 (2)	Fran Mannon; Donald Schuster
Tuesday, March 12, 2016 (1)	Louisa Rodham
Thursday, May 2, 2016 (1)	Larry DeStefano
Monday, May 6, 2016 (1)	Karen Ibsen

ATTEMPTS TO SCHEDULE INTERVIEWS:

Karen Ibsen: Ms. Ibsen's attorney, Robert Steinman, Esq. was first contacted by telephone in February, 2016 and asked to call to arrange an interview time. Subsequently, the Investigator faxed a letter to Mr. Steinman and placed additional calls asking to call to arrange an interview time. The Investigator made contact with Mr. Steinman, and was told that Ms. Ibsen was to be married in two weeks and an interview could be scheduled upon her return to work. In April, the Investigator made several attempts to schedule an interview. The Investigator made contact with Mr. Steinman, who said, because there was a possibility of resolving the Matter with ABC Consultants, Inc., to call back in a week. The Investigator made additional attempts to schedule an interview, until it was finally scheduled for Monday, May 6, 2016.

Larry DeStefano: Mr. DeStefano initially refused to be interviewed regarding the first investigation in November. After a letter and several conversations with Mr. DeStefano's attorney, the Investigator received a return letter dated March 6, 2016 stating "If a statement is mandated by [Mr. DeStefano's] employer, my client will readily cooperate." The Investigator planned on taking a statement on March 12, 2016. Mr. DeStefano, however, refused, eluding to being "caught in the middle" between Ms. Ibsen and Mr. Schuster. Apparently, Mr. DeStefano was told he must provide a statement.

The interview was eventually scheduled for Thursday, May 2, 2016.

RESTRICTIONS OF INTERVIEWS:

The company placed no restrictions on any interview in terms of scope of questioning or time allotted for each interview, and no person was restricted from being interviewed. To the contrary, company attorneys advised unlimited access to all personnel during the interview process and company officers fully cooperated with interviews, on-site inspection of facilities and scheduling.

LEGAL REPRESENTATION:

ABC Consultants, Inc. is represented by Michael D. Jennings, Esq. of Clark Lewis LLP of Philadelphia who did not attend any interview.

Karen Ibsen (Complainant) is represented by Robert Steinman, Esq. of Philadelphia who attended Ms. Ibsen's interview.

Larry DeStefano is represented by Gregory G. Horatio, Esq. and Stèfan Moriarty, Esq. of Pennsauken, New Jersey who did not attend Mr. DeStefano's interview.

ANTI-RETALIATION POLICY:

ABC Consultants has an anti-retaliation policy in effect that promises an employee will not be subject to retaliation if a sexual harassment complaint is made. The anti-retaliation policy is part of the Sexual Harassment policy attached as Exhibit "A." The anti-retaliation clause is:

> *No employee will be subject to any form of retaliation or discipline for pursuing a sexual harassment complaint, whether or not it is ultimately determined that sexual harassment occurred, except if it is determined that the complaint was filed in bad faith.*

EXHIBIT LIST:

Exhibit A ..... ***Sexual Harassment and Retaliation Policy***

Exhibit B ..... ***Karen Ibsen Affidavit****

Exhibit C ..... ***Fran Mannon Affidavit***

Exhibit D ..... ***Fran Mannon Notes of Meeting of January 28, 2016***

Exhibit E ..... ***Donald Schuster Affidavit***

Exhibit F ..... ***Louisa Rodham Affidavit***

Exhibit G ..... ***Louisa Rodham Statement of February 5, 2016***

Exhibit H ..... ***Karen Ibsen handwritten changes to L. Rodham Statement***

Exhibit I ..... ***L. Rodham Statement (revised) with "post-it note" acknowledgment***

Exhibit J ..... ***Larry DeStefano Affidavit***

Exhibit K ..... ***Draft Affidavits (alphabetical order)***

Exhibit L ..... ***L. DeStefano letter of April 22, 2016; F. Mannon letter of April 25, 2016***

* As explained below in the "Affidavits" section, Ms. Iamurri's final affidavit is not attached as an exhibit although this tab has been designated if it is produced.

AFFIDAVITS:

Copies of four final affidavits are attached to this Report. Because each interviewee had an opportunity to amend their respective affidavits, the final affidavits may vary from the draft affidavits. Ms. Ibsen, through her attorney, refused to comment on or return her draft affidavit. Although the Investigator was told a separate affidavit would be produced, as of the date of this report, it has not. Notwithstanding, Ms. Ibsen's position is well documented by the draft affidavit and the three documents attached as Exhibits G, H and I which represent statements given by Karen Ibsen to Louisa Rodham, and contain corrections by Ms. Ibsen indicating their accuracy.

The draft Affidavits for all interviewees were prepared by the Investigator directly from the oral statements given during the interview. Not all of the interviewee's comments were incorporated. To the contrary, the affidavits reflect statements directly related to the claims. Generally, positive or negative statements about the company or its personnel or rumors of events not related to the claims were not included in the affidavits. A copy of the draft affidavits and the letter and instructions that accompanied each affidavit are attached as Exhibit "K."

NATURE OF COMPLAINT:

This retaliation complaints arise from Karen Ibsen reporting to Fran Mannon an incident that occurred on Monday, October 22, 2016 -- the so-called "I Love You" incident -- when Donald Schuster, her direct supervisor, told her that he loved her ("the Claims"). This statement by Mr. Schuster caused Ms. Ibsen to reconsider previous incidents between herself and Mr. Schuster, and she grew to believe Mr. Schuster had been acting romantically to "win her over."

Several months ago, Ms. Ibsen complained she suffered retaliation since making the Claims. She alleges, among other things, employees of ABC Consultants intentionally hid information necessary to perform her job, unfairly criticized her work performance and behavior, have not met their commitment to keep her separated from Donald Schuster, and generally want her to resign her position.

PRELIMINARY STATEMENT:

The following Preliminary Statement was read to each interviewee 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 Consultants 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 Consultants or any of its affiliates, I do not represent Ms. Ibsen 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 Consultant employee. This is the first work of any kind I have performed for ABC Consultant.

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 <u>not</u> completely confidential. Although I and the Company will make every attempt to keep the information confidential, as 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.

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

SUMMARY OF INTERVIEWS:

Karen Ibsen believes that Donald Schuster, through Fran Mannon and Larry DeStefano, retaliated against her for making the Claims. She also believes Fran wanted her to leave the company. Fran Mannon and Donald Schuster deny any action was taken against Karen Ibsen in retaliation for making the Claims. Louisa Rodham has little firsthand knowledge and could only opine that action against Ms. Ibsen was not retaliatory.

Larry DeStefano, although stopping short of stating there was retaliation, implied he believes retaliatory action was taken against Ms. Ibsen was making the Claims. Mr. DeStefano was a reluctant witness, before, during and after the Investigator's interview. As described above, Mr. DeStefano refused to be interviewed for the initial investigation. When interviewed, he was hesitant to answer questions, was generally evasive, and admitted trying to being "caught in the middle" between Ms. Ibsen and Mr. Schuster. After the interview, although making corrections to his affidavit (indeed initialing the changes) he refused to sign the affidavit stating in an attached note he had been advised not to. Mr. DeStefano made a written complaint of retaliation against Mr. Schuster in a letter of April 22, 2016, to which Fran responded on April 25, 2016. A copy of both letters are attached as Exhibit "L."

Meeting With Fran Mannon

At the end of January, 2016, Fran called Ms. Ibsen into a meeting. At the meeting, Fran discussed deficiencies in Karen's work and related complaints. Before the meeting, Karen thought Fran may want to speak with her about the results of the sexual harassment investigation, but was apparently surprised when the subject of the meeting was her work performance.

Fran told Karen there were multiple complaints about not processing checks quickly enough. Karen responded that she cuts checks when she received them, or in some instances,

checks were in fact processed. Karen believes that some check requests were not forwarded or were hidden deliberately by Mr. Schuster. No other interviewee believes that checks were intentionally hidden, including Larry DeStefano who would have the most direct knowledge. In response to the accusations that Karen had not been timely processing checks, Larry DeStefano and Ms. Ibsen instituted a date-stamping system so there could be no dispute when she received the requests.

Karen asked Fran if she could transfer out of the accounting department, although Karen reported Fran said there were no positions available. Fran reported that serviced coordinator positions were open, but Karen did not apply, although Fran offered and there would likely have been no reduction in pay. Fran also asked Karen if she wanted to be transferred to a female supervisor, but Karen did not respond.

Fran placed a memo in Karen's personnel file regarding poor work performance and the conference.

After the meeting, and partially in response to the complaints against her, Karen contacted a representative from a client with whom she had been working. The representative sent an e-mail saying that Karen was doing a good job with the client's project. Although Karen said she gave it to Fran and Larry DeStefano to be placed in her personnel file, it was not there when she reviewed her personnel file.

Dress Code

Prior to the conference, Fran told Karen the staff noticed she was wearing jeans more often than usual. According to Ms. Ibsen, this statement occurred on a Thursday in January. Karen responded, "Okay." Fran recalls reminding Karen that "dress down day" was Friday because she had been often wearing jeans.

The following Monday, Fran came up to Karen's office specifically to check to see if she was wearing jeans, an action denied by Fran. Both agree there was no further discussion of the dress code.

Ms. Ibsen believes this is retaliation and an example of Fran harassing her with petty complaints.

Working Hours

Also in January, Ms. Ibsen admits came in early, worked through lunch and left at approximately 3:30 p.m. She did so to reduce the potential to see Donald Schuster. Ms. Ibsen stated she liked to work in the morning because Mr. Schuster did not come in until between 9:00 and 9:30 a.m. Fran told Karen she was not allowed to take lunch at 3:30 p.m. which placed Karen back on the regular schedule of leaving at 4:00 p.m. Ms. Ibsen did not know if others were allowed to work through lunch and leave early. Notwithstanding, Ms. Ibsen believes this is an example of retaliation because other employees had altered schedules.

Work Checklist

Donald told Larry to make a checklist to monitor her work because it was something the company's auditors would need. Ms. Ibsen stated, to her knowledge, no one else was required to fill out a checklist when tasks were completed. Mr. DeStefano stated Mr. Schuster asked him to complete a checklist to confirm the accounts payable, then later asked for another checklist to confirm the general ledger. Karen spoke with Larry about the checklist and said she would not help the company develop a checklist to use against her. Karen stated she does not know whether Larry completes a checklist of her work currently.

Annual Review

Ms. Ibsen's anniversary date is April 5th. She did not receive, nor did she request a review this year. Ms. Ibsen stated in three years, she received only one review.

Missing Salary Document

Ms. Ibsen stated that, in the Fall of 2016, after an increase in pay, there was a salary document containing the breakdown of her wages. Although Mr. Schuster was supposed to place it in her file, she believes he never did which caused the annual salary calculations to be incorrect. The problem was rectified in or around November, 2016. Other than Larry DeStefano, she did not tell anyone about the missing document.

Interaction with Donald Schuster

Ms. Ibsen repeatedly stated she did not want any interaction at all with Donald Schuster although from time to time there were incidents of interaction. Ms. Ibsen stated Mr. Schuster walked into Larry DeStefano's office "a few times" when she was sitting there, came in, did not say anything, and backed out. Karen did not make a complaint about these incidents.

Karen reports feeling intimidated simply seeing Donald at any time, including staff meetings. The last staff meeting she attended was September, 2016, because Donald attends these meetings. Karen believes her agreement with the company to "keep Donald away" includes staff meetings.

Karen stated that, when Larry was out and her officemate, Jen Bernard, was away, she noticed that Donald walking by her office many more times than usual. She once noticed him walking past her office ten to twelve times in a short period of time.

Karen has not spoken with Donald since she made the Claims. Occasionally she sends an e-mail him to let him know checks are available in Larry's office.

Mr. Schuster acknowledged he is to have no contact with Ms. Ibsen, but said literally no contact is "simply impractical." He noted bank files are kept in Karen's office and there are times when he must place things in the safe, for example, tokens and petty cash. He also stated there are times when he needs to review the importance of any other information that may be in her office. Donald said he has made every attempt to avoid going into Karen's office and in fact, has made "extraordinary attempts" to avoid contact with her altogether.

Since the Claims, at Fran's direction, Larry DeStefano has replaced Donald Schuster as Karen's supervisor. Fran denies ever promising Karen that she could have literally no contact with Donald.

Louisa Rodham Meeting

Karen spoke with Louisa Rodham, Vice President and Chief Operating Officer of ABC Consultants, about these complaints of retaliation. Karen spent an hour telling Ms. Rodham the various acts of retaliation and provided a written statement. Karen reported that, although she did not expect her to be, Louisa seemed generally concerned with resolving the problem and was pleasant to deal with.

As a result of the meeting with Ms. Rodham, there are several affidavits (an initial draft and two amendments) that set forth Ms. Ibsen's position. These documents are attached to this report.

Letter to the Board of Directors and Subsequent Action

On April 30th, Ms. Ibsen sent a letter to the Board of Directors complaining about the retaliation against her and the fact that "nothing had been done." She also wanted to make the

Board aware of these incidents. She reports concern that the Board was not aware since all employees signed a new policy that did not provide for the Board being told about complaints.

Ms. Ibsen stated that, as a result of her letter, John Shrum, a member of the Board of Directors, called on April 30th and asked her questions about the letter and the policies and procedures. Mr. Shrum used to work at ABC Consultants. He did not tell her what action the Board would take and Karen offered to have him call if he needed further information.

Ms. Ibsen said she heard that on Thursday, May 2, 2016, the Board had an emergency closed meeting and on Friday, there was a staff meeting (which she did not attend because Donald Schuster attended) at which time it was explained the Board fired Fran Mannon because of a "policy issue." She heard Fran admitted acting inappropriately, but does not know in what context that was said. Even though Karen's name was not mentioned, she believes most staff members assume Fran was fired in connection with her complaints and the Claims.

RECOMMENDATIONS:

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

COMPENSATION:

I have or will be compensated by ABC Consultants, Inc. and no other person or entity.

THIS INVESTIGATIVE REPORT WAS COMPLETED ON JULY 29, 2016.

MICHAEL J. TORCHIA, ESQ.

SAMPLE #3: Complex Investigation Sexual Harassment

INVESTIGATIVE REPORT

December 18, 2015

This Investigative Report supersedes any previous report.

MATTER/CASE NAME: **Pittsfield Twp. adv. [Complainant]**

INVESTIGATOR: **Michael J. Torchia, Esq.**
Semanoff Ormsby Greenberg & Torchia, LLC
2617 Huntingdon Pike
Huntingdon Valley, PA 19006
mtorchia@sogtlaw.com
(215) 887-0200
Fax: 884-3500

ATTORNEY CONTACT: **James R. Randolph, Esq.**
Dechert Lewis, LLP of Philadelphia
(215) 241-1000

INTERVIEW SCHEDULE:

Total interviews: 41

*All interviewees are currently employed by Pittsfield Township unless otherwise indicated.

Friday, October 16, 2015 (2)	Chief Joseph Storm, Lt. Jay Frankel
Wednesday, October 21, 2015 (10)	Sgt. Michael Vahan, Ptlm. Robert Essing, Ptlm. Robert Kripati, Ptlm. Joseph Coin, Ptlm. Jack Berlin, Ptlm. Todd Sondheim, Sgt. William Clemens, Ptlm. Joshua Loch, Ptlm. Joseph Alfredo, Ptlm. Carl Suppert
Thursday, October 22, 2015 (7)	Ptlm. John DiGuilio, Ptlm. Scott Frankel, Sgt. William Donald, Ptlm. Joseph Sadie, Ptlm. Bridget McCardle, Ptlm. Joseph Gast, Det. Walter Shofer.
Friday, October 23, 2015 (5)	Sgt. P. Andrew Tracker, Acting Sgt. Clarence Martin, Ptlm. Peter Barnett, Ptlm. David Wells, Ptlm. Raymond Purcy
Monday, October 26, 2015 (5)	Det. James Devane, Det. Mark Cattell, Records Off. Robert Wooley, Sec. Louisa Semancer, Disp. Robert Wilkinson, Sr.
Wednesday, October 28, 2015 (8)	Disp. Alfred Marononi, Clerk/Sec. Carol Morgan, Clerk/Sec., Tina Galley, Disp. Fred Amici, Disp. James Delay, Disp. Robert Fowler, Det. Sgt. Richards, Ptlm. John Newler (via telephone; no affidavit; employee of Newton Twp.)
Saturday, November 07, 2015 (1)	Det. Sgt. John Farroway (telephone)
Monday, November 16, 2015 (3)	Ptlm. Kurt Feller, Ptlm. Daniel McNish, Ptlm. Keith Roberts

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. To the contrary, Township attorneys advised unlimited access to all personnel during the interview process and police administration fully cooperated with interviews, on-site inspection of facilities and scheduling to the point of paying overtime to officers and dispatchers to interview when off-duty. In addition, on October 16, 2015 Lt. Frankel issued “Special Order No. 9910” directing all officers to participate and cooperate with

my investigation and reissued "Special Order No. 9911" which contained a correction. A copy of both Special Orders are attached collectively as Exhibit "A."

LEGAL REPRESENTATION:

Pittsfield Township is represented by James R. Randolph, Esq. of Dechert Lewis, LLP of Philadelphia.

Patrol Officer [Complainant] is represented by Joseph F. Boulee, Esq. of Smith, Jones and Williams, of Philadelphia.

Patrol Officer [Complainant #2] is represented by Joseph F. Boulee, Esq. of Smith, Jones and Williams, of Philadelphia.

Sergeant [Respondent] is represented by Carol Laine, Esq. of Dilworth Block, LLP of Philadelphia. Also, Fraternal Order of Police attorney Scott Miller, Esq. of Duffy & Miller of Millersville attended [Respondent's] interview. Mr. Miller did not attend any other interviews.

SEXUAL HARASSMENT POLICY:

Pittsfield Township has a sexual harassment policy in effect that specifically prohibits sexual harassment and directs any complaints to the Mayor. A copy of the sexual harassment policy is attached as Exhibit "B."

NATURE OF CLAIMS:

Patrol Officer [Complainant] has alleged sexual harassment and retaliation against the Pittsfield Township Police Department. [Complainant's] claims emphasize the alleged unwelcomed conduct by Sergeant [Respondent] and retaliatory acts after he brought the unwelcomed conduct to the attention of Police Administration, specifically, Chief Joseph Storm ("Storm") and Lieutenant Jay Frankel ("Frankel"). [Complainant] also reports incidents of sexual harassment occurring to others.

No other interviewee indicated that he or she intended to take action as a result of discrimination or sexual harassment except Patrol Officer [Complainant #2]. [Complainant #2] alleged sexual harassment against Sergeant [Respondent] and, since [Complainant #2] appeared at the interview with an attorney purporting to represent him against the Pittsfield Township Police Department, I am assuming that [Complainant #2] is at least considering making a formal claim. I am unaware of any formal claims yet made by [Complainant] or [Complainant #2].

PRELIMINARY STATEMENT:

The following Preliminary Statement was read to each interviewee 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 Pittsfield Township's attorneys. I am here today to investigate claims of sexual harassment brought by [Complainant]. Based on my preliminary investigation, it appears that you may have important or relevant information

I do not represent Pittsfield Township, I do not represent Mr. [Complainant] and I do not represent you. I am here as an independent investigator. If you are represented by counsel you have the right to have counsel present although I will tell you that this is not a criminal investigation.

I would like to ask you about the claims and would like you to answer the questions honestly and completely. From your responses I will 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 <u>not</u> completely confidential. Although I and the Township will make every attempt to keep the information confidential, as should you, Township officials and their attorneys will have access to the information and your statement will become part of the investigative file and my final report.

At the conclusion of this interview, please do not discuss your statements or my questions with anyone except your attorney.

I will also tell you that I have no relationship, personally or professionally to any Pittsfield Township employee or official. This is the first work of any kind I have performed for Pittsfield Township.

AFFIDAVITS:

Affidavits were prepared directly from the oral statements given during the interview. Not all of the interviewee's comments were incorporated into the affidavits. To the contrary, the affidavits reflect statements directly related to the claims. Generally, positive or negative statements about the Police Department personnel or rumors of events were not included in the affidavits. A copy of the letter and instructions that accompanied each affidavit to each interviewee is attached as Exhibit "C."[1]

AFFIDAVITS: Copies of the 40 affidavits are attached to this Report. All affidavits have been reviewed signed and notarized by the interviewees unless otherwise indicated. Because each interviewee had an opportunity to amend their respective affidavits, the final affidavits may vary significantly from the draft affidavits.

SUMMARY OF INTERVIEWS:

INCIDENT OF SEPTEMBER 1, 2015: During the evening of September 1st, [Complainant] was working the 3:00p.m. to 1:00a.m. shift. [Sergeant #1] was [Complainant's] supervisor, but had to leave left at approximately 9:30p.m. The next shift began at 10:00p.m. For the overlapping time, Sergeant [Respondent] was in charge of both Platoons. The incident began when [Respondent] asked Dispatcher Lawler to call [Complainant] back to the station ("Code 2") to change vehicles. It is undisputed between [Complainant] and [Respondent] that [Respondent] called [Complainant] back to the station at least several times. There exists a tape of the radio transmissions that evening which is in the possession of Police Administration. It is also undisputed that during the radio interplay, there was some tension between [Complainant] and [Respondent]. [Complainant] became increasingly agitated at being ordered to Code 2 and [Respondent] became increasingly agitated that [Complainant] was not returning. It appears that tension escalated each time [Respondent] called and [Complainant] responded. This

[1] Various letters accompanied the affidavits but only the date due and method of return varied. The attached letter is substantially similar to the letters that all interviewees received.

tension resulted in a confrontation in the courtyard of the police station. The confrontation continued from the courtyard into the station and climaxed when [Respondent] relieved [Complainant] from duty. There is some dispute as to the exact words spoken (and the versions of the incident are contained in the respective affidavits of [Complainant] and [Respondent]), however, [Respondent] claims that [Complainant] was cursing and complaining at being written up, and [Complainant] claims he did not curse and only made one complaint. [Respondent's] version of the events is contained in a letter dated September 2nd to Lt. Frankel attached to this Report as Exhibit "D."

This event is important because it caused a meeting with [Complainant], Storm and Frankel on September 3rd when [Complainant] complained for the first time that he had been sexually harassed by [Respondent]. Also, many officers believe that [Complainant] complained of sexual harassment because he was upset at having been disciplined.

The following documents which are relevant to the incident of September 1st only are not attached to this Report: (1) [Respondent's] disciplinary report of [Complainant]; (2) a summary of the radio transmissions of September 1st; (3) Police Daily Attendance Report; (4) Police Manual of Operating Procedures and Disciplinary Code (October, 1997) and (5) Daily Report Sheet and Radio Log showing [Complainant] relieved from duty at 2330 (11:30pm). This Report Sheet does not indicate a car stop by Patrolman [Complainant #2].

COMPLAINTS OF SEXUAL HARASSMENT PRIOR TO SEPTEMBER 1, 2015: It is undisputed that the Police Administration and Pittsfield Township officials did not know that [Complainant] was offended or was suffering unwelcomed conduct by [Respondent] prior to September 3rd. In fact, [Complainant] stated that he did not complain to Police Administration or Pittsfield Township officials about [Respondent's] actions prior to September 3, 2015.

MEETING OF SEPTEMBER 3, 2015:

The first time that the Police Administration was aware that [Complainant] objected to actions of [Respondent] occurred at a meeting among Chief Storm, Lieutenant Frankel and Patrolman [Complainant] on September 3, 2015. [Complainant] stated that he did not feel he could complain to Police Administration because of his belief that Lieutenant Frankel and Chief Storm had a close relationship with Sergeant [Respondent] and his further belief that nothing would be done if he complained. At this meeting, after discussing incident of September 1st, [Complainant] complained of [Respondent's] allegedly sexually harassing actions. Storm and Frankel told [Complainant] that they would speak to [Respondent]. After [Complainant] left the meeting, Storm told Frankel to speak to [Respondent] and tell him to immediately "stop doing anything" to [Complainant]. Soon thereafter, Lieutenant Frankel spoke to [Respondent], told him generally of the allegations, and asked him to stop having any contact with [Complainant]. From the time that Lieutenant Frankel spoke to Sergeant [Respondent], there was no further contact between [Respondent] and [Complainant] that [Complainant] alleges was unwelcomed.

[COMPLAINANT'S] CORRESPONDENCE:

In a letter of September 8, 2015, [Complainant] resigned from the Tactical Response Team. [Complainant's] letter of September 8th is attached as Exhibit "E."

In a letter of September 14, 2015, to "Police Department Administration," [Complainant] asked for [Respondent] to be held accountable for his actions. This letter was delivered to Chief Storm and Lt. Frankel. [Complainant's] letter of September 14, 2015 is attached as Exhibit "F."

EMERGENCY MEETING OF OCTOBER 14, 2015: On October 14th, Chief Storm called an emergency Sergeants meeting. The meeting was attended by Mark LeBeau (Mayor), Chief Storm, Lt. Frankel, and the Sergeants. At the meeting, the Sergeants were told of [Complainant's] claims generally. The Sergeants were also instructed to pass along to the patrol officers instructions to immediately cease any horseplay or comments to each other and to immediately report any inappropriate conduct.

[COMPLAINANT'S] CLAIMS OF SEXUAL HARASSMENT: [Complainant] makes a variety of claims against [Respondent] ranging from [Respondent] grabbing his genitals and buttocks, to various comments of a sexual nature, to displaying pornographic images on the computer. [Complainant] alleges that the first comment occurred when he was an intern. [Respondent] generally denies the allegations although admits to displaying some pornographic material on the computer, but offers explanations (see [Respondent] Affidavit). [Respondent] also admits some grabbing and pinching of [Complainant] and others buttocks but denies ever grabbing his genitals.

[COMPLAINANT #2's] CLAIMS: [Complainant #2] has also made a variety of claims against [Respondent] ranging from [Respondent] grabbing his genitals and buttocks, to various comments of a sexual nature, to displaying pornographic images on the computer. [Respondent] admits to displaying some pornographic material on the computer, but offers explanations (see [Respondent] Affidavit). [Respondent] also admits to pinching [Complainant #2] some time ago but never since.

[COMPLAINANT'S] CLAIMS OF RETALIATION: Although [Complainant] had no further contact with [Respondent], following [Complainant's] meeting with Chief Storm and Lieutenant Frankel, [Complainant] makes several complaints of retaliation.

A. MIKE LEBEAU'S COMMENTS: [Complainant] complains of retaliation because the Mayor, Mike LeBeau allegedly said to [Complainant] that the investigation may result in a finding that he "might be the bad guy." After the conversation, Mr. LeBeau delivered to [Complainant] a memorandum dated October 14, 2015 outlining what steps the Township had taken and were about to take regarding his claims including my investigation and sexual harassment training (previously scheduled). A copy of Mr. LeBeau's memorandum is attached as Exhibit "G." Mr. LeBeau also provided [Complainant] the opportunity to rejoin the Tactical Response Team. In addition, Mr. LeBeau offered to have [Complainant] contact him at any time and provided his work and home telephone numbers. There was also an offer to contact Commissioner Thomas Mahoney. Finally, Mr. LeBeau notified [Complainant] that a meeting was going to be held among the Sergeants to explain the situation.

B. JUVENILE ARREST: [Complainant] complains of retaliation regarding an arrest of a juvenile outside District Court (See [Complainant] Affidavit). [Complainant] called a juvenile offender a "jerk-off" and feels that he should not be disciplined for using that term. This matter is still being investigated.

C. NO STEPS TAKEN TO REMEDY CONDUCT: [Complainant] complains that after he reported [Respondent's] conduct during the meeting of September 3rd, no steps were taken to remedy the conduct. [Complainant] also compares the action taken after he complained to action taken after someone wrote graffiti on Patrol Officer [Female Officer] locker (see below). [Complainant's] perception is that there was immediate action taken after the locker incident, but no immediate action taken after he complained. [Complainant] also believes that nothing would have been done to remedy his complaints if [Female Office Worker] had not informed, Det. Sgt. John Galloway, of sexually charged comments [Respondent] made to her. [Complainant] believes that Det. Sgt. Galloway spoke with Chief Storm about the comments to [Female Office Worker], and it was only then that the Police Department took seriously the allegations of sexual harassment.

D. SAFE SEX FLYER: [Complainant] alleges that someone placed a "safe sex" flyer into his mailbox. It is unknown who, if anyone, placed this flyer into [Complainant's] mailbox. The flyer was given to Sergeant Galloway at a meeting in Highspire to give to [Sergeant #1] from Lou Ninke, a former dispatcher now a detective in Highspire. North told [Sergeant #1] to give it to Sgt. Clement. Sgt. Galloway looked in the envelope briefly, saw the flyer and gave it to [Sergeant #1]. Sergeant Clement placed it in his own mailbox which is directly above [Complainant's]. That is the last time anyone saw the flyer until [Complainant] discovered it in his mailbox. [Complainant] discovered the flyer in his mailbox without the envelope or business card. [Complainant] does not think that [Respondent] placed it in his mailbox, [Respondent] was not working that day and denies any involvement. A copy of this "safe sex" flyer is attached as Exhibit "H."

UNWELCOMED NATURE OF [RESPONDENT'S] ACTIONS: There are contradictory statements regarding whether [Respondent's] conduct seemed to be unwelcomed by [Complainant].

[Complainant] testified that the conduct was unwelcomed since the time he was an intern. Most other interviewees either declined to speculate whether the conduct was unwelcome to [Complainant] or opined that the current claims of sexual harassment were retaliatory against Sergeant [Respondent] for relieving him of duty on September 1st. Several interviewees characterized [Complainant] as someone who engaged in practical jokes and the daily banter between the officers. Several interviewees commented that [Complainant] is a bodybuilder and participated in an amateur boxing contest and thought that [Complainant] would have protested if the conduct was unwelcomed. The prevailing theory among the officers is that the sexual harassment claims brought by [Complainant] are in retaliation for being relieved from duty on September 1st.

WORKING ENVIRONMENT AND HORSEPLAY: Although many officers stated that they did not themselves engage in it, virtually all officers acknowledge a longstanding pattern of horseplay, banter and joking among the officers. Virtually all officers commented that there was frequent, sometimes constant banter, many times of a sexual manner, between the officers while in the squad room and that pictures and jokes were often left in each other's mailboxes, posted on lockers and on bulletin boards. No officer reported significant banter while performing job duties or in the field and no officer reported banter having any detrimental effect on service to the public. There were reports of physical horseplay or "goosing" or pinching of the buttocks or upper thigh to make another officer "jump." There would be gestures or actual "tapping" or "flicking" another officer's crotch, but other than Patrol Officers [Complainant] and [Complainant #2], no officer reported actual grabbing of genitals. Many officers commented that the horseplay both verbal and physical had been going on for many years, that it was known that certain officers were more targeted than others, especially [Detective #1], and that most everyone engaged in it in one way or the other.

OTHER INCIDENTS OF SEXUAL HARASSMENT:

There were incidents both reported and unreported that may be considered sexual harassment.

A. [Female Office Worker] reports a comment made to her from [Respondent] in the Spring, 2015. [Female Office Worker] made a comment to the effect, "These people are really up my ass today." [Respondent] replied, "I wouldn't mind being up your ass." [Respondent] recalls the incident but reports that his response was, "That must hurt." [Female Officer Worker] made no complaint at the time but, in late September, 2015, told Det. Sgt. John Galloway.

B. [Officer #1] reports a comment made to him from [Respondent]. During training with the PR24 nightstick with [Respondent], there was a move the officers were practicing when a female police officer from Swarthmore ended up on the floor with [Officer #1] on top of her. Sgt. [Respondent] said, "If you make any humping moves I'll kick your ass." [Officer #1] reported that he took it as humor and the female officer laughed and did not appear offended.

C. Several officers recall an inappropriate graffiti being written on Patrol Officer [Female Officer] locker. Apparently, the phrase was "Hot Babe." The graffiti was discovered by a fellow officer, reported, and erased before Patrol Officer [Female Officer] ever saw it. There was an internal investigation and interview of all officers but the perpetrator was never found. This incident occurred approximately one year ago. Officer [Female Officer] made no complaint.

D. Several officers reported hearing rumors that one or more of the interns had complaints about [Respondent] and others but these rumors could not be confirmed and no complaints were made. The interns allegedly involved were not contacted. [Complainant] reports that [Intern], a former intern, changed her work schedule to avoid riding with [Respondent]. [Complainant] said that [Intern] said, that while in the basement gunroom, [Respondent] grabbed an electrical stun gun and was "begging her" to let him stun her between her thighs. See [Complainant] Affidavit.

E. [Dispatcher] reports that 6-12 months ago [Complainant] stated to several officers that [Dispatcher] had been masturbating in the radio room the night before. When [Complainant] made a reference to [Dispatcher] masturbating during a radio transmission, [Dispatcher] asked [Sergeant #1] to

talk to [Complainant]. [Sergeant #1] spoke with [Complainant], asked him to stop, and [Complainant] apologized to [Dispatcher]. [Complainant], however, continued to refer to [Dispatcher] as "Spanky" referring to masturbation.

OTHER DOCUMENTS AND EVIDENCE:

There exists additional evidence that, if this matter progresses to formal claims, will become relevant and necessary to review in detail.

A. Sergeant [Respondent] stated that he has personal notes of events that occurred at the station including notes involving [Complainant].

B. Radio transmissions to and from [Complainant] are recorded as a matter of course by the dispatcher including the events of September 1, 2015.

C. [Complainant] stated that he is in possession of the original "safe sex" flyer allegedly found in his mailbox. It is in a sealed evidence bag.

RECOMMENDATIONS:

As an independent investigator I have not been asked to provide, nor have I volunteered any recommendations for action to any official of Pittsfield Township, the Police Department or their attorneys.

COMPENSATION:

I have or will be compensated by Pittsfield Township and no other person.

THIS INVESTIGATIVE REPORT WAS COMPLETED ON DECEMBER 18, 2015.

MICHAEL J. TORCHIA, ESQ.