SEXUAL HARASSMENT

WHAT SHOULD EMPLOYERS DO NOW?

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In recent months, we have witnessed an explosion in high profile sexual harassment scandals which have garnered public attention and outcry. From Harvey Weinstein to Charlie Rose to Matt Lauer, we have seen some spectacular falls by men who allegedly abused their power in the workplace. The resulting #MeToo and #TimesUp movements, commemorated by Time Magazine's 2017 Person – "The Silence Breakers," have had a powerful and empowering impact inside and outside of the workplace. As a result, the landscape for sexual harassment claims has changed dramatically.

Over the past several years, the Equal Opportunity Employment Commission (EEOC) also has devoted significant attention to this topic. In January 2015, the EEOC created a task force, led by Commissioners Chai R. Feldblum and Victoria A. Lipnic, to study harassment in the workplace. In June 2016, the task force issued a comprehensive report analyzing harassment in the workplace and methods for preventing it.[1] In sum, the task force found (1) workplace harassment remains a persistent problem; (2) it goes unreported; (3) there is a compelling business case for stopping and preventing harassment; (4) it starts at the top – leadership and accountability are critical; (5) traditional, legal-focused training must change – new approaches should be explored. In January 2017, the EEOC issued proposed enforcement guidance that was built on the findings in the report.[2] The home page of the EEOC's website now features a link titled "What to do if you believe you have been harassed at work," which offers guidance to employees about steps that they can take to address workplace harassment.[3]

The recent, heightened focus on sexual harassment in the workplace is expected to lead to an increase in what have been relatively stable rates of sex-based harassment filings with the EEOC. For example, in fiscal year (FY) 2015, sex-based harassment complaints constituted approximately 24.5% of the total harassment charges received by the EEOC.[4] In FY 2016, sex-based harassment complaints constituted approximately 23.9% of all harassment charges.[5] In FY 2017, 24.82% of all harassment charges were sex-based harassment complaints.[6] However, the total number of sex-based complaints fell slightly to 6,696 complaints in FY 2017 as compared to 6,758 in FY 2016 and 6,822 in FY 2015.[7]

With the EEOC's renewed focus on harassment in the workplace, and with the increasing media and public attention to complaints about workplace harassment, including harassment by individuals who occupy positions at or near the top of the organizational hierarchy, employers must be increasingly vigilant to ensure that both the policies and the culture actively promote a respectful and legally compliant workplace. Case precedent establishes that an employer is strictly liable for harassment by a supervisor[8] that results in an adverse employment action. However, when harassment by a supervisor does not result in an adverse employment action, an employer may raise an affirmative defense to liability by showing: (1) it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the complaining employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.[9] In order to establish vicarious liability for harassment by a non-supervisory co-worker based on a hostile work environment theory, the plaintiff must establish the employer knew or should have known of the harassment and failed to take prompt remedial action.[10]

I. BEST PRACTICES TO PREVENT SEXUAL HARASSMENT IN THE WORKPLACE

A. Set The Proper Tone In The Workplace

Employers must send the message that harassment will not be tolerated in their workplaces. Upper management and front-line supervisors and managers set the tone for how

seriously the organization takes harassment. Accordingly, management must establish clear rules and boundaries of appropriate behavior among employees and managers. When the appropriate tone has not been set and adhered to by upper management, employees often believe harassing behavior is tolerated and even encouraged.[11]

There can be significant legal consequences when management fails to set and maintain the proper tone in the workplace.[12] Courts routinely award significant verdicts where the evidence indicates management contributed to sexual harassment. In one case, the plaintiff, a former police administrative aide, sued her former employer, the New York Police Department, as well as four individual police officers, alleging, among other things, sexual harassment.[13] The plaintiff testified that she was subjected to a sexually hostile work environment over the course of her employment, which "grew worse as time went on."[14] She described the working environment as a "rowdy atmosphere with a lot of sexual innuendos, sexual comments, questions, [and] intrusive questions regarding her personal life and personal sexual habits."[15] Significantly, the plaintiff identified the chief of police as the "chief perpetrator of the precinct's sexually hostile environment," and noted that he "was generally in charge of all the employees at the Seventh Precinct during her shift."[16] Finding the plaintiff was subjected to a sexually hostile working environment, the district court affirmed a $400,000 jury award to the plaintiff.

Allowing a corporate culture that encourages or tolerates harassing conduct can increase the number of sexual harassment claims filed and the likelihood of a plaintiff's success by fostering a hostile work environment. Conversely, promoting a culture that does not tolerate harassing conduct can help decrease the number of legal claims asserted by current and former employees and can help the company defeat claims if brought.

B. Maintain A Workable Harassment Policy That Provides At Least Two Avenues Of Complaint

As explained above, an employer may defeat a claim for harassment through the *Faragher/Ellerth* affirmative defense if it can show: (1) it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.[17] An employer may show it has exercised reasonable care to prevent harassing behavior by showing it has adopted an effective and comprehensive anti-harassment policy.[18]

Although adoption and distribution of a valid anti-harassment policy can support a determination that an employer exercised reasonable care in preventing and promptly correcting harassment, it is not dispositive.[19] "To be deemed sufficiently preventative, an anti-harassment policy must be comprehensive, well-known to employees, vigorously enforced, and provide alternate avenues of redress."[20] Importantly, an "effective policy must provide avenues for complaint that do not require the plaintiff to bring his or her complaint to the offending supervisor first."[21] A policy that requires an employee to first report harassment to his or her supervisor, or that fails to provide at least two avenues of complaint, may interfere with an employer's ability to assert the *Faragher/Ellerth* affirmative defense.

It is worth reviewing your company's harassment policy to ensure the reporting structure is clear and provides avenues to complainants other than just their direct supervisor. Among other features, a policy should provide appropriate avenues for complaints about senior leaders.

C. Train Senior Leaders, Managers, And Employees

Although most employers provide some type of training about the company's harassment policy to employees, it is important that all managers, including senior leaders and members of the C-suite, participate in training about the company's policy, and about what they should do if they receive a complaint from an employee or otherwise become aware of behavior that violates the policy. Because there is no legal mandate that an employee use a specific term, for example, "sexual harassment" or "racial harassment" in order to inform his or her employer about a harasser in the workplace, managers often fail to recognize or adequately respond to a complaint.[22] For example, an employee's comment to her manager that another employee is bothering her, repeatedly touches her, or keeps staring at her might constitute a complaint or might be sufficient to put the manager on notice of unlawful conduct; however, managers often fail to recognize these types of complaints as anything more than just usual workplace gripes.[23] Training managers at every level to recognize a complaint is especially important because in the case of co-worker harassment, "once an employer knows *or should know* of harassment, a remedial obligation kicks in."[24]

Lack of managerial training about how to recognize harassment complaints can lead to disastrous results for an employer. For example, in *Gentry*, the plaintiff sued her former employer alleging she was sexually harassed by her supervisor.[25] Although the plaintiff admitted she never formally used the term sexual harassment when she complained, she did tell the company's benefits coordinator in the HR department that she "was uncomfortable with some of the discussions in the office and there was a lot of shoulder rubbing, touching, and interoffice dating."[26] The appeals court affirmed the jury verdict in favor of the plaintiff and stated that plaintiff's comments about feeling uncomfortable with touching and hugging in the office "should have raised suspicions."[27] The court further held that when an employee complains about this type of behavior, it "**should be sufficient to alert an employer about a potential harasser, assuming the proper sexual harassment policy and training are in place**."[28]

Given the high levels of employee turnover in today's workplace, employers must remain constantly vigilant to ensure their senior leaders and managers are adequately trained on the dangers of harassment and about the importance of maintaining and promoting a respectful workplace. Providing live, interactive training to all new hires and annual harassment training for supervisors and managers is one way to ensure managers recognize a potentially protected complaint when they see one and understand their obligations to act. In today's environment, it is also essential that senior leaders demonstrate a visible commitment to the company's anti-harassment and respectful workplace initiatives.

II. RESPONDING TO COMPLAINTS OF WORKPLACE HARASSMENT: A SOUND INVESTIGATION IS CRITICAL

As explained above, both state and federal courts have emphasized the importance of establishing anti-harassment policies containing complaint procedures and effective enforcement mechanisms. The foundation for an effective enforcement mechanism is a carefully developed investigation process.

Failure to develop and follow a sound investigation process can negatively impact an employer in several important ways. First, where an employer responds to a complaint by conducting a poor investigation (or not conducting any investigation), the complainant may pursue litigation where he or she might not have if a proper investigation had been conducted.

Second, the employer gives up possible affirmative defenses to claims of unlawful harassment that are available under state and federal law. For example, in one recent case, a court affirmed a jury verdict in favor of the plaintiff, where the evidence demonstrated that after her supervisor was alerted to a possible problem between the plaintiff and a co-worker, the supervisor asked about the "situation" once in a hallway. Although the plaintiff reportedly stated that "there is a situation and I'm all set. It is under control," the court found that a reasonable jury could have concluded that the employer was liable because the investigation consisted simply of asking an informal question in a hallway, rather than doing so in a private setting, asking follow-up questions, or raising the issue after the initial inquiry.[29]

Third, it is clear that a failure to properly investigate claims of harassment can expose employers to increased liability to the victims of such conduct. Moreover, an employer's failure to adequately investigate claims of harassment can negatively affect jurors' views of the employer, resulting in the jury punishing the employer with a large compensatory and/or punitive damage award to the victim.

In sum, carefully developed procedures for fairly and effectively investigating complaints of workplace harassment may limit the likelihood of a legal action being commenced, provide an affirmative defense in the event legal action is commenced, and help the employer avoid financial and public relations debacles. Because the procedures necessarily may differ when the complaint involves the conduct of a senior manager or member of the C-suite, it is important that employers also create a plan to handle investigations of such complaints before issues arise.

The following is intended to provide a practical guide to conducting fair and effective workplace harassment investigations.

A. The Key Features Of An Effective Investigative Process

The most effective investigative practices are those that will ensure that the matters at issue are seriously addressed, that all relevant evidence is considered, and that a fair result is obtained. To achieve these objectives, an employer should develop a set of practices that provides for the timely, fair, and thorough investigation of workplace harassment complaints.

1. Timeliness

Investigations must be commenced promptly upon receipt of a complaint. This necessarily includes promptly addressing all complaints even if the complaining party does not follow company procedure in reporting the alleged harassment.[30] Indeed, failure to deal with complaints in a prompt manner often subjects the employee to more harassment, allows the harasser to harass new victims, and sends the message that the company does not take harassment seriously. This can lead to the foreclosure of any potential affirmative defense by the company.[31]

Measures that should be considered to expedite investigations include (1) establishing appropriate deadlines at the outset, (2) if possible, interviews should commence soon after the receipt of the complaint, and (3) the investigation should be completed as soon as possible; if the investigation cannot be promptly completed due to legitimate extenuating circumstances, the complainant should be advised of the delay. Employers should consider identifying external resources to handle investigations of senior leaders in advance of receipt of any complaints, in

order to ensure that such investigations will be handled as promptly as investigations involving other employees.

Directly related to the issue of timeliness in responding to harassment complaints is tolerating senior leaders or other managers who fail to report complaints of harassment, as this can delay, or altogether prevent, an employer from promptly responding to or investigating a complaint, exposing the company to additional liability.[32] Further, unaddressed complaints allow problems to fester, and before long what was originally just a vague comment can turn into something more serious.

2. Fairness

Workplace investigations must be conducted fairly. The investigator must be objective and unbiased. This means that the investigator cannot take the side of either the complainant or the accused – he/she cannot set out to "convict" the accused or "discredit" the complainant. Also, the investigator should not have a personal relationship with the complainant or the accused, or a personal or professional stake in the outcome of the investigation. Because a member of the C-suite typically will exercise control over the employment of the VP of Human Resources or the General Counsel, it is important that procedures be implemented to ensure that such investigations be conducted by qualified, outside investigators who are better positioned to ensure fairness and the appearance of a fair investigation.

A fair investigation also contemplates that the accused will be fully informed of all of the charges made against him/her and will be given a meaningful opportunity to respond. The complainant, the accused, and all witnesses should be given the opportunity to offer any and all relevant evidence. A fair investigation also contemplates that the evidence gathered during the investigation will be objectively evaluated and that credibility determinations will be based upon legitimate factors such as consistency, demeanor, and bias.

3. Thoroughness

Workplace investigations must be thorough. All persons with knowledge of relevant facts must be interviewed and all relevant documents must be reviewed. The investigator should interview the complainant, the accused, and all persons with first-hand knowledge of the disputed events. While time is of the essence in conducting workplace investigations, the need to conduct a thorough investigation should not be compromised.[33] In some instances, this may entail interviewing former employees who may have knowledge of relevant events.

B. Events That Will Trigger An Investigation

An investigation should be commenced whenever a complaint of harassment is made. A complaint need not be written and the complainant does not have to use the words "discrimination," "harassment," or "unlawful." It is sufficient if the complainant provides notice to the employer that some unlawful conduct may have occurred.

Under certain circumstances, ***an investigation may be required even in the absence of a complaint***. That is, an employer may be obligated to conduct an investigation if it becomes aware of information that creates a reasonable suspicion that some harassment may have occurred. For example, if a supervisor or senior leader observes harassing conduct in the workplace, the employer will be obligated to conduct an investigation even though no one "complained" about the conduct as the employer has "constructive notice" of the potentially

unlawful conduct. Similarly, if there is general company knowledge of inappropriate conduct, or if an employee confides in a supervisor regarding such conduct, an investigation must be commenced even though no one "complained." Employers also should recognize that an investigation may be warranted even when some of the complained-about conduct involves statements about other women (or men) or about incidents that the plaintiff learns about from other sources.[34]

It goes without mention that ignoring complaints of harassment because the alleged harasser is a senior executive, a top-producer for the company, or long-tenured employee can prove costly for an employer. Indeed, giving a senior executive the benefit of the doubt solely because of his or her position or tenure with the company or because he or she generates significant revenue puts the company at risk of committing other common mistakes, including not conducting an adequate investigation and failing to deal promptly with complaints. Further, an employer that retains a known harasser could be deemed as having acted with malice or reckless disregard for the truth, which can lead to an award for punitive damages.[35]

C. Respond Adequately to Complaints Against More Senior Managers and Top Producers

Ignoring complaints of harassment because the alleged harasser is a senior manager, a top-producer for the company, or long-tenured employee can prove costly for an employer. Indeed, giving a manager the benefit of the doubt solely because of his or her position or tenure with the company or because he or she generates significant revenue puts the company at risk of committing other common mistakes, including not conducting an adequate investigation and failing to deal promptly with complaints. Further, an employer that retains a known harasser could be deemed as having acted with malice or reckless disregard for the truth, which can lead to an award of punitive damages.[36]

The decision of Ogden v. Wax Works, Inc. provides a good example of the risk of treating top-producers with kid gloves.[37] In Ogden, the plaintiff testified that over the course of a year, she was subjected to her supervisor's unwelcome physical advances and incessant propositions and was retaliated against when she refused these advances.[38] When the plaintiff first complained about the harassment to the regional manager, he indicated he was aware that the harasser had affairs with other employees and the harasser had been warned before. However, when the plaintiff called him a couple days later, the regional manager's attitude had completely changed, and he informed her that the harasser had assured him that "the matter was merely a personal conflict, which had since been resolved." Ultimately, the regional manager told the plaintiff that "Wax Works viewed [the harasser] as an 'asset' to the company and saw no reason to fire him."[39] The court noted that there was "substantial evidence indicating that Wax Works neither conducted a "thorough investigation" nor took the "appropriate action" promised by its sexual harassment policy, belying its claim to have exercised reasonable care to "prevent and correct promptly . . . sexually harassing behavior."[40]

D. Planning The Investigation

The foundation for an effective investigation is careful pre-investigation planning. Once the employer's obligation to conduct an investigation is triggered, those responsible for initiating the investigation should plan the investigation. Initial planning should include identifying the issues and preparing a preliminary list of persons who have relevant knowledge relating to the matter being investigated; determining who should be informed of the complaint and the investigation;

deciding who should be appointed to conduct the investigation; and determining whether any temporary remedial measures should be implemented.

1. Identification Of The Issues

The complaint and all supporting materials that may be submitted by the complainant should be analyzed to determine the issues that must be investigated. Assessment of the issues will play a role in the selection of the investigator and ultimately will impact the effectiveness of the investigation. A preliminary list should be prepared of the witnesses who may have relevant knowledge.

2. Dissemination Of Information

It is extremely important to limit disclosure of the complaint and the investigation to those with a legitimate "need to know." Dissemination of information about the complaint and/or the investigation too broadly could adversely affect the employer's qualified privilege protecting its communications, and it could jeopardize the integrity of the investigation itself. For example, if potential witnesses acquire advance knowledge of the complaint, some may collaborate to "get their stories straight." Limiting disclosure of the fact and substance of the complaint and details concerning the investigation to persons who have a legitimate "need to know" is the prudent course.

3. Appointment Of The Investigator

When selecting an investigator, the employer should evaluate the nature of the issues to be investigated and the investigator's training, prior experience, and demeanor. The investigator should have training in the law governing the issues to be investigated and should also have training with respect to conducting workplace investigations. The investigator should also possess good interviewing skills. Prior experience with the employer's business operations and prior experience investigating similar issues is often helpful. It is also important to select an investigator who will be capable of testifying clearly and effectively where subsequent court proceedings are likely.

If a member of management or a representative of the employer's human resources department or law department is being considered, the individual should be outside of the chain of command of the organizational unit in which the complaint arose. Also, the individual should not have any personal or professional ties to the complainant, the accused, or any witness, and should not have any personal or business stake in the outcome of the investigation. Because the CEO or another member of the C-suite ultimately may control the employment of the HR Vice President or General Counsel who ordinarily conducts or oversees other workplace investigations, investigation of C-suite executives is often best handled by engaging an outside professional to conduct the investigation.

In recent years, many professionals (attorneys and non-attorneys) have made careers out of carrying out such investigations, producing reports, and if necessary providing testimony. One advantage of using an attorney for such an investigation is the possibility of keeping the communications protected via the attorney-client privilege. If litigation over the termination takes place, the company can elect whether to use the "good faith investigation defense" and at that point can elect to waive the attorney-client privilege and allow the information to be used in supporting its decision.

It is also important to consider both federal and state laws. Especially for publicly traded companies, certain matters will require an independent review by the board's audit committee and appropriate action and reporting by the board.

4. Temporary Remedial Measures

Upon receipt of a harassment complaint, the employer should determine whether it is necessary to implement immediate measures to ensure that further unlawful conduct does not occur and that evidence is preserved. The determination as to whether and what form of temporary remedial measures should be implemented will depend upon the facts of each situation.

As a general rule, an employer should immediately remind the accused and the complainant of the employer's policy prohibiting retaliation against employees who present complaints as well as employees who participate in investigations as witnesses. The employer should also inform the complainant of avenues to report retaliation or further instances of harassment. Where the complaining party complains about harassment arising out of the circulation and/or display of offensive materials, the employer should take steps to remove such materials from the workplace and preserve them (or in the case of graffiti, preserve photographs of the offensive material) for use in the investigation and in subsequent litigation.

Another temporary remedial measure that may be appropriate is suspending the accused. This may be necessary and appropriate where there are allegations of egregious harassment or threats of violence.

In no event, however, should temporary remedial measures be implemented where they would in any way adversely affect the complainant. Indeed, even placing a complainant on paid leave may be deemed to constitute an adverse employment action, particularly when coupled with other actions that detrimentally impact the complainant.[41] Finally, in those rare cases where the conduct complained about may violate criminal laws, the employer may need to notify law enforcement officials.

E. Commencement Of The Investigation

At the outset of an investigation, the investigator should promptly review all documents that are immediately available. This would include, at the very least, the complaint (if written) and any supporting materials submitted with the complaint. The investigator also should acquire and review:

1. Personnel files of the accused and/or the complainant.
2. Files relating to prior investigations of similar complaints made against the accused or made by the complainant.[42]
3. Managers' files and notes concerning the complainant and the accused.
4. Relevant corporate policies.
5. Any relevant email communications.
6. Surveillance videotape or other tangible records that may contain information relevant to the investigation.

The investigator then should identify the employees to be interviewed. In addition to the complainant and the accused, the investigator should interview anyone with first-hand knowledge of the events that gave rise to the complaint. Other witnesses may include the authors and

recipients of relevant documents, the complainant's supervisor (including to determine whether complainant has ever previously complained of harassment by the accused), co-workers of the complainant and the accused and, in appropriate cases, others who have been subjected to the same harassing conduct that the complainant has complained about.

The investigator also should consider the order in which interviews should be conducted. Ordinarily, the complainant should be interviewed first. The order of the interviews of the accused and other witnesses will depend upon the circumstances in each case. Usually, the accused will be interviewed immediately after the complainant. However, in some cases it may be necessary to interview certain witnesses before interviewing the accused in order to be able to effectively interview the accused and test his/her credibility. Interviews should be conducted as soon as practicable so that witnesses do not have the opportunity to collaborate to "get their stories straight" or influence or intimidate other witnesses.

F. Employee Interviews

1. Preparation

The investigator should prepare thoroughly for each interview. The investigator should have a thorough understanding of the relevant events and the issues to be addressed as well as the laws or policies that are implicated in the matter. The investigator also should have a detailed outline of the events to be addressed or a detailed list of questions to be asked of the interviewee. All relevant documents should be reviewed by the investigator prior to conducting interviews.

2. Who Should Be Present During Witness Interviews?

Generally, attendance at interviews should be limited to the investigator, the witness and, where appropriate, an individual to assist the investigator by taking notes of the matters discussed during the interview. The presence of other persons representing the employer can have a chilling or intimidating effect on witnesses.

Usually the interviewee is not entitled to have counsel present. Nor is the interviewee entitled to have non-employees, such as family members or friends, present. However, where the interviewee is a member of a union and the interview may lead to disciplinary action against the employee, then the employee is entitled to have a union representative or a co-worker present if he/she requests that such representative be present.

3. Where Should Interviews Be Conducted?

Generally, investigative interviews should be conducted away from the witnesses' regular work area. In some instances, it may be appropriate to conduct some interviews away from the employer's premises. Interviews should be conducted in a private, quiet setting, free of distractions.

4. Disclosures to Persons Being Interviewed

Prior to the commencement of each interview, certain matters should be disclosed to the witness, either orally or in writing. A record of the disclosures should be preserved. Generally, the investigator should disclose to the witness the following information:

a. The reason for the interview.
b. The role of the investigator. If the investigator is an attorney, the investigator should make it clear that he/she does not represent the witness.
c. The role of the witness.
d. The employer's expectation that the witness will be truthful and not withhold material information.
e. The need for confidentiality. The witness should also be informed that the information disclosed by the witness will be kept confidential to the extent possible, but that the employer cannot promise absolute confidentiality. It should be made clear that all or some of the information disclosed during the interview may be disclosed to members of management or staff members who have a need to know and also may be disclosed to third parties if litigation ensues.
f. The witness should be informed that he/she is protected against retaliation for participating in the investigation. The accused should be reminded that retaliation against the complainant or any witness participating in the investigation is absolutely prohibited.

5. Confidentiality

When conducting investigations, an employer cannot have a blanket policy requiring confidentiality. Rather, the employer must make a case-by-case determination regarding the need for a witness instruction on confidentiality. As background, in 2015, the National Labor Relations Board (NLRB) found the employer violated the National Labor Relations Act (NLRA) by asking employees who were involved in a workplace investigation not to discuss the matter with their co-workers while the investigation was ongoing.[43] This decision holds that companies cannot have blanket policies requiring confidentiality during a workplace investigation.

Thus, requesting interviewee confidentiality is valid in circumstances where the employer can demonstrate that confidentiality was objectively necessary to prevent such things as threats to witnesses, destruction of evidence or fabrication of testimony. Employers should not use blanket disclaimers for the need for confidentiality in workplace investigations. Nor should employers use general disclaimers for certain types of investigations. Instead, a decision should

be made at the start of each interview on the particular need for confidentiality and any instruction to witnesses should be tailored accordingly.

Balancing this decision with the need to protect the integrity of workplace investigations in the future, companies should consider practical alternatives to a strict confidentiality instruction. For example, asking a witness to consider the perspective of the complainant and accused if they choose to discuss the matter may help maintain the integrity of the process without running afoul of the NLRA. If a determination is made that a confidentiality instruction is necessary in a particular circumstance, companies should articulate and document the reason for the confidentiality instruction. For example, "We ask you to keep this investigation confidential because of the need to protect the individual who lodged the complaint from retribution by the alleged perpetrator of the threats."

6. Interview Techniques

Generally, when interviewing fact witnesses, the investigator should ask open-ended questions (e.g., Are they familiar with the employer's policy prohibiting sexual harassment? Have they ever observed any violations of the policy?). Then, the investigator should follow-up with more specific questions relating to the events at issue. As previously noted, the investigator should refrain from asking questions that suggest disapproval of the complainant or the accused or that suggest that the investigator is seeking a particular answer to a question.

Events should be covered in chronological order, if possible. When covering multiple events, the investigator should not leave an event and move to a new event without asking the witness, "Is that all?" If moving from one topic to the next is necessary without completion of the first topic, the investigator must remember to return to the original topic and ensure that it has been completely addressed. Moreover, it is important to gather specific facts or conduct, and not generalities by asking who, what, where and identifying any witness to the conduct or exchange.

Other matters that should be explored, where appropriate, include the individual's current and past relationship to the complainant and the accused, whether there is a basis for any bias on the part of the witness, and whether the witness has any personal or professional stake in the outcome of the investigation (e.g., the supervisor of the accused may not be totally candid about the accused's conduct out of concern that it may reflect adversely on him in the eyes of his supervisors).

At the end of every interview the investigator should ask every witness, "Is there anything else you think we should know about?" or a similar "catch all" question. The investigator should also ask every interviewee "Are there any documents, photographs, e-mails, messages or other items of physical evidence relating to the events at issue that you are aware of?"

With respect to interviewing the complainant:

a. If the complaint has been presented in writing and the writing contains a detailed statement of the basis for the complaint, then during the interview process the complainant should be asked to sign and date the written complaint and indicate in writing that the document represents a complete and accurate statement of all his/her claims.

b. If the complaint is presented orally, or the written complaint is obviously incomplete, then during the interview of the complainant the investigator should have the complainant describe in detail each and every offensive act or statement.

c. The complainant should be assured that the complaint will be taken seriously and investigated thoroughly.

d. The investigator should focus on facts and remain objective.

e. The investigator should observe the complainant's demeanor and assess his/her credibility.

f. The investigator should determine when and where the alleged incident occurred, then obtain all specific details relating to the incident.

g. The complainant should be asked to identify all witnesses whom he/she is aware of and what the complainant believes each witness may know, as well as anyone the complainant has spoken to about the incident.

h. The investigator should inquire as to whether the complainant is aware of any other employees (or former employees) who have experienced the same discrimination/harassment that complainant has complained about.

i. The complainant should be asked to turn over or describe all documentary evidence relating to the complaint (e.g., notes, diaries, audio tapes, photographs, letters, greeting cards, gifts, etc.).

j. The complainant should be assured of protection against retaliation and directed to report any such conduct immediately.

k. The complainant should be assured that the complaint will be kept as confidential as possible, consistent with the company's obligation to conduct a thorough investigation.

l. The investigator should ask or attempt to elicit information from the complainant about what he/she would like to see as a result of the complaint/investigation.

m. The investigator should not conclude the interview before asking "Is there anything else?" The investigator should also inform the complainant that if he/she later recalls any other relevant information, he/she should provide that information to the investigator.

With respect to interviewing the accused:

a. It is very important that the accused clearly understand the reason for the interview and the fact that the investigation is required by law and company policy. It is also important that the accused be apprised of all of the claims made against him/her. All particulars of the accusations need not be fully disclosed at the start of the interview. Depending on the circumstances, it may be better to address the accusations individually during the interview to get more candid responses.

b. The investigator should assure the accused at the outset of the interview that the investigator's role is that of an impartial fact finder and that no final determination will be made as to the merits of the complaint until the investigation is concluded.

c. Once again, the investigator should focus on facts and remain objective.

d. The investigator should observe the accused's demeanor and assess his/her credibility.

e. The investigator should cover each and every allegation made by the complainant and record all information provided by the accused.

f. The investigator should obtain the identity of any witness who may support the accused's version of the events and obtain copies of any relevant documents or physical evidence.

g. The investigator should ask whether the accused and complainant have ever socialized together, and if there was any prior consensual relationship between the complainant and the accused.

h. The investigator should determine the accused's perception of his or her working relationship with the complainant, and determine if the accused knows of any reason why complainant would make the allegation.

i. At the end of the interview, the accused should be warned not to take any retaliatory action against the complainant or any witness and advised of the penalties for such conduct.

j. The investigator should ask the accused "Is there anything else?" The investigator should also inform the accused that if he/she later recalls any other relevant information, he/she should provide that information to the investigator.

7. Dealing with Uncooperative Employees

Dealing with a reluctant complainant - In the event that a complainant does not want an investigation to be conducted, the investigator should attempt to determine the reason for the complainant's reluctance. At the same time, the investigator should assure the complainant of the employer's policy against retaliation and remind the complainant of the employer's legal obligation to investigate the complaint. If the complainant continues to refuse, the investigator should inform him/her the employer will proceed with investigation and will reach its conclusions without the benefit of the complainant's input. The complainant's refusal to cooperate should be documented in a writing signed by the complainant. It is generally not prudent to take disciplinary action against a complainant for refusing to cooperate in an investigation of his/her complaint, as such disciplinary action could give rise to a retaliation complaint.

If a complainant is represented by counsel and refuses to be interviewed without counsel present, the investigator should advise the complainant that attorneys are not permitted to participate in proceedings relating to internal employment matters. If the complainant still refuses to be interviewed without counsel present, it should be made clear that the interview is necessary to permit the Company to conduct a thorough investigation, that the investigation will proceed and that the outcome will be based on the evidence gathered from others and inferences which may be drawn from that evidence.

Of course, there may be situations where the complainant's interview is so important that the employer should waive its policy against counsel being present. In such case, the complainant and the attorney should be informed at the outset of the interview that the attorney cannot participate in the interview and the interview will be terminated if the attorney becomes disruptive. A record of any such disruptive behavior should be maintained as part of the investigation file.

Dealing with an uncooperative accused or witness - If the accused or a witness refuses to cooperate with the investigation, the investigator should inquire as to the reasons for the employee's reluctance and consider whether there is some way to address those reasons. It should be explained that the employer has a legal duty to conduct the investigation, that it is attempting to conduct a fair investigation by gathering all relevant information, that it is the accused's opportunity to share his/her side of the story and that if the employee refuses to cooperate, the investigation will proceed and that the outcome will be based on the evidence gathered and inferences which may be drawn from that evidence without the benefit of the employee's input. The accused should also be reminded that adverse inferences could be drawn from his/her refusal to cooperate. If the employee still refuses to cooperate, the refusal to cooperate should be documented in a statement signed by the employee.

8. Documenting The Interviews

All interviews should be carefully documented by the investigator and/or the investigator's assistant. A court reporter may be used to record all significant in-person or telephonic interviews. A transcript created by a certified stenographer eliminates any questions later on as to who said what to whom and virtually eliminates protracted disputes as to what was said during an interview that often arise when interviews are recorded by hand by the interviewer or an assistant and a summary of the notes are sent to interviewees for review.

If stenographic transcripts of interviews are not utilized, then detailed notes should be taken during the interviews and later summarized in memorandum form. The handwritten notes should be preserved even after the summary is prepared. Depending on the circumstances, it is a good practice to show the interview summary to the interviewee for review and he/she should be invited to make any changes necessary so that the document represents a complete and accurate summary of all of all of the relevant information provided during his/her interview. The interviewee should then sign the summary stating that he/she has reviewed the document, that he/she had an opportunity to make changes, and that it is a complete and accurate statement of the matters discussed at the interview. While such documentation is not warranted or possible in all investigations, having the witness review and sign interview notes is useful in that it "locks the interviewee in" to a version of the events that can be very helpful if the interviewee later attempts to change his/her story.

There are special considerations when considering use of a tape recorder to record interviews. First, depending on your state's law, a recording may not be permissible unless all parties to the conversation consent. Moreover, while reasonable persons may differ, the use of

a tape recorder can have a more intimidating or chilling effect on persons being interviewed similar to the use of a court reporter. Moreover, a tape recorder can easily malfunction and/or produce a poor quality audio recording. Another option is to have two interviewers present to corroborate any notes taken.

9. Evaluating the Evidence

After the initial interviews are completed, the investigator should evaluate the evidence and establish a plan for completing the investigation. In this regard, the investigator should:

a. Review the information provided by the complainant and the accused to identify points of agreement and disagreement.
b. Review all witness interview summaries and all documentary evidence obtained since the commencement of the investigation.
c. Determine whether any other individuals should be interviewed or whether any witnesses should be re-interviewed.
d. Determine whether any other documents must be obtained.
e. Determine whether it is necessary to implement any interim remedial action.

At that point, the investigator should take such steps as are necessary to complete the fact-gathering portion of the investigatory process.

G. Documenting the Results of the Investigation

In most cases, the investigator should prepare an investigation report. In the report, the investigator should recite the complaint, the chronology of the investigation, a summary of the factual evidence, and a discussion of credibility issues, where necessary. In summarizing the results of the investigation, the investigator should avoid stating legal conclusions. Rather, the investigator should present the results of the investigation in the context of whether the conduct engaged in by the accused was inappropriate or violated company policies or standards of conduct. The investigator should avoid using terms like "unlawful." The conclusions should be presented utilizing terms such as "inappropriate" or "unprofessional." Finally, the report should not contain any references to privileged communications or recommendations as to disciplinary action. Determinations as to disciplinary actions are the responsibility of management.

H. Assessing The Results Of The Investigation And Determining Appropriate Discipline

An employer must not only exercise reasonable care to prevent harassment and to promptly investigate complaints, it must also exercise reasonable care in responding to harassment in order to avoid liability.[44] Failure to take prompt and adequate remedial action can, and often does, preclude an employer from asserting the *Faragher/Ellerth* affirmative defense.[45]

Thus, when the investigation is completed, appropriate members of management, representatives from human resources and, where appropriate, legal counsel, should review the investigator's report. In the case of an investigation of a member of the C-suite, it may be appropriate or necessary for members of the board to review the investigator's report. The reviewing group should determine whether to adopt the investigator's findings or whether further investigation should be conducted. It is critically important that during this review process each member of the group review the report in its entirety. This careful review is important to allow the

review group to defend the integrity of the review process and the legitimacy of the group's determination as to disciplinary and remedial action.

Where the findings are adopted and the complaint is found to have merit, the reviewing group must decide upon appropriate disciplinary/remedial action. In deciding upon appropriate disciplinary action in cases where a discrimination/harassment complaint is found to have merit, the following factors should be considered: (1) the severity of the conduct, (2) the frequency of the conduct, (3) the personal, professional, and economic impact of the conduct upon the complainant, (4) whether other employees have complained about the accused, (5) the level of discipline imposed by the employer for similar/equivalent transgressions in the past, and (6) the level of discipline that will be necessary to prevent recurrence of the conduct complained about. Ultimately, remedial action taken by an employer in response to a harassment complaint should be prompt and effective so as to guard against further harassing conduct by the alleged harasser, and the remedial actions should be proportional to the severity of the conduct.[46]

If the complaint is sufficiently serious to warrant removal, it will be important to review employment agreements, by-laws of the corporation or, less commonly, the articles of incorporation in order to determine what approvals or documentation must be in place prior to termination. The company should also be prepared to comply with any notice requirements included in the terms of the executive's employment or other agreements with the company. Certain payments may be required either as a matter of contract or as a matter of law at the time of the termination. The company should ensure that it has complied with all of the terms of the agreement and is satisfied that it has met with or can meet the obligations triggered by the termination.

I. Communicating The Results Of The Investigation

As a general practice, the results of the investigation must be communicated to both the complainant and the accused. Where the complaint was found to have merit, the complainant should be informed generally of the fact that disciplinary action was taken against the accused and of any remedial/preventative measures being implemented by the employer. Where the complaint could not be substantiated or it was found that the complaint was without merit, the complainant should be advised of the employer's commitment to maintaining a workplace free of discrimination/harassment and to encouraging reports of such conduct.

If an investigation results in a departure of high level executive, it is important to have a plan in place to address continuity of operations issues. If the departure may have a significant effect on a company's finances, investor confidence, and possibly create a ripple effect of departures among the company's executive team, it is important to have an action plan in place to address continuity of operations issues. If an investigation leads to a departure of a senior executive, a company will want to consider how to deliver the message of the executive's departure, both internally and externally, who will deliver that message (and particularly whether the executive will be allowed to announce his/her own departure). The company will also want to consider whether to engage a PR firm or other consultants to handle the message internally and externally, whether to issue a press release, and what the tenor of the message will be. When issuing any communications, employers also should be mindful of possibility that an accused may later seek to assert a defamation or similar claim and should take measures to limit the likelihood that any such claims will be successful.[47]

Regardless of the nature of the action taken against the accused (or by the accused, if that individual voluntarily steps down), the employer should take appropriate remedial action to minimize the risk of recurrence. Such actions might include training programs for senior leaders

and other employees, re-distribution of the employer's EEO/sexual harassment policies and issuance of communications from senior leaders about the company's commitment to those policies and about prohibitions against retaliation, monitoring of the workplace, and periodic contact with the complainant to insure that no retaliation or further harassment has occurred. The follow-up contact with the complainant should be documented.

J. Do Not Retaliate Against the Complaining Party

Retaliating against an employee who has complained of harassment can subject an employer to increased liability for the separate legal wrong of retaliation.[48] It is important to remember that a plaintiff may recover for retaliation even if he or she is unable to prove the underlying claim of harassment.[49] Additionally, an employer that retaliates against an employee runs the risk that the jury will sympathize with the plaintiff because, in many cases, jurors have experienced some form of retaliation themselves. Accordingly, employers should take extra caution to avoid any retaliation, such as reminding everyone involved, including witnesses, the alleged harasser, and the complaining party, that retaliation of any kind will not be tolerated.[50]

CONCLUSION

Sexual harassment is likely to remain at the forefront of the public discussion and attention for the foreseeable future, and employers that ignore that reality do so at their peril. However, employers can reduce their exposure to potential liability and costly litigation by taking preventative measures such as having a robust anti-harassment policy that is easy for employees to understand and provides multiple avenues for complaint, providing frequent live and interactive harassment training to all employees including senior leaders, and involving senior leaders in anti-harassment and respectful workplace initiatives. Employers should also ensure that they have mechanisms in place for promptly responding to all complaints to include conducting a thorough investigation even when the complaint is about the conduct of a member of the C-suite or other senior leader, and holding them visibly accountable for conduct that is inconsistent with those policies, and taking quick and effective remedial measures once harassing conduct is discovered.

INVESTIGATION CHECKLIST

A. Preparing for the Investigation

- ☐ Review the personnel file of relevant employees. In particular, review the files of the complaining employee and the employee(s) accused.
- ☐ Collect and review all relevant documents, including applicable policies and/or work rules.
- ☐ Prepare a preliminary list of persons who may have knowledge of the matter being investigated.
- ☐ Set a timetable and establish a plan for conducting interviews.
- ☐ Consider whether immediate remedial measures are warranted and, if so, put such immediate remedial measures in place.
- ☐ It may also be helpful to consult with legal counsel regarding your initial investigation plan. Counsel can advise you regarding the most effective way to complete the investigation.

B. Consider Confidentiality Needs and Restrictions

Assess need to require witnesses to maintain confidentiality.

- Is evidence in danger of being destroyed?
- Is there danger of witness collusion and/or fabrication of testimony?
- Is there a need to prevent a cover-up?
- Do witnesses need protection?
- Do these concerns outweigh the employees' interests in discussing discipline or disciplinary investigations?

- ☐ If you have determined that some level of witness confidentiality is necessary and outweighs the employees' interest in discussing workplace investigations, inform each witness of necessary confidentiality restrictions.
- ☐ Tell each witness that any confidentiality restriction "does not prohibit you from reporting possible violations of law to any government agency, and does not prohibit you from making any disclosures protected under the whistle blower provisions of law or government regulations."

C. Thoroughly and Immediately Investigate ALL Complaints

- ☐ Investigate every complaint. Thorough investigations may help to insulate or at least limit liability from legal claims of harassment, discrimination, wrongful termination, etc.

- ☐ Keep the investigation and the facts that it uncovers on a strict "need to know" basis. Do not, however, make any promises that information will remain confidential. This simply may not be possible and may even jeopardize your ability to conduct a thorough investigation.

- ☐ Interview the complainant, the accused, the immediate supervisors, and witnesses as soon as possible. Take written statements when appropriate.

D. Interview the Complainant

- ☐ Remain objective.

- ☐ Determine the identity of the accused.

- ☐ Determine when and where the alleged incident occurred.

- ☐ Determine if the incident was isolated or part of a pattern of conduct.

- ☐ Get specific details of the incident(s).

- ☐ Ask the complainant his or her reaction to the incident(s).

- ☐ Determine if there were any witnesses to the incident(s).

- ☐ Determine if the complainant has spoken to anyone else about the incident(s).

- ☐ Assure the complainant that the complaint will be taken seriously and investigated thoroughly.

- ☐ Assure the complainant that the complaint will be kept as confidential as possible consistent with your obligation to conduct a thorough investigation.

- ☐ Never agree to forego an investigation of a complaint pursuant to the complainant's request for confidentiality.

- ☐ Attempt to find out what the complainant wants/expects as a result of the investigation.

- ☐ Ask "Is there anything else you think I should know?"

E. Interview the Accused

- ☐ Remain objective.

- ☐ Determine if the accused knows of the incident or incidents to which the complainant is referring. If so:

    - Determine when and where the incident(s) took place.

    - Get specific details of the incident(s).Ask how the complainant reacted.

- Determine if there were any witnesses to the incident(s).

- Determine if the accused spoke to anyone else about the incident(s).

☐ Determine if there was ever a prior consensual relationship between the parties.

☐ Determine the accused's perception of his or her working relationship with the complainant.

☐ Ask whether the complainant and accused socialized together either alone or in a group.

☐ Determine if the accused knows of any reason why the complainant would make the allegation.

☐ Determine whether the accused directed, or had responsibility for, the work of other employees or the complainant, had authority to recommend employment decisions affecting others, or was responsible for the maintenance or administration of the records of others.

☐ Observe the accused's demeanor and reaction.

☐ When the accused is the complainant's supervisor, determine if the complainant was recently granted or denied any job benefits such as raises or promotions.

☐ Assure the accused that the complaint will be kept as confidential as possible consistent with your obligation to conduct a thorough investigation.

☐ Ask "Is there anything else you think I should know?"

F. Interview the Immediate Supervisors

☐ Determine the parties discipline problems or behavior patterns.

☐ Determine whether the parties' supervisors had any knowledge about any relationship between the complainant and the accused.

☐ Determine if the complainant ever reported the conduct to the supervisor.

☐ Ask "Is there anything else you think I should know?"

G. Interview Witnesses Where Necessary

☐ Remain objective.

☐ When the witness is a current or former employee, review his or her personnel file prior to the interview.

☐ Be cognizant of privacy concerns for both the complainant and the accused.

- ☐ Start with broad, open-ended questions. Get more specific as necessary.

- ☐ Do not give details of the complaint unless it is necessary to obtain relevant information.

- ☐ Phrase questions so as not to give unnecessary information.

- ☐ Do not automatically limit the investigation to witnesses currently in the work-force. Interview former employees, friends, and relatives of both the complainant and the accused if advised to do so by counsel.

- ☐ Ask “Is there anything else you think I should know?”

- ☐ Do not confiscate personal property.

H. Take Corrective Action (if necessary)

- ☐ Promptly take necessary corrective action, up to and including discharge where warranted. Corrective action must be effective and must guard against further harassing acts.

    - Consider the severity of the conduct; the frequency; the pervasive-ness of the conduct; any past actions; and, whether you believe the accused will engage in any further actions.

    - When imposing discipline on the accused, any form of discipline short of discharge should be issued along with a warning that similar misconduct in the future may result in immediate termination.

- ☐ Document all corrective action taken. Include a summary of the investigation explaining the appropriateness of the action.

I. Follow Through

- ☐ Inform the complainant what action was taken after you have thoroughly investigated the complaint (but without providing private personnel or disciplinary information).

- ☐ Instruct the complainant to immediately report recurring or continuing harassment.

- ☐ Periodically check back with the complainant to ensure that the harassment has been eliminated and is not continuing.

- ☐ Obtain a signed statement reflecting items 1 and 2, and document item.

ENDNOTES

[1] Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of the Co-Chairs Chai R. Feldblum & Victoria A. Lipnic 5-15 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm* (last visited January 31, 2018).
[2] https://www.eeoc.gov/eeoc/publications/promising-practices.cfm (last visited January 31, 2018).
[3] https://www.eeoc.gov/eeoc/newsroom/wysk/harassed_at_work.cfm (last visited January 31, 2018).
[4] See All Charges Alleging Harassment FY 2010 - FY 2017 (Charges filed with EEOC), https://www.eeoc.gov//eeoc/statistics/enforcement/all_harassment.cfm (last visited January 30, 2018); *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2017*, https://www.eeoc.gov//eeoc/statistics/enforcement/sexual_barassment_new.cfm (last visited January 30, 2018).
[5] *See id.*
[6] *See id.*
[7] *See id.*
[8] In one recent case, the court of appeals vacated a judgment in favor of the employer which was premised on a finding that the alleged harasser was not the plaintiff's supervisor, and identified and discussed several factors that supported a contrary finding. *See Moody v. Atlantic City Board of Educ.*, 870 F.3d 206, 217-18 (3d Cir. 2017) (citing and discussing *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2442 (2013)).
[9] The parameters of this affirmative defense were first set forth by the Supreme Court in the cases of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).
[10] *See Dillon v. Ned Management Inc*., 85 F. Supp.3d 639 (E.D.N.Y. 2015) (discussing this standard).
[11] *See, e.g., Hare v. H&R Indus., Inc*., 67 F. App'x 114, 119 (3d Cir. 2003) (owner and general manager, as well as plaintiff's supervisor, knowingly permitted hostile work environment).
[12] *Katt v. City of N.Y.*, 151 F. Supp. 2d 313 (S.D.N.Y. 2001).
[13] *Id.* at 319.
[14] *Id.* at 320.
[15] *Id.*
[16] *Id.* at 320-21.
[17] *Faragher*, 524 U.S. at 807.
[18] *Minix v. Jeld-Wen, Inc.,* 237 Fed. App'x 578, 583 (11th Cir. 2007)*, cert. denied,* 552 U.S. 1182 (2008); *Edwards v. Hyundai Mfg. Ala., L.L.C.,* 603 F. Supp. 2d 1336, 1349 (M.D. Ala. 2009).
[19] *See MacCluskey v. University of Conn. Health Ctr.*, No. 17-0807-cv, 707 F. App'x 44, 47 (2d Cir. Dec. 19, 2017).
[20] *Jackson v. Cintas Corp.*, 391 F. Supp. 2d 1075, 1091 (M.D. Ala. 2005) (internal quotations omitted).
[21] *Edwards,* 603 F. Supp. 2d at 1349.
[22] *See, e.g., Gentry v. Export Packaging Co.*, 238 F.3d 842, 849 (7th Cir. 2001).
[23] *See, e.g., Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 187-88 (4th Cir. 2001) (noting that district manager failed to recognize plaintiff's complaint of racial harassment, and instead downplayed the complaint by responding that the harasser "did not mean anything" by his racial slurs.).
[24] *Dolman v. Willamette Univ.*, No. CV-00-61-HU, 2001 WL 34043744, at *13 (D. Or. Apr. 18, 2001) (stating that an employer is liable for a hostile work environment unless it takes "adequate remedial measures in order to avoid liability," and such actions should be "reasonably calculated to end the harassment.").
[25] *Gentry*, 238 F.3d at 845.
[26] *Id.* at 849.
[27] *Id.*
[28] *Id.*
[29] *See McCluskey v. University of Conn. Health Ctr.*, No. 17-0807-cv, 707 F. App'x 44, 45, 47 (2d Cir. Dec. 19, 2017).
[30] *See, e.g., Porter v. Erie Foods Int'l*, 576 F.3d 629, 636 (7th Cir. 2009) ("[A] prompt investigation is the hallmark of a reasonable corrective action.") (internal quotation omitted).

[31] *See, e.g., White v. N.H. Dept. of Corr.*, 221 F.3d 254, 261 (1st Cir. 2000) (finding employer vicariously liable for supervisor's sexual harassment because it failed to handle internal investigation properly or timely, allowing the harassing conduct to continue); *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1097 (9th Cir. 2008) (concluding that employer failed to establish affirmative defense to vicarious liability of supervisors' harassment, in part because employer's only attempt to correct harassment came "after several months of plaintiff's alleged mistreatment by her supervisors").

[32] *See, e.g., Sharp v. City of Houston*, 164 F.3d 923, 931 (5th Cir. 1999) (concluding that an employer is deemed to have constructive knowledge of harassment by plaintiff's supervisor when it was aware of past complaints and failed to adequately supervise him, and it "tolerated an attitude of fierce loyalty and protectiveness within the ranks to the point that officers refused to address or report each other's misconduct").

[33] *See, e.g., Mula v. Abbvie, Inc*., No. 15-cv-6563-FPG, 2018 WL 501277 (W.D.N.Y. Jan. 22, 2018) (rejecting hostile work environment claim in a case involving alleged harassment by a supervisor, and noting that although the investigative process took time, this was due to the employer's thoroughness in investigating various subjects and witnesses involved).

[34] *See Johnson v. J. Walter Thompson U.S.A., LLC*, 224 F. Supp.3d 296, 308 n.6 (S.D.N.Y. 2016) (emphasizing that "the Second Circuit has held that a court may consider comments about other women that may not have been 'directed' at a plaintiff . . . as well as remarks that a plaintiff learns 'second hand'").

[35] *See, e.g., Cadena v. Pacesetter Corp.*, 30 F. Supp. 2d 1333, 1339-41 (D. Kan. 1998) (awarding $300,000 in punitive damages, where plaintiff who complained about harassment was told "that's just Charlie for you . . . the company would never fire [him] because he made too much money for the company" and "that was just how he operated," indicating the employer knew about the harassing supervisor's conduct but failed to timely respond); *Gentry*, 238 F.3d at 849 (upholding jury award of punitive damages where plaintiff complained about her supervisor's sexual harassment and was told that "was just [the harasser's] personality, that was how he worked . . . He-had-been–there-for–years type thing . . . [t]here was really nothing that had ever been done about it and she didn't think that there ever was [going to be anything done"]).

[36] *See e.g., Cadena v. Pacesetter Corp.*, 30 F. Supp. 2d 1333, 1339-1341 (D. Kan. 1998) (awarding $300,000 in punitive damages, where plaintiff who complained about harassment was told "that's just Charlie for you . . . the company would never fire [him] because he made too much money for the company" and "that was just how he operated," indicating the employer knew about the harassing supervisor's conduct but failed to timely respond); Gentry, 238 F.3d at 849 (upholding jury award of punitive damages where plaintiff complained about her supervisor's sexual harassment and was told that "was just [the harasser's] personality, that was how he worked . . . He-had-been–there-for–years type thing . . . [t]here was really nothing that had ever been done about it and she didn't think that there ever was [going to be anything done"]).

[37] *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000).

[38] *Ogden*, 214 F.3d at 1003-04.

[39] *Id.* at 1005.

[40] *Id.* at 1007.

[41] *See Johnson v. J. Walter Thomas U.S.A., LLC*, 224 F. Supp.3d 296, 314-15 (S.D.N.Y. 2016) (declining to grant 12(b)(6) motion to dismiss retaliation claim where plaintiff alleged that she was placed on paid leave following employer's receipt of a letter from her lawyer, and after promising and failing to conclude an internal investigation within a week, the employer placed development of her department on hold and criticized her work ethic and her credibility).

[42] Lack of knowledge of the accused's prior history was among the factors that was found to justify a verdict against the employer in *MacCluskey v. University of Conn. Health Ctr.*, 17-0807-cv, 707 F. App'x 44 (2d Cir. Dec. 19, 2017). In that case, the alleged harasser was disciplined for sexually inappropriate behavior in 20000, and given a "last chance" agreement which provided for termination upon "any future instances of unsolicited flirtatious letters or comments to any employee, or any behavior similar to this.'" *Id*. at 45. At some point between 2009 and 2010, a different individual began complaining about the alleged harasser. No action was taken at the time of those initial complaints, and although the employer subsequently conducted an investigation following receipt of a 2011 report, the court deemed it problematic that the supervisor who became aware of the initial complaint was not aware of the existence of the "last chance"

agreement, as "such knowledge surely would have provided reason for a more probing inquiry" about the initial complaint. *Id*. at 47.

[43] *Banner Health System*, 358 362 N.L.R.B. No. 137 (June 26, 2015).

[44] *Turner v. Saloon, Ltd.*, 715 F. Supp.2d 830, 836 (N.D. Ill. 2010).

[45] *See, e.g., Nicholas v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 876 (9th Cir. 2001) (noting that employer failed to take prompt remedial action when it made no effort to investigate plaintiff's complaint, it did not demand the unwelcome harassment cease, and it did not threaten more serious discipline should the harassment continue, and employer "placed all of its remedial burden on the victimized employee by conditioning its response on [plaintiff's] reports of further harassment;" therefore, it was unable to assert an affirmative defense); *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 177-78 (4th Cir. 2009).

[46] *See, e.g., Jones v. Southeastern Pa. Transp. Auth*., 796 F.3d 323 (3d Cir. 2015) (finding that employer acted appropriately where the employer "conducted an investigation, made findings, developed a 'plan of action',' required [alleged harasser] to attend counseling session, and gave him a demerit on his evaluation," and rejecting argument that remedial action was not sufficient because alleged harasser had not been trained until after plaintiff's complaint).

[47] For a recent analysis of a defamation claim against the author of an internal investigation report, *see Turner v. Wells*, No. 16-16692, 2018 WL 456955 (11th Cir. Jan. 18, 2018) (affirming trial court's dismissal of complaint for failure to state a claim on several grounds, including that certain challenged statements were "pure opinion and nonactionable," and because the plaintiff was a public figure who was therefore required to, but did not, allege in a non-conclusory manner that the defendants acted with malice in drafting and publishing the report).

[48] *See, e.g., Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1106 (9th Cir. 2000) (alleging separate claims for sexual harassment and retaliation).

[49] As courts have emphasized, a retaliation claim is "not dependent on the merits of the underlying discrimination complaint." *Eichler v. Am. Int'l Grp., Inc.*, No. 05-cv-5167, 2007 WL 963279, at *15 (S.D.N.Y. Mar. 30, 2007).

[50] Because employees and management may be mistaken about what might be considered retaliatory conduct, specific examples may be necessary. *See, e.g., Ogden v. Wax Works, Inc.*, 214 F.3d 999, 100304 (8th Cir. 2000) (finding retaliation when plaintiff rejected her supervisor's advances, and responded by criticizing her work performance, screaming at her over work issues, conditioning her work evaluation on her "willingness to submit to his advances," and refusing her vacation request).