The Witness Files

THE 10 MOST DIFFICULT PEOPLE YOU'LL ENCOUNTER IN WORKPLACE INVESTIGATIONS AND HOW TO DEAL WITH THEM

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The Witness Files

Workplace investigations are like snowflakes – no two are exactly alike

Over time, however, it seems there are types of witnesses we meet again and again. Even across different types of investigations, we see complainants, alleged wrongdoers, and third party witnesses exhibiting very similar behaviors.

As we get to know these types of witnesses, we find out what strategies tend to work to best interact with them to meet our overall objectives:

- gathering information
- responding appropriately to our findings
- optimizing future workplace conduct

Because the investigation interview is the foundation of any workplace investigation, it's important to develop the knowledge and skills needed to handle investigation interviews with all different types of employees. Some investigation interviews are straightforward, but more often they require an understanding of human nature and of the laws that govern the way we operate in today's workplace.

This eBook introduces 10 different types of witnesses an investigator is likely to encounter during a workplace investigation and explains how to handle each situation to get the information you need while managing the risk to the company.

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THIS EBOOK IS NOT INTENDED TO BE A SUBSTITUTE FOR PROFESSIONAL LEGAL ADVICE.

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The Poor Performing Complainant

Managing retaliation claim risks in workplace investigations can be tricky

MEET:

PAULA THE POOR PERFORMER

READ MORE ›

Paula's complaint of sexual harassment is complicated by another ongoing work-related issue.

Our first investigation involves Paula and her claim of sexual harassment. But things aren't as straightforward as they seem.

Paula has made what, based on the initial information that is available to you, a well founded complaint of sexual harassment. For the purposes of this example, let's assume that Paula's complaint is against a manager (Mike) in another department with no supervisory authority over her. Specifically, Mike has been sending highly inappropriate e-mails of a sexual nature to Paula on the company e-mail system. We have no reason to believe that Paula's supervisor is aware of Mike's e-mails.

Pretty straightforward so far right? This is not a "he said, she said" situation with the challenges that go along with those. You should be able to establish that the e-mails do or do not exist, evaluate them, and take the appropriate actions in response.

COMPLICATIONS

What makes this complaint more complicated is that Paula is on a written performance-based warning. She is a telephone customer service representative, and her supervisor Sara has been trying for some time to get Paula to improve what Sara thinks is subpar customer relations skills. It is not an issue that has warranted termination yet, but Paula is a weak performer who does not seem to improve, and knows she is not far from termination. The company probably would have fired her already, but Paula's prior supervisor's evaluations and written documentation were not quite as strong as we would have liked, so we want to be sure it is clear we have given her every chance to succeed. We literally were planning to meet with her this month to evaluate her progress since the last discussion about her performance.

INVESTIGATE EVERY COMPLAINT

Let's start with the easy part – of course we have to investigate Paula's complaint. The obligation to provide both Paula and other employees with a working environment free from such unwanted e-mails is non-negotiable. And as described above, we have made that scenario fairly easy.

Mike will receive whatever disciplinary action is warranted based on the egregiousness of the e-mails, reasonable steps will be taken to minimize the likelihood it will happen again, and a resolution will be communicated to Paula, including an open invitation for her to let the company know immediately if there are further issues.

RISK OF RETALIATION CLAIM

Of course, Paula's complaint raises the potential of a retaliation claim for any job action against her. Paula has placed herself in the legally protected class of people who have complained about unlawful conduct. By mere proximity in time, any disciplinary action against her carries with it some risk that she will claim the disciplinary action was motivated by her harassment complaint. Her performance

THE POOR PERFORMING COMPLAINANT

KEY POINTS:

- This is not a "he said, she said" situation.
- You should be able to establish that the e-mails do or do not exist, evaluate them, and take the appropriate actions in response.
- The situation is complicated by the fact that Paula is a weak performer who knows she is not far from termination.

issues, while quite real, are somewhat subjective in nature so leave room for debate, and as noted the file is not as solid as we would like.

MANAGING THE RISKS

There are at least three critical aspects of managing the inherent retaliation risks associated with taking action against Paula. One is to manage Sara. Sara will need to hear about Paula's complaint, and she will be livid. Sara already feels like you are holding her back on getting rid of an employee who is dragging her team down, and she will see the complaint as potentially delaying the appropriate inevitable termination. (More on that below.)

It is critical that we keep Sara from making angry communications – to Paula, to Mike, to HR, really to any non-legal personnel (i.e. communications with legal personnel will likely be privileged, anything else is discoverable).

With very few exceptions, it is advisable to communicate first with Sara in person rather than sending an e-mail in effect inviting an angry e-mail in response. Sara needs to understand that achieving the business goal of optimizing her team's performance will be much more easily accomplished if you deliberately manage the situation together.

Second, with Paula, it is important to carefully craft communications to avoid any suggestion that the two situations – the harassment and the performance – are linked. Generally this will mean keeping the two tracks separate. Because they are.

However, there is a point where it may seem contrived to completely divorce the two situations. For example, as noted there is an imminent performance discussion to be had with Paula. If you do not interact frequently with Paula, it could seem almost suspicious to communicate with her separately about the two situations very close in time when you rarely have occasion to communicate with her. In such a circumstance, it may be advisable to acknowledge the existence of the dual situations, and specifically note their separateness:

Paula, we have two separate things we need to discuss. One is that I need to follow up with as quickly as possible about your complaint about Mike. Second is that as you know, you and Sara and I have to schedule our discussion about your performance. Let's take care of the situation with Mike first, assuming we can get through that fairly quickly, we can schedule the other meeting soon after that. Okay?

Each employee scenario is a little different, but these seemingly minor communications can become critical as they get picked apart in a retaliation case, so it will be advisable to walk through them with your regular employment counsel to strike the right balance on these communications.

Finally, do you slow down on personnel actions against Paula because of this complaint? The answer to this question will also vary with each situation, and again you should discuss it with counsel. We would like to think that the two issues can be kept entirely separate, but the truth is Paula's termination does become higher risk because of the complaint. Whether we like it or not, it may affect your timing.

THE POOR PERFORMING COMPLAINANT

KEY POINTS:

- Communicate first, email second.
- Avoid any suggestion that the two situations – the harassment and the performance – are linked.
- Follow up as quickly as possible.

In the scenario described here, defending the termination is not a slam dunk – there are subjective aspects to the decision, and less than optimal documentation of past issues. Terminations under those circumstances are somewhat trickier than those involving more "measurable" issues and/or with a strong history of documentation.

In short, the combination of what seem to be two relatively straightforward situations creates complications greater than the sum of the parts. Your team needs to carefully work through it to minimize risk to the company.

THE POOR PERFORMING COMPLAINANT

KEY POINTS:

- The combination of seemingly straightforward situations can be more complicated than it looks.
- Work through the issues carefully and separately to minimize risk to the company.

NEXT ›

THE SQUEAMISH SUPERVISOR
Unaddressed workplace misconduct can increase liability for your business.

2

The Squeamish Supervisor

Unaddressed workplace misconduct can increase liability for your business

MEET:

SQUEAMISH STAN

READ MORE ›

Stan is involved in a workplace investigation involving sexual harassment allegations, but Stan is neither the accuser nor the accused.

In this chapter, the spotlight is on Stan, the Vice President of Sales, who wants to keep his star salesman on the team.

The issue involves a workplace investigation of sexual harassment allegations, but Stan is neither the accuser nor the accused. Rather, both of those individuals work for Stan.

THE SITUATION

Marilyn and Jim are both sales representatives in Stan's department. They have fairly regular contact with each other, and Marilyn has complained to HR for the second time about Jim's highly off-color comments, unabashed internet surfing of sexually explicit material, and very inappropriate comments about Marilyn appearance.

Jim does not deny some of the comments, though generally his version of events involves less offensive statements than Marilyn's. But third parties have witnessed some of the communications and there is no question that Jim is way over the line.

After the first complaint, Jim received a written warning and a series of counseling sessions with a coach to give him some training on appropriate workplace behavior. And Jim did well for a few months after that. But just six months after the first complaint, Jim was at it again, Marilyn was back to HR, an investigation was conducted, and again there was little doubt about Jim's conduct. He is a repeat offender, and one has to wonder if he is incorrigible.

MANAGER'S DILEMMA

It will be no surprise to readers that HR and legal counsel have determined that more serious action needs to be taken against Jim. Termination is recommended, though a significant unpaid suspension might be acceptable to the HR/legal team.

When Stan is confronted with this recommendation, however, he is adamantly opposed to any such action. Of 17 sales reps in the department, Jim is the second most productive. The pressure is on to have a great year and Stan cannot afford to have Jim on the sidelines, not for a significant suspension, and certainly not terminated. Stan is taking this to the CEO. Of course, this is a common scenario – a manager who is reluctant (at best) to lose an otherwise productive employee because of a harassment complaint or other disciplinary issue. It is a classic conflict in many organizations.

HIGH RISK OF LIABILITY

The liability prevention answer to this predicament is not particularly difficult given the fairly extreme version presented here. If the company lets Stan's opinion carry the day, Jim will likely continue his conduct, and Marilyn – or some other employee offended by Jim already or in the future – would seem to have a lucrative potential claim on her hands. The company has failed to adequately address a known serial harasser. Not to

THE SQUEAMISH SUPERVISOR

KEY POINTS:

- Serious action needs to be taken against Jim for his comments.
- A manager who is reluctant to lose a star player despite his bad behavior puts the company at risk.
- The company has failed to adequately address a known serial harasser.

take strong action against Jim is high risk behavior from a liability prevention standpoint.

And there are CEOs (though I think a shrinking small minority) who would acknowledge that risk, yet yield to Stan's argument on the basis that the cost of terminating Jim from a production standpoint is greater than the cost of the risk of continuing to employ Jim. Given the cost of a harassment verdict with these kinds of facts, that balancing decision is probably factually incorrect these days (again, noting I have set out fairly extreme facts), but it is a decision that will sometimes be made.

INDIVIDUAL LIABILITY

Are there any strategies that can be employed with Jim and/or Stan and/or the CEO by the investigator to reduce the likelihood of such a standoff? One, to the extent there may be individual liability for any or all of them under the applicable state law, that is usually compelling information to a manager. To the extent Jim may have personal liability (less likely given his co-worker status unless his behavior is so egregious as to raise possible tort claims against him), that should be made clear to him in the investigation process under any circumstances.

Stan and the CEO as managerial employees are more likely to have individual liability under various states' laws. There may be court decisions in your state underscoring that risk. Make sure your counsel makes all affected parties aware of any such exposure, not only in the investigation stage but also when conducting managerial training.

CONCESSIONS TO REDUCE RISK

Two, while it seems clear that Jim is a walking liability who may never get the wake-up call, and if he does it will only be if he gets hit hard in his wallet, if Jim is not to be terminated, perhaps some adjustments to the workplace can reduce the ongoing risk of Jim's behavior. Perhaps his office can be relocated to a place where he can be more closely observed and monitored. If he is on the road a lot, does he need to be in the office at all?

Certainly Marilyn should be assured of no contact with Jim, but in a way that cannot be perceived by her as limiting her opportunities. For example, relocating Marilyn to another location in the office may be perceived – not only by her but by judges and juries – as a retaliatory adverse action against her. In limited circumstances Marilyn might agree to such a relocation, but that is something that needs to be handled very delicately because of the retaliation risk.

As noted, the fairly extreme facts presented here – no question as to the harassment and an openly opposed supervisor – are unusual, but the general tension between managing harassment or other kinds of liability related to compliance failures on the one hand, and keeping otherwise productive employees, is very common. And it is legitimate for a company to be balancing those two considerations. The most successful companies seem to be those that have a culture of being utterly mission-driven, and intolerant of things that distract from that mission and will likely have little ambivalence about taking against Jim the action warranted by the facts uncovered in the investigation.

THE SQUEAMISH SUPERVISOR

KEY POINTS:

- Managerial employees are more likely to have individual liability under various states' laws.
- The cost of a harassment lawsuit would likely outweigh the benefit of Jim's productivity.
- Avoid making adjustments in the workplace that could be construed as retaliation against Marilyn.

NEXT ›

RELUCTANT RUBY
Careful coercion may be necessary to get a witness to provide the information you need.

3

The Reluctant Innocent Bystander

Careful coercion may be necessary to get a witness to provide the information you need

MEET:

RELUCTANT RUBY

READ MORE ›

Ruby is a third party we know has important information for the investigation we are conducting, but is reluctant to share it with the investigator.

THE RELUCTANT INNOCENT BYSTANDER

KEY POINTS:

- In a "he said, she said" situation, talking to witnesses is critical.
- A reluctant witness may have legitimate concerns about providing information.

In this chapter, we will discuss Ruby, the third party we know has important information for the investigation we are conducting, but is reluctant to share it.

Why is Ruby important? Many workplace investigations involve unrecorded personal interactions about which two protagonists have very different recollections and/or reports.

HE SAID, SHE SAID

Even in this electronic age where more and more personal interactions are, for better or worse, memorialized in various ways online, there are still of plenty of "he said, she said" situations. If these protagonists are our only two witnesses about this interaction, and neither provides an obvious basis for questioning his or his credibility, it can put the investigator and the employer in a difficult situation.

Consider the most common such scenario, the complaint of sexually inappropriate conduct by a supervisor towards a subordinate. If we believe the supervisor, at least to some degree we inherently do not believe the subordinate and do not act on her expressed concerns, at least as much as she would like. If we believe the subordinate, at least to some degree we inherently do not believe the supervisor and take remedial actions against him. Either step has potential liabilities, the first to the subordinate, the second to the supervisor.

ANOTHER VIEWPOINT

While there are strategies for balancing the competing concerns in such a stalemate, as an investigator seeking to determine what really happened, that objective is aided by having somebody who has observed interactions between our two lead characters. When somebody says, "You should talk to Ruby, she was there," talking to Ruby becomes critical. Every witness' credibility must be scrutinized and Ruby is no different, but on its face Ruby is the closest thing to a disinterested witness you will have. That is not to say either of the protagonists' credibility is suspect, it is not, but both are deeply invested in the outcome of the investigation in a way that Ruby probably is not.

But Ruby does not always want to talk. Ruby may report to the same supervisor as the complainant and be concerned about her own job if she provides information that may be harmful to her boss. The flip side may be true as well. While the subordinate lacks the ability to directly influence Ruby's job the way the supervisor might, Ruby may consider her a friend. If Ruby feels the subordinate's concerns are not well founded, she may be concerned about being perceived by the subordinate or colleagues as somehow being disloyal. Or, Ruby may simply "not want to get involved" – few who are witnesses to a car accident are glad that they were and that they will need to be involved in various proceedings that do not directly concern them. It's inconvenient.

BUILDING RAPPORT

Usually pleasant persistence and persuasion is the place to start with Ruby. “There have been some concerns expressed and the company has an obligation to follow up on them and determine what happened. I just need a little of your time and help to do what the company has asked me to do.” This approach can make it more of a personal matter between you and Ruby. She may be more likely to help you as an individual than she is to help out “the company” or a faceless process. It is harder to say “no” face to face to a person than it is to an unseen entity or thing.

This scenario highlights the importance of building rapport in an investigator’s toolbox. In certain situations that we expect to involve one or more Rubys, it may also counsel us to select an inside rather than outside investigator, because an inside investigator may already have such a rapport with Ruby and can draw on a reservoir of positive interaction to draw her out. An outside investigator may have more difficulty in doing so. This is but one factor in selecting the right investigator for the situation, but warrants consideration.

USING COERCION

Regardless of the investigator, if persuasion does not work, some degree of coercion may become necessary. Ideally the company’s inappropriate workplace conduct/harassment policy states that all employees have an obligation to cooperate in workplace investigations. (If you do not know that your policy has such a statement, go check now! This is an easy and potentially valuable fix.) If it does, tell her that. Even if it does not, employees have an obligation to follow lawful directives from their employer and, yes Ruby, the employer is making you have this conversation. And while you are telling her this, give her the same assurances against retaliation that you are giving the complainant, and memorialize that you have done so.

This element of coercion must be balanced with our goal of obtaining as much information as possible from Ruby in order to have the most thorough possible investigation. If we have gone this far, Ruby probably is not going to really spill her guts to us, but you never know. Thus, to the extent we can keep Ruby somewhat comfortable while still forcing her to do something she does not want to, it will maximize the amount of information obtained.

Rarely does it get to the point where Ruby still won’t talk. Actually disciplining her for failure to cooperate can certainly be delicate under these circumstances, but the employer needs to maintain the integrity of the investigation process. If you are not consulting with counsel about your investigation already, you will want to do before taking that step with Ruby.

THE RELUCTANT INNOCENT BYSTANDER

KEY POINTS:

- Start with pleasant persistence and persuasion.
- Move to coercion if necessary.
- Consider whether to use an inside or outside investigator.
- Ideally the company’s inappropriate workplace conduct/harassment policy states that all employees have an obligation to cooperate in workplace investigations.

NEXT ›

THE HIGH-RISK HARASSER
Workplace harassment investigations represent liability for employers.

4

The High-Risk Harasser

Workplace harassment investigations represent liability for employers

MEET:

HANK THE HARASSER

READ MORE ›

The central concern in most workplace harassment investigations is the employer's potential liability to the complaining party.

The central concern in most workplace harassment investigations is the employer's potential liability to the complaining party.

Appropriately so – there are decades of verdicts and decisions evidencing the potential liability for employers who do not address hostile environments and other workplace harassment situations.

But consider these scenarios: Hank and Harry are both accused of highly inappropriate communications towards Mary. Hank is Mary's African-American co-worker. Mary is white, as is Mike – another co-worker who last year was accused of similar conduct and received a written counseling.

4 PEOPLE, 1 ISSUE

Harry is the CEO. He is well known in the community and the industry and, of course, highly compensated. He is in the second year of a five year contract that may be terminated only for cause. Assume for purposes of this scenario that, while third parties report some borderline comments by both Hank and Harry, Mary's statement is the only evidence of egregious harassment.

While Hank and Harry are in very different places in the organization, their reactions when confronted are similar – both are outraged. Each claims that Mary is a serial complainer, engages in loose workplace talk herself, and that, while he should perhaps have been more careful in how he responded to her, the complaint is Mary's way of protecting her own job.

Hank indicates that he is going to seek legal counsel, and alludes to the situation with Mike and that it would be discrimination if he were to be subject to more serious discipline than Mike. Harry takes the offensive even more aggressively, stating that his professional reputation is at stake and that even asking other employees about Mary's allegations against him will damage his professional and community standing.

2 KINDS OF LIABILITY

Hank and Harry illustrate two potential types of liability the company may have towards the accused. I am separating Hank and Harry into separate "sub scenarios" because, while both illustrate the general point of potential liability to accused harassers, it does seem that the two scenarios (potential discrimination against Hank, defamation against Harry) tend to arise separately rather than with the same individual. Whether the accused has expressly raised liability scenarios as Hank and Harry have, the employer has to account for this possibility and take steps in investigations to protect itself.

INVESTIGATE TO REDUCE RISK

First, any accused – regardless of his apparent initial degree of culpability – needs to understand that the company rarely, if ever, has any reasonable choice under the law but to investigate any claim of workplace harassment. It is the only way to protect the company and, for an innocent accused, it is the

THE HIGH-RISK HARASSER

KEY POINTS:

- There are decades of verdicts and decisions evidencing the potential liability for employers who do not address hostile environments.
- The company has to account for the possibility of liability and take steps in the investigations to protect itself.

best way to protect the accused as well. What constitutes an appropriate "investigation" will vary with each situation – airlifting in a team of lawyers is the exception and not the rule – but the company has to take steps so that it can demonstrate in any future legal proceeding that it fulfilled its obligation to respond promptly and appropriately.

CONDUCTING INTERVIEWS

Indeed, all participants in the investigation should be advised, in writing, prior to their interviews, of the following:

- Allegations have been made and the company is required by law to investigate them.
- The company has made no conclusions as to the truth (or not) of the accusations and will not until it has gathered available information.
- The individual being interviewed is expected to keep the investigation confidential. (Consult with counsel about how you communicate this in light of concerns expressed by the National Labor Relations Board.)
- The individual is required to share with the investigation all information requested and known to him/her.

Documentation of these communications to every participant in the investigation – complainant, accused, third party witnesses – will provide a great degree of protection to the company against any claims by the accused that the company has rushed to judgment. The documentation will be particularly valuable against defamation claims – it will be very difficult to prove that the company spread false information about the accused if every witness has signed off on the above points.

JUSTIFY ADVERSE ACTION

With respect to potential discrimination claims, the outcome of the investigation will be of course be important. As with any adverse action, it is important for the employer to be able to demonstrate that it has proceeded thoughtfully and based on facts and not assumptions or improper biases. As with any adverse action taken against an individual in a legally protected class, the stakes of being able to make that demonstration are higher.

Finally, as with any adverse action taken against an individual in a legally protected class where there is an obvious point of comparison with an individual not in the protected class, if the employer treats the two individuals differently, it needs to be able to provide a business justification for the different treatment. In this case, if Mike and Hank are the subjects of similar accusations with similar evidence behind them, the steps taken towards Mike will be a critical point of reference. If the company is going to take more serious action against Hank, it needs to be able to explain the difference between the situations – convincingly.

THE HIGH-RISK HARASSER

KEY POINTS:

- The company has to take steps so that it can demonstrate in any future legal proceeding that it fulfilled its obligation to respond promptly and appropriately.
- Documentation of all communication will provide protection against claims that the company has rushed to judgment.

Workplace harassment investigations present competing liabilities towards different employees probably more than any employment law situation. Balancing these sometimes competing potential concerns requires experience, judgment, and caution – and documentation that the company is exercising each of those.

THE HIGH-RISK HARASSER

KEY POINTS:

The company will need to provide justification if it treats the two subject differently.

NEXT ›

THE CLUELESS, YET COMPLIANT, ACCUSED
Carl needs a reality check.

5

The Clueless, Yet Compliant, Accused

Carl needs a reality check

MEET:

CLUELESS CARL

READ MORE ›

Carl, a middle aged middle manager, has been accused of repeated sexually inappropriate comments in the presence of adult but much younger women in the workplace.

Our next featured witness is the clueless, yet compliant, accused employee.

For reference call him Carl. Carl, a middle aged middle manager, has been accused of repeated sexually inappropriate comments in the presence of adult but much younger women in the workplace. Unlike many employees accused of such comments, when confronted Carl owns up to most of the alleged comments. No blanket denial, no spin, no questioning the accuser(s), no trying to defend the context.

Carl is old enough and intelligent enough to know better, but he doesn't. He is not a pervert. In the company of these younger women, he is perhaps a bit transported to his younger days, and engages in topics of discussion in which somebody in a position of authority should not be engaging with these young women. Carl has not propositioned these young women, nor do I think that he would. He is simply clueless.

THE REAL CARL

I have a composite Carl in mind. That real-life composite Carl got a pretty good kick in the pants from his employer, delaying a possible promotion. He also had to undergo training, including some from yours truly. Carl "got it," corrected his behavior, got back on track, and by all accounts has not repeated the behavior. When he sees me, he actually thanks me for being part of the process that put him on the straight and narrow (not to mention probably preventing him getting sued had he continued his behavior).

It does not always work this way, of course. But you will meet Carls in workplace investigations and, on balance, when you do it will usually make your job and the company's job easier. (Carl does not need to be a man, of course. My composite Carl is a man, and the fact is that most Carls will be men, but there could be a harassing woman, or somebody accused of things other than sexually inappropriate comments, who fits much of the description of Carl.)

AN EASY CASE

You will have many fewer credibility issues to resolve. And because Carl is owning much of the behavior alleged against him, any select denials will often be more credible than those of an accused who denies most or all of the allegations against him.

Carl also will make it easier to accomplish the forward-looking goals of our investigation, i.e. a plan to avoid future inappropriate conduct. If Carl is committed to correcting his conduct now that he has been jarred out of his clueless state and back to reality, this has all the makings of a successful investigation. In that sense, Carl is an easy case.

DANGERS OF LENIENCY

The challenge with investigating Carl is to not let his compliant nature influence the employer to be too lenient on Carl. For starters, we do not know when we are interviewing Carl that he is the sincerely remorseful and compliant wrongdoer that he claims to be.

THE CLUELESS, YET COMPLIANT, ACCUSED

KEY POINTS:

- When confronted, Carl owns up to most of the alleged comments.
- The challenge with investigating Carl is to not let his compliant nature influence the employer to be too lenient.

We have all seen people who, because they are busted, fall on their swords thinking that will minimize the measures taken against them. A year later, they may be back on our desk with a new set of complaints. If that is the case, the potential liability to the employer has increased exponentially. Now we don't just have a harassing supervisor, but we have a harassing supervisor of whom we are on prior notice.

Even if the Carl before us is in fact compliant and will mend his ways such that he is unlikely to present further risk of liability to the employer, how the employer handles Carl may affect other future legal matters not involving Carl.

If the employer responds to Carl in a manner that does not seem at all proportionate to the alleged behavior, the employer's soft response may be used against it in unrelated future legal matters involving the complainant against Carl, or in matters involving neither Carl nor the complainant. (Yes your lawyer can and should object to the introduction of those matters in other court proceedings. That could be a post unto itself but suffice it here to say that maneuver will sometimes work, sometimes not.)

APPROPRIATE CONSEQUENCES

Certainly juries should understand that Carl's misconduct would be dealt with somewhat less severely than that of a wrongdoer who was not entirely forthcoming in his investigation interview, but it will likely be important to a jury that Carl not be viewed as having "gotten off" without some consequences for his conduct. Even if more clueless than contemplated, Carl's workplace conduct was inappropriate.

THE CLUELESS, YET COMPLIANT, ACCUSED

KEY POINTS:

- How the employer handles Carl may affect other future legal matters not involving Carl.
- It is important that Carl not be viewed as having "gotten off" without some consequences for his conduct.

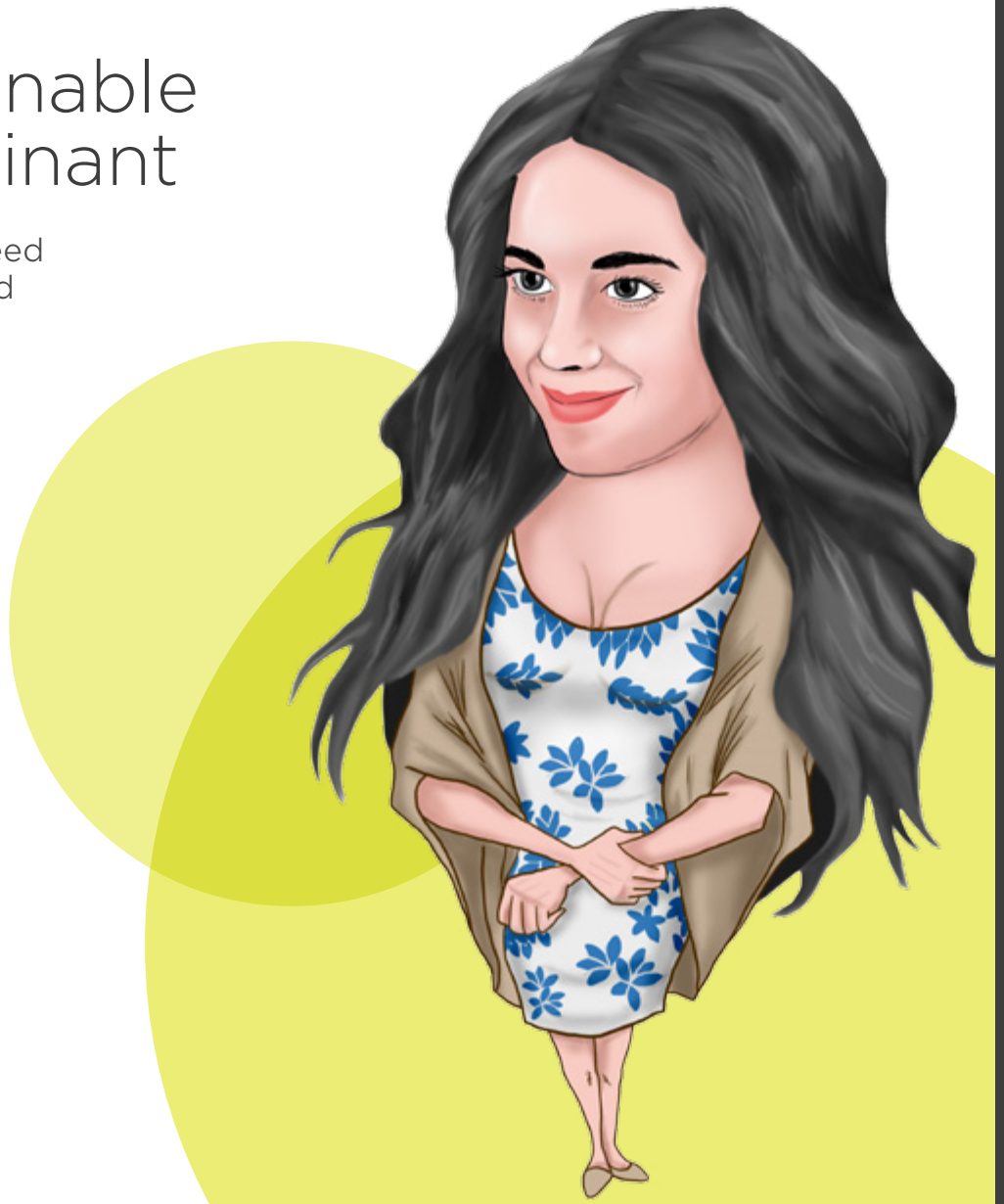
NEXT ›

THE QUESTIONABLE COMPLAINANT
All complaints need to be investigated.

6

The Questionable Complainant

All complaints need to be investigated



MEET:

DUBIOUS DONNA

READ MORE ›

It's easy to be skeptical when Dubious Donna, a marginal employee, complains about her above-average co-worker.

Thus far, all the scenarios have involved inappropriate workplace conduct, some more egregious than others but all things we would likely agree an employer needs to prevent in the workplace.

Such scenarios are seemingly a timeless feature of the workplace. No matter how much employers train, educate, manage, and apply carrots and sticks to eliminate inappropriate workplace behavior, decades of experience make it clear that inappropriate conduct is a fact of life, requiring employers' attention in order to minimize it and resulting liability.

THE COMPLAINANT

But we also know that not every complaint is valid, which brings us to Dubious Donna. Donna comes to you with a complaint about Maurice. Donna and Maurice are both customer service representatives (CSRs). They work in a large area of cubicles with a team of a dozen other CSRs. Donna is a 10-month employee. Her job performance consistently but barely meets the company's productivity standards. She uses her paid time off soon after she accrues it, and seems to do so by calling off sick on Monday mornings.

THE ACCUSED

Maurice is a five-year employee. His productivity is above average. He is content where he is and does not seem interested in pushing to the next level as a candidate for a management position, but he is a rock-solid employee who has literally never presented a management issue. He is married with a young child.

THE SUPERVISOR

Sarah supervises the CSR time. Sarah is 45 years old. She has been with the company nine years. She started as a CSR herself, and a few years ago was promoted. She is a strong supervisor, and is very hands-on working with her team and by all appearances is as well-liked by them as a supervisor can be.

THE COMPLAINT

Given these profiles, and despite your ingrained hyper-vigilance on such issues, your first reaction is to be skeptical when Donna tells you that Maurice has acted inappropriately towards her and it is making her uncomfortable in the office. First, she says, he very obviously "looks her up and down" and leers at her when she walks by him. He also makes comments about her appearance, not highly explicit but he uses words like "hot" and other descriptions that go beyond a friendly, "You look nice today." (It is not the purpose of this post to discuss whether a male should even say that to a female co-worker.) She says she does not want to get him fired, she just wants it to stop.

Donna is somewhat unclear on details when you ask some initial follow-up questions. For example, she cannot be very specific about actual statements made by Maurice. In addition to what you already know

THE QUESTIONABLE COMPLAINANT

KEY POINTS:

- Inappropriate conduct is a fact of life, requiring employers' attention in order to minimize it and resulting liability.
- Not every complaint is valid.
- Donna is somewhat unclear on details when you ask some initial follow-up questions.

about Maurice, this causes you to further question the truth of Donna's report. She also can identify no employees she thinks might be able to verify the reports, even though, when asked, she says that Maurice's comments are made in a normal tone of voice in what is a very open and busy work area.

DON'T JUDGE

You thank Donna for making you aware of her concerns, and let her know you will be back with her shortly. As she leaves, you are fairly confident Maurice has not actually engaged in the alleged behavior.

However, it is important that you follow your usual process and not base your handling of the complaint on your initial judgments. If you are experienced in investigating workplace complaints and highly sensitized to inappropriate behavior, your initial reaction might very well be accurate. However, the worst position for the company (and you) to be in is for a future plaintiff's lawyer to be able to characterize you as having a default assumption that a "good guy" like Maurice would not do this. There are plenty of examples of "good guys" who, to our surprise, have engaged in inappropriate behavior.

Whatever you do, do not memorialize your initial reactions in an e-mail, which would be subject to discovery and invite such a mischaracterization of your approach to these issues.

FOLLOW THE PROCESS

Work through your process as with any other complaint. Not all complaints are equal and the scope of your investigation will vary depending on the severity of the allegations and the number of people who may be implicated.

As Donna has presented this to you this far, there are no identified witnesses. You will certainly need to talk to Donna and Maurice, presumably their supervisor, and perhaps a co-worker or two who is in a position to observe their interactions and is likely to give you an objective report.

So this may be a relatively small investigation in scope, but put your blinders on and work through these steps, focusing on the specifics of this situation. If a judge or jury or EEOC investigator picks up your file on the matter a year from now, it should reflect that Donna's and Maurice's productivity and Donna's attendance were not relevant to your conclusions.

JUST IN CASE

As with any complaint, if you cannot verify Donna's allegations but cannot prove they were made in bad faith, you will not take any action against Maurice, but you may take other steps to ensure an appropriate environment "just in case".

Heighten the supervisor's observations of Donna's and Maurice's interactions and document that you have done so. Schedule some training for the whole group. Consider reconfiguring physical working arrangements to heighten the visibility of interactions between the two employees.

THE QUESTIONABLE COMPLAINANT

KEY POINTS:

- Heighten the supervisor's observations of Donna's and Maurice's interactions and document that you have done so.
- Schedule some training for the whole group.
- Consider reconfiguring physical working arrangements to heighten the visibility of interactions between the two employees.

NO RETALIATION

Most importantly, even if Donna's complaint is not supported by the evidence, she cannot be retaliated against for making the complaint. (Viewing this most cynically, perhaps Donna knows this and that fact contributed, consciously or subconsciously, to her making the complaint.) This can be a challenge, because Donna has stirred the pot, and Maurice and/or Sarah, may be frustrated with her. Other employees who hear about this (which they will, regardless of whatever confidentiality restrictions the main players agree to) may distance themselves from Donna.

You will need to work with Sarah to manage the potential retaliation issue. Particularly since Donna is a marginal employee, you should also work with Sarah to manage Donna's performance, because if it gets to a point where Sarah wants to take corrective action against Donna for her marginal performance and/or her attendance, as a practical matter the bar is now set higher. Sarah's "case" will need to be stronger because action against Donna now carries a potential retaliation risk that will only gradually diminish over time, and Sarah needs to be able to make this case – but without over-managing Donna, which itself would appear retaliatory. Again, remember that, if you are not providing legal advice to Sarah, your communications with her are subject to discovery. The above strategic considerations openly memorialized in a non-privileged e-mail can hurt your case.

DOCUMENT FOLLOW-UP

Finally on the retaliation front, Donna must be advised (in writing) to let you know immediately if she has any concerns of retaliation. Given what you think is a questionable complaint already, it would be natural not to encourage more concerns, but better to be able to manage concerns if she has them – or to have documented your openness to them if she does not.

In some ways Donna's complaint might present more management challenges than if Maurice had engaged in the alleged conduct. Thus, while it is certainly good news if it appears there has not been inappropriate conduct, the situation will require careful attention on an ongoing basis.

THE QUESTIONABLE COMPLAINANT

KEY POINTS:

- Unless you are providing legal advice to Sarah, your communications with her are subject to discovery.
- Any action against Donna now carries a potential retaliation risk.

NEXT ›

THE COUNSELED COMPLAINANT
Don't panic! Follow 3 rules of thumb.

7

The Counselled Complainant

Don’t panic! Follow 3 rules of thumb

MEET:

COUNSELLED COMPLAINANT

READ MORE ›

When a complainant brings an uninvited and unwelcome guest to the investigation interview, look at the benefits of having an attorney present.

In this eBook I consider common issues that arise with witnesses in workplace investigations.

Some of the issues pertain to the complainant, some to the accused wrongdoer, and some to third party witnesses. Here we consider what to do when an employee brings a lawyer to the investigation interview. While any witness could have legal counsel, that arises most commonly with the complainant, so we will use that scenario as our discussion point. As always, be sure to consult with your own counsel for any rules and considerations unique to where you are doing business and to your company.

In one sense, a lawyer is not only an uninvited guest but usually considered unwelcome by employers. One common theme in my discussions of investigations is the importance of controlling the flow of information. The more the employer can control the flow of information, the easier it is to manage the investigation process and minimize the various risks associated with an investigation situation. Inserting a strong-willed lawyer who is paid to represent the interests of a single individual rather than those of the company can present a challenge.

ADVANTAGES OF COUNSEL

On the other hand, experienced and competent counsel for a complainant can sometimes be helpful in managing a potentially explosive situation. An experienced employee-side lawyer will recognize that the best result for his or her client may often be to find a solution that enables the employee to continue working at the company, not drive the matter towards litigation. The lawyer may understand better than the client the company's need to take some time to work through matters, and may be of assistance in counseling a client to maintain confidentiality.

Further, the presence of potentially adversarial counsel will often cause key top level people to give the situation the attention it deserves, which will often be helpful in crafting a resolution the company will stand behind. It can be easier for human resources and other personnel charged with overseeing investigative processes when their bosses are at the top of their games

I have seen plenty of examples of both positive and negative aspects of the presence of counsel, and how you manage counsel for the complaint will – like so many aspects of workplace investigations – depend on the specific situation. There are several rules of thumb to keep in mind when a lawyer shows up for the complaint.

3 RULES FOR WHEN AN EMPLOYEE HAS REPRESENTATION

1. Do not express disapproval to the employee. We all have the right to hire a lawyer. As discussed below, the scope of that lawyer's involvement may be limited, but the employer should not express a hostile reaction when learning of a lawyer's involvement, and management employees who learn of or must be told of the lawyer's involvement should be advised of this as well. Simply say to the employee, "Well,

THE COUNSELED COMPLAINANT

KEY POINTS:

- An experienced and competent counsel for a complainant can sometimes be helpful in managing a potentially explosive situation.
- The presence of potentially adversarial counsel will often cause key top level people to give the situation the attention it deserves.

please provide me with the contact information and we will determine how to follow up." (By the way, my experience is that one fairly common result is that the employee referencing some unnamed lawyer does not actually have one, so this calm response will best smoke out that scenario as well.)

Expressing negativity about the lawyer could later become evidence harmful to the company in a retaliation claim or perhaps even a wrongful discharge claim. The specifics of that will vary in different locations, but this is a good rule of thumb for all employers.

2. Communicate with the employee's lawyer only through counsel. There are certainly workplace investigations that do not require significant involvement of legal counsel, particularly if you have proactively worked with legal counsel to establish a decision making framework for when counsel should be involved. The involvement of legal counsel for a complainant should be considered a clear red flag for you to immediately consult with the company's legal counsel. With no disrespect to the many experienced and savvy human resources and other business professionals who may handle investigations, working directly with the employee's counsel is not usually a fair fight. At least make sure counsel for the company is consulted before any contact with an employee's counsel.

3. The employee's lawyer is not in charge. Generally the presence of a lawyer for the complainant should not dramatically change your action steps. I normally take the position that the presence of a lawyer for the complainant does not inhibit the employer's right and ability to communicate directly with its employees. This becomes somewhat more complicated if counsel for the company is conducting interviews because of lawyers' professional rules largely prohibiting us from communicating with parties who have representation. This is one potentially delicate area reinforcing the advice above to consult with counsel to ensure compliance with the laws applicable to your company.

Likewise, while you may often choose to allow the employee's lawyer to be present for his or her client's interview, this is a company process, not a trial. The lawyer does not normally have the right to be a full fledged participant and direct the course of the investigation. Normally this is not a problem, as lawyers recognize that their clients have to cooperate to some degree in order for the company to be able to remedy the situation, but at times there will be disagreement on this point that must be worked through.

In short, if a lawyer shows up for an employee in an investigation, don't panic. It is just one more aspect of the particular investigation to carefully work through while gathering as much information as the company reasonably can, then making a good decision about next steps based on the information obtained.

THE COUNSELED COMPLAINANT

KEY POINTS:

THE 3 RULES OF THUMB

1. Do not express disapproval to the employee.
2. Communicate with the employee's lawyer only through counsel.
3. The employee's lawyer is not in charge.

NEXT ›

THE GOSSIPY EMPLOYEE
Gossipy Grant is well-intentioned but disruptive.

8

The Gossipy Employee

Gossipy Grant is well-intentioned but disruptive

MEET:

GOSSIPY GRANT

READ MORE ›

Confidentiality in investigations can be tricky. Gossipy Grant takes it to another level.

Confidentiality is a tricky thing in workplace investigations.

Employers have to balance several somewhat conflicting considerations when addressing investigation confidentiality.

3 CONSIDERATIONS

First, most of us who are involved in workplace investigations feel that we can best do our jobs where the people who have relevant knowledge of the subject of the investigation do not talk to anybody except us. We want to control the flow of information as much as possible, and experience tells us that is beneficial in getting to the bottom of the complaint.

Second, though, absolute confidentiality presents challenges, for at least two reasons. Years ago, HR professionals, employment lawyers and even the EEOC recognized that it is not advisable to promise complete confidentiality to a complainant, because it is often not possible to fully investigate concerns without disclosing some aspects of the complaint, including the identity of the accuser.

More recently, the National Labor Relations Board has taken the position that a blanket policy of requiring confidentiality of employees involved in investigations could violate employees' rights to communicate about the terms and conditions of their employment under the National Labor Relations Act. Rather, employers need to make a particularized determination that confidentiality is necessary under the circumstances of the immediate investigation.

While this position has yet to be tested in the courts (and the NLRB's recent aggressive positions have failed some tests in the courts recently), employers should proceed carefully at least before taking serious disciplinary action against employees who violate policies or agreements to maintain confidentiality in an investigation.

Third, employers must face the reality that people talk. I always remember what one colleague told me in another context – everybody tells one person. Everybody. Think about it.

GOSSIPY GRANT

The focus of this chapter is the witness who tells more than one person. We will call this gossipy employee Grant. You interviewed Grant because, when his co-worker Carly complained that their boss Bob was making highly inappropriate comments of a sexual nature to Carly, she identified Grant as the only individual who had witnessed these comments firsthand. Like many employees, Grant is getting caught up in the workplace drama, particularly his central role in it. He is well intentioned and does not have any particular agenda, in fact he is taking this all very seriously and wants to help the company reach the best resolution.

So, despite having agreed with you that he would keep matters confidential, Grant begins talking to other employees about the situation. This first comes to your attention when one of those employees

THE GOSSIPY EMPLOYEE

KEY POINTS:

- The NLRB has taken the position that a blanket policy of requiring confidentiality in investigations could violate employees' rights.
- Think carefully before taking serious disciplinary action against employees who violate confidentiality agreements in an investigation.

comes to you, because it strikes him as odd that he is approached by Grant on this topic, and is wondering if there will be some more official conversation on the topic, such as with HR. While you are calmly thanking the employee for the inquiry and saying you will get back to him, your blood is heating up at Grant.

You talk to Grant and tell him that it will be most productive if he lets you, the person actually trained and employed to conduct this investigation, handle the investigation and you would appreciate it if he maintains confidentiality as you had discussed. This does help matters, but Grant still does have some conversations with other employees. Well intentioned or not, at this point it is insubordination, and it is getting in the way of the company completing its investigation.

DISCIPLINE EMPLOYEES CAREFULLY

There are many reasons to be careful about taking serious disciplinary action against Grant:

It may disrupt your primary mission of determining what Bob really said to Carly, and take away your only third party witness.

As noted above, the NLRB may take the position that disciplinary action is improper. While I believe that best practice is still to ask employees for confidentiality (just take some more careful steps in articulating that than perhaps we did in the past), and that courts are unlikely to hamstring employers in dealing with an extreme obstructionists like Grant, employers do need to consider this risk in taking action against such employees.

While again Grant is an extreme example, he does have a ready-made retaliation claim. He is involved in an investigation of alleged conduct prohibited by Title VII, and the law prohibits the employer from taking action against him for his involvement in that investigation. Of course this is not the reason you would take action against Grant, but the basic facts are there such that you need to manage this potential risk as well.

My sense is that in a situation this extreme, Grant warrants a stern written warning that is carefully crafted to minimize the risks set forth above. Indeed, Grant is arguably inhibiting your ability to satisfy the employer's obligations to investigate under Title VII, and the employer needs to document that. There are certainly enough hazards that you should consult with legal counsel (if he/she is not already involved) before issuing such a memo.

INVESTIGATION CONFIDENTIALITY

Grant is an extreme example, and it is unusual to encounter an investigation confidentiality problem to that degree, but I think most employers will recognize the eager employee who watches too many cop shows on TV and gets caught up in being the center of attention.

THE GOSSIPY EMPLOYEE

KEY POINTS:

- A best practice is still to ask employees for confidentiality, just ask.
- Well intentioned or not, continued discussion of investigation details after being asked to keep them confidential is insubordination.

The situation more than anything highlights two preventive best practices:

- Set forth in advance the expectation of confidentiality.
- Talk to your legal counsel about the specifics that make sense for you in light of the legal issues touched on in this chapter, but in most cases I think best practices still call for establishing this expectation up front.
- Move quickly. As I said at the outset, your ability to manage information flow is limited perhaps more than anything by human nature. The faster you can complete your investigation, the fewer of these problems you will encounter. In addition, this will enable you to respond to the actual complaint as soon as possible – also an important an risk management step.
- As is almost always the case in these scenarios, proactive steps and the presence of an experienced investigator who has encountered and addressed most situations that can arise in the long run can save the company thousands of dollars and untold distractions resulting from legal claims.

THE GOSSIPY EMPLOYEE

KEY POINTS:

- The faster you can complete your investigation, the fewer problems you will encounter.
- The presence of an experienced investigator can save the company thousands of dollars in legal claims.

NEXT ›

THE MASTER MANIPULATOR
The toughest harassment situation for an employer to manage.

9

The Master Manipulator

The toughest harassment situation for an employer to manage

MEET:

MIKE THE MANIPULATOR

READ MORE ›

This situation may call for more sophisticated and/or clandestine investigative tools.

THE MASTER MANIPULATOR

KEY POINTS:

- Vicky is a marginal performer, but needs her job.
- Vicky doesn't have concrete proof of Mike's behavior because he is smart about it.

This chapter represents the employer's most difficult challenge.

The hardest employee complaint to prove (or disprove) and the hardest setting in which to take steps to avoid and/or detect future problems. Here we meet the master manipulator as harasser.

I submit that the master manipulator is a minority of workplace harassers. Some are not manipulators – they are clueless or insensitive but manageable after appropriate disciplinary measures. And most of the manipulators are not masters – they leave electronic smoking guns, or are unabashed in their behaviors and attitudes so that third party corroboration is easily obtained. (The latter do not even warrant a chapter – they are just busted.) Because of the significant "degree of difficulty" of this less common situation, however, the master manipulator is an important topic.

THE INVESTIGATION SUBJECT

Let me introduce you to Mike. Our company manufactures machine presses used by auto parts manufacturers. The machines are complicated, so we employ highly skilled field engineers who will go to our customer's plant and address any mechanical issues. They are important to the success of our business and they are well compensated. A field engineer is assigned to a specific geographic territory. Mike was hired 18 months ago to be our field engineer in a relatively small but densely populated (with people and auto parts manufacturers) region.

Our company has one other employee in the region – Mike's assistant Vicky. Vicky is part administrative assistant and part customer service rep. Her job requires good interpersonal and organizational skills and limited secretarial skills; it does not require a degree. Sometimes Vicky works in the small field office for the region, and sometimes she will accompany Mike on customer site visits because one of her responsibilities is to be a customer contact. Vicky is a three-year employee, and has been a marginal performer, and a few months ago received a poor evaluation from her primary manager at headquarters for not being sufficiently effective to some key customers.

THE VICTIM OF HARASSMENT

Mike is sexually harassing Vicky, and he is "smart" about it. He does not text or e-mail her, and in the presence of customers or company employees who may be at the field office from time to time, Mike's conduct is completely professional and appropriate. When it is just the two of them in the office or a car, however, Mike makes grossly inappropriate and suggestive comments, and occasionally touches Vicky's arms or legs suggestively.

Needless to say, Vicky is extremely uncomfortable. But she is also scared. She needs her job, and she knows Mike will deny any harassment, is well-liked by customers, and that she cannot disprove what she knows will be his denials.

Finally, however, Vicky cannot take it anymore and contacts HR to complain about the sexual harassment. The company does what it is supposed to do, interviewing Vicky and Mike and others who might have observed the two of them and has no evidence of Mike's inappropriate conduct. Mike denies, and nobody else has seen anything appropriate.

WEIGHING THE ALLEGATIONS

At this point, you cannot conclude that Mike has engaged in sexual harassment. You realize that Vicky has "motive" to fabricate or exaggerate allegations. But you also recognize that this is a worst case scenario as far as the company being able to manage and monitor behavior in the work environment.

Mike's and Vicky's jobs do not lend themselves to some measures you might take in "toss up" situations – you can't rearrange the physical layout of their work or take other relatively simple steps so that Mike's behavior can be more observed, and you can't juggle assignments. Mike in effect is an abuser, and he has found a vulnerable victim. Of course, if Vicky can ever prove her case to a jury, the company is in deep water if it appears not to have addressed this sexual harassment.

HANDLING THE SITUATION

I know of no tougher harassment situation for an employer to manage. A few thoughts:

You probably do not have long term employees like Mike. At least you shouldn't! I am not a psychologist, but he probably has a diagnosable personality disorder, and it only takes one person besides Vicky to experience that in some context before you quickly determine that there is a pattern with Mike, and he will be terminated, or resign one step ahead of the sheriff.

As much as anything, Mike underscores the importance of meaningful background checks. Mike will be a great interview, and he will very logically explain his series of relatively short-term jobs as career progression. Call me old fashioned in this era of more frequent job movement, but less job stability is still, if not a red flag, a demand to obtain meaningful references. Mike will have engaged in this or other antisocial behavior elsewhere – do everything you can to find it before you hire him.

It would be easy to conclude that Vicky's complaint is a smokescreen to protect her shaky job. And it could be. But when assessing credibility, you must factor in the unique circumstances of a somewhat isolated, remote working situation. On the one hand, you cannot prove Vicky's allegations of sexual harassment. On the other hand, you must factor in that the work environment may, as in this scenario, be the cause of that lack of proof.

The situation may call for more sophisticated and/or clandestine investigative tools. Of course talk to legal counsel about what those options may be in Mike's and Vicky's jurisdiction, but it may be possible to give Vicky the tools to capture the smoking gun that Mike has so carefully avoided leaving behind. Obtaining the smoking gun proves the allegations; not obtaining it despite the ability to do so may contribute to a conclusion that the allegations are not true.

THE MASTER MANIPULATOR

KEY POINTS:

- This case showcases the importance of meaningful background checks.
- If Vicky can ever prove her case to a jury, the company is in deep water if it appears not to have addressed this sexual harassment.
- The situation may call for more sophisticated and/or clandestine investigative tools.

While there is some cost to it, you may invest more in having another company employee become involved in this relationship. Mike will not manifest the sexual harassment in front of the employee, but Mike's game is premised on people not knowing him well, and the more another employee can spend time with Mike and Vicky, the more you might be able to figure out this situation.

The "good news" in this tricky situation is that Mike-like situations will resolve themselves in the medium term. The trick for the company is to make sure that you do not completely buy into Mike's game in the meantime so that his legacy at your company is liability to the company.

THE MASTER MANIPULATOR

KEY POINTS:

- Make sure to seek further legal counsel if the allegations persist.
- Consider having another company employee become involved in this relationship.

NEXT ›

THE PARTING SHOT COMPLAINANT
Don't ignore complaints from departing employees.

10

The Parting Shot Complainant

Don’t ignore complaints from departing employees

MEET:

PARTING SHOT COMPLAINANT

READ MORE ›

This “parting shot” complaint can be from an employee exiting voluntarily or involuntarily.

The nine employees who have been the focus of the previous chapters have something in common – they are all current employees of the company.

But not infrequently management learns of a workplace concern when an employee is exiting the company.

This "parting shot" complaint can be from an employee exiting voluntarily or involuntarily. It might relate to harassment, workplace safety, or various other workplace issues. The departing employee might report that he/she made others in the organization aware of the concerns, but in this post we are assuming that you – whether HR, legal counsel, or other management – for whatever reason have not previously been notified of the concerns. (Because, as readers of this website, you will undoubtedly have already taken appropriate action and either found that the concerns were unfounded, or acted to address them.) To the extent that the employee is being involuntarily terminated, here we are assuming the reasons of record and any reasons known to you are unrelated to the workplace concerns being complained of.

THE EMPLOYEE IS GONE – DO WE NEED TO INVESTIGATE?

In short, yes. As with virtually any workplace complaint, gathering the facts and taking appropriate action (if any) in response to your findings is advisable for liability avoidance, and also just good management. A full-blown investigation with statements and lawyers is not always needed, but it is rarely wise to simply "punt" on any workplace complaint.

In this scenario, there are at least three good reasons to investigate in order to minimize the company's liability.

The fact that the complaining employee is leaving may eliminate some potential liability in that the employee is no longer in a liability-creating situation. For example, to the extent there is a hostile work environment towards women and the employee resigned to take another position, by all appearances she has voluntarily removed herself from the situation before the company had any opportunity to do anything about it. But regardless of the circumstances, the employee feels that she has been wronged, or she would not have raised the concern. Therefore, there is some risk that it will become a legal claim of some sort. This is particularly true of course in the case of an involuntary departure. The company needs to gather the facts to be in the best position to defend itself later against any such claim.

Just as important, the company has obligations to the remaining employees. If there is a hostile environment or a safety issue, even if the complainant is no longer exposed to that issue, remaining employees are still working in the reported situation. If one of those employees raises a concern later and the company had prior notice of the issue and failed to act, the company's exposure is much greater for not having acted on the first report – often a perceived "cover up" is viewed much more negatively than the wrong itself.

THE PARTING SHOT COMPLAINANT

KEY POINTS:

- There are at least three good reasons to investigate in order to minimize the company's liability.
- The company needs to gather the facts to be in the best position to defend itself later against a claim.
- Just as important, the company has obligations to the remaining employees.

Finally, even in legal matters relating to other concerns, it can be helpful for the company to demonstrate a culture of compliance and concern. Likewise, while defense lawyers will certainly work to keep seemingly unrelated issues out of any lawsuit, it is possible that inaction by the same actors in other settings would come to light in other cases and be harmful to the company.

SHOULD YOU PUT THE BRAKES ON THE RESIGNATION OR TERMINATION IN LIGHT OF THE COMPLAINTS?

Sometimes. This is a situation-specific question that should be discussed with experienced employment counsel. Factors that should cause the company to consider maintaining the status quo could include:

Any suggestion that the real reason for a termination is related to the concerns expressed. For example, if the employee suggests that a supervisor has trumped up performance concerns in retaliation for the employee rejecting his romantic advances.

In a resignation, any suggestion that the resignation is to escape the complained of circumstances. An employee leaving without another job lined up and no explanation for that (such as a family reason) is also more of a red flag than a "by the way" report by an employee leaving for a better career opportunity.

The more severe the complained of circumstances, the more likely it would be advisable to hit "pause" in some fashion until you can better evaluate the situation. In a termination, the company might place the employee on unpaid leave for a brief period of time. In a resignation, the company might advise the employee that, in light of the concerns, it is not accepting the resignation until it can follow up on the concerns. These measures need not cost the company anything or prejudice its ability to ultimately move forward on a well-founded termination, but will enable the company to demonstrate in future legal proceedings that it took the concerns seriously.

HOW DO YOU FOLLOW UP WITH THE DEPARTING EMPLOYEE?

When an employee is gone, your ability to involve him/her in an investigation is much more limited than when they are on your payroll. Sometimes employees are sincere in just wanting the company to be aware of the concerns, but wish to move on and not be involved. Your ability to compel cooperation is limited, and that in turn can limit your ability to effectively investigate the concerns. But be sure that your file reflects your attempts to reach the employee, and certainly communicate to the employee that the company takes the concerns seriously and, in order to best address them, needs the employee's cooperation.

In short, you want any future jury to view you as having done what you reasonably could to address concerns.

SHOULD YOU COMMUNICATE YOUR FINDINGS TO THE DEPARTED EMPLOYEE?

It depends. With a current employee, with few exceptions it will be advisable to communicate in some fashion the findings of the company's investigation into concerns expressed by the employee as well as the action steps intended to address the concerns. Looking at the three reasons noted above for

THE PARTING SHOT COMPLAINANT

KEY POINTS:

- An employee leaving without another job lined up and no explanation for that (such as a family reason) is a red flag.
- You want any future jury to view you as having done what you reasonably could to address concerns.

following up, it is possible to position the company well to address each of those concerns without following up the employee. Liability to that employee is in effect "capped" at the time the employee departed. But, depending on the situation, particularly if you fear the departed employee may be litigious, some follow-up communication may be warranted.

Parting shots are often tricky because they introduce a major moving part that is not present in most employee complaints. Most principles of sound investigations apply in these scenarios, and employers need to resist any temptation to view the departure as solving the problem and getting the company off the hook for what may be a liability-creating situation.

THE PARTING SHOT COMPLAINANT

KEY POINTS:

Employers need to resist any temptation to view the departure as solving the problem and getting the company off the hook.

NEXT ›

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About the Author: Bill Nolan

Managing Partner, Ohio Office of Barnes & Thornburg LLP

Bill Nolan opened Barnes & Thornburg's Ohio office in April 2009, seeking to bring a unique energy, geographic platform, and business model to the Ohio legal market. He strives to bring attentiveness and clarity to employment, contract, and other disputes, and on helping clients build teams, policies and processes to minimize the frequency and severity of disputes.

Bill speaks and writes extensively on employment law topics, as well as about effective attorney/client relationships and managing legal costs. He authors the Ohio chapters of four BNA state-by-state treatises, Trade Secrets, Covenants Not to Compete, Employee Duty of Loyalty, and Tortious Interference with Contracts. He also serves as a volunteer mediator for the U.S. Equal Employment Opportunity Commission.

He is regularly listed in Chambers USA, The Best Lawyers in America and Ohio Super Lawyers, including as one of Super Lawyers' Top 100 lawyers in Ohio and Top 50 lawyers in Columbus. Best Lawyers named him a "2015 Lawyer of the Year" for his work in education law.

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