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THE EMPLOYER'S GUIDE TO INVESTIGATING SEXUAL HARASSMENT COMPLAINTS

How management responds to and investigates a claim of sexual harassment often has as much impact on the employer's ultimate liability as the conduct of the harassing party. Indeed, there have been a number of recent state and federal court decisions completely absolving the employer of liability where it promptly investigated the complaint and took effective and appropriate remedial action, without more. Burden of proof, harassment policies, statistical evidence and other legal niceties aside, here are some "rules" which you may find useful should you be faced with having to investigate a sexual harassment claim.

RULE NO. 1: USE YOUR HEAD

Common sense. Something we all have. Let it be your best guide. When discussing a sexual harassment claim with an employee, *stop* what you were doing before the employee arrived *and hear* what you're being told. Objectively *listen* to the employee's complaint (remember, you are not on trial). However, what you do from this point forward may impact whether your company ever goes to trial, so stay away from the inclination to debate the merits of the employee's story.

Yes, a claim of sexual harassment involves legal issues. So do many other employment issues you deal with every day. But just because this is currently a "hot" legal issue does not mean that you recklessly abandon the common sense and business judgment that has gotten you this far. Quite the contrary, those skills will be essential to the handling of these complaints. Stay calm and objective, obtain legal advice if necessary and read on.

RULE NO. 2: LEAD, FOLLOW OR GET OUT OF THE WAY, BUT DO SOMETHING

Title VII of the Civil Rights Act ("Title VII") requires the company to conduct an investigation of the alleged misconduct. If you do nothing, you will find yourself using your checkbook a lot if the matter goes to litigation. Ignoring the problem will not make it go away but will usually exacerbate it. Recognize that you may not be the best person to handle the investigation *(e.g.,* if your personal viewpoint

during the Thomas confirmation hearings were that Anita Hill just couldn't take a joke and that these silly claims are all figments of the female hyperactive imagination, you may appear less than objective.) Remember, whoever does the groundwork will end up explaining the investigation to the jury in a few years *and,* more importantly, will be subject to cross examination. "Mr. Investigator, you found no harassment during your investigation. Isn't it true that you have described sexual harassment claims as . . ." You understand?

If you want your lawyer to conduct the investigation, be sure to consider whether your communications will be protected by the attorney-client privilege. Also, the investigation often is a crucial part of your defense. Your counsel may be a fact witness at trial which can disqualify him/her from representing you and/or cause you to waive the attorney-client privilege -- a result you want to avoid.

RULE NO. 3: THE CONSTITUTION AND THE WORK PLACE

Due process -- two words worthy of your attention and remembrance. You say you thought neither the Constitution nor general legal policies required you to provide *due process* in the employment setting? Well, you are correct. But there are legal rights and there are practical rights. *Practically,* there is a powerful incentive to give everyone concerned in the investigation a chance to speak their mind. The incentive is simple: if this goes to litigation, you must show that your investigation and handling of the matter was fair and evenhanded to all concerned.

RULE NO. 4: ASK THE ALLEGED VICTIM

The person conducting the investigation must immediately speak with the person who allegedly was harassed. Otherwise, you won't know what to investigate. Where should the interview be conducted? It is probably best to have it somewhere other than the area where the employee works. I know that in our law firm, were someone from Human Resources to come down to a work area, get an employee from her work station, and then troop into an office and close the door, we've just guaranteed that rumors will be generated and imaginations inflamed.

Obviously, difficult questions of a sexual nature may have to be asked. Remember this when you decide *who* will conduct the investigation (See Rule 2). You should probably ask the complaining employee to write a detailed narrative of what occurred, listing any witnesses.

It may be impossible to conduct an investigation when all the employee tells you is that he/she's being "harassed" or "picked on." A specific narrative may help guide you and may also serve to protect you down the road when the employee remembers incidents which are more egregious or different than those mentioned in the initial interview. But don't use the narrative as a reason to narrow the scope of the

investigation if logic dictates there may be other relevant matters which should be addressed.

RULE NO. 5: **TALK TO THE ACCUSED**

You think talking to the victim was fun? Once you've talked to the victim and any other witnesses, you've got to speak to the person who is accused of the harassment. Remember *due process?* This person should not be prejudged, should be allowed every opportunity to explain their version of events, and should be treated with the same courtesy as the employee who cries harassment. In other words, each should receive fair treatment.

RULE NO. 6: PRIVATE REFLECTION

The person who conducted the investigation should meet with Human Resources and it is probably appropriate and beneficial to confer with outside legal counsel at this point if you haven't already. But the involvement of *additional* supervisors or employees at this stage should be kept to an *absolute minimum*. It is here that the chance is greatest that an offhand comment or misplaced notes concerning the incident will get into the hands of a friend, spouse, or other third party who happens to be in the office. That person mentions it to a friend in the locker room at the local health club and then it's off to the races. You suddenly find yourself in an expanding universe of twilight zone proportions of those who know about "the incident." Neither the accuser nor the accused will be pleased about this. Remember the witness stand? Can you explain to a jury just how the accused's little league coach's daughter found out about the investigation?

You, Human Resources and legal counsel should at this time decide whether all the facts have been gathered, whether there are other questions which must be asked, whether other witnesses should be interviewed and whether other information needs to be garnered. Once you've done this, you need to decide what you're going to do.

RULE NO. 7: THE INVESTIGATION RESULTS IN A "DRAW."- NOW WHAT?

The hard part is that you're faced with a credibility contest. The only thread of similarity between the victim's story and the accused's story is that they both work there. However, both versions are credible to the point you can't make a credibility determination. Should this occur, you may wish to *consider* (depending on the nature and severity of the allegations) issuing a written memorandum to the accused stating that the company was unable to determine whether there was a violation of its policy, stating that he or she nevertheless placed himself/herself in a position where an appearance of impropriety was created (although not proven), reiterating the company's strong policy against sexual harassment and against the

types of activities described by the complaining party, and making clear that such activities, if proven in the future, will not be tolerated. It is probably not a good idea to word these memorandums in terms of being unable to conclude that the law was violated. Couch everything in terms of enforcement of the company's policies.

You should then meet with the employee who complained, explain what was done in the investigation and the results of the investigation, and advise that the memorandum was issued. Encourage the employee to come forward with any future problems. It's probably not a good idea to give the employee a copy of the memorandum to the supervisor.

As long as we're at it, let's devote a little more time to what you do with this memorandum. For some reason, employers like to treat a personnel file as if it were a landfill. They indiscriminately throw things in it when they can't decide where else to put them. Depending on your organization, any number of employees on various missions may come into contact with the file and the memorandum. Not good. Let us make a suggestion. If you have such a memorandum, place it and the notes from your investigation in a separate file, and keep it under lock and key with *limited access.*

Another sticky wicket is a nasty doctrine called *Compelled Self Publication.* This occurs when an employer makes an untrue statement to the employee and that employee then repeats that statement about himself to a third person or persons. Unfortunately, *Texas may recognize this doctrine.* Here's the calculus: if you conduct less than an adequate investigation, arrive at the wrong conclusion, terminate an employee, and the employee then repeats the unsubstantiated accusation to others, you may be subject to suit for libel or slander. The typical situation: employee repeats the untrue statement that you terminated him for sexual harassment when explaining way he left his previous employment.

How do you avoid this? First off, conduct a complete investigation. Our old friend *due process* comes to mind again. Second, be careful with your choice of words. An example: instead of describing an employee's termination as resulting from unwanted sexual advances to female employees, try thinking along the lines of "violation of established company work rules or policy" or "services no longer required in light of needs of the company." Now remember, truth is the ultimate defense. If you're sued for this type of defamation, and you have to support your case at trial, you have to go loaded for bear. Yet another reason to conduct a thorough investigation to prove your conclusion.

RULE NO. 8: DISCIPLINING THE VIOLATOR

If you come to the conclusion that the allegations are true, or have a substantial factual basis, what do you do? Once again, as in every aspect of the investigation, steps taken may be directly driven by the nature and severity of the allegations. Here are two suggestions:

1. Terminate the accused. *Economic capital punishment* is an extreme penalty, and may subject you to a suit by the accused for intentional infliction of emotional distress (if you fail to truly accord due process sights -- see Rule 3) or for defamation (if you let word leak out as to the nature of the investigation or why the employee was terminated -- see Rule 7). The penalty should fit the crime. Just be careful.

2. Provide a strongly written warning to the accused, indicating that the actions were inappropriate and that a proven reoccurrence will lead to further disciplinary action, including termination.

If you take either steps 1 or *2,* you should advise the complaining employee of what has occurred and why it has occurred, and reiterate the company's *strong opposition to* such activity. Also see Rule 7 regarding the memorandum. Ask the complaining employee to keep you closely advised of any future incidents and anything that may be perceived as retaliation.

RULE NO. 9: TRANSFER, EASY FIX

You may consider transferring the employees. If you transfer the complaining party, however, such may be viewed as having the effect of a demotion and/or a form of retaliation. Be careful on this one. Not only do you send a message to the complaining employee but to all other employees about the enforcement of your harassment policy.

RULE NO. 10: LOOSE LIPS SINK SHIPS

Effective communicators speak to people in a language they can understand - - their paycheck. After the investigation and the discipline, if any, you should remind all individuals with knowledge of the allegations that this information is confidential, that it is not to be disclosed, and that disclosure of it may lead to *their* discipline up to and including termination.

RULE NO. 11: PREVENTIVE MAINTENANCE

You may go a long way in avoiding this problem entirely by educating supervisors and others on the various forms of sexual harassment. Often they believe their

actions are wholly innocent and entirely appropriate, when in actuality their actions may be a type of sexual harassment. Supervisors should be advised of the "do's and don'ts" of sexual harassment. To enforce these lessons, supervisors should be informed that they can be held *personally liable* for harassment, that it can destroy their career and their family, and that a lawsuit becomes a public record. The harasser's spouse may end up reading a complaint where her husband is accused of fondling a woman on the job or demanding various sexual favors. Lawsuits are not only a matter of public record but, on a slow news day, may even make the newspaper or television. Powerful incentive to ensure enforcement of your harassment policy.

RULE NO. 12: PROMULGATE AND ENFORCE A POLICY

Aside from being at least a technical violation of Title VII and the EEOC's regulations, the failure to develop, communicate and enforce a policy against harassment - sexual and otherwise - deprives the employer of an important defense. A carefully tailored policy should be developed and implemented by senior management. It should be strong in intent and workable in actual practice. It must be aggressively communicated to employees, prominently displayed and included in all personnel manuals/handbooks. Enforcement of and compliance with the policy should be part of the job description of every supervisor and a subject of every performance evaluation.