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Sexual Harassment

Sexual Harassment Claims—Changing the Response Calculus

By Craig M. Bonnist and Kelly B. Gallagher

Harvey Weinstein. Al Franken. Matt Lauer. John Conyers. Roy Moore. Trent Franks. Mario Batali. And a cast of what seems like thousands—the list of those accused of workplace sexual harassment and sexual assault, as well as the victims of those accused, grows longer every day. Time Magazine just named the so-called silence breakers, the people who are speaking out about acts of sexual harassment and sexual assault, as its person of the year.

While this watershed moment has sweeping implications for society, it also raises the practical question of what employers should do when they receive notice or are otherwise aware that employees may have behaved inappropriately. What is a business to do when it receives a complaint about its star salesperson, its indispensable operations manager, or, as in Weinstein's case, the person whose name is synonymous with its business? In all cases, the first step should be to investigate the claims. In some, depending on the circumstances, that means retaining an outside, truly independent law firm—not beholden in any way to the company—rather than investigating in-house using human resources personnel, general counsel, or even the company's go-to law firm.

Here's why, and here are some factors that indicate when it is sufficient to use in-house personnel or your usual law firm, as opposed to when it is best to bring in true outsiders.

Credible, Impartial and Competent Investigation

The U.S. Supreme Court has rendered decisions that offer affirmative defenses and shield employers from liability when they consistently enforce policies that prohibit sexual harassment, including conducting reasonable investigations when allegations of sexual harassment arise. What constitutes a “reasonable investigation?” There is no bright-line statutory or case law that separates reasonable investigations from sub-standard, but there are several criteria that are instructive.

Employers often look into the claims internally using their human resources department, general counsel, or other employees. In many instances, especially for more routine complaints of harassment or discrimination, and particularly where the parties are not at the most senior levels, the utilization of internal resources is a viable and suitable option. Employers need to be cognizant, however, that courts can and will scrutinize the competency and objectivity of internal investigations. See Smith v. First Union National Bank, 202 F.3d 234 (4th Cir. 2000) (investigation was inadequate where investigator has never previously investigated sexual harassment claim and ignored allegations of sexual harassment).

To avoid or survive this potential scrutiny, another option is for employers to retain outside counsel experienced in employment law and investigations. Retaining outside counsel can at times provide for a more proficient investigation, as counsel will have conducted many prior investigations, have specialized knowledge of the relevant law, and bring a neutral and open perspective. Additionally, employees often are more likely to be forthcoming and honest during questioning by a third party than by someone they know and with whom they routinely work. In addition, sexual harassment investigations conducted by an attorney can in many instances be protected by the attorney-client privilege. See e.g. Brownwell v. Roadway Package Sys. Inc., *185 F.R.D. 18* (N.D.N.Y. 1999); Peterson v. Wallace Computer Servs. Inc., 984 F. Supp. 821 (D. Vt. 1997). This protection is afforded to investigations when outside counsel are acting in their capacity as counsel when investigating—preparing the employer for litigation or providing legal advice, for instance—but generally not when simply fact-

finding.

Raising the Affirmative Defense

Based on the results of the investigation, the employer may decide to raise the affirmative defenses arising from the two Supreme Court decisions: Burlington Industries v. Ellerth and Faragher v. City of Boca Raton. Raising this defense, however, involves potential drawbacks. If an employer asserts the special defense, it may be forced to waive the attorney-client privilege. Harding v. Dana Transport, Inc., 914 F. Supp. 1084 (D.N.J. 1996); Reitz v. City of Mt. Juliet, 680 F. Supp. 2d 888, 8 95 (M.D. Tenn. 2010) (city waived attorney-client privilege when city relied on investigation memorandum for Faragher-Ellerth affirmative defense); but see Kaiser Foundation Hosp. v. Superior Court, 66 Cal. App. 4th 1217, 1227-29 (Cal. App. 1 Dist. 1998) (if employer produces the substance of an investigation and seeks to protect only specific communications between the attorney and client, the attorney-client privilege is not waived).

Employer and counsel therefore must be prepared for the possibility that documents, notes, and records generated during investigations will have to be disclosed in discovery. Whether an attorney or in-house personnel conducts an investigation, the underlying facts of the incident are never protected by attorney-client privilege and will need to be disclosed if the case goes to litigation.

Raising the Faragher-Ellerth affirmative defense may result not only in waiver of the attorney-client privilege and production of documents relating to the investigation, but also potentially in the deposition of the attorney[s] who conducted the investigation. In Koumoulis v. Independent Financial Marketing Group, 295 F.R.D. 28 (E.D.N.Y. 2013), the court ordered production of documents the employer withheld as privileged and the deposition of the employer's outside counsel. 295 F.R.D. at 45 (the communication's “predominant purpose was to provide human resources and thus business advice, not legal advice.”). In other cases, however, courts have been less inclined to require the production of all documents relating to the investigation. In In re Kellogg Brown & Root, 756 F. 3d 754 (D.C. Cir. 2017), the court determined that there should not be “a rigid distinction” between a legal purpose and a business purpose. 756 F. 3d at 760 (“Was obtaining or providing legal advice a primary purpose of the communication meaning one of the significant purposes of the communications?”).

When attorneys who conducted the investigation are compelled to testify at trial regarding the relevant findings, those attorneys may no longer be able to represent the employer. See ABA Model Rule 3.7 (prohibiting lawyers from acting as advocates at trial when the lawyer is likely to be a necessary witness). The majority of jurisdictions, however, require only the disqualification of the lawyer, rather than that of the lawyer's entire firm.

A Third Way—Raising the Defense AND Protecting the Privilege

Employers facing particularly difficult, or high-profile harassment claims, can have the best of both worlds—protecting attorney-client privilege and raising the affirmative defense by engaging outside counsel specifically to conduct an independent investigation.

How does this work? The employer's regular counsel engages experienced employment attorneys who can interview witnesses, review documentation, and make credibility determinations. The attorneys who investigated then give the results to the employer's litigation/employment counsel. The company's counsel can then advise the employer on corrective actions and next steps. It's a win-win-win situation: The employer is able to present a robust Faragher-Ellerth affirmative defense, juries are more likely to be persuaded by an independent investigator who doesn't have long-term financial connections to the employer, and the employer gets the reassurance of a solid testifying witness without the risk of disclosing privileged communications with litigation counsel or of having litigation counsel disqualified.

Some employers may balk initially at paying two sets of lawyers, but under the right conditions, there can be immense value in having a competent, objective outside firm handle the investigation and then testify without burdensome, expensive motion practice about discovery disputes and the attorney-client privilege. The outside firm will not be predisposed to reach certain credibility determinations, as may be the case with the employer's usual counsel, who has had prior dealings with the parties to the claim and the witnesses interviewed. Moreover, having the outside firm, rather than the employer's usual counsel, conduct the investigation reduces the risk of the employer's influence (for example, protecting the accused executive whose name is synonymous with the company).

Regardless of the disposition of the investigation, the employer's retaining counsel specifically to investigate harassment claims tells the workforce that the company is committed to a safe and harassment-free environment—a commitment that should predominate the employer's interest in simply mitigating its current pecuniary exposure. Of course, implementing a policy of investigating all claims appropriately will have the benefit of mitigating exposure. The message sent to employees

through a comprehensive independent investigation demonstrates a true zero-tolerance policy and genuine interest of the employer in eliminating sexual harassment. This scenario is being played out today, with responsible employers engaging independent counsel to investigate even time-barred claims of harassment. With victims feeling empowered to come forward and disclose their experiences with employers, even when they are not pursuing civil claims, employers have the opportunity to properly investigate and effect real change in the work environment.

Craig M. Bonnist, a partner resident in the New York and Stamford, Conn., offices of McCarter & English, counsels and litigates on behalf of employers concerning employment disputes before the Connecticut, New York and New Jersey federal and state trial and appellate courts, as well as the Equal Employment Opportunity Commission and state and local discrimination agencies. He conducts internal investigations in harassment claims and has successfully litigated numerous cases through verdict, obtaining notable and published decisions. He has successfully defended his clients in breach of contract and restrictive covenant claims as well as discrimination and retaliation claims that includes allegations of sexual harassment, race, disability, gender and age discrimination. Craig formerly served as a co-chair of the Westchester County Bar Association's Labor and Employment Section and is a member of the Labor and Employment Section with the American Bar Association.

Kelly B. Gallagher, is an associate in the Labor & Employment group at McCarter & English, resident in the firm's Hartford office. Her litigation experience spans from conception through decision, and has included strategic assessment and crafting of claims and defenses, effective e-discovery management, tactical briefing and advocacy at various critical pre-trial stages, settlement evaluation and execution at trial. Representative litigation experience includes completing a bench trial in federal court, completing an arbitration evidentiary hearing, and securing the reversal of a trial court decision in the Connecticut Supreme Court.