

# INTELLIGENT INVESTIGATIONS OF EMPLOYEE MISCONDUCT <sup>1</sup>

## Employment Roundtable

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October 18, 2007

The manner in which workplace investigations are handled can have a tremendous impact on the employer's exposure to and ability to defend against a lawsuit. The following materials provide a road map for conducting investigations in the workplace with the goal of limiting an organization's potential liability.

### I. WHY DO EMPLOYERS CONDUCT INVESTIGATIONS?

Workplace investigations are necessary because the law requires them. To effectively respond to complaints of unlawful harassment, which is every employer's legal obligation, an employer must first confirm the facts. Another reason for conducting investigations is to monitor compliance with the law and prevent future claims by employees. Employers may also conduct investigations for their own internal business reasons, *i.e.* to make sure theft or drug use is not occurring in the workplace. Employers conduct investigations involving many types of workplace misconduct, including:

- Unlawful harassment (based on race, sex, national origin, or other protected classes);
- Discrimination (based on race, sex, national origin or other protected classes);
- Wage and hour violations;
- Retaliation for asserting work-related rights (for example, complaining of discrimination or harassment, "whistleblowing," filing a workers compensation claim, or insisting on overtime pay);
- Illegal conduct, such as theft or drug use, in the workplace;
- Corporate fraud (Sarbanes-Oxley Act of 2002).

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<sup>1</sup> This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

Significantly, prompt and sufficient investigations of complaints can provide the employer with a defense to harassment claims. While the standard for imposing liability on an employer depends upon whether or not the perpetrator of the harassment had supervisory authority over the victim, prompt investigation of harassment claims is essential for setting up a defense in either instance.

When the employee is subjected to harassment by a co-worker, a negligence standard applies. The employer will be liable if it knew or should have known of the conduct and failed to take prompt remedial measures to correct it.<sup>2</sup> With respect to harassment by a supervisor, the standard for imposing liability is set forth in two Supreme Court decisions, *Burlington Industries, Inc. v. Ellerth*,<sup>3</sup> and *Faragher v. City of Boca Raton*.<sup>4</sup> These cases hold that an employer is subject to vicarious liability for unlawful harassment by a supervisor.<sup>5</sup> However, the presumption of vicarious liability may be overcome if the harassment has not culminated in a tangible employment action (such as discharge, demotion, failure to promote, undesirable reassignment, or a change in pay or benefits), and the employer proves that (1) it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to prevent harm otherwise.<sup>6</sup> While both *Faragher* and *Ellerth* involved sexual harassment, the EEOC and a number of courts have taken the position that the same standards apply to other types of legally prohibited harassment.<sup>7</sup>

To take advantage of the *Faragher/Ellerth* affirmative defense, an employer will almost certainly need to have a written harassment policy and complaint procedure in place that affords an employee multiple opportunities for corrective action, including the ability to report harassment to someone other than their supervisor if the supervisor is the alleged harasser.<sup>8</sup> Moreover, once an employer is aware of a complaint, it is critical to act promptly to investigate and take remedial action. An employer who does so may be able to avoid liability even when inappropriate conduct is confirmed.<sup>9</sup>

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<sup>2</sup> 29 CFR §1604.11(d); *see also* OAR 839-005-0030(6).

<sup>3</sup> 524 US 742, 118 SCt 2257 (1998).

<sup>4</sup> 524 US 775, 118 SCt 2275 (1998); *see also* OAR 839-005-0030(4)

<sup>5</sup> *Faragher*, 524 US at 777; *Ellerth*, 524 US at 765.

<sup>6</sup> *Ellerth*, 524 US at 765; *see also Faragher*, 524 US at 807.

<sup>7</sup> *See EEOC Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors* dated June 18, 1999, page 3, <http://www.eeoc.gov/policy/docs/harassment.html>; *see also, e.g., El-Hakem v. BJY, Inc.*, 262 F Supp2d 1139, 1150-51 (D Or 2003) (applying standard from *Faragher* and *Ellerth* to claim for race discrimination).

<sup>8</sup> *See Montero v. AGCO Corp.*, 192 F3d 856, 862 (9<sup>th</sup> Cir 1999) (discussing the importance of the employer's policy in establishing the *Faragher/Ellerth* affirmative defense); *Jernigan v. Alderwoods Group, Inc.*, 489 F Supp2d 1180, 1195-1197 (D Or 2007) (same).

<sup>9</sup> *See, e.g., Lappin v. Laidlaw Transit, Inc.*, 179 F Supp2d 1111 (ND Cal 2001), in which the employer had a sexual harassment policy and complaint procedure, but plaintiff only reported one physical fight or altercation between herself and one alleged harasser and never represented that the incident was sexual in nature. The employer immediately initiated an investigation that involved interviews of all witnesses and a meeting between all the parties, after which it issued a warning to the alleged harassers. The court concluded that the employer could not be liable for harassment based on what plaintiff reported and the warning was "an appropriate response under the circumstances." *See also Kohler v. Inter-Tel*

Strictly speaking, the *Faragher/Ellerth* affirmative defense is available only in cases involving supervisor harassment.<sup>10</sup> However, as the Oregon Court of Appeals explained in *Garcez v. Freightliner Corp.*,<sup>11</sup> “the principle embodied in the defense--that an employer can avoid liability in situations where it acts promptly to remedy harassment--is contained in the requirements for a prima facie case based on negligence.” The main difference is that in cases involving co-worker harassment, plaintiff must prove the employer knew or should have known of the harassment and failed to take prompt corrective action. In cases of supervisor harassment, it is the employer that bears the burden of proof.<sup>12</sup> Consequently, regardless of whether the alleged harasser is a supervisor or a co-worker, the best way to avoid liability is to take prompt and effective remedial action, which requires an adequate investigation of any complaints.<sup>13</sup>

## II. APPROPRIATE FRONTLINE RESPONSES

The worst thing an employer can do when it receives a complaint is to ignore it. Even if the employer believes the complaint is baseless or the complainant no longer works for the company, the employer should nevertheless conduct a prompt,<sup>14</sup> thorough, and unbiased investigation, and make no judgments until the investigation has been completed. The company wants to know (or should want to know) of any inappropriate behavior in the workplace and first impressions may be wrong. Accordingly, the company should always follow its own procedures, and be open and receptive to complaints. The EEOC provides information on suggested procedures and investigative techniques.<sup>15</sup> Prompt investigation and resolution of allegations of misconduct also improves morale:

Whatever the misconduct, the sooner it is addressed, the sooner the organization can once again focus on its mission. Resolution of misconduct halts the disruption and unproductive behavior caused by the rumor mill. In addition, it

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*Technologies*, 244 F3d 1167 (9<sup>th</sup> Cir 2001) (no liability found where employer had an anti-harassment policy in effect, upon hearing employee’s complaint employer immediately commenced an investigation by a neutral third-party, employer offered to allow employee to return to work under new supervisor and the same terms and conditions of employment, employee refused to cooperate with investigation, did not respond to the employer’s offers, and employer reviewed harassment policy with alleged offender and reprimanded him even though no actionable harassment was confirmed).

<sup>10</sup> *Swinton v. Potomac Corp.*, 270 F3d 794, 803 (9<sup>th</sup> Cir 2001).

<sup>11</sup> 188 Or App 397, 72 P3d 78 (2003).

<sup>12</sup> *Id.*, 188 Or at 412; *see also*, *Swinton*, *supra*, n.40.

<sup>13</sup> *See generally Swenson v. Potter*, 271 F3d 1184, 1193 (9<sup>th</sup> Cir 2001) (“The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation \*\*\*\* An investigation is a key step in the employer’s response \*\*\* and can itself be a powerful factor in deterring future harassment. By opening a sexual harassment investigation, the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace.”)

<sup>14</sup> *See, e.g., id.* (investigation three days after learning of incident was prompt); compare *Bennett v. New York City Dep’t of Corrections*, 705 F Supp 979 (SD NY 1989) (four-week delay not prompt).

<sup>15</sup> *See EEOC Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors*, <http://www.eeoc.gov/policy/docs/harassment.html>. *See also* BOLI’s FAQ at [http://www.oregon.gov/BOLI/TA/T\\_FAQ\\_Tasexhar.shtml](http://www.oregon.gov/BOLI/TA/T_FAQ_Tasexhar.shtml).

sends a message to all employees that the employer will not tolerate misconduct and will deal with it swiftly.<sup>16</sup>

The employer's front-line response to a complaint will set the tone for the entire process. The individual who receives a complaint, whether it be the supervisor or an HR professional should generally observe the following Do's and Don'ts:

**DO:**

- Be open and receptive to a complaint. The company wants to know (or should want to know) of any inappropriate behavior in the workplace.
- Take the complaint seriously, show concern, do not make jokes.
- Be non-judgmental in terms of whether you believe the complainant or not. Your first impression may be incorrect.
- Follow company procedures. Generally, this means informing human resources or the company's equal employment opportunity officer.
- Respond promptly. Don't let it drag on.
- Take immediate steps to correct serious risks such as threats of violence or allegations of violence, even if you do not have time to first complete an investigation. Carefully consider separating the "victim" from the "harasser" pending investigation.

**DO NOT:**

- Do not act as a gatekeeper. Pass all relevant information on to human resources, even if the victim asks you not to do anything about his or her complaint.
- When conducting witness interviews, do not indicate whether you believe or disbelieve an employee's account. No decision should be made before a complete investigation has been conducted.
- Do not promise a victim or witness that they will remain anonymous or that the interview will be kept confidential. It is usually appropriate to tell the victim or witness that what is said in the interviews will be kept as confidential as is reasonably possible given the circumstances and given the company's legal obligation to respond to the complaint.
- Do not make any promises about how the complaint will affect anyone's job, except to assure the victim that no retaliation will be made for a

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<sup>16</sup> Kathleen A. Kedigh, *Employee Misconduct Investigations: Getting to the Truth Without Getting into Trouble*, 61 J. Mo. B. 82, 82 (2005).

complaint made in good faith. Often, employees accused of harassment will want to know immediately if their job is in jeopardy. Although it is generally inappropriate to assure an accused harasser that his or her job is safe, it is generally appropriate to assure him or her that no action will be taken until a thorough investigation has been conducted and they have had an opportunity to tell their side of the story.

- Do not retaliate against the complainant and instruct the accused harasser not to do so.

Upon receiving a complaint, employers should take immediate action to eliminate the possibility of further harassment while the investigation is ongoing. If the complaint includes threats of violence or serious workplace disruptions, interaction between the complainant and the alleged harasser should be avoided (*e.g.*, by reassigning the complainant to another supervisor, changing shifts worked by complainant or the alleged harasser, allowing a complainant or harasser to take administrative leave or work from home). The implementation of such interim relief while the investigation is ongoing helps avoid cases in which the victim claims constructive discharge – i.e. that working conditions were so intolerable, the employee was forced to resign.<sup>17</sup> On the other hand, be careful taking any action, such as reassigning the complainant to a remote and unattractive assignment, that could be viewed as retaliatory. Try to get the complainant’s agreement to an interim solution.

The decision of who should conduct the internal investigation is an important one. An investigation may be deemed insufficient if the investigator is not objective or lacks experience.<sup>18</sup> The investigator’s ideal traits have been described as follows:

The investigator should possess exceptional interpersonal skills, be perceived as neutral and fair, and be a good listener. In addition, she should be detail-oriented and willing to press for details. She also should have knowledge of the company and its operations and a working knowledge of discrimination and other laws affecting the workplace. Prior investigative experience and knowledge of investigative techniques are highly recommended. Finally, the investigator should have the ability to act as a credible witness, be in a position to maintain confidentiality, and – if she is an internal employee – have the likelihood of continued employment with the company.<sup>19</sup>

Many companies will assign to a human resources representative or to an equal employment opportunity officer the task of conducting investigations and provide special training to those individuals. Special training is very helpful due to the complicated legal and potentially explosive emotional context in which these investigations typically occur. An employee

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<sup>17</sup> Eric Akira Tate, *The When, Who, and How of Workplace Investigations (With Form)*, 16 No. 2 Prac. Litigator 7, (Mar. 2005) (providing further examples of interim relief).

<sup>18</sup> *Id.*

<sup>19</sup> *Who Should Conduct the Internal Investigation of Employee Complaints?*, 14 No. 2 N.Y. Emp. L. Letter 3 (Feb. 2007); *see also* Tate, *supra* (“Someone who is objective, skilled, experienced, and with sufficient authority” should conduct the investigation. “Typically, this should be someone in human resources, and not a member of line management.”)

subjected to improper investigative techniques may have a claim against the company (*e.g.*, for false arrest, invasion of privacy, intentional infliction of emotional distress).

If the employer hires an attorney to conduct the investigation, the company's communications with the attorney *may* be subject to attorney-client or work product privileges.<sup>20</sup> It is important that human resource professionals and other managers who learn of or are involved in such communications be instructed to maintain any privilege by not disclosing the communications to others. In addition, interpreters may be necessary in some instances to ensure that the witnesses understand the questions.<sup>21</sup>

### III. WHAT IS THE GOAL OF AN INVESTIGATION AND HOW IS IT CONDUCTED?

The goal of a workplace investigation is to obtain a clear picture of the events that transpired which, in turn, will allow the company to determine its response. Witness interviews are usually the core component of any harassment investigation. These materials do not address other investigative techniques such as surveillance, polygraph tests, accessing electronic communications (such as telephone or electronic mail messages) or conducting searches in the workplace.<sup>22</sup> Complex legal questions surround each method of investigation and legal counsel should be consulted prior to employing any of these techniques.<sup>23</sup> A fair and impartial investigation requires that the employer interview both the complainant and the alleged harasser

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<sup>20</sup> However, the attorney-client privilege may be waived if the attorney's investigation is used as an affirmative defense in a legal action. For example, in *Fultz v. Federal Sign*, 1995 WL 76874 \*2-3 (ND Ill Feb. 17, 1995), the court overruled defense counsel's attorney-client privilege objections to deposition questions in a sexual harassment case in which defense counsel had conducted the investigation. In so doing, the court stated:

\*\*\* [I]f the investigation or its results is to be used as evidence at trial, then clearly the privilege which it enjoys would be waived. One cannot assert the attorney/client privilege to keep an opponent from discovering facts about an investigation when the investigation is to be used at trial as a defense to defeat the opponent's allegations. This would be a classic case of using the attorney/client privilege not as a shield, but as a sword. Defense wishes to have its cake and eat it too. \*\*\* While the investigation, having been conducted by retained counsel, would ordinarily be privileged, that privilege is lost once the claimant of the privilege asserts his right to use the investigation as part of his or her case in the litigation.

<sup>21</sup> See Eric Akira Tate, *The When, Who, and How of Workplace Investigations (With Form)*, 16 No. 2 Prac. Litigator 7 (Mar. 2005) (citing to *Henderson v. Simmons Foods, Inc.*, 217 F3d 612,616 (8<sup>th</sup> Cir 2000) (supervisors interviewed non-English speaking employees without aid of interpreter).

<sup>22</sup> See generally, Kathleen A. Kedigh, *Employee Misconduct Investigations: Getting to the Truth Without Getting into Trouble*, 61 J. Mo. B. 82, 84-88 (2005).

<sup>23</sup> See generally, Gerard P. Panaro, *Three Laws to Be Aware of When Investigating Employee Misconduct*, 13 No. 1 HR-ADV 7 (2007) (discussing the application of the Fair and Accurate Credit Transaction Act (FACTA), the Electronic Communications Privacy Act (ECPA) (*see also* ORS 659.840) and the Employee Polygraph Protection Act). In *Ortega v. O'Conner*, 146 F3d 1149 (9<sup>th</sup> Cir 1998), the Court of Appeals held that government's "highly intrusive" search of governmental employee's private office and his personal possessions, including private letters and romantic mementos, and government's seizure of many items in the office, including personal items, violated the employee's constitutional Fourth Amendment right to be free from unreasonable searches and seizures.

to determine the facts. These individuals should be asked to identify any witnesses who are able to corroborate their version of the events. As one court observed:

[The decision-maker] must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial \*\*\* They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.<sup>24</sup>

All witnesses with pertinent information should be promptly interviewed, *i.e.*, ideally the day a complaint is made or the next day. The investigator should try to determine the precise details of what transpired. It is not sufficient for the employee to state that he or she was “sexually harassed” or that a co-worker made an “improper remark.” This sort of vague allegation is subject to interpretation by the complainant and the interviewer, and is neither helpful in gaining a true understanding of what happened, nor in testing the veracity of the witness. The investigator must determine the exact words that were used and in what tone, where the complainant was touched, by whom, and in what context it occurred.

Documentary evidence, if any, should also be gathered and retained. Such evidence may include written notes, correspondence, and email communications. In addition, security videotapes or time clocks may need to be reviewed (*e.g.*, to determine when an individual was on the premises or when theft occurred).

The employer should not draw conclusions before all of the witnesses are interviewed. Depending on the circumstances, it may be necessary to re-interview witnesses, particularly if new issues are raised after the initial interview. The investigator will ordinarily want to ask each witness general, open ended questions that include the following:

- Describe everything that happened in detail (every incident that occurred, exactly what this witness heard or saw);
- What was the context of the behavior - where were they, what were they doing, why were they there?;
- When did the incident(s) occur?;
- Who else was present and what, if anything, did they see or hear?;
- What, if anything, did you do about the incident (for example, did the witness tell the harasser to stop?)?;
- What, if anything, did you tell others about the incident?;

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<sup>24</sup> *Cotran v. Rollins Hudig Hall Int'l Inc.*, 69 Cal.Rptr.2d 900, 910 (1998), quoting *In Board of Education v. Rice*, App. Cas. 179, 182 (1911).

- Have you heard anyone else discuss the incident and, if so, what did you hear?

An employee-witness may not be receptive to the employer's request for an interview. The employee may refuse to answer questions or demand to have a lawyer present. Aside from the right to representation that may exist under certain collective bargaining agreements or when criminal action is being investigated by governmental authorities, employees do not have a right to counsel during a workplace investigation.<sup>25</sup> Nonetheless, it may be appropriate to allow the employee to have a representative if the employee will cooperate more fully with a representative present and the representative is not disruptive.<sup>26</sup> Failure to cooperate in an investigation may be appropriate grounds for disciplinary action, although employers should be wary of the potential for retaliation claims.<sup>27</sup> An employer should generally consult with legal counsel before responding to an employee's demand to have representation during an interview or an employee's outright refusal to participate in an investigation.

During the interviews, the investigator should avoid giving witness the impression that the employer has already made a decision, the decision will be made based solely on this witness's comments, or that the investigator believes the witness is or is not credible. The investigator's questions should be designed to elicit both positive and negative input from the witnesses, and provide background information only when necessary (e.g., ask "What did she say?" not "Did she say she was offended?") The investigator should avoid editorializing on the answers (e.g., "That seems reasonable to me.") or explaining what information has been obtained from others (e.g., "That's not what the other three witnesses said.").

An employee subjected to improper investigative techniques may have a legal claim against the company for false imprisonment, defamation, or intentional infliction of emotional distress. For example, in *Buckel v. Nunn*,<sup>28</sup> a security guard confronted an employee suspected of theft, directed her back to a small storage room, placed himself between her and the door, informed her that he would decide whether she would go home or go to jail, and he repeatedly accused her of stealing from the store. She was allowed only one telephone call, and was not allowed to answer other calls from her husband and mother-in-law. The employee was visibly upset during the questioning, which lasted about three hours. The security guard was later joined in the interrogation by another employee. The security guard and second employee kept insisting that the employee had stolen items, although they had no proof that she had taken

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<sup>25</sup> See generally, Kathleen A. Kedigh, *Employee Misconduct Investigations: Getting to the Truth Without Getting into Trouble*, 61 J. Mo. B. 82, 83 (2005).

<sup>26</sup> See generally, Paul E. Starkman, *When Employees "Lawyer Up": Handling Requests for Personal Attorneys During Internal Investigations*, 36-SPG Brief 26 (2007) (discussing "the need for employers to avoid knee-jerk reactions when an employee wants to consult with a personal attorney in connection with an internal investigation \*\*\*\* An employer may later find itself regretting hasty reactions against an employee who has made reasonable requests to consult with an attorney.")

<sup>27</sup> Some exceptions exist for public employees. See generally, Kathleen A. Kedigh, *Employee Misconduct Investigations: Getting to the Truth Without Getting into Trouble*, 61 J. Mo. B. 82, 83 (2005). Discipline may, under some circumstances, constitute unlawful retaliation. See Paul E. Starkman, *When Employees "Lawyer Up": Handling Requests for Personal Attorneys During Internal Investigations*, 36-SPG Brief 26 (2007).

<sup>28</sup> 133 Or App 399 (1995).

anything. The appellate court upheld a jury's award of \$85,000 in favor of the employee on an intentional infliction of emotional distress claim.

It is important to avoid making any promises about how the complaint will affect anyone's job, except to assure the complainant that no retaliation will be made for a complaint or report made in good faith. Witnesses should also be reminded that the company prohibits retaliation.

The investigator may wish to take notes to document the interviews. It is important to remember that in the event of litigation, these notes will likely be subject to discovery by the opposing party. Therefore, to the extent possible, the investigator should write down what was actually said, without characterization or embellishment of the witnesses' statements, and without stating any conclusions. These documents, along with any documentation of the complaint, should be kept in a separate, confidential file. If the employer wishes to record the interviews, the investigator should inform the employee the interview is being recorded.<sup>29</sup> Recording statements may, however, intimidate some employees and impede the investigator's ability to get the truth.<sup>30</sup>

#### **IV. REACHING A CONCLUSION**

After completing interviews and review of any other documents or evidence, the investigator must reach a conclusion. Normally, this will require the investigator to decide whether the alleged conduct did or did not occur and whether the conduct violates a company policy. There is no clear legal standard for making personnel decisions based on a workplace investigation, as there is in a criminal or civil case where a decision must be made based on proof "beyond a reasonable doubt" or "by a preponderance of the evidence." It may be reasonable to adjust the proof required and/or the actions taken based on the seriousness of the allegations.

The results of an investigation may turn solely on the credibility of witnesses, particularly in a case where the only witnesses are the complainant and the alleged harasser. In making such determinations, the investigator should be able to explain why one witness was more credible (*e.g.*, one witness had a greater motive to lie or a reputation for untruthfulness, there were inconsistencies in witnesses' stories, or one witness' body language was defensive and/or inappropriate to the context, as in not acting surprised upon hearing the allegation).

#### **V. MAINTAINING CONFIDENTIALITY**

The investigator should not promise confidentiality or anonymity to the complainant, the alleged harasser, or to the witnesses. However, it is appropriate to state that the information will be kept as confidential as is possible given the company's duty to investigate and respond to the complaint. In addition, it is appropriate to instruct each person interviewed that this is an important process and that the witness needs to be completely truthful. The investigator should

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<sup>29</sup> See generally, Kathleen A. Kedigh, *Employee Misconduct Investigations: Getting to the Truth Without Getting into Trouble*, 61 J. Mo. B. 82, 86 (2005).

<sup>30</sup> *Id.*

keep the process confidential to the greatest extent possible. The investigator should discuss the matter only on a strictly need-to-know basis and should not engage in gossip.

Witnesses who are interviewed should be told that they are not to discuss confidential matters with anyone at work or outside work. Breaches of confidentiality may subject the company or the witness to claims of invasion of privacy or defamation by the complainant and/or the harasser. In addition, breaches of confidentiality may subject employees to retaliatory actions by others. Finally, if the story gets out before interviews are conducted, employees who have not yet been interviewed may, intentionally or unintentionally, alter their version of the facts based on what they have learned from others. Prompt intervention and discipline of employees who breach confidentiality may assist in the defense of legal claims.<sup>31</sup>

As discussed above, if the employer hires an attorney to conduct the investigation, communications with the attorney may be subject to attorney-client or work product privileges. The human resources professional or manager may learn of or be involved in these communications, and must do his or her part to maintain any privilege by not disclosing the communications.

Documentation of the investigation (witness notes, etc.) should not be placed in the harasser's or victim's personnel file. Remember that employees have the right to inspect their personnel files. Investigation materials may contain confidential witness statements that would be inappropriate to provide to the perpetrator or victim.

## **VI. PREVENTING RETALIATION**

Companies cannot lawfully punish or discriminate against an employee because the employee has made a good faith complaint of unlawful discrimination or harassment, or asserted other workplace rights. Employees may be able to state a claim for retaliation even if their primary claim fails – *e.g.*, it is often easier to prove retaliation than it is to prove discrimination or harassment. At the same time, complaining to an employer “does not immunize [the employee] from complying with her employer’s reasonable policies regarding workplace conduct.”<sup>32</sup> Some things to keep in mind with respect to retaliation:

- A company may be held liable for retaliation by co-workers if it knew or should have known of the retaliation.
- Complainants remain subject to the employer’s rules and performance expectations and they should be treated the same as other employees. Heightened scrutiny of an employee after they complain can be considered a form of retaliation.

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<sup>31</sup> *See, e.g., Jernigan v. Alderwoods Group, Inc.*, 489 F Supp2d 1180, 1196-1197 (D. Or. 2007) (citing to evidence that the employer immediately intervened and disciplined employees who breached confidentiality as evidence that it took reasonable care in conducting its investigation into claims of sexual harassment).

<sup>32</sup> *Id.* at 1202.

- Any retaliatory conduct should be reported immediately to human resources and promptly addressed.
- Check in with the complainant from time to time after a complaint has been resolved even if there are no complaints of retaliation.

The Oregon Bureau of Labor and Industries recently offered this advice for avoiding retaliation claims by an employee who settled a sex discrimination claim against her employer but continued to work for the employer:

So what's the best way to protect your company \*\*\*? Remember that even though you disagreed with her allegations, she had a right to do what she did [complain or sue] and thus has a right to be treated with the same dignity and respect with which you treat all employees.

That means not only must you treat her in a nondiscriminatory manner, you must be sure that her coworkers do, as well. Even seemingly small things, like not inviting her to lunch with the others, can end up becoming crucial issues. This is particularly true if these are "power lunches" where contacts are made and business is conducted.

And if you avoid interacting with her, you can end up ostracizing her and inadvertently encouraging others to do so as well. This would only make the retaliation claim stronger and your workplace healthier.<sup>33</sup>

## **VII. DECIDING WHAT TO DO AS A RESULT OF THE INVESTIGATION**

The investigator will normally meet with the supervisor, human resources, and perhaps the organization's counsel to determine an appropriate response in light of the investigator's conclusions. In the harassment context, the employer should notify the complainant and the alleged perpetrator of the results and any action the employer intends to take based on the results. If the employer determines that discipline short of termination is appropriate, the perpetrator should be informed of the consequences of any further transgressions, and that any form of retaliation is strictly prohibited. Any disciplinary action imposed should be documented and placed in the perpetrator's personnel file, keeping in mind that any such documentation should not contain an admission that the employer/employee violated the law (*e.g.*, DO NOT say "this employee engaged in sexual harassment"; DO say "the following conduct occurred and violated company policy"). Employers do not have a duty to make an announcement to their employees at large regarding the investigation. In fact, doing so may very well set up a defamation or retaliation claim.<sup>34</sup>

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<sup>33</sup> May 23, 2006: *Lawsuits Can Be Uglier the Second Time Around: Avoid Exposure to Retaliation Claims*, [http://www.oregon.gov/BOLI/TA/TA\\_COL\\_052306\\_Avoid\\_Retaliation\\_Claims.pdf](http://www.oregon.gov/BOLI/TA/TA_COL_052306_Avoid_Retaliation_Claims.pdf) .

<sup>34</sup> See *Jernigan v. Alderwoods Group, Inc.*, 489 F Supp2d 1180, 1195-1197 (D. Or. 2007) (also noting that the employer "had no duty to make an example of [the alleged harasser] as a cautionary tale for other employees").

Although an investigator often undertakes an inquiry with the expectation or hope that the “truth” will be uncovered, often times the waters are murkier after the investigation than before. Investigators are reluctant to make a firm decision when there are no independent witnesses and the alleged harasser and victim have diametrically opposed versions of the events (a “he said, she said” case). If the conduct cannot be confirmed or disproved, that should be the investigator’s conclusion; and a common approach is to re-instruct all parties on the company’s discrimination and harassment policies and complaint procedure, conduct additional training of the individuals and/or the workforce on diversity and harassment issues,<sup>35</sup> and consider or invite any requests to be transferred out of the department in which the events allegedly occurred.

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<sup>35</sup> Putting both the complainant and the harasser in the same harassment training class might be problematic. In *Rivas v. Steward Ventures, Inc.*, 2007 WL 496767 (D Ariz), an employee was further harassed during the training class itself; according to the investigator, the harasser “used the class as a forum to air her displeasure with Plaintiff and to make Plaintiff feel uncomfortable.”