CONDUCTING EFFECTIVE INDEPENDENT WORKPLACE INVESTIGATIONS IN A POST-#METOO ERA

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I. INTRODUCTION

Since the #MeToo movement exploded on social media in October 2017, workplace conduct--as well as the responses by employers in investigating the complaints and engaging in appropriate remedial measures—has been under greater scrutiny. In the wake of the #MeToo movement, the Equal Employment Opportunity Commission (EEOC) has reported an increase in the number of sexual harassment claims and has issued resources intended to help employers navigate their obligations, including as to investigations of complaints.

This article highlights how workplace investigations involving protected complaints of harassment, discrimination and retaliation have been impacted by the #MeToo movement. It also outlines eight steps that can facilitate effective workplace investigations and, in turn, remediate inappropriate conduct and limit legal exposure. There is also a summary of key cases addressing the applicability of work product and attorney client privileges to workplace investigations.

Prompt and thorough workplace investigations in response to protected complaints of harassment, discrimination and retaliation are beneficial for determining appropriate measures to remediate misconduct and may serve to also limit an employer's liability. Investigations should be conducted by experienced professionals who are able to effectively

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elicit key facts. The investigation should be sufficiently resourced to enable a fair and thorough review of the relevant facts. Investigators should engage in a comprehensive and methodical approach to investigations to ensure efficacy.

Utilizing outside, independent investigators is beneficial to maintaining the objectivity of the investigation. Employment attorneys have the type of background and training necessary to conduct harassment, discrimination, and retaliation investigations. Investigations conducted or facilitated by attorneys, at times, can also afford some protections of certain privileges. This article will provide insights into the treatment of privilege regarding workplace investigations.

II. BACKGROUND ON THE #METOO MOVEMENT AND IMPACT

The initiation of the #MeToo movement in October 2017 was not the first time that individuals spoke up about sexual harassment. The pervasive nature of the movement through social media, however, gave rise to an eruption of accusations and responses in the workplace, from a plethora of industries, and society as a whole.

The statement of "MeToo" dates back to a 2007 campaign by Tarana Burke, a New York-based advocate for gender rights.[1] Burke coined the term as a way to build solidarity among survivors of harassment and assault. This grassroots effort did not hit the mainstream until a decade later. In 2017, several women came forward with sexual harassment and rape allegations against Hollywood mogul Harvey Weinstein. On October 15, 2017, actress/activist Alyssa Milano circulated a request over Twitter for women who had been sexually harassed or assaulted to use the hashtag "#MeToo" on social media. Within two days, more than 760,000 replies and re-tweets occurred, and the #MeToo revival movement took root throughout a variety of social media sites.[2]

Within weeks of the #MeToo social media storm, some women felt more empowered to assert wrongdoing. Hundreds of men were accused, including major names in Hollywood and business and

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[1] "The Woman Who Created #MeToo Long Before Hashtags," Sandra E. Garcia, *The New York Times*, October 20, 2017.

[2] "Woman Compiling MeToo Names Says They're the 'Tip of the Iceberg'", Jessica Brice and Jeff Green, Bloomberg, October 17, 2018.

across numerous industries. Employers across the country received an influx of allegations, some of which had occurred many years earlier.

Researcher Davia Temin has compiled the largest listing of #MeToo accusations, termed "the Index,"[3] which now lists over 900 individuals (mostly men, but also 29 women). To be included on Temin's list, the accused were mentioned in at least seven news articles as being accused of improper behavior ranging from sexual harassment to assault/rape or condoning/protecting such behavior.[4]

#MeToo grew to a mainstream social movement, reflected by Time Magazine naming as its 2017 Person of the Year a group of women known as "The Silence Breakers."[5] These individuals were those who made it acceptable to speak out against abuse. In the workplace, there were reports of a seismic shift in vocalizing complaints about unacceptable behavior. In a 2017 poll, 82% of the respondents said that women are more likely to speak out about harassment since the Weinstein allegations.[6]

Even more women raised their voices in the January 20, 2018 Women's March, when over a million people around the country marched for women's rights, including protection from sexual harassment and assault. By February 2018, it was reported that 71 high-profile men who were accused of sexual misconduct after Weinstein resigned or were terminated.[7]

During the EEOC's fiscal year 2018 (which ended on September 30, 2018), the number of sexual harassment charges increased, as did the number of sexual harassment lawsuits the agency filed, even though the overall number of workplace discrimination charges filed was at the lowest level since fiscal year 2006.

The EEOC received 76,418 workplace discrimination charges in its 2018 fiscal year, down from the 2017 count of 84,254 charges.[8] There were, however, 7,609 sexual harassment charges filed in fiscal year

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[3] *Id*.

[4] *Id*.

[5] http://time.com/time-person-of-the-year-2017-silence-breakers, December 18, 2017.

[6] *Id.*

[7] "After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power," Sarah Almukhtar, Michael Gold and Larry Buchanan, *The New York Times*, February 8, 2018.

[8] https://www.eeoc.gov Enforcement and Litigation Statistics Chart.

2018, which represented a 13.6% increase over 2017.[9] This was the highest annual number of sexual harassment charge filings since fiscal year 2011. The EEOC also filed 41 sexual harassment lawsuits in 2018, representing a 50% increase from 2017.[10] In April 2019, the EEOC reported that the number of internal harassment complaints fielded through Navex Global, a leading provider of corporate compliance services and whistleblower hotlines, surged by more than 25% from 2017 to 2018 and made up 8.5% more of all complaints last year than in 2017.[11]

III. EEOC TASK FORCE REPORT, PROPOSED GUIDANCE, AND PROMISING PRACTICES

Even before the #MeToo Movement, the EEOC convened a Select Task Force on the Study of Harassment in the Workplace in 2015 to conduct a far-reaching study that focused on the epidemic nature of harassment, including on the basis of sex, sexual orientation, gender identity, pregnancy, race, disability, age, ethnicity, national origin, color and religion.[12] Chai R. Feldblum and Victoria A. Lipnic, the Co-Chairs of the Select Task Force, issued their findings in the comprehensive Executive Summary.

The Select Task Force offered troubling statistics on the pervasiveness of unreported sexual harassment in the workplace. According to the Select Task Force, 25% to 85% of women reported having experienced sexual harassment in the workplace. The percentages varied based on the terminology used to characterize the conduct and the pool of women surveyed. Researchers concluded that many individuals do not label certain forms of unwelcome sexually based behaviors as "sexual harassment" even if they view the behaviors as problematic or offensive.[13] A more troubling fact was the finding that approximately three out of four harassed employees never reported the conduct.[14]

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[9] EEOC Press Release: *"*EEOC Releases Preliminary FY 2018 Sexual Harassment Data," October 4, 2018 https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm.

[10] *Id.*

[11] "Surge in Claims*," Law360*, April 4, 2019.

[12] *See* "Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs," Chai R. Feldblum & Victoria A. Lipnic (June 2016) [hereinafter "*Select Task Force Executive Report*" and "*Executive Summary*"] at 1.

[13] *Executive Summary* at Part 2 Section B.

[14] *Id*. at Introduction.

For fiscal year 2015, the types of alleged harassment broke down as follows: 45% on the basis of sex; 34% on the basis of race; 19% on the basis of disability; 15% on the basis of age; 13% on the basis of national origin; and 5% on the basis of religion.[15]

The Proposed Guidance and companion Select Task Force Co-Chairs' Report outlined five key measures that have generally proven effective in preventing and remedying harassment. They are: (1) a strong and committed leadership; (2) regular and proven accountability; (3) robust and comprehensive harassment policies; (4) reliable and accessible complaint procedures, which include prompt and thorough investigations of harassment; and (5) routine, interactive (preferably live) training tailored to the specific workforce and workplace.[16]

The Proposed Guidance provides concrete recommendations for creating and ensuring an effective harassment complaint reporting system, which includes conducting proper and comprehensive investigations. An effective harassment complaint system contains the following components, as well as others:

- is "fully resourced," enabling the organization to respond promptly, thoroughly and effectively to complaints;
- welcomes questions, concerns, and complaints;
- encourages employees to report potentially problematic conduct early;
- treats alleged victims, complainants, witnesses, alleged harassers, and others with respect;
- operates promptly, thoroughly, and impartially;
- imposes appropriate consequences for harassment or related misconduct, such as retaliation;
- provides prompt, thorough, and neutral investigations; and
- protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers, and other relevant individuals to the greatest extent possible, consistent with a

[15] *Select Task Force Executive Report*

[16] *Proposed EEOC Guidance* at 68.

> thorough and impartial investigation with relevant legal requirements.[17]

Further, those employees who are responsible for receiving, investigating, and resolving complaints should be neutral, independent and well-trained to perform these critical functions. [18] The importance of using professional, trained individuals cannot be understated. They must be able to "appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations, and disciplinary action imposed (if any), and corrective and preventative action taken (if any)."[19] Employers often engage experienced employment lawyers or other trained professionals as investigators who can independently evaluate employment-related allegations and assess credibility.

While the Proposed Guidance does not define "fully resourced" harassment complaint systems, based upon the many areas highlighted, there is a clear expectation that employers devote monetary resources and time to ensure that the mechanisms for reporting and addressing complaints work. If employers fail to devote sufficient resources, such efforts may in fact be deemed unreasonable and lead to an inadequate result. The "fully-resourced" requirement would likewise serve to avoid "sham investigations," and/or investigations where the conclusions are limited because an investigator is limited from assessing the full breadth of evidence.

The 2016 EEOC Report included four checklists to assist employers in setting up policies and dealing with workplace harassment.[20] These checklists covered the topics of: (1) leadership and accountability; (2) anti-harassment policies; (3) harassment reporting systems and investigations; and (4) compliance training. In November 2017, the EEOC published its Promising Practices for Preventing Harassment, which expanded on the instructions previously provided by the Commission. On October 31, 2018, the EEOC hosted a public meeting

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[17] *Id*. at 72.

[18] *Id.* at 72-73.

[19] *Id.* at 73.

[20] "Use Four Harassment Checklists, EEOC Commissioner Says," Allen Smith, J.D., www.shrm.org, March 15, 2017.

where a panel of experts discussed options for preventing sexual harassment and emphasized the need to change workplace culture. The Proposed Guidance has been pending without approval since entering the Office of Management and Budget and has been met with some challenges.[21]

The tools provided by the EEOC Executive Summary and Proposed Guidance, along with the landscape after #MeToo, have led to an increased need for investigations. There is a heightened focus on both preventative and remedial measures with the investigation serving as the conduit between these two goals. The importance of a fully resourced investigation is to stop improper conduct and provide a safe and productive environment for employees. Further, a proper investigation will serve to limit liability in the case of future litigation.

IV. CONDUCTING THE INVESTIGATION: AN EIGHT-STEP APPROACH

There are several steps that are useful to follow in conducting a methodical and comprehensive investigation. They are as follows:

1. planning the investigation;
2. preserving evidence and selecting investigative tools;
3. conducting the interviews;
4. making credibility assessments;
5. analyzing the evidence and reaching a conclusion;
6. documenting the investigation;
7. communicating the results; and
8. following up and monitoring.

Each of these steps will be discussed in turn.

1. Step One: Planning the Investigation

The first step in properly addressing a claim is to determine whether an actual complaint was made. Investigations can be prompted when employees submit a written complaint, but also when verbal allegations are made. Investigations are also commenced when complaints are

[21] "White House Leaves Harassment Guidance in Limbo," Chris Opfer, Bloomberg, June 13, 2018.

made anonymously and when management and/or those in HR or compliance roles directly observe problematic conduct.

- ***Selection and Role of Investigator***

Internal personnel may be called upon to investigate initial complaints, depending on the nature of the complaint. When properly trained in investigation techniques, human resources and related compliance personnel can be valuable resources. However, there are often obstacles such as familiarity with the relevant parties and bias challenges that are inherent when the investigator is employed by the entity. Also, as discussed below, privilege issues can complicate an investigation when in-house or outside attorneys serve in the dual roles of investigating and rendering legal advice to the employer. As a result, employers might elect to hire an independent, outside attorney/investigator.

Employment investigators need to be credible, impartial, organized and knowledgeable in employment law issues. The investigator should not prejudge the parties involved or the outcome of the investigation. It is important that the investigator be disconnected from the individuals involved in the investigation.

The role of the investigator should be determined at the outset of the investigation. The employer will need to decide whether to engage the investigator only as a fact finder, or if the employer requires legal advice and recommendations on the findings as well. Notably, when legal advice and recommendations are needed, employers often utilize a third-party employment lawyer/investigator to engage in fact-finding that will facilitate legal advice and recommendations to be rendered by in-house or outside legal counsel. An investigator serving in a dual capacity tasked with both finding facts and acting as legal advisor could result in complicated privilege issues if the investigation report and related materials become part of discovery in a subsequent litigation.

- ***Engagement Terms and Scope of Investigation***

When an outside investigator is retained, there are specific items that should be included in a retainer/engagement agreement to ensure a clear understanding on scope. Not only will fee structure need to be addressed, but also requests for indemnification and defense provisions since the investigators are acting as agents of the employer when serving as third-party investigators.

- ***Interim Measures***

A decision must be made on whether interim measures are required. Considerations include whether the allegations are causing excessive disruption in the workplace, and whether the complainant is in imminent harm or at risk of further damage due to reprisals. If so, steps should be taken to protect the individual before the start of the investigation. These issues can also be reevaluated as needed during the investigation. All parties involved should be provided with instructions to avoid retaliation and how to report same if experienced during or after the investigation.

2. Step Two: Preserving Evidence/Selecting Investigative Tools

- ***Preservation of Evidence and Review of Records***

Given the priority of gathering and preserving evidence, investigators must assess if electronic data or preserved evidence needs to be safeguarded. It may be necessary to engage with an IT department or other data specialists. The investigator should consider whether preservation requests are within the scope of the engagement.

Investigators should evaluate what information should be provided and from whom. Investigators should assess whether it is appropriate only to rely on searches by in-house representatives or the authors of documents to ascertain whether they are producing all relevant documentation.

Often, the identification of key documents develops during the investigation as the facts are developed and/or as the interviewees reference relevant documents. Nonetheless, there are standard documents in employment investigations that investigators find helpful. Those include: the personnel files of the complainant, accused and relevant employees; organizational charts that reflect the hierarchy and reporting structure of the employer; and company manuals that reflect relevant policies and procedures. For complaints involving union employees, the investigator should obtain the collective bargaining agreement.

As for social media accounts, such as Facebook, Twitter and Instagram, such content may be relevant to a complaint in certain instances. Investigators need to be cognizant of laws that may be applicable regarding social media privacy, which limit the amount and scope of permissible access. It is important, however, not to overstep

privacy laws and social media privacy settings. Many states prohibit employers from demanding social media passwords and attorneys from employing deceptive practices to gain access to social media accounts. There were attempts to pass a federal law, the Social Media Privacy Protection and Consumer Rights Act of 2018, but the bill failed to proceed through Congress after being introduced.[22] Another bill was introduced in 2019, the Social Media Privacy Protection and Consumer Rights Act of 2019, but has not yet passed.[23]

3. Step Three: Conducting the Interviews

While not necessary (and often not feasible), having more than one investigator present can be beneficial, especially for key interviews. Having two investigators present, particularly for the interviews of the complainant or accused, can be helpful on a variety of levels.

- ***Persons and Order of Interviews***

In most instances, the investigator will elect to interview the complainant first in order to obtain a full understanding of the complaint. The investigator will need to interview the accused to give him or her the opportunity to present his/her account of what occurred. The investigator will need to consider how much to reveal to the accused in the interview and/or about the investigation. It is important to balance the fairness to the accused against confidentiality concerns and/or possible retaliation of the complainant.

Other potential persons with knowledge, such as employees from the same department/work areas and those who may have witnessed incidents and/or have exposure to key players, should be interviewed as well. Higher-level employees may need to be interviewed, including authors of relevant documents/policies, management, Human Resources, IT, and finance employees. It often makes sense to interview the accused after others, but this may vary depending on the circumstances. In some cases, the situation may warrant conducting interviews of former employees or third parties.

Interviews should take place as soon as possible in light of all circumstances, as a prompt and thorough investigation is required.

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[22] S.2728 - 115th Congress (2017-2018), https://www.congress.gov/bill/115th-congress/senate-bill/2728.

[23] S. 189 -116th Congress (2019-2020), https://www.congress.gov/bill/116th-congress/senate-bill/189.

While it is important to move swiftly, the investigation itself should not be rushed to the detriment of details. Rather, it is important that the investigation be thorough and detailed.

Regardless of the order and number of interviews, there is a frequent need to conduct follow-up interviews after new information is acquired. The investigator should reassess after interviews are conducted or when new documentation is provided whether it is necessary to go back to prior interviewees for further information.

- ***Representation Requests***

At times, an employee may request the presence of counsel for representation during an internal investigation. While some employers may have policies prohibiting representation in internal investigations, when outside attorney/investigators conduct investigations, there are other considerations. Not only does permitting the complainant's counsel to be present promote transparency, but there are also ethics implications that could impact interviewing a complainant represented by counsel. If the accused is facing potential criminal charges or if the employee reasonably believes an answer could cause incrimination in a criminal case, there is an increased likelihood of a request for counsel.

- ***Union and Criminal Implications/Refusals to Cooperate***

Investigators should consider if the complainant or accused is a union member. If a union is involved, the terms of any collective bargaining agreement and current practices may impact the investigation, as well as compliance with legal requirements about union representatives participating in the interviews conducted. Investigators must consider whether any collective bargaining agreement applies to the investigation of claims. Union members facing potential discipline are entitled to request union representation at the interviews in certain instances pursuant to the *Weingarten* case.[24]

[24] In a unionized work setting, employers must be careful not to violate the rights of representatives under the Supreme Court decision in *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In *Weingarten*, an employer refused to allow a union representative to be present at an investigatory interview with an employee. The Supreme Court concluded that the employer's conduct constituted an unfair labor practice. The court concluded that an employee has the right to union representation at any investigatory meeting where an employee reasonably believes the meeting could result in discipline.

A potential roadblock to investigations is where complainants, witnesses, or the accused refuse to participate in interviews. The investigator should try to understand the reasons for the refusal and the concerns involved. It is important that the investigator document refusals to participate. The complainant or accused might refuse on the advice of counsel due to pending litigation and/or due to criminal implications. This is an area in which employers should seek counsel, as a blanket imposition of discipline for failure to cooperate can result in retaliation claims.

- ***Logistics and Recordings***

When interviews are conducted in person, the investigator can establish rapport more easily and can observe the witness's physical demeanor, which can be helpful in assessing credibility.[25] In an effort to maintain confidentiality, interviews should be held as privately as feasible. Investigators can consider off-site locations if there are concerns about witness identities. Investigators should avoid locations that can be viewed as intimidating and/or confining.

The investigator should not conduct group interviews, which can undermine confidentiality and candor, and taint the investigation through shared recollections. Joint meetings with the complainant and the accused should not occur. Not only is a joint interview improper, but it increases the risk of claims of intimidation and retaliation.

While some investigators believe that recording can be a helpful resource, many investigators do not audio record as it can have a chilling effect on the interviewees. Assuming that the investigator does not record, he or she should confirm that no person being interviewed is surreptitiously recording the interview.

- ***Preliminary Instructions and Confidentiality Considerations***

The investigator should give a preliminary statement to explain his or her role and set forth why the interviewee was selected. The investigator should encourage cooperation and honesty, and be calm, firm, neutral, and open. The investigator should reiterate that retaliation, investigation interference and intimidation is not permitted and advise of the reporting procedure for retaliation.

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[25] However, as set forth below, physical demeanor is a more subjective credibility factor when compared to other more objective credibility factors.

There currently continues to be tension on the issue of confidentiality in investigations between the EEOC and the National Labor Relations Board (NLRB). In its Proposed Guidance, the EEOC recommends that the employer protect the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers, and other relevant individuals to the greatest extent possible. However, protecting privacy is very challenging due to the 2012 NLRB ruling in the case of *Banner Estrella Medical Ctr*.[26] In *Banner*, the NLRB determined that a blanket confidentiality instruction is not appropriate because it negatively affects employees' rights to engage in concerted activity under Section 7 of the NLRA.

Under *Banner*, employers must demonstrate a need for confidentiality on a "case-by-case basis" and that there is a "legitimate and substantial business justification" that outweighs Section 7 rights such as:

- witnesses need protection;
- evidence in danger of being destroyed;
- testimony in danger of being fabricated; or
- need to prevent a cover-up.[27]

The EEOC Task Force Report recognized the issue but did not offer practical advice to investigators and employers on how to reconcile the conflicting positions. Instead, it was decided that the EEOC and NLRB work together to harmonize the interplay of the federal EEO and NLRA laws.[28]

In instances where in-house counsel (or outside legal counsel who represents the employer) conducts a workplace investigation, there needs to be compliance with *Upjohn Co. v. United States*.[29] Pursuant

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[26] 358 N.L.R.B. 809 (2012), affirmed by 362 NLRB 137 (June 26, 2015) and 851 F.3d 35 (March 24, 2017). In the *Banner* case, the NLRB found that the employer's confidentiality agreement violated § 8 of the National Labor Relations Act, 29 U.S.C.S § 158, because it could be reasonably construed to restrict employees from sharing information about salaries and discipline. The NLRB found that the employer did not present a legitimate business reason for the confidentiality agreement that outweighed its burden on employees.

[27] *Id*. It is unclear as to whether the current composition of the NLRB will overturn the *Banner* decision, but there have been speculations as to the future of the *Banner* case.

[28] *Select Task Force Executive Report* at pg. 42.

[29] 449 U.S. 383 (1981). *Upjohn* did not actually reference the *Upjohn* warning. Instead, it provided guidelines to point out when communications between corporate counsel and employees qualify under an attorney-client privileged exchange.

to Upjohn, to clarify on the attorney-client privilege, counsel is required to explain to employees that he or she only represents the employer in the investigation, not the individual employees themselves. This initial procedural step is referred to as an *Upjohn* warning. In some cases, witnesses also request family members or co-workers to be present for the interview. However, the investigator should permit an interpreter if needed to overcome a language barrier. Third parties are typically not permitted to be present for a variety of reasons.

- ***Questioning Techniques***

Investigators should make the interviewee feel secure and comfortable enough to speak freely. Individuals should have a full and fair opportunity to provide information. Investigators should ask open-ended, non-judgmental questions and afford ample time for responses. The investigator should engage in active listening and follow up on relevant points to obtain all necessary evidence. After the initial questioning, the investigator can later clarify and pin down specific facts.

Investigators should prepare the topics to be covered, but not limit him/herself to a list of specific questions because open-ended discussion often leads to relevant information. It is important to find a balance between guiding the interview and narrowing the scope by being too rigid with a list of pre-determined questions.

4. Step Four: Making Credibility Assessments

During investigations, there are often conflicting versions of events. The investigator is frequently in a position that necessitates a credibility decision. An investigator should not shy away from making findings and should not make findings that an incident is "unsubstantiated" simply because there are conflicting accounts (*i.e.*, "he said/she said"). Failure to make credibility assessments can result in an ineffective investigation. In *Hathaway v. Runyon*, the Eighth Circuit Court of Appeals found that it is not a remedy for the employer to do nothing simply because the employee denies harassment.[30] Allegations are often not corroborated by an eyewitness. This alone should not deter an investigator from making a finding when there are other ways to establish the credibility of the information. This includes determining whether one person providing the information is more credible than the other.

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[30] 132 F.3d 1214, 1224 (8th Cir. 1997).

- ***Sources for Credibility***

Investigators have several resources they can use for assistance in making credibility assessments. These sources can include, but are not limited to, state and federal jury instructions[31], EEOC Guidance, professional treatises and scholarly and/or scientific work by experts. Under the current EEOC Guidance there are certain credibility factors listed. However, in the new Proposed EEOC Guidance, specific credibility factors are not listed.

The current EEOC Guidance provides the following factors to determine credibility: inherent plausibility; demeanor; motive to falsify; corroboration; and past record.[32] However, investigators should not rely heavily on the inherent plausibility and demeanor factors because they are less reliable, and more subjective, than other factors.

In the Proposed EEOC Guidance, rather than listing factors, it provides that, "If there are conflicting versions of relevant events, it may be necessary for the employer to make credibility assessments so that it can determine whether the alleged harassment, in fact, occurred.[33] The EEOC also cited *Lightbody v. Wal-Mart Stores East, L.P.*,[34] a case in which credibility was a key issue.

In *Lightbody*, the plaintiff worked for Wal-Mart and submitted a written complaint to the store management asserting that the Assistant Manager engaged in inappropriate behavior. The HR Manager commenced an eight-day investigation, interviewing the plaintiff, the Assistant Manager and two employees identified by the plaintiff. The accused Assistant Manager denied many of the accusations and the HR Manager only corroborated one allegation. The plaintiff argued the investigation was deficient because the HR Manager failed to interview all relevant witnesses. One of the employees interviewed had identified six other female employees who cited inappropriate behavior

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[31] In addition to federal jury instructions, the investigator can look to model jury instructions in the state in which the investigation is conducted.

[32] Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002, June 18, 1999, p. 13. This includes "eyewitnesses" (people who saw the person soon after the alleged incidents), or people who discussed the incidents with him or her contemporaneous to the time the incidents occurred, or physical evidence (such as written documentation) that corroborates the party's testimony.

[33] *Proposed EEOC Guidance*, at 60, https://www.regulations.gov/document?D=EEOC-2016-0009-0001.

[34] No. 13-cv-10984-DCJ, 2014 U.S. Dist. Lexis 148134 (D. Mass. Oct. 10, 2014).

by the accused Assistant Manager, but the HR Manager did not interview them because the plaintiff was not aware of the conduct. The HR Manager decided that such conduct could not have affected the plaintiff's environment since she was not aware of it. However, the District Court of Massachusetts found that a reasonable jury could conclude that Walmart's investigation was deficient and that it failed to take appropriate remedial action. The court held that a jury could also conclude that a thorough investigation and formulation of an appropriate disciplinary action would have required Walmart to follow leads that bore on the Assistant Manager's credibility.[35]

As mentioned above, federal jury instructions are another resource that can assist in making credibility determinations. The Federal Model Jury Instruction on witness credibility sets forth the following criteria to assess:

- the opportunity and ability of the witness to see, hear, or know the things to which he or she testified;
- the witness's memory;
- the witness's manner while testifying;
- the witness's interest in the outcome of the case, if any;
- the witness's bias or prejudice, if any;
- whether other evidence contradicted the witness's testimony;
- the reasonableness of the witness's testimony in light of all of the evidence; and
- any other factors that bear on believability.[36]

In recent years, social science and law enforcement research has challenged the ability to assess if someone is lying based upon physical demeanor alone.[37] There are no studies that have uncovered a single behavior that can prove without fault that a person is lying.[38] A change

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[35] *Id.* at 13

[36] *Federal Model Jury Instructions 1.14 Witness Credibility*. Some other items that may affect believability can include the employee's past record of prior complaints or misconduct and whether a witness has a reputation for dishonesty.

[37] *Spy the Lie: Former CIA Officers Teach You How to Detect Deception*, Philip Houston, Michael Floyd, Susan Carnicero, Don Tennant, Macmillan, July 17, 2012.

[38] "The Truth About Lying: What Investigators Need to Know," Brian D. Fitch, Ph.D., *Law Enforcement Bulletin*, June 10, 2014.

in a witness's base line body language can sometimes offer clues on truthfulness.

Investigators must be mindful not to place too much weight on physical cues, such as eye contact or nervous behavior, or make blanket judgments about lying. According to prominent psychologist Paul Ekman,[39] research over a 20-year period has shown that it is extremely difficult to determine if someone is lying.[40] Specifically, a person's ability to detect lies based on physical cues is incorrect 40%-60% of the time. Instead of focusing on a single component of behavior, demeanor considerations may be more meaningful if the investigator makes a baseline assessment of an individual's conduct, including indicators of emotion, cognition and control and assesses changes in that baseline with certain questions. Additionally, the investigator should focus on the actual statements made by the interviewee, including "halo" statements and statements that do not contain true answers, but are more evasive deflections.[41]

- ***Credibility as to Motive v. Events***

An investigator is often asked to make credibility assessments to determine whether the underlying events occurred and/or whether the accused had an improper bias or motive to engage in actions against the complainant.

The investigator should evaluate whether those interviewed have a motive to falsify information, a specific interest in the outcome, or any other such form of bias. The investigator should also view the witness's recollection of specifics to decide if that recollection seems credible. This can sometimes be judged based on whether there is corroboration of the information, including consistency of the accounts, support in relevant documents, and contemporaneous discussions and documentation.[42]

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[39] Dr. Ekman was named one of the 100 most influential people in the world by TIME Magazine, and in 2014 ranked fifteenth among the most influential psychologists of the 21st century.

[40] "8 Myths About Lying," Paul Ekman, Ph.D., *Forbes*, June 8, 2015; *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage*, rev. ed., Paul Ekman, Ph.D. (New York, NY: W.W. Norton and Company, 2009).

[41] *See Spy the Lie: Former CIA Officers Teach You How to Detect Deception*, Philip Houston, Michael Floyd, Susan Carnicero, Don Tennant, Macmillan, July 17, 2012 (discussing "halo" statements).

[42] *Id.*

5. Step Five: Analyzing the Evidence and Reaching a Conclusion

- ***Fair Estimate of Truth / Preponderance of the Evidence Standard***

After the interviews are complete, the investigator must then begin to analyze the evidence gathered during the course of the investigation. Investigators apply a preponderance of the evidence standard,[43] so it is expected that the information will be thoroughly reviewed for support. Under the preponderance of the evidence standard, the investigator makes a judgment on what is believed to have occurred based on what is more likely true than not true. The investigator need not have 100% certainty as long as there is a supportable basis for the finding.[44]

The Proposed EEOC Guidance states that an investigation is "effective" if it is sufficiently thorough to "arrive at a reasonably fair estimate of truth."[45] The EEOC cited the following cases in support of this proposition: *Baldwin v. Blue Cross/Blue Shield of Ala.*[46] (holding that the employer's investigation was reasonable and both elements of the *Faragher-Ellerth* defense were satisfied); *EEOC v. Boh Bros. Constr. Co.*[47] (holding that a reasonable jury could conclude that the employer failed to take reasonable measures to prevent and correct harassment after conducting only a belated and cursory 20-minute investigation in which the investigator did not take any notes or ask any questions during his meeting with the complainant and he never contacted the employer's EEO Officer or sought advice about how to handle the matter); *Lightbody v. Wal-Mart Stores E., L.P.*[48] (concluding that a reasonable jury could find that the employer was liable for sexual harassment of the plaintiff because, in investigating

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[43] A preponderance of the evidence standard requires proof that, in light of all of the evidence, that what is claimed is more likely so than not. *Federal Model Civil Jury Instructions* 1.10 citing *United States v. Montague*, 40 F.3d 1251, 1254-55 (D.C. Cir. 1994) (The preponderance standard requires an analysis and weighing of all of the evidence presented by both sides.) In investigations that are more quasi-criminal and/or involve legal findings regarding fraud or criminal activity, using a higher standard, such as a clear and convincing standard, might be appropriate.

[44] "Legal Trends: Conclude and Communicate," Jathan W. Janove, *HR Magazine*, August 1, 2004.

[45] *Proposed EEOC Guidance,* at 60.

[46] 480 F.3d 1287, 1302-06 (11th Cir. 2007).

[47] 731 F.3d 444, 465-66 (5th Cir. 2013) (en banc).

[48] No. 13–cv–10984–DJC, 2014 WL 5313873, at *5 (D. Mass. Oct. 17, 2014).

the plaintiff's complaint, it failed to follow leads that bore on the alleged harasser's credibility); and *Grimmett v. Ala. Dep't of Corr.*[49] (concluding that the employer failed to show that it exercised reasonable care where it presented general evidence that it had initiated an investigation but no specific evidence that would enable the court to evaluate the adequacy of the investigation and the employer's conclusory finding that the harassment complaint was unfounded).[50]

The EEOC further provides that "[t]he investigation 'need not entail a trial-type investigation,' but it should be conducted by an impartial party and seek information about the conduct from all parties involved."[51]

- ***Organize, Analyze and Assess***

Investigators should organize the information and analyze the interview and documentary evidence. Investigators can then incorporate the credibility assessments, make well-reasoned findings of fact, and reach a conclusion.

6. Step Six: Documenting the Investigation

- ***Notes, Summaries, Statements***

During the interviews, the investigator should take contemporaneous notes and create a written record of each interview. The investigator should maintain all versions of notes regardless of whether they were in a handwritten format or typed. This is advisable even if a summary is created afterwards. Written statements for interviewees to sign can also be helpful at times. However, there are also potential challenges with statements. As such, requesting statements to be signed may vary among investigators and/or determined on a case-by-case basis.

- ***Reports and Investigator File***

Upon completion of a fact-finding investigation, the investigator should provide a report on the factual findings and conclusion at the end of the investigation. There are different types of reports that can be prepared. Written reports ensure clarity on key issues and findings. Regardless of the type, the investigator should refrain from making

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[49] No. CV-11-BE-3594-S, 2013 WL 3242751, at *13 (N.D. Ala. June 25, 2013).

[50] *Id*.

[51] *Proposed EEOC Guidance* at 60.

legal conclusions such as findings of harassment or discrimination unless retained to do so. As mentioned above, investigators are often engaged only to make fact findings while others, such as the employer's legal counsel, typically rely upon the fact findings to draw legal conclusions and/or make legal recommendations.

Once the report is complete, the investigator should take care to maintain an investigation file that includes the interview notes, the outlines, the lists of interviews, any written or signed statements, documents reviewed, any drafts[52] of the report provided to the employer, and the final report. Employers should maintain separate files for privileged or protected communications, if any, to enable easy removal if the investigation file is subject to production in litigation. Given that litigation is often filed (with a variety of statutes of limitation) and/or since other issues may arise, the amount of time to maintain the file will vary depending upon the circumstances.

7. Step Seven: Communicating the Results

Once the investigation has been completed, the employer should consider the best person to communicate the results to the complainant and accused, and whether more than one person should be present. The employer also needs to decide how much information to convey to the complainant or accused. The employer should take steps to ensure that it communicates information about the outcome of the investigation only to certain individuals on a need-to-know basis to preserve confidentiality.

8. Step Eight: Following Up and Monitoring

The employer should be proactive in following up with all parties and engaging in active monitoring. When an investigation is complete, it is imperative that the employer take steps to ensure that no retaliation occurs against complaining employees or those who participated in the investigation. The Proposed EEOC Guidance says that employers must make unequivocal statements that retaliation is prohibited and that no action will be taken against those who make good faith

[52] There are often concerns surrounding draft reports on which investigators should be apprised.

complaints or participate in an investigation, whether or not the alleged conduct is found to violate the harassment policy.[53]

Extreme caution should be exercised when taking adverse action for alleged false complaints. Good faith complaints that are deemed unsubstantiated are not necessarily false complaints.

V. INVESTIGATION DISCOVERABILITY, PRIVILEGE, AND WAIVER

One of the many complex issues that surround workplace investigations, especially before any litigation is commenced, involves the applicability of certain privileges. When attorneys conduct investigations and/or provide direction to non-attorneys, there are often discovery disputes over whether the investigation is discoverable or protected by certain privileges. The most common privileges asserted in this context are the attorney-client and work product privileges.[54] Yet, even when these privileges apply, employers that raise issues of the adequacy of their investigation and/or corrective action might lose these privilege protections. Once these protections are lost, investigative materials may become subject to disclosure during the discovery process.

In determining whether or not an investigation is privileged, the courts typically engage in a highly fact-sensitive analysis. The courts look to certain factors to determine whether privileges will apply, such as: (1) whether the investigation was conducted by an attorney or a non-attorney; (2) whether non-attorneys are being directed by an attorney; (3) whether an attorney investigator is an in-house counsel or outside attorney; (4) the attorney's role in the investigation (*i.e.*, was the attorney charged with conducting interviews and fact-finding or assessing legal liability); (5) whether an attorney investigator is serving as a decision maker in a business capacity as opposed to a legal capacity; (6) whether the attorney was engaged primarily for the purpose of providing legal advice; (7) whether the investigation was primarily conducted for a remedial purpose and/or due to the employer's legal obligation to remediate conduct; (8) what the acts were that triggered the investigation and the timing surrounding same; and (9) whether the attorney was engaged in "anticipation of litigation."

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[53] *Proposed EEOC Guidance* at 71.

[54] While there are some cases in which the parties have attempted to invoke the self-critical analysis privilege, such does not routinely appear in the investigation context and will not be the focus of this paper.

A. Attorney-Client Privilege

Some courts look to the following factors to assess the applicability of the attorney-client privilege: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal advisor, (8) except if the protection has been waived.[55]

Other courts look to similar factors, such as the following: "(1) the asserted holder of the privilege is, or sought to become, a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an option on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or not; and (4) the privilege has been (a) claimed and (b) not waived by the client."[56]

The attorney-client privilege does not apply only to attorneys. It also applies to agents of the attorney. For example, the privilege may apply to non-lawyer investigators who perform investigations at the direction of an attorney.

Depending on the circumstances, the gathering of facts might be privileged as well. In *Upjohn Co. v. United States,* the United States Supreme Court upheld the attorney-client privilege as to communications and the attorneys' mental processes in evaluating the communications related to attorney investigations performed by an in-house counsel.[57]

B. Work Product Privilege

The work product privilege is broader in scope than the attorney-client privilege. The privilege is meant to protect the necessary privacy in which an attorney and the attorney's agents can formulate

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[55] *Gingerich v. City of Elkhart Probation Dept.*, 273 F.R.D. 532 (N.D.Ind.2011) (citing *U.S. v. Evans,* 113 F.3d 1457 (7th Cir 1997)).

[56] *Harding v. Dana Transport, Inc.* 914 F. Supp. 1084, 1090 (D.N.J. 1996).

[57] 449 U.S 383, 383-84 (1981).

legal theories and strategy "in anticipation of litigation" without unwarranted interference from adversaries.

The work product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3) as "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." However, pursuant to Rule 26(b)(4), those materials may be discovered if they are otherwise discoverable under Rule 26(b)(1) and "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means...." Regardless, even if the court orders discovery of those materials, steps must be taken to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.[58] "Factual" work product, which includes information obtained by a lawyer in the course of an investigation, receives less protection than "opinion" work product that reflects an attorney's mental impressions or legal conclusions.[59]

In considering the applicability of the work product privilege, the key factor courts analyze is whether the investigation was conducted "in anticipation of litigation." The courts vary in how they interpret what is enough to be considered in "anticipation of litigation." Some courts have determined that it is reasonable to assume that "in anticipation of litigation" could be triggered by the receipt of a pre-litigation demand letter, the filing of an administrative charge, or an internal complaint coupled with other facts such as the complainant's threats of filing a lawsuit and/or if the complainant retains an attorney.

Courts sometimes focus on the employer's response to a complaint to determine whether such was "in anticipation of litigation." For example, if the investigation resulted from an employer's routine response to internal complaints in connection with a harassment policy, the courts are less likely to find such to be "in anticipation of litigation." However, if the employer sent an internal complaint to an attorney and such is outside of an employer's normal process, the courts are more likely to find that such was "in anticipation of litigation." However, the timing of the filing of a lawsuit and/or actual verbal threats of

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[58] *Fed.R.Civ.P.* 26(b)(4).

[59] *Reitz v. City of Mt. Juliet*, 680 F. Supp. 2d 888, 892 (M.D. Tenn. 2010).

litigation are not always dispositive on whether a court will find that an investigation into an internal complaint was in "anticipation of litigation."

Even if work product protection applies, courts have reached varying conclusions about when the employee is able to satisfy the "substantial need" and "undue hardship" thresholds. When the investigative materials are necessary to rebut the defense that the employer promptly investigated and took immediate corrective action, the courts are often convinced that the employee has met the required showing of a substantial need for the evidence.

C. Faragher-Ellerth Affirmative Defense and Waiver

Additionally, even in instances where the court does find that the attorney-client and/or work product privileges apply, employers routinely waive these privileges when they seek to rely on the investigation and/or assert that they took appropriate corrective action as an affirmative defense to the claims brought against them. This type of defense is often referred to as a *Faragher-Ellerth* defense, which derived from two cases decided by the United States Supreme Court in 1998.

In *Burlington Industries, Inc. v. Ellerth*[60] and *Faragher v. City of Boca Raton*,[61] the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: (1) employers are responsible for the acts of their supervisors; and (2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if there is no tangible employment action, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

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[60] 118 S. Ct. 2257 (1998).

[61] 118 S. Ct. 2275 (1998).

Once an employer raises a *Faragher-Ellerth* type defense, the employer is typically deemed to have put the matter "in issue," thereby waiving applicable privileges. Employers routinely argue that they did not put the investigation itself "in issue" but, rather, only seek to rely on the remedial action that they took. They further argue that, since they are only relying upon the remediation, the investigative materials should not be produced. A majority of courts, however, do not permit employers to withhold production on such basis as it would unfairly enable employers to use the investigation as both "sword and shield." Courts have found that an employee needs to know what was told to the investigator in the investigation to determine whether the remedial action was appropriate. Moreover, if an employer is claiming that an investigation was thorough, the employee needs to be able to assess what the investigation entailed in order to rebut its thoroughness.

Additionally, courts vary on the breadth of the waiver application. Some courts permit an extremely broad waiver, while other courts limit the waiver and direct the redaction of certain information. There are a host of cases where the investigative materials were protected by privilege and not discoverable.[62] There are just as many or even more reported opinions in which courts decided in favor of disclosing all or part of investigative materials.[63] Employers familiar with the privilege standards as to investigative materials in their applicable jurisdictions will be in a better position to make decisions about the investigation

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[62] *See, e.g., Sandra T.E. v. S. Berwyn Sch. Dist. 100,* 600 F.3d 612 (7th Cir. 2010); *Davis v. Emery Air Freight Corp.,* 212 F.R.D. 432 (D. Me. 2003); *Waugh v. Pathmark Stores, Inc.,* 191 F.R.D. 427 (D.N.J. 2000); *E.E.O.C. v. Lutheran Soc. Servs.,* 186 F.3d 959 (D.C. Cir. 1999); *Ryall v. Appleton Elec. Co.,* 153 F.R.D. 660 (D.Colo. 1994); *City of Petaluma v. Superior Court*, 248 Cal. App. 4th 1023 (2016); *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110 (1997).

[63] *See, e.g., Banneker Ventures, LLC v. Graham*, 253 F. Supp. 3d 64 (D.D.C. 2017); *Doe 1 v. Baylor University*, 320 F.R.D. 430 (W.D. Tex. 2017); *Gillespie v. Charter Comm.,* 133 F. Supp. 3d 1195 (E.D Mo. 2015); *Koss v. Palmer Water Department* 977 F. Supp. 2d 28 (D. Mass. 2013)*; Koumoulis v. Independent Financial Marketing Group,* 295 F.R.D. 28 (E.D.N.Y. 2013); *Musa-Muaremi v. Florists' Transworld Delivery, Inc.,* 270 F.R.D. 312 (N.D. Ill. 2010); *Reitz v. City of Mt. Juliet,* 680 F. Supp. 2d 888 (M.D. Tenn. 2010); *McGrath v. Nassau County Health Care Corp.,* 204 F.R.D. 240 (E.D.N.Y. 2001); *Long v. Anderson Univ.,* 204 F.R.D. 129 (S.D. Ind. 2001); *Brownell v. Roadway Package Sys.,* 185 F.R.D. 19 (N.D.N.Y. 1999); *Worthington v. Endee*, 177 F.R.D. 113 (N.D.N.Y. 1998); *Peterson v. Wallace Computer Servs., Inc.,* 984 F. Supp. 821 (D. Vt. 1997); *Johnson v. Rauland-Borg Corp.,* 961 F. Supp. 208 (N.D. Ill. 1997); *Harding v. Dana Transp, Inc.,* 914 F. Supp. 1084 (D.N.J. 1996); *Fenceroy v. Gelita USA, Inc.,* 908 N.W.2d 235 (Iowa 2018); *Payton v. N.J. Turnpike Auth.,* 691 A.2d 321 (N.J. 1997).

steps identified above, including the type of investigator needed, the appropriate scope of the investigation, and the type of investigation report preferred.

VI. CONCLUSION[64]

In the wake of the #MeToo Movement, there should be an increased focus on accepting complaints through established reporting procedures, engaging in prompt and thorough workplace investigations in response to protected complaints of harassment, discrimination and retaliation, and taking appropriate remedial measures to address inappropriate conduct. Investigations should be conducted by experienced professionals who are able to effectively elicit key facts and are properly trained in the legal standards and effective investigation techniques such as engaging in the comprehensive and methodical approach to the investigations set forth in the eight steps above. Utilizing outside, independent investigators with the background and training necessary to conduct such investigations can be beneficial. Lastly, when workplace investigations occur, there should be consideration of the applicability of work product and attorney client privileges.

[64] This article is to be used for informational purposes only and its contents are not intended to constitute legal advice