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One Way or Another: Picking the Best Way to Show a Misbehaving Executive the Door

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Investigating C-Suite Misbehavior

The C-Suite is not immune to sexual harassment or other behavior that violates Company policy and possibly federal or state law. How corporate counsel respond to it can be critical and can significantly impact potential liability. Plaintiffs' lawyers who learn that different investigative procedures were utilized to look into allegations against senior executives are thrilled, convinced that the double standard and efforts to "cover up" misbehavior will cause juries to throw money at their clients. And there cannot be two approaches to deciding whether an employee stays or goes after an investigation finds allegations to be credible, one for the employee with a key to the executive washroom (to the extent those still exist) and another who works on the production line.

Corporate America has Lost Patience with Misbehaving Executives

Since the #MeToo movement gained full steam in October 2017, many large companies have terminated high-profile executives for sexual misconduct:

- In October 2017, The Weinstein Company fired its founder – and the face of the #MeToo movement, Harvey Weinstein – following numerous reports of sexual misbehavior involving employees, actresses, and other female associates. Weinstein faces criminal charges as well.
- In June 2018, Intel CEO Brian Krzanich was forced out following revelations of what he claimed to be a consensual office romance.
- Similarly, in November 2019, McDonald's fired CEO Steve Easterbrook in connection with an allegedly consensual relationship with an employee. Easterbrook had been considered a valued, forward-thinking strategist who led the fast-food restaurant into the world of online ordering and delivery.
- In December 2019, investing giant BlackRock sacked global head of active securities Mark Wiseman following a consensual affair at work. Wiseman failed to report the relationship as required by the company's code of conduct, and perhaps making matters worse, his wife also worked at BlackRock (and was there long before he was).

Ellerth/Faragher is Your Friend

For an employer to avail itself of the *Ellerth/Faragher*¹ affirmative defense, it is imperative that a robust and well-communicated reporting mechanism is in place. While there is no *per se* rule that companies maintain a policy prohibiting harassment with a reporting requirement, prevailing on the defense – which requires that the employer exercise reasonable care to prevent and correct promptly instances of sexual harassment, and also that the employee failed to take advantage of the employer’s preventative or corrective measures or avoid harm otherwise – virtually requires that a reporting procedure is in place.

Absent the *Ellerth/Faragher* defense, employers are faced with what amounts to strict liability in the case of sexual harassment perpetrated by executives. In other words, if the jury believes the allegations are true, the company loses.

But even if an employer has an ideal no-harassment policy in place, with multiple reporting options, failure to act promptly on the report can doom the defense. This is generally not a concern with most complaints of harassment. However, when the recipient of the complaint fails to take the allegations seriously, whether because the complainant has a reputation for overreaction or because the alleged harasser is known as a fair, compassionate leader, an investigation can run off the rails before it begins.

If in-house counsel plays a role in initiating the investigative process, it is vital that natural feelings of friendship and respect for the alleged harasser do not get in the way of an objective assessment of the complaint or interfere with sound, practical initial steps in the investigative process.

The investigative process itself is often the best evidence of the employer’s prompt efforts to remediate any illegal harassment, and this means that the employer must decide whether to disclose the results of the investigation, thereby waiving the privilege.

Who Is the Client?

Once an investigation has commenced, witness interviews usually shed the most light on the underlying accusations. Interviews of the complainant and the alleged harasser are essential, as are sessions with witnesses identified by either.

But in the context of these interviews, whether they are conducted by outside or inside counsel, it is critical that those interviewed understand who the lawyer represents. This is where the *Upjohn* warning comes in: the lawyer must clearly and unequivocally advise the interviewee that the lawyer represents the company in this process, not the individual and that the attorney-client privilege

¹ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

belongs to the employer, and it is solely its to waive.² Moreover, the *Upjohn* warning must make clear that the purpose of the investigation is to gather facts to provide legal advice to the company.

But many C-suite executives are used to seeking the advice of inside and outside counsel on a whole array of legal issues affecting the company and in which the executive is immersed, and it can be easy to slip into the notion that the company's lawyer is the executive's lawyer. It is advisable to make the *Upjohn* warning as direct and upfront as possible, perhaps using examples to differentiate circumstances where an executive is seeking legal advice on behalf of the company and when he is being interviewed as part of a harassment inquiry. Executives also sometime have a misconception that the company's lawyer is actually engaged in a form of joint representation, and that she represents both the company and the executive as an individual.³

Some investigative lawyers soft-pedal the *Upjohn* instruction because they are worried that too harsh a warning will result in a witness clamming up. The investigator is somewhat at the mercy of the witness; a less-than-candid interviewee can make an investigation very difficult. But if the attorney-investigator does not make it clear that he does not represent the employee, a court can find that an attorney-client relationship existed, which ordinarily the company cannot waive. This could result in the company being in a position where it cannot disclose the facts learned in the investigation should it determine that disclosing the investigation results is in the employer's best interests (for *Ellerth/Faragher* purposes).

Inside or Outside Counsel

One important consideration for a company at the outset of any investigation of one of its senior executives is whether to have its in-house lawyer run the investigation or have an outside lawyer or investigator do it. Generally speaking, the independence of an outside investigator can be helpful as the company attempts to demonstrate later that the results of the investigation were not tainted by bias. But utilizing regular outside counsel can sometimes not create an adequate sense of independence. If the lawyer representing a harassment victim later tries to call into question the investigation results, it can be effective to point out the regular, ongoing business relationship between the investigator and the client company. The appearance of bias can be heightened if the outside lawyer has a personal friendship with the alleged harasser and is the principal point of contact for the assignment of legal matters. In these cases, identifying a different outside law firm to conduct the investigation can be beneficial. Should we touch on the wisdom or lack thereof in having a lawyer as witness? This is why I largely use investigative firms instead of using one of our lawyers.

² *Upjohn Co. v. United States*, 449 U.S. 383, 389-97 (1981).

³ See *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) (CFO claimed that he was represented by investigative counsel and that his statement was privileged, and sought to have the statements suppressed in a later criminal trial; investigator had failed to document *Upjohn* warning, had not recommended separate counsel, and failed to advise of potential conflicts in writing; court reversed suppression order but admonished counsel for *Upjohn* inadequacies).

What if the Accused is a Member of the Legal Department?

When the subject of the investigation is actually a member of the company's in-house legal team, things can become especially dicey. In such cases, it is prudent for the Board of Directors of one of its committees to retain outside counsel to investigate and serve as the company's principal contact throughout the investigation. In such cases, inside counsel should essentially recuse themselves from any involvement in the investigation, both to avoid perception of bias and also because they likely could serve as fact witnesses as the investigation unfolds.

Confidentiality?

Complainants are often concerned about making a formal complaint "on the record" for various reasons. Sometimes they are concerned about retaliation; more often they are concerned about the impact the complaint might have on their own reputations and the potential consequences to the alleged harasser.

It is tempting as an investigating lawyer to reassure the victim that her report will be held in the "strictest confidence" in order to ensure that the company receives the complete story. But this approach is not advisable for reasons both practical and legal. Though it reversed its decision in December 2019, the National Labor Relations Board concluded in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), enf. denied on other grounds, 851 F.3d 35 (D.C. Cir. 2017), that rules prohibiting discussion of the subjects of workplace investigation were potentially violative of the National Labor Relations Act, and required that employers prove on a case-by-case basis that the integrity of an investigation would be compromised absent confidentiality.⁴

The practical problems associated with promises of confidentiality are more worrisome. Thoroughly investigating accusations of harassment when confidentiality has been promised to the complainant is virtually impossible. There is no reason the investigator cannot reassure the reporter that the Company [no caps? – it appears both ways] will take reasonable steps to ensure that the matter is treated as "confidentially as possible" given the needs of the investigation and the company's desire to avoid unnecessary scrutiny of the situation. In addition, it is worth reminding the complainant of the company's commitment against any form of retaliation in such circumstances.

⁴ In a welcome decision for employers, the Board in *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019), overturned *Banner Estrella*, holding the work rules requiring confidentiality in investigations were presumptively lawful. In light of the fact that the Board's composition changes with each administration, it is worth noting that *Apogee Retail* might itself be overturned depending on the results of the 2020 presidential election.

The Decision

Many investigations of workplace misconduct fail to uncover clear, unassailable evidence of policy violations. Many investigations result in a less than satisfactory outcome, where the accused tells a different story and no corroborative evidence exists. In such “he said/she said” circumstances, the employer should, at a minimum, remind both parties of the employer’s policy prohibiting harassment and retaliation against those making complaints. It is also a good idea to counsel the accused executive to avoid situations in which his actions could be misinterpreted. Training of the executive also may be warranted under the circumstances.

Of course, in some situations, “hard” evidence (security camera footage, emails and other data on electronic devices and company servers, eyewitness accounts, hotel/restaurant receipts, and sometimes even admissions) exists and makes it much easier to reach a definitive conclusion. If a violation is found, inside counsel are next faced with assisting the Board or other executives to whom the harasser reports about what to do from a disciplinary perspective.

Whether to terminate depends on the following factors:

- The severity of the offense;
- The pervasiveness of the conduct;
- Whether the conduct was welcome;
- Whether the behavior clearly violates company policy;
- Any evidence of retaliation; and
- How the company’s response is received by others in the organization.

This last factor has taken on added importance since the #MeToo movement has gained steam. Many organizations have become more sensitive to the reaction that employees may have if the company’s response suggests that it is not taking issues of harassment seriously.

Preparing for Potential Legal Actions

The company’s investigative work and prompt remedial action generally contains the potential liability with respect to any harassment action contemplated by the accuser. The victim still may assert a claim, but the value is significantly lessened if the employer is able to demonstrate facts supporting the *Ellerth/Faragher* defense.

But is there risk associated with the termination of the executive for violations of corporate policy? Recently, defamation claims brought by those accused of sexual harassment against both victims and employers have increased. Some states have attempted to pass laws designed to make such

suits, which can chill the reporting of such claims, more difficult to maintain. For example, in California, AB 2770 began last year making certain workplace communications reporting harassment “privileged,” reducing the risk of viable defamation claims following a harassment investigation. Specifically, AB 2770 makes the following kinds of communications immune from defamation claims as long as they are not made “with malice”:

- Reports of sexual harassment made by an employee based on “credible evidence”;
- Communications between the employer and “interested persons” (including witnesses) in the context of the harassment investigation; and
- An employer’s response to an inquiry from a prospective employer of the harasser regarding whether it would rehire the harasser following a finding that the former employee engaged in harassment.

In addition, roughly a third of the states have implemented statutes designed to make “strategic lawsuits against public participation” more difficult. These “anti-SLAPP” statutes often provide a procedural mechanism to dismiss cases early where the allegations in the complaint related to the exercise of constitutional rights” like speech or association.⁵ The particularly rigorous versions of these laws award mandatory attorney’s fees if such motions are successful (and they often are, since they usually require the plaintiff to come forward with credible evidence establishing each element of his prima facie case before discovery has begun).

Severance and Release? [Don’t we want to mention that the employment agreement may complicate the ability to let the executive go?]

Employers separating high-level executives often feel compelled to provide severance in exchange for a release. Of course, the release must be supported by valid consideration; thus, previously negotiated severance included in the executive’s employment contract usually will not suffice (unless the receipt of severance was conditioned on execution of a release).⁶

Public relations can also be a factor when deciding whether to pay severance. The employer’s standing among its employees – especially in this age of social media – can be damaged if word of payments to the harasser become known. The value of knowing the harasser cannot sue after signing the release must be weighed against the potential outcry from those who view such severance as inherently wrong and inconsistent with the company’s values.

⁵ See, e.g., “Texas Citizens Participation Act,” Tex. Civ. Prac. & Rem. Code §27.001 *et seq.*

⁶ Of course, if the agreement requires no severance in the event of a termination “for cause” and the employer feels that it can establish cause through facts uncovered in the investigation, it can proceed with the understanding that any severance paid to the executive is money to which the executive was not entitled. The more conservative approach would be to add a modest amount of severance in addition to the negotiated sum in the event that the employer is unable to establish “cause” to a judge.

Some employers are concerned about departing executives going to work for competitors after being terminated and want to include restrictive covenants in severance agreements. While this is acceptable in many states where valid consideration exists to support such a consideration, it is not something that is permitted in every state. For example, in Texas, restrictive covenants cannot be supported by severance payments alone.⁷ Rather, they are valid only where the consideration is the employer's provision of confidential information in return for the employee's promise to keep the material secret, and providing such material to a departing executive would defeat the purpose of a restrictive covenant.

At a minimum, employers showing a terminated executive the door should take steps to ensure that he does not walk off with confidential material regardless of whether he will be bound by a restrictive covenant. Once the decision has been made to terminate, all access to the company's computer system should be cut off, and the executive should be required to return all electronic devices issued to him. Moreover, even if devices belong to him but contain company information, the employer has a right to retrieve such information, and it should remind the executive of his ongoing obligation to return all material belonging to the company and to maintain its confidentiality even after the employment relationship has ended.

Showing the Executive the Door

In most cases, the termination of the executive found to have engaged in harassment is conducted behind closed doors, and the executive is not subject to a "perp walk" accompanied by security unless there have been threats of violence or suggestions of sabotage or theft of confidential material. Still, inside counsel will want to work with senior management, the company's internal communications team, and possibly outside counsel and public relations professionals to craft a message for both internal and external use regarding the executive's departure. The message matters, both to minimize the risk of defamation claims and to remind employees and the outside world of the company's commitment to its culture.

⁷ See, e.g., *Trilogy Software, Inc. v. Calidus Software, Inc.*, 143 S.W.3d 452, 462-63.