Outsourcing Investigations of Sexual Harassment: The Unexpected Consequences of Good Intentions

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During the 1990s, claims of sexual harassment rose significantly, increasing liability risks for all organizations, large and small, for-profit and not-for-profit. Ever since sexual harassment took center stage during the 1991 confirmation hearings of Clarence Thomas as associate justice of the United States Supreme Court, the number of charges filed with the Equal Employment Opportunity Commission (EEOC) has risen substantially. Because federal law caps damages at $50,000 to $300,000, depending on the number of employees within the organization, many claims are litigated in state courts where total damages may not be limited. For meritorious cases, out-of-court settlements and jury-trial awards increasingly reach six or seven figures. These heightened economic risks require businesses to take a special interest in understanding sexual harassment law and avoiding sexual harassment litigation.

Two recent U.S. Supreme Court decisions, *Burlington Industries v. Ellereth*¹ and *Faragher v. City of Boca Raton*² reaffirmed the principle that employers may be held liable for not establishing, disseminating, and consistently enforcing a policy that prohibits sexual harassment. Also, if a complaint alleging sexual harassment arises, these cases confirm the need for employers to conduct a “reasonable” investigation. As a result, the EEOC issued revised enforcement guidelines regarding employer liability for sexual harassment committed by supervisors.³ The EEOC emphasized the importance of prompt, thorough, and impartial investigations conducted by well-trained investigators.

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Investigations perceived to be fair may help to insulate the firm from potential litigation, and merely adhering to the letter of the law may not guarantee such a perception. In an article in a recent issue of Employment Relations Today, the author argued that the perception of a fair and objective inquiry into alleged sexual harassment is best achieved by outsourcing these investigations to a neutral, professional third party. Undoubtedly, many organizations—particularly small and medium-sized businesses—will find it more cost effective when conducting investigations in compliance with EEOC guidelines to seek assistance from knowledgeable, experienced, and unbiased outside investigators. This decision, however, has potentially significant unintended consequences: Amazingly, it forces such businesses to comply with the provisions of the Fair Credit Reporting Act (FCRA)! A letter opinion by the staff of the Federal Trade Commission (FTC) interpreting the 1997 amendments to the FCRA indicates that the newly expanded disclosure, notification, and consent requirements apply to all employers that use “consumer reports” (e.g., outside investigations) for making employment decisions. Therefore, employers that use third parties to help investigate claims of sexual harassment must comply with the FCRA’s new disclosure requirements.

This article reviews the two reasons why investigations into allegations of sexual harassment are necessary. We then describe the key characteristics of an effective investigation. The third section examines the recent FTC letter ruling on sexual harassment investigations. Next, this article presents suggestions for dealing with the FTC letter ruling in light of the requirements associated with a thorough and confidential investigation. In the final section we suggest ways in which business might lobby for changes in public policy in order to free itself of these new compliance burdens.

THE NEED TO INVESTIGATE

Whether to investigate a claim of sexual harassment is no longer a matter of debate; failure to investigate—and to investigate competently—can have a significant negative impact on the firm. “The message from judges and juries across America is clear: Faulty investigation of sexual harassment claims can lead to judgments in favor of sexual harassment victims and alleged harassers whose terminations are based on insufficient evidence.” While the first of these reasons is obvious to most, the second consideration may be new to many. Moreover, this twofold rationale forces the employer to consider, from a pragmatic standpoint, the very real possibility of having to defend harassment-related
claims from two almost diametrically opposing viewpoints. Unquestionably, the margin of error is narrowing for the employer who must deal with a sexual harassment claim. As a result, there is a far greater need now than ever before for the employer to conduct a vigorous and effective investigation when allegations of impropriety first arise. These investigations must rely not only on a legally defensible process, but also must be perceived as being fair and impartial.

The Victim’s Claim

For enlightened employers today, it is axiomatic that any claim of sexual harassment must be investigated. This conclusion is sensible in light of the current state of law regarding sexual harassment. In particular, the 1998 U.S. Supreme Court decisions in Burlington Industries and Faragher expressly create a new affirmative defense for an employer facing a hostile-environment claim of sexual harassment. The EEOC recently published guidelines flowing directly from Burlington and Faragher that deal specifically with vicarious liability of employers for acts of a supervisor. The guidelines state that a claim by an employee or former employee alleging that an unlawful hostile environment existed in the workplace can be successfully defended where the employer shows that the “employer exercised reasonable care to prevent and correct promptly any harassment” and that the employee unreasonably failed to take advantage of any corrective opportunities provided by the employer. The duty of the employer to exercise “reasonable care” necessarily requires the employer to conduct some type of investigation once management learns of the supposed harassment. Quite simply, the failure to investigate may very well now be regarded as strong evidence that the employer approves, albeit implicitly, of the sexual harassment.

The Alleged Harasser’s Claim

But there is another reason supporting the employer’s decision to investigate any harassment claim fully. In recent years, those accused of sexual harassment are also suing their employers for emotional distress, defamation, and wrongful discharge. Two reasons appear to bolster this trend. First, the proportion of unsupportable claims filed with the EEOC is climbing. For fiscal year 1995, EEOC personnel concluded in 30.4 percent of the filings that “no reasonable cause” existed for the claim. Three years later, EEOC investigators found 42.3 percent of the claims contained allegations that were not supported. An almost 12 percent increase over three years in claims found to be without merit
certainly should cause employers to be wary of allegations made by supposed victims of sexual harassment. But the problem associated with meritless claims is compounded by the fact that many employers have recently adopted a zero-tolerance policy toward those accused of sexual harassment. Some employers fearing liability for violating the law prohibiting sexual harassment are reacting to an allegation of sexual harassment by terminating the employee accused of misconduct before any type of procedural due process is provided the alleged perpetrator.

Unfortunately, the development of a formula that would assist employers in defending lawsuits by individuals who are terminated for creating a hostile work environment and later assert that the allegations against them are false is still in its infancy. However, the Supreme Court of one major state has provided at least a modicum of assistance for management by ruling recently that the termination of an employee for sexually harassing a coemployee is not wrongful under state law if the investigation into the veracity of the allegations occurred in good faith and the investigation generated reasonable grounds to believe that sexual harassment did occur, even if the plaintiff in the original sexual harassment suit was unsuccessful. Note that the defense asserted by an employer in this type of case is still based on the fact that the employer conducted a reasonable investigation. Regrettably, however, current law provides no absolute safe harbors for firms conducting sexual harassment investigations.

**ELEMENTS OF A REASONABLE INVESTIGATION**

The quality of the investigation will likely vary according to the size of the business. For example, the level of sophistication demanded of a family-owned electronics store to investigate a claim of sexual harassment likely will be nowhere near that demanded of IBM. However, the EEOC guidelines are emphatic that any complaint, regardless of the manner in which the employer learns of possible impropriety, must be investigated. Legal issues associated with conducting a reasonable investigation are best considered in terms of three time frames: (1) preinvestigation, (2) actual investigation, and (3) postinvestigation.

**Preinvestigation**

Because the threat of defamation exists as soon as any allegation becomes public, management should carefully consider four factors before deciding to go forward with a fact-finding investigation. First, the employer must create an effective grievance procedure aimed at properly servicing the concerns of individuals who believe they are the victims of sexual harassment. Effective
grievance procedures include provisions that prohibit retaliation against the person alleging harassment; designation of the person or persons to initially contact; and a statement of the time frames within which federal or state claims must be filed. Grievance procedures also must be well publicized.

Next, the employer needs to determine when a fact-finding investigation is warranted. Management must realize that their duty to determine whether to investigate arises at the first hint of impropriety. While filing a conventional complaint with the EEOC or employing the formal mechanism available under the employer’s grievance policy will trigger the need to investigate, the employer should also scrutinize allegations that are informal (e.g., an anonymous note left on a supervisor’s desk suggesting that the supervisor should watch Mr. X’s activities near the water cooler), where the accuser states serious allegations but asks that nothing be done, or where the alleged harassment has ceased.

The determination of when not to investigate is as important as knowing when to investigate. If the alleged harasser confesses to the inappropriate activity without any prodding, there is no need for an investigation, and the employer can move directly to determining corrective action. Or, if after a cursory review of the complaint it is clear that the behavior could not have occurred in the manner described by the alleged victim (e.g., the alleged harasser was on vacation during the period where inappropriate behavior was stated to have occurred), then there is no need for an investigation. Or, if overwhelming evidence is presented at the earliest possible time that the allegation of sexual harassment was motivated by retribution toward a jilted lover, no further investigation is warranted. If management can deftly determine when not to investigate, exposure for defaming the alleged harasser is minimized.

Finally, it is critical that the determination to investigate be made expeditiously. Courts appear, depending on the circumstances, to be willing to allow the employer to commence an investigation within a few days or perhaps a week after a complaint is made by the employee, but waiting weeks after a credible allegation is reported will likely increase the likelihood of the court finding the investigation was insufficient.

Investigation

The effective investigation must exhibit three attributes: (1) thoroughness, (2) promptness, and (3) impartiality. A thorough investigation into a complaint of sexual harassment involves interviewing the complainant, the alleged harasser, and relevant witnesses. The focus of most inquiries of this type relates exclusively to the question of whether the alleged harasser created a “hostile work
environment.” The thrust of the interviews is to determine the facts; accordingly, the investigator must distinguish statements of fact from mere conjecture. Every conceivable dimension of the allegations and any statements to the contrary made by the accused harasser must be investigated, as most employees who file a complaint or are the subject of an allegation of sexual harassment are emotionally involved and may not articulate specifics clearly. Finally, the investigator must make determinations when conducting interviews and when writing the report regarding the credibility of the parties and witnesses. This requires the interviewer to make judgments regarding demeanor (e.g., eye contact) and motivation (e.g., witness recently turned down for a promotion by accused harasser), almost always tough calls.

The investigation should be undertaken promptly, and the duration of the inquiry should be as short as possible. Claims of impropriety from more than a single person toward one individual or other circumstances may necessarily negate the possibility of an investigation proceeding quickly to fruition. Nevertheless, courts have ruled that reasonable investigations are normally completed within a few days to a couple of weeks.

The final necessary component of an effective investigation, and perhaps the most important, involves impartiality. Actual and perceived impartiality is attainable only where an independent individual, typically from outside of the organization, conducts the investigation. Although a person from the organization’s human resources department or a member of management from another division are sometimes sought to conduct the investigation, only very large organizations can afford to create a cadre of investigators who can perform the investigation at the highest levels of proficiency and, at the same time, be perceived by all parties as truly impartial. In addition, many investigations begin only to find that what was perceived as being a small problem is much greater than the scope originally anticipated. An investigator from outside the organization is often more likely to let the facts control the direction of the investigation.

An outside investigator may be an HR consultant, a private investigator, or an attorney not directly connected with in-house counsel. Regardless of the professional credentials of the investigator, the individual conducting the investigation should be skillful in interviewing witnesses and evaluating their credibility. Further, the interviewer must constantly be on guard against showing favoritism, as any oral statement or body movement by the investigator may impact negatively on the honesty of responses from the individual being interviewed. The individual must also possess a complete understanding of the law of sexual
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harassment, given that the law in this area is complex and continues to rapidly evolve. Of equal importance, the person hired to conduct the investigation must have impeccable credentials in terms of personal and professional integrity. Not surprisingly, the demand for outside professionals, as a result of the 1998 U.S. Supreme Court rulings and the 1999 EEOC guidelines, is growing.

In addition to the three absolute attributes of an effective investigation described above, the employer must also consider the degree to which the investigation will be confidential. The individual making the allegations might need to know that the investigation is taking place and the general scope of the investigation in order to guard against retaliation. The accused harasser, once informed of the charges, will have an acute interest in protecting his or her reputation and will similarly desire to know details regarding the inquiry. Out of necessity, since sexual harassment investigations are often of the “she said, he said” variety, third-party witnesses usually must be told the basic allegations in order to provide valuable information capable of corroborating one side or the other. Although the investigation may be less painful to parties and witnesses if management seeks to guarantee the confidentiality of harassment allegations, in practice protecting absolute confidentiality may not be possible. Instead, those conducting the inquiry and making decisions based on the investigation should merely state that they will make reasonable efforts to keep all aspects of the matter confidential.

Postinvestigation

Using notes made by the interviewer of the meetings with the accuser, the accused, and witnesses, the investigator normally prepares a written report. This report should include the interviewer’s perceptions of the individuals examined. But perhaps most important, the investigator must make a determination whether the allegations in the complaint are true. While management is free to reach a contrary decision, usually because of historical information regarding the parties or knowledge of the culture within a particular division of the organization, such action should take place only when the reasons for disagreeing with the investigator’s determination are significant. Because the impartial investigator viewed the individuals while they spoke, great weight should be given to the investigator’s conclusion.

When it is determined that harassment has occurred, then immediate and corrective actions, including terminating the harasser, must be undertaken. On the other hand, an investigation that fails to find support for the allegations does not immediately
provide solace for everyone in the workplace. Even if management is successful in keeping the matter confidential, the complainant might continue to believe the alleged harasser is a “bad person,” and the person accused will believe they have been wronged. Therefore, when the investigation reveals that no sexual harassment occurred, good judgment often leads management to conclude that the individuals involved should be counseled on the subject of sexual harassment and, perhaps, separated.

Prior to 1999, employers investigating claims of sexual harassment had no reason to consider anything other than the guidelines issued by the EEOC and court decisions. Recent developments, however, have created a need for employers to rethink their investigation strategy.

THE FAIR CREDIT REPORTING ACT AND SEXUAL HARASSMENT

In response to inaccurate (and improper use of) credit transaction records, Congress enacted the Fair Credit Reporting Act in 1970. Congress’s intent was to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of the business community in a manner that is fair and equitable to the consumer and that ensures confidentiality.

Employers may be surprised to learn that Congress amended the FCRA in 1997 in such a way as to include under its provisions sexual harassment investigations performed by outside investigators. This surprising development was first brought to light in April of 1999 through an informal opinion letter issued by the FTC staff. The question posed by a Washington state attorney to the FTC staff was whether the FCRA applied to outside investigators performing sexual harassment investigations. The informal opinion found that “outside organizations utilized by employers to assist in their investigations of harassment claims ‘assemble or evaluate’ information.” Therefore, these outside investigators would be considered consumer reporting agencies involved in producing investigative consumer reports. Whether this extension of the FCRA was intended by Congress is unknown, but we strongly doubt Congress foresaw this result. Undoubtedly, though, this letter opinion has major implications for employers choosing to outsource investigations of sexual harassment.

As interpreted by the FTC staff, the 1997 amendments to the FCRA greatly increased the burdens on businesses using an outside investigator to conduct workplace investigations in two domains. First, employers are now required to provide multiple notices to the person accused of sexual harassment. Second, because the FCRA attempts to provide individuals with an opportunity to correct
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Employers must be aware that three different disclosures are required by the FCRA.

inaccurate or incomplete information, the investigator’s report must be disclosed to the accused harasser if the employer plans to discipline the employee.

Disclosures

Investigations of sexual harassment typically require gathering and assessing factual information, and this information is normally compiled into a report. Managers should be aware that the FCRA covers two different types of reports. A report containing information detailing an employee’s character, general reputation, or personal characteristics, is considered a “consumer report.” When this information is obtained through personal interviews, the report is deemed an “investigative report.” Most employers will discover that they utilize both consumer reports and investigative reports. When an outside investigator is compensated to prepare such reports, that investigator is considered a “consumer reporting agency.”

Employers must be aware that three different disclosures are required by the FCRA. The first disclosure requires employers to notify employees—and to obtain their consent—that a consumer or investigative report may be obtained for employment purposes. The other two disclosures must be made when outside investigators are used. The second disclosure must be made when an investigative consumer report is to be obtained and the employee must receive a notice within three days that an investigative report has been requested. Within this notice, the employee must receive a third disclosure of his or her right to request information on the nature and scope of the investigation and, should such a request be made, the employer must provide it to the employee in writing within five days of the request. For a business community overburdened with the reporting and compliance costs of governmental regulations, these added disclosure requirements further complicate the already delicate task of conducting sexual harassment investigations.

Adverse Action

Prior to using an outside investigator’s report to take an adverse employment action against an employee, the employer must provide the employee with a copy of the report and a copy of the consumer’s (i.e., employee’s) rights under the FCRA. The FTC staff indicates there should be a five-day waiting period between the time the employee receives notice of intended adverse action and actually taking action. Once the adverse employment action has been taken, however, the employee is provided with notice of such action. This adverse action notice includes the name, address, and
telephone number of the outside investigator that compiled the report. Also contained in that notice is a statement that the outside investigator did not make the adverse employment action and is unable to provide the employee with the specific reasons why the adverse action was taken. The employee must also be provided with notice of his or her rights under the FCRA to obtain a free copy of the report from the outside investigator within 60 days, and that the accused has the right to dispute the accuracy or completeness of the information contained therein.

OUTSOURCING INVESTIGATIONS: PRACTICAL ADVICE

Outsourcing investigations to specialists helps to minimize the economic risks associated with adverse employment decisions based on faulty or incomplete investigations conducted in-house. The decision to outsource investigations of sexual harassment, however, immediately places additional compliance burdens on these employers. For example, the assurance of confidentiality during investigations is critical for obtaining the cooperation of individuals who might be of assistance in providing data to be used in assessing the allegations and crafting an appropriate response. The FCRA’s requirement that sources of information, favorable and unfavorable, be disclosed to the employee under investigation, however, would likely have a chilling effect on the willingness of employees to cooperate in the investigation for fear of retaliation. Employers may think twice about using outside investigative services, but this would only increase the attendant risks associated with performing in-house investigations conducted by nonspecialists—a catch-22 to be sure!

If an organization chooses to use outside professional investigative services in order to follow through on its assurance that investigations will be prompt, thorough, competent, and impartial, then the organization must educate itself about—and implement assiduously—the provisions of the FCRA, especially in light of the FTC’s recent opinion. Moreover, willful noncompliance leaves companies vulnerable to punitive damages. To limit liability associated with violating the FCRA, the organization can take the following actions.

Conduct an Initial In-House Investigation

Before hiring an outside professional investigator, the organization may wish to initially conduct an in-house investigation, unassisted by outside professionals. This would delay the necessity for sharing any information with the alleged harasser. The FCRA’s disclosure and notification provisions apply only when an outside
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the investigator must understand that the prepared report will be provided to the employee under investigation, and both the investigator and the employee should be aware of the possible consequences of such a required disclosure.

investigator is used. The organization may wish to forgo outside investigations altogether until the FCRA’s impact on the implementation of antidiscrimination policies is resolved by Congress or the courts, but this might increase the organization’s liability under EEOC guidelines.12

investigate through surveillance only

outside investigators can be asked to conduct surveillance only, using direct observation (perhaps aided by videotape) exclusively. The most burdensome of the FCRA’s provisions apply only when an outside investigator uses personal interviews to gather information. This surveillance-only tactic, however, would surely be of limited value in determining and assessing the facts (or fictions) of a particular complaint of sexual harassment.

request redacted reports

Because the FCRA prohibits employers from editing a report from an outside investigator after the investigator submits the report, an employer utilizing outside investigators might request directly that the investigator submit only a redacted report. While ensuring confidentiality, this tactic has dubious value in assessing the facts of the case and crafting an appropriate resolution and remedy. Taking an adverse employment action without the ability to name names leaves the employer vulnerable to claims of defamation or wrongful discharge.

revamp pre- and postemployment procedures

To comply with the FCRA’s notification requirements, but without drawing unnecessary attention in any subsequent investigation, employers might require that all job applicants sign an authorization for conducting and compiling investigate reports. Similarly, for current employees, the organization may have everyone sign a blanket authorization. The FTC staff has suggested that such one-time disclosures and authorizations are adequate for employers to obtain reports about applicants and current employees at any time during the application process or during an employee’s tenure.13 These blanket disclosures and prior written authorizations may cause employees to request access to any investigation obtained on them. The company will need to weigh the investigative benefits against the potential administrative costs associated with this tactic.

confronting the harasser

When confronting the alleged harasser, the company employing outside investigative assistance must be prepared to provide the
employee with a copy of any written report provided by the investigator. The report needs to be prepared with the understanding that it contain no more information than is necessary for the employer to make a fair and appropriate decision. The investigator must understand that the prepared report will be provided to the employee under investigation, and both the investigator and the employee should be aware of the possible consequences of such a required disclosure.

A PROPOSAL FOR CHANGES IN PUBLIC POLICY

The proliferation of legislation to prevent workplace discrimination, both at the federal and state levels, creates compliance dilemmas for all organizations, especially when overlapping legislation seeks to accomplish different public policy goals. These dilemmas surely become managerial headaches for the vast majority of businesses without HR specialists or in-house counsel. Employers have an important vested interest in seeking changes to public policy so that they may more effectively and efficiently eliminate sexual harassment from the workplace.

The previously cited FTC staff letter opinions purport to be consistent with the legislative intent of the modifications to the FCRA—if this is true, then it may be difficult to lobby for meaningful reform. Arguably, though, there is little evidence to conclude that Congress anticipated (or intended) that the provisions of the FCRA would be brought to bear on employers seeking to comply with the EEOC’s desire to eliminate sexual harassment from the workplace. Indeed, a strong case can be made that the FTC’s interpretation of the FCRA represents an unnecessary intrusion into an employer’s good-faith efforts to establish and implement effective processes for investigating complaints of sexual harassment. The disclosures and notifications required by the FCRA, according to the staff opinion, both unfairly and inappropriately burden the employer in its efforts to effectively investigate and resolve one of the most sensitive of workplace complaints.

Firms that are concerned with the FTC staff’s interpretation of the 1997 amendments to the FCRA, should lobby Congress to either seek a complete exemption for organizations using outside investigators, or consider two possible intermediate revisions.

Complete Exemption from the FCRA

The most direct way to provide relief to organizations using outside investigators is to simply exempt investigations involving sexual harassment, workplace discrimination, and workplace violence from the provisions of the FCRA. This would signal Congress’s appreciation for the unique issues that arise in addressing these
significant workplace problems. Additionally, it would be particularly beneficial to the small business community because it is here that the compliance burdens are disproportionately felt.

**Suggested Revisions**

Short of seeking a complete exemption, two intermediate kinds of legislative relief should be sought. For investigations of sexual harassment, workplace discrimination, and workplace violence, the prior consent of the accused should not be required in order for an investigation to be initiated. This would alleviate the problems associated with situations in which a blanket consent was not obtained prior to the investigation. Moreover, to facilitate investigations and to protect as much as possible the confidentiality of witnesses, employers should be allowed to edit or redact full investigative consumer reports. This would protect witnesses and other sources of information from possible retaliation or future harassment. Taken together, these simple proposals would effectively eliminate the dilemmas created by the overlapping and competing public policy goals of the EEOC and the FCRA. Implementation of any one of them, however, would still offer major relief to those organizations that find it necessary to utilize outside investigations in their efforts to comply with the public policy goal of eliminating sexual harassment from the workplace.

**CONCLUSION**

The decision to outsource investigations of sexual harassment now places an onerous set of obligations on the organization. In complying with the EEOC’s directive to conduct timely, thorough, and competent investigations, outsourcing these investigations brings the firm under the regulatory hand of the FTC and the provisions of the FCRA. We have reviewed these developments and have offered practical advice on managing the investigative process. Only seeking relief through changes in public policy can eliminate the unintended consequences of the decision to outsource investigations. The business community should move quickly to place this matter on its legislative agenda.

**NOTES**


6. Fair Credit Reporting Act, 15 USC 1681, et seq.

7. FTC Staff Opinion (April 5, 1999), reproduced at www.ftc.gov/os/statutes/fcra/vail.htm.


11. FTC Staff Opinion (June 27, 1997), reproduced at www.ftc.gov/os/statutes/fcra/weisberg.htm.

12. On November 16, 1999, 106 H.R. 3408 was introduced to amend the FCRA to exempt certain investigative reports from the definition of “consumer report.” The bill was referred to the Committee on Banking and Financial Services. The full text can be found at www.thomas.gov.