# Conducting Harassment Investigations With Outside Counsel

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Jackie Ford, a partner in the Vorys Houston office and a member of the labor and employment group, authored an article for *Employment Law360* titled "Conducting Harassment Investigations with Outside Counsel." The full text of the article is included below with permission from *Law360*.

## Conducting Harassment Investigations With Outside Counsel

Sexual harassment is illegal. It has been illegal for a long time — over 40 years, in fact. It is, in other words, not new. What is new, however, is the sheer volume of harassment allegations now being made in all corners of the country and at all types of public and private workplaces. The #MeToo movement has encouraged thousands of women to share their stories of harassment and sexual assault, and to follow up with legal actions against wrongdoers. And just this week, "Time's Up," a legal defense fund for victims of sexual harassment in both the entertainment business and other industries, emerged as another highly visible support system for asserting harassment claims. As they start the new year, employers and their counsel should take a moment, take a breath, update their harassment prevention policies, conduct meaningful training, and be prepared to respond quickly and thoroughly to any and all allegations of sexual harassment.

## A Quick Overview of Sexual Harassment Law

Both the law and the policy surrounding sexual harassment have been the topic of much legal and social conversation for several decades. As that conversation has progressed, courts have struggled to find a defining boundary between "harassment" (illegal) and conduct such as "mere offensive utterance"[1] (not illegal). Employers faced with such allegations are well advised to review the basic legal standards for harassment (in terms of both liability and defenses) and follow some best practices for investigating such allegations.

First, a history lesson. In 1979, 24 year-old bank employee Mechelle Vinson sued her employer, the Meritor Savings Bank, for something called "sexual harassment." Vinson's case relied on what was then a somewhat novel legal theory: that an overly sexualized workplace might be a form of the "discrimination based on sex" prohibited by Title VII of the Civil Rights Act of 1964. Vinson argued that the sexual relationship she claimed to have had[2] with her boss had been inherently coercive and humiliating, and that, because she would never have been expected to comply with her boss's sexual demands had she been male, his behavior constituted a form of discrimination "based on sex." This last point was particularly important, because Title VII did not expressly include the term "sexual harassment" or provide any guidance for what discrimination "based on sex" was meant to encompass.

Without resolving most of the factual disputes in the case, the trial court concluded that any sexual relationship between Vinson and her boss had been "a voluntary one," and had "nothing to do with [Vinson's] continued employment" at the bank. The U.S. Supreme Court disagreed, on both points. First, the court ruled that the correct test for a sexual harassment case is not whether the sexual conduct is "voluntary" but whether it is "welcome." In so doing, the court reasoned that an employee may "voluntarily" participate in (or fail to protest) unwelcome sexual conduct, and that such unwelcome conduct may constitute a sexually "hostile environment" for the employee. An employee who participates in unwelcome coercion (or sexual jokes, comments, propositions and the like) may do so "voluntarily" not because the conduct is unobjectionable but out of fear that voicing any objection may lead to termination. A "consensual" sexual relationship may thus be "unwelcome" (and thus prohibited), particularly when it involves coercion of an employee by a supervisor or manager.

Since Vinson, the Supreme Court has articulated additional standards to help employers find the sometimes elusive line between welcome and unwelcome sexual conduct between employees. To say that this process can be a difficult and uncomfortable one is an understatement. But the court has also given employers a specific incentive to investigate harassment claims and bring any harassing behavior to a halt.

## Affirmative Defense Based On Prevention (Policy) And Response (Investigation)

In two cases decided in 1998[3], the Supreme Court created an affirmative defense to "hostile environment" sexual harassment claims.[4] The defense creates a strong incentive for employers to both investigate harassment claims and take any necessary disciplinary steps thereafter. Employers can assert the defense by (1) having exercised "reasonable care" to prevent harassment from occurring, typically shown by establishing (and then training to employees about) a company policy prohibiting such harassment; (2) conducting a "swift and remedial" investigation of harassment claims once they "knew or should have known" of the behavior; and (3) taking steps reasonably calculated to keep the harassment from happening again.

## Best Practices for Conducting a Harassment Investigation

Once an employer learns of an accusation of harassment involving one of its employees, it should structure and launch an effective investigation. Decisions made at the beginning of the investigation process can have profound implications for its ending.

1. **Define the purpose and scope of the investigation.** Obvious as it may seem, some investigations suffer from a lack of a clearly and specifically articulated purpose. Writing down that purpose helps the investigator prioritize the most relevant issues and steer clear of tangential ones.

2. **Ensure that the investigator understands what constitutes "harassment."** As the case law demonstrates, "voluntary" sexual behavior may still constitute illegal sexual harassment. The investigator should understand these distinctions so as not to overlook potentially relevant information regarding "consensual" behavior.

3. **Make a conscious effort to avoid implicit or unconscious bias.** Various forms of unconscious bias may infect an otherwise good faith investigation, resulting in an inaccurate set of conclusions that may not withstand later scrutiny. As just one example, an investigator may be "primed" by those directing the process to reach a foregone conclusion, perhaps to protect an accused executive who is otherwise valuable to the company or to confirm an existing narrative about an accuser who is "always complaining about something." In other cases, bias based on witnesses' race, religion, class or other factors may unconsciously play into an investigator's credibility determinations. Recognizing the potential for these forms of bias, and taking deliberate steps to avoid them, increases the likelihood that the investigation will provide the client with the kind of accurate and objective information it needs in order to assess its legal situation and take any appropriate actions.

4. **Consider the use of an outside investigator.** Harassment investigations often require review of extremely personal, sensitive and embarrassing information. If the investigator works with or otherwise knows the subjects of the information, seeing that type of information about a colleague may create long-term problems once the investigation is concluded. While members of a company's human resources or legal departments may be well qualified to investigate most matters, a harassment investigation may create long-term problems for the investigators' future work with the accused or other witnesses; once seen, flirty emails and racy text messages may be impossible for the investigator to forget. An outside investigator unconcerned about future collegiality may be able to conduct a more objective investigation as a result.

5. **To privilege or not to privilege?** Lawyers typically think of the attorney-client privilege as a universally good thing — that it is always better to have a client's communications protected by the privilege than not protected by the privilege. While this is certainly true in most cases, it is not always applicable in a harassment investigation. If, for example, the investigation itself is going to be Exhibit A in the employer's investigation-based affirmative defense to a harassment claim, the investigation may need to be designed less for the current need for attorney-client privilege than for the future option of disclosure. Even if the investigation is to be conducted under the protections of the privilege, the employer may want to use different counsel for the investigation itself than it would otherwise turn to for day-to-day consultation. By doing so, the employer avoids having its long-term counsel become a potential witness in any ensuing litigation in which the investigation itself becomes an issue.

6. **Establish a single point of contact.** If the investigation is to be privileged it is important to instruct the client in steps necessary to protect that privilege. Establishing a single point of contact to direct the

investigation and confer with the investigator helps prevent privileged information being shared with anyone outside the scope of the privilege. To that end, group emails should also be avoided, as they are easily shared (intentionally or otherwise) with individuals outside the privilege.

7. **Do an engagement letter.** Even if the outside investigator has done prior work for the company, the new investigation may merit a separate engagement letter. Among other things, the engagement letter defines the purpose and scope of the project, confirms whether the investigation is being done at the request or direction of counsel (establishing its degree of intended privilege protection), specifies a reporting structure, and generally describes the anticipated work product. The process of writing such a letter also forces the parties to specify what the investigation should be about, and how they plan to handle its results.

Harassment investigations often combine factual findings and legal analysis. Determining whether specific behavior occurred is a factual question; determining the legal exposure resulting from that behavior, or from the employer's response to it, is, for the most part, a legal question. Regardless of how the investigation itself is conducted, counsel should be consulted to help assess the investigation's outcomes and next steps. While harassment itself certainly it not new, the current environment casts a renewed light on the importance of conducting careful and thoughtful investigations when harassment allegations are made.

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[1] *Harris v. Forklift Sys.,* 510 U.S. 17, 28(1993).

[2] The accused harasser maintained that Vinson's allegations were pure fabrications. The bank itself also denied Vinson's allegations, arguing that her years-long failure to report any misconduct by her supervisor demonstrated that the alleged misconduct had not, in fact, occurred.

[3] See *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

[4] "Quid pro quo" and "hostile environment" are two categories of harassment typically recognized under Title VII and similar state laws. As its name suggests, a "quid pro quo" case typically involves a manager or supervisor requiring sexual conduct in exchange for workplace benefits. By contrast, a "hostile environment" need not necessarily involve a manager or any form of power imbalance. Instead, a "hostile environment" is created by severe and pervasive harassment (verbal, physical, or otherwise) that interferes with an employee's work performance and creates an intimidating, hostile, or offensive work environment.