One Year Later:

Investigations in the Post-Weinstein Era

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for

The American Employment Law Council

October 2018 Conference

October 10-13, 2018

The Breakers
Palm Beach, Florida

TABLE OF CONTENTS

I. "Off With Your Head!" – How Swift Is Too Swift? 3
a. Before the Investigation Begins 4
b. The Investigation 5
c. The Pressure to Act Swiftly 7
d. Litigation Risk 9
II. "It Was Long Ago And Far Away" – Stale and Non-Actionable Claims 10
III. "It Is My Time And My Dime" – Off-Duty Conduct 13
IV. "But I Already Did That" – Reopening Closed Investigations 14
V. "It Only Takes A Feather?" – Burden of Proof 15
VI. Conclusion 17

It was one year ago. *The New York Times* headline screamed, "Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades." America was riveted. Employment lawyers watched, and without grasping all that had happened, knew it was something big. And so it began.

Since April 2017, over 400 high-profile executives and employees have been accused of sexual harassment.[1] Many of them have faced serious repercussions at work: 190 of them were fired or forced to resign, and 122 were placed on leave, suspended, or were the subject of an internal investigation.[2] The accused include prominent executives and leaders in many fields: finance, media and entertainment, consumer goods and services, the legislature and judiciary, the arts, sports, and higher education.

"Change is the law of life. And those who look only to the past or present are certain to miss the future." – John F. Kennedy

The #MeToo movement, which officially "began" in October 2017, has been met with both applause and criticism. An interesting March 2018 survey by the Bucknell Institute for Public Policy/You Gov showed having a favorable impression of the #MeToo movement was split along party lines. It varied by gender too. While 41% of the 1,000 respondents reported having a favorable impression of the movement, 21% had an unfavorable one (and 38% expressed no opinion). A staggering 71% of Democratic women, as opposed to 20% of Republican women, thought it was a welcome development. Forty-five percent (45%) of Republican men – and only 8% of Democratic men – thought the movement was unfortunate. As lawyers and investigators, we must be alert to these divergent views of the #MeToo movement.

The #MeToo movement, as well as the publicity surrounding such allegations, has forced employers to take proactive steps to improve workplace culture and consider how they would respond if allegations of sexual harassment come to light. In unprecedented numbers, these allegations are not being raised through traditional, internal workplace complaint processes, but in a public way. Journalists are looking to break big stories. In April 2018, *The New York Times* and *The New Yorker* received the 2018 Pulitzer Prize for Public Service "[f]or explosive, impactful journalism that exposed powerful and wealthy sexual predators, including allegations against one of Hollywood's most influential producers, bringing them to account for long-suppressed allegations of coercion, brutality and victim silencing, thus spurring a worldwide reckoning about sexual abuse of women."[3] The public is eager to consume these stories, as they simultaneously speak to issues of social and workplace justice and feature salacious details about well-known figures falling from grace. At the same time, social media has radically changed expectations of privacy and amplified the risks to employers. One individual's story becomes a movement on social media and videos of misbehaving corporate leaders go viral in a matter of hours.

These days, sexual harassment complaints are not playing out in legal courtrooms, but in the court of public opinion, where there are no statutes of limitations. Allegations which would not survive a motion to dismiss can cause significant reputational harm very quickly. A single complaint of workplace misconduct can become a full-blown corporate crisis in a matter of days. According to research

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1 Jeff Green, *#MeToo Has Implicated 414 High-Profile Executives and Employees in 18 Months*, TIME (June 25, 2018), http://time.com/5321130/414-executives-snared-metoo/.

2 *Id.*

3 *The 2018 Pulitzer Prize Winner in Public Service*, PULITZER.ORG, http://www.pulitzer.org/winners/new-york-times-reporting-led-jodi-kantor-and-megan-twohey-and-new-yorker-reporting-ronan (last accessed September 10, 2018).

reported in the Harvard Business Review, even one sexual harassment claim can tarnish a company's image.[4] The time that employers have to take effective action is getting shorter and shorter.

While employers are under greater pressure than ever before to act quickly in response to allegations of sexual harassment, employers also face increasing demands to ensure that investigations are conducted, and any resulting employment decisions are reached, by a fair and thorough process. Although legal "due process" – which encompasses principles of adequate notice, impartiality and an opportunity to be heard before any deprivation of life, liberty, or property – applies to *government* action and not actions undertaken by a private employer, good corporate governance and prudent risk management requires that private employers incorporate "due process" into their workplace investigations.[5]

When investigations are not fairly conducted, it undermines the positive change that the #MeToo movement is working to effectuate. This has resulted in a call for "due process" from women as well as accused men.[6] According to a recent survey by Vox/Morning Consult, 63% of women are concerned about men being falsely accused of sexual assault and harassment.[7] And 56% of women are concerned about the punishments for less-serious forms of sexual assault or harassment being the same as the punishment for more-serious forms of sexual assault or harassment.[8]

Given the changed landscape in which employers now find themselves—in which claims of workplace misconduct which would not necessarily be legally viable can nevertheless cause significant business and reputational damage—this paper seeks to explore several areas:

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[4] Serena Does et al., *Research: How Sexual Harassment Affects a Company's Public Image*, HARVARD BUSINESS REVIEW (June 11, 2018), https://hbr.org/2018/06/research-how-sexual-harassment-affects-a-companys-public-image

[5] *See, e.g.*, Lenora Lapidus & Sandra Park, *The Real Meaning of Due Process in the #MeToo Era*, THE ATLANTIC (Feb. 15, 2018), https://www.theatlantic.com/politics/archive/2018/02/due-process-metoo/553427/; Jocelyn Frye & Michele L. Jawando, *Creating a Fair Process to Combat Sexual Harassment Is Essential to Women's Progress*, CENTER FOR AMERICAN PROGRESS (Mar. 7, 2018), https://www.americanprogress.org/issues/women/news/2018/03/07/447554/creating-fair-process-combat-sexual-harassment-essential-womens-progress/; Emily Stewart, *Trump wants 'due process' for abuse allegations. I asked 8 legal experts what that means*, VOX (Feb. 12, 2018), https://www.vox.com/policy-and-politics/2018/2/11/16999466/what-is-due-process-trump; Christine Emba, *The "due process" assault freak-out is a fever dream*, THE WASHINGTON POST (Dec. 1, 2017), https://www.washingtonpost.com/opinions/the-due-process-assault-freak-out-is-a-fever-dream/2017/12/01/8f14cd80-d6d5-11e7-a986-d0a9770d9a3e_story.html?noredirect=on&utm_term=.10682bf5f7f9.

[6] Anna North, *Why women are worried about #MeToo*, Vox (Apr. 5, 2018), https://www.vox.com/2018/4/5/17157240/me-too-movement-sexual-harassment-aziz-ansari-accusation. *See also* Audie Cornish, *Gayle King Thinks #MeToo Needs Due Process*, N.Y. TIMES MAGAZINE (June 12, 2018), https://www.nytimes.com/2018/06/12/magazine/gayle-king-thinks-metoo-needs-due-process.html; *What Kind of Due Process Are Those Accused of Sexual Misconduct Entitled To?* NPR (Dec. 22, 2017), https://www.npr.org/2017/12/22/573046500/what-kind-of-due-process-are-those-accused-of-sexual-misconduct-entitled-to.

[7] North, *supra* note [6].

[8] *Id.*

- How do employers and their legal advisors balance calls for swift action and the demands for due process?
- How does this tug-of-war affect the evolution of investigative practices?
- What if the claims against an employee are legally stale or non-actionable?
- What if the claims involve off-duty conduct of an employee?
- When should an investigation be opened or re-opened?

While there are few clear-cut answers, one thing is clear. The #MeToo movement has changed the conversation and the narrative. For workplace investigators, this watershed moment reminds us of the importance of our roles as independent factfinders. For lawyers, this means a higher-level strategy and response than ever before. As investigators and lawyers, we must be prepared to navigate murky waters, which invites a conversation among us.

I. *"Off With Your Head!"* – How Swift Is Too Swift?

How do we balance taking swift action with giving the respondent a fair process? This million dollar question has never been so prevalent.

Although the #MeToo movement has helped to change workplaces for the better, there can be no doubt that sexual harassment in the workplace remains both prevalent and underreported. According to an EEOC task force on sexual harassment, anywhere from 25% to 80% of women report having experienced sexual harassment in the workplace.[9] The costs of workplace misconduct are high—for both employees and employers. Apart from the physical, psychological, economic, and occupational costs that a victim may suffer, an employer may face litigation or settlement costs, as well as decreased morale, decreased productivity, increased turnover, and reputational damage.[10]

It is from this perspective—the knowledge that there is more work to be done to make employees feel safe reporting sexual harassment, to instill faith in employees that their claims will be fairly and properly addressed, and to convince employees that they will not suffer retaliation for coming forward with a complaint or cooperating with an investigation—that we consider the following questions: (1) What makes a workplace investigation fair? and (2) What process is "due" in an investigation?

Unfortunately, the risks to employers of getting it "wrong" when it comes to responding to allegations of sexual harassment could not be greater. Companies are facing civil litigation and regulatory actions

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[9] *EEOC Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, U.S. Equal Emp't Opportunity Comm'n (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [hereinafter *EEOC Report*].

The EEOC study suggests that the wide spread in percentage is a result of the sampling methodology used. If, for example, the term "sexual harassment" was expressly included in a probability sample, the result was around 25%. If however, the conduct was described as unwanted sexual attention or sexual coercion, the number is closer to 60%. Other studies that have used convenience sampling about behaviors, found the incidence rate to be about 75% (although some samples saw as high a rate as 90%).

[10] *Id.*

targeted at management and board members' lack of oversight and failure to respond to allegations of sexual misconduct, particularly in cases involving multiple allegations or "superstar" executives. Bombshell reports of sexual harassment by Harvey Weinstein and Steve Wynn have pushed The Weinstein Company into bankruptcy and left Wynn Resorts battling multiple lawsuits.[11] In April 2018, Nike found itself on the front page of *The New York Times* for not doing enough to address sexual harassment and gender discrimination, even after complaints were made to human resources.[12] Within one month, 11 senior executives and managers had resigned.[13] While an inadequate or slow response to allegations of sexual harassment can precipitate a corporate crisis, acting "too" quickly carries its own risks. Employers are facing an increasing number of lawsuits brought by accused harassers claiming that they were not afforded "due process" before suffering adverse employment actions and/or public dismissal.[14]

Given the competing demands of swift action and deliberative process, employers are facing a double bind. As a recent *Wall Street Journal* article explained: "Companies that don't swiftly fire accused men risk being seen by the public and employees as soft on harassers. But if they do move quickly, the fired men can claim that they were terminated unfairly before a comprehensive investigation."[15]

a. Before the Investigation Begins

The groundwork for an investigation that will, at its conclusion, be viewed as fair and impartial is laid before the first interview is ever conducted. Although a complete discussion of best practices for workplace investigations is outside the scope of this paper, we focus here on a few critical questions.

Who should conduct the investigation? The appropriate answer to this question will depend based on the nature of the complaint, including the identities of the victim and the accused. An employer may choose to have its human resources department or in-house attorneys conduct the investigation. Alternatively, an employer could decide to use its outside lawyers or even retain independent counsel with no prior relationship with the corporation. If the allegations involve a high level executive, a company may be more likely to choose external counsel to conduct the investigation.[16] By using independent counsel in the right circumstances, a company can better protect itself against accusations of bias.

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[11] *See, e.g.*, Brooks Barnes, *Weinstein Company Files for Bankruptcy and Revokes Nondisclosure Agreements*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html; Khalon Richard, *After Sexual Misconduct Claims, Vegas Mogual Steve Wynn Fell Fast*, NPR (Mar. 15, 2018), https://www.npr.org/2018/03/15/592318034/after-sexual-misconduct-claims-vegas-mogul-steve-wynn-fell-fast.

[12] Julie Creswell et al., *At Nike, Revolt Led by Women Leads to Exodus of Male Executives*, N.Y. TIMES (Apr. 28, 2018), https://www.nytimes.com/2018/04/28/business/nike-women.html.

[13] Julie Creswell & Kevin Draper, *5 More Nike Executives Are Out Amid Inquiry Into Harassment Allegations*, N.Y. TIMES (May 8, 2018), https://www.nytimes.com/2018/05/08/business/nike-harassment.html

[14] *See, e.g.*, Rachel Louise Ensign, *Meet the Lawyer Representing Wall Street's #MeToo Men*, WALL ST. J. (Aug. 27, 2018), https://www.wsj.com/articles/meet-the-lawyer-representing-wall-streets-metoo-men-1535367601.

[15] *Id.*

[16] *See, e.g.*, Jen Rubin, *Our CEO Is An Accused Harasser. Now What?* CORPORATE COUNSEL (Aug. 21, 2018), https://www.law.com/corpcounsel/2018/08/21/our-ceo-is-an-accused-harasser-now-what/.

Are there policies that clearly communicate how the investigation will be conducted and encourage cooperation? Company policies should expressly state that all complaints or information about sexual harassment will be investigated, that investigations will be conducted in a timely manner—if at all possible within 30 days, and that all persons involved (including complainants, witnesses and alleged perpetrators) will be afforded due process to protect their rights to a fair and impartial investigation. Employees should be required to cooperate and enforcement of non-retaliation policies must be robust.

How will the investigation be kept confidential? An EEOC task force recommends that, in conducting workplace investigations, the "privacy of both the accuser and the accused should be protected to the greatest extent possible, consistent with legal obligations."[17] Confidentiality protects all persons involved, and minimizes the risk of retaliation, until the relevant facts can be gathered and an informed conclusion can be reached.

How will relevant evidence be identified and preserved? Investigations that comport with due process are thorough. An employer should have established guidelines for promptly identifying corroborative witnesses and information in the investigation process and ensuring that relevant evidence is quickly protected against deletion or destruction.

Are there contractual obligations that should be taken into account? Particularly if a senior executive is involved, an employment agreement could require additional processes to be followed when investigating allegations of workplace misconduct, mandate the circumstances in which an executive can be terminated for "cause," or impose financial requirements upon the employer depending on how and why the employee is terminated.

b. The Investigation

Although employers have no common law obligation to provide "due process" to an at-will employee accused of wrongdoing,[18] legal expectations may be changing as states responding to the #MeToo movement enact legislation or regulation requiring procedural protections for employees accused of sexual harassment. Even if not legally required, ensuring that an investigation comports with principles of due process sends a powerful and positive message about an employer's values: allegations of sexual harassment will be dealt with promptly and fairly.

There is no one right way to structure an investigation to provide "due process." Constitutional principles offer a starting point, establishing three foundational pillars: (1) notice to the relevant parties; (2) the opportunity to be heard; and (3) a neutral decision-maker.[19]

Recent legislative developments provide further guidance. In April 2018, New York enacted legislation requiring all employers to adopt sexual harassment prevention policies which "include a procedure for

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[17] *EEOC Report*, *supra* note [9].

[18] Employers, however, may still have legal obligations to conduct an investigation. For example, under Title VII, an employer has an obligation to investigate complaints of harassment that are based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

[19] *What Kind of Due Process Are Those Accused of Sexual Misconduct Entitled To?* NPR (Dec. 22, 2017), https://www.npr.org/2017/12/22/573046500/what-kind-of-due-process-are-those-accused-of-sexual-misconduct-entitled-to.

the timely and confidential investigation of complaints that ensures due process for all parties."[20] Model sexual harassment guidelines recently published by the New York Governor's office mandate the following:

- All complaints or information about suspected sexual harassment must be investigated, whether that information was reported in verbal or written form.
- An investigation of any complaint, information or knowledge of suspected sexual harassment must be prompt and thorough, and should be completed within 30 days.
- All parties (including the accused and any relevant witnesses) should be interviewed.
- The company must obtain and preserve relevant documentary evidence.
- The investigation will be confidential to the extent possible.

More specifically, under the New York State guidelines, the following steps should be undertaken in all sexual harassment investigations:

- Immediate review of the allegations upon receipt of the complaint.
- Preservation and collection of all relevant documents and records, including electronic communications.
- Interviews of all parties involved, including any relevant witnesses;
- Documentation of the investigation in writing, including:
    - A list of all documents reviewed, along with a detailed summary of relevant documents;
    - A list of names of those interviewed, along with a detailed summary of their statements;
    - A timeline of events;
    - A summary of prior relevant incidents, reported or unreported; and
    - The final resolution of the complaint, together with any corrective actions action(s).
- Maintenance of written documentation and associated documents in the employer's records.
- Prompt notification of the complainant and the accused of the final determination.
- Implementation of any corrective actions.

[20] *Model Sexual Harassment Policy*, NEW YORK STATE, https://www.ny.gov/combating-sexual-harassment-workplace/employers (last accessed August 29, 2018).

- Informing the complainant of his/her right to file a complaint or charge externally.[21]

It is, of course, essential that the investigator assess the credibility of each witness. Seeking corroborative evidence is one of the most important ways to assess credibility. Direct corroboration can include eyewitness accounts as well as physical evidence. In the absence of percipient witness statements or physical evidence, an investigator should seek indirect corroboration, such as contemporaneous statements by the complainant. For example, the complainant may have spoken with, sent emails to, or exchanged text messages with family, friends, or colleagues describing the conduct or incident, kept a diary, or spoken with mental health professionals about the allegations. An investigator should ask the complainant, the accused and other witnesses for any documentary or physical evidence that could support their version of events and for a list of other individuals who could have relevant information. In addition, to evaluate credibility, investigators should look for and evaluate inconsistencies in witness statements. Any potential bias or motive of a witness should also be considered.

Finally, issues of organizational justice must come into play in any discussion about due process and workplace investigations. Employees should be treated equally in the investigation of, and response to, sexual harassment allegations, regardless of corporate status or seniority. By the same token, the discipline used to address sexual harassment should be tailored to the severity of the conduct, sending a message to employees that workplace justice is not only even-handed, it is also proportional. As the EEOC task force explains: "[S]exual assault or a demand for sexual favors in return for a promotion should presumably result in termination of an employee; the continued use of derogatory gender-based language after an initial warning might result in a suspension; and the first instance of telling a sexist joke may warrant a warning."[22] Undertaking a one-size-fits-all approach could result in lower levels of reporting and leave sexual harassment unaddressed because complainants may be reluctant to report less-egregious forms of misconduct for fear that a co-worker will lose his or her job. Indeed, some researchers have found that "perceptions of unfairness in the organization" may actually precede, or make more likely, workplace misconduct like sexual harassment.[23] As the EEOC has recommended, it is better to avoid using terms like having a "zero tolerance" policy, which conveys a "one-size-fits-all approach, in which every instance of harassment brings the same level of discipline."[24]

c. The Pressure to Act Swiftly

These days, even before investigations are concluded, employers are facing pressure to dispense "swift justice," particularly when the allegations involve high-profile individuals or corporate leaders and/or when the allegations are severe or numerous. Matt Lauer, who was seemingly fired before a full

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[21] *Model Sexual Harassment Policy for All Employers in New York State*; NEW YORK STATE, https://www.ny.gov/sites/ny.gov/files/atoms/files/StatewideSexualHarassment_PreventionPolicy.pdf (last accessed August 29, 2018).

[22] *EEOC Report*, *supra* note [9].

[23] Franciska Krings & Stephanie Facchin, *Organizational Justice and Men's Likelihood to Sexually Harass: Moderating Role of Sexism and Personality*, 94 J. Applied Psychology 501, 501 (Apr. 2009).

[24] *EEOC Report*, *supra* note [9].

investigation was conducted, is one extreme example of this phenomenon. The Human Resources department at NBC News first received an email complaint from a woman "stating that she had a serious concern to report," on Wednesday, November 22, 2017.[25] The following Monday, the complainant was interviewed by a human resources representative and a senior NBC Universal employment lawyer. The interview team found her allegations to be credible. The next day, Mr. Lauer was interviewed. He admitted to having engaged in sexual activity with the complainant, and he was fired that same day. By Wednesday, November 29, 2017—just one week after the complaint was made—NBC announced that Mr. Lauer had been fired. That same day, Variety ran a story, based on two months of journalistic investigation, describing the specific allegations against Mr. Lauer made by three women,[26] suggesting that the company believed that it had sufficient corroborating evidence of workplace misconduct when it took such quick and definitive employment action against Mr. Lauer.

While it remains a relatively rare occurrence for an employer to terminate an accused employee before a completed investigation, it is becoming quite common for employers to decide to take interim employment action (*e.g.,* such as suspension with or without pay) during a sexual harassment investigation. If there is a genuine question of workplace safety at issue or if there is some corroborating evidence of misconduct at the outset of the investigation, an employer can feel fairly confident that it is the right decision to, at a minimum, suspend the accused pending the completion of the investigation. Unfortunately, the evidence in many sexual harassment investigations is often not clear cut, in which case the decision to suspend the accused before a complete investigation is more difficult and fraught with additional risks, including claims by the accused of constructive discharge, discrimination, retaliation, or defamation.

In some cases, public scrutiny makes it virtually impossible for an employer not to take interim action. For example, on November 3, 2017, the studio behind *House of Cards* announced that it had suspended Kevin Spacey following an October 29, 2017 *Buzzfeed* article in which actor Anthony Rapp alleged that Mr. Spacey had made a sexual advance toward him when Mr. Rapp was 14 years old. Earlier that same day, Netflix had announced that it would "not be involved with any production of 'House of Cards' that includes Kevin Spacey."[27] Ultimately, filming resumed in December 2017—without Mr. Spacey.

CBS's interim suspension of *NCIS: New Orleans* producer Brad Kern is another example. In December 2017, *Variety* published an article detailing prior complaints against Mr. Kern as well as two prior human resources investigations.[28] Although Mr. Kern had not been suspended as a result of the two prior

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[25] *Report, NBC News Workplace Investigation*, *available at* https://www.politico.com/f/?id=00000163-4566-d92c-a17f-edf6cffd0000 (last accessed Sept. 2, 2018).

[26] Ramin Setoodeh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women*, VARIETY (Nov. 29, 2017), https://variety.com/2017/biz/news/matt-lauer-accused-sexual-harassment-multiple-women-1202625959/.

[27] Kristine Phillips, *Netflix drops "House of Cards" star Kevin Spacey after new allegations arise*, THE WASHINGTON POST (Nov. 4, 2017), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/11/04/netflix-is-dropping-kevin-spacey-from-house-of-cards/?utm_term=.44f2c3e7b20d.

[28] Maureen Ryan, *CBS Showrunner Investigated Twice in 2016 for HR Violations, Employees Say Behavior Continues*, VARIETY (Dec. 14, 2017), https://variety.com/2017/tv/news/brad-kern-cbs-showrunner-ncis-new-orleans-cbs-harassment-1202641474/.

internal investigations,[29] when a new complaint came to light earlier this year, CBS took more decisive action: hiring outside counsel to investigate and formally suspending Mr. Kern pending the outcome of the investigation. The president of CBS Entertainment told reporters: "I believe in terms of keeping him out of the workplace during the investigation, that was to be as fair and open as we could be."[30]

The pressure to act swiftly poses unique challenges to an employer when the accused is the "face" of the company or other high-level executive. Can a visionary corporate founder or a CEO accused of misconduct feasibly be placed on administrative leave pending an investigation? Recent events at Uber provide one example of the dilemma an employer faces when a corporate leader is implicated in allegations of misconduct. On February 19, 2017, former Uber engineer Susan Fowler wrote a blog post describing a culture of sexual harassment and retaliation and detailing the company's failure to respond to her complaints.[31] The next day, Uber hired former Attorney General Eric H. Holder to conduct an investigation.[32] Within four months, 20 Uber employees were terminated for workplace misconduct.[33] Some of the allegations that came to light during the investigation implicated Uber CEO and founder Travis Kalanick.[34] Nevertheless, the Uber board resisted calls to suspend or terminate Mr. Kalanick. On June 13, 2017, Mr. Kalanick took matters into his own hands and took a self-imposed leave of absence from Uber. A week later, due to investor pressure, he resigned.[35]

d. Litigation Risk

Conducting impartial and thorough workplace investigations can also help mitigate the risk of liability in any resulting litigation. Although it is not new for employees bringing wrongful termination lawsuits to challenge the workplace investigations that led to their dismissal, we are seeing a vanguard of litigation in which plaintiffs are pointing to an employer's failure to adequately investigate sexual harassment complaints as critical evidence of gender discrimination.

In August, two former female employees filed a class action lawsuit against Nike alleging a culture of sexual harassment and gender bias as demonstrated, in part, by complaints to human resources about sexual harassment that were ignored or mishandled.[36] In one instance, a female employee said she complained to HR about a work-related email from her supervisor in which he made a comment about

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29 *Id.*

30 Michael Ausiello, *NCIS: New Orleans EP Brad Kern Formally Suspended Amid Third Misconduct Investigation*, YAHOO NEWS (Aug. 5, 2018), https://finance.yahoo.com/news/ncis-orleans-ep-brad-kern-162249541.html.

31 Susan J. Fowler, *Reflecting On One Very, Very Strange Year at Uber*, SUSANJFOWLER.COM (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber

32 *See Uber Report: Eric Holder's Recommendations for Change*, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/technology/uber-report-eric-holders-recommendations-for-change.html.

33 *See* Mike Isaac, *Uber Fires 20 Amid Investigation Into Workplace Culture*, N.Y. TIMES (June 6, 2017), *available at* https://www.nytimes.com/2017/06/06/technology/uber-fired.html.

34 *See, e.g.*, Maya Kosoff, Uber's Sexual Harassment Crisis Just Got Even Darker, VANITY FAIR (June 15, 2017), https://www.vanityfair.com/news/2017/06/uber-india-rape-survivor-sues-medical-files.

35 Mike Isaac, *Uber Founder Travis Kalanick Resigns as C.E.O.*, N.Y. TIMES (June 21, 2017), https://www.nytimes.com/2017/06/21/technology/uber-ceo-travis-kalanick.html?smid=tw-nytimes&smtyp=cur.

36 Tiffany Hsu, N.Y. TIMES (Aug. 10, 2018), *Ex-Employees Sue Nike, Alleging Gender Discrimination*, https://www.nytimes.com/2018/08/10/business/nike-discrimination-class-action-lawsuit.html.

her breasts. The supervisor was given a verbal warning, and the employee continued reporting to him.[37] Another woman complained that her supervisor had magazines of scantily clad women on his desk even after he was asked to remove them. She reported him to HR and was admonished for not confronting him about it first.[38]

In another recent case, *Hariri v. HSBC Bank USA, N.A.*, a former Vice President of HSBC who had been terminated on the basis of sexual harassment allegations claimed that he was discriminated against on the basis of his sex, in violation of Title VII.[39] Plaintiff alleged that the investigation was a sham because, among other things: the human resources representative who interviewed him stated that her questions must be answered honestly "because she already knew the answers"; messages that showed the complainant made comments to the plaintiff such as "hi sexy" were not taken into account; and that *his own* complaints about sexual harassment had not been taken seriously.[40]

When an aggrieved employee claims that the investigation that led to his/her termination was a "sham," a court will examine whether the investigation bears the hallmarks of due process: Did the accused have notice of the allegations? Did the accused have the opportunity to be heard? Was relevant evidence collected and considered? Was there a neutral decision-maker?[41] For example, courts will consider whether investigators "failed to interview key witnesses"[42] or whether the decision-maker failed to carefully assess the credibility of witnesses.[43] In addition, courts may consider issues of organizational justice, such as whether the employer followed its usual procedure for investigating similar complaints or disciplining similarly-situated employees.[44]

II. *"It Was Long Ago And Far Away"* – Stale and Non-Actionable Claims

How should employers respond to claims of harassment that involve conduct occurring outside the statute of limitations period? Just ask, for example, CBS.

In August 2018, CBS launched an investigation into potential misconduct occurring over the last three decades. Six women alleged Les Moonves engaged in forcible touching and physical intimidation. Moonves pointed to the timing in his response: "There were times decades ago when I may have made some women uncomfortable by making advances."

Complainants, many whom have remained silent for years, sometimes decades, are becoming more emboldened to raise claims. There are many reasons why employees do not immediately report

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37 Alexia Fernandez Campbell, *Why the gender discrimination lawsuit against Nike is so significant*, Vox (Aug. 15, 2018), https://www.vox.com/2018/8/15/17683484/nike-women-gender-pay-discrimination-lawsuit.

38 *Id.*

39 First Amended Compl., *Hariri* v. *HSBC USA, Inc.*, 18 Civ. 2702 (JPO) (S.D.N.Y. Apr. 3, 2018) (ECF No. 10).

40 *Id.*

41 *See, e.g.*, *Pollard* v. *El Dupont De Nemours Co.*, 213 F.3d 933 (6th Cir. 2000) (affirming district court decision indicating that simply providing a form of questions with a choice of "yes" or "no" to employees is not a formal investigation), *rev'd on other grounds*, 532 U.S. 843 (2001); *see also Smothers* v. *Solvay Chemicals, Inc.*, 740 F.3d 530, 539 (10th Cir. 2014).

42 *See Trujillo* v. *PacifiCorp*., 524 F.3d 1149 (10th Cir. 2008); *Solvay*, 740 F.3d at 542 (investigation inadequate where the accused did not have "chance to explain or deny [the] allegations").

43 *See, e.g.*, *Mastro* v. *Potomac Electric Power Co.*, 447 F.3d 843, 856-57 (D.C. Cir. 2006).

44 *See, e.g.*, *Zisumbo v. Ogden Reg'l Med. Ctr.*, 801 F.3d 1185 (10th Cir. 2015); *Trujillo*, 524 F.3d at 1158-59.

allegations of harassment. If a complainant failed to report allegations of harassment until much later, it may be a reflection of the employer's reporting and complaint resolution process at the time.

In the past, employers might have been tempted to ignore such claims, but no longer. Given the trend to address old or stale claims, we need to understand the underpinnings of traditional statutes of limitations and be prepared to discuss with the client the difficulties of investigating those claims and the scope of each investigation.

There are many reasons the law imposes statutes of limitations in sexual harassment and sexual assault claims, which require plaintiffs to bring cases forward with the federal and state fair employment practices agencies and court within prescribed time periods. Limitations period are meant to:

- Mitigate the risk of unreliable witness testimony.[45]
- Strike a reasonable balance between permitting redress of an ongoing wrong versus imposing liability for conduct occurring long ago.[46]
- Place a reasonable limit on legal relief while allowing evidence to be considered in cases of on-going, continuing violations.[47]
- Recognize the difficulty in accurately judging cases when there is a "tremendous distance of time."[48]

While the legal limitations periods may preclude a plaintiff from filing a lawsuit, they do not preclude an employee from raising a complaint in the workplace. Today, employers are more likely to investigate

[45] "Statutes of limitation were put in place in part to discourage convictions based on 'unreliable witness testimony,' including memories of events that occurred years in the past." Hearing on Implementation of the Sexual Assault Survivors' Bill of Rights and Clearing the DNA Backlog Written Testimony of Rebecca O'Connor of the Rape, Abuse & Incest National Network (RAINN) Before the U.S. House Judiciary Committee (2018). https://judiciary.house.gov/wp-content/uploads/2018/02/OConnor-Testimony-2.27.2018.pdf.

[46] *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (1995). Questioned by the United States Supreme Court in *AMTRAK v. Morgan*, 536 U.S. 101 (2002), which limited the way continuing violation claims may be made, specifically around pay discrimination: "We hold that the statute [Title VII] precludes recovery for discrete acts of discrimination of retaliation that occur outside the statutory time period. We also hold that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory period. The application of equitable doctrines, however, may either limit or toll the time period within which an employee must file a charge." *Morgan*, 536 U.S. 101 (2002). These were both defining cases for the "continuing violation doctrine."

[47] "The time provisions of Title VII are subject to equitable modification." *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 475 (1976). "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences." *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977).

[48] "Why is there a statute of limitations? Probably because the reliability of such charges, such grievous charges as these, cannot be accurately judged at a tremendous distance from the time in which they were alleged to occur." Senator Simpson, 141 Cong Rec S 11127 (1995).

old claims, even with the challenges they bring. While they are more difficult to investigate, the task is to try.

Potentially unreliable evidence can be a challenge when assessing old claims. We all know memories fade. Witnesses can forget what happened a week ago, let alone years ago. As U.S. District Court Judge Mark Bennett wrote, "Memories are so malleable, numerous, diverse, and innocuous that post-event information alters them, at times in very dramatic ways. Memories can be distorted, contaminated, and even, with modest cues, falsely imagined, even in good faith."[49]

Another challenge is that evidence can get lost over time. A complainant may claim text messages would corroborate his or her complaint but, if those messages were on an older generation iPhone, they may well be lost as a result of two or three upgrades.

When faced with fading memories and/or lost evidence, investigators must nonetheless collect the information that is available, evaluate the reliability of the information and credibility of witnesses, and make findings.

Finally, the investigator must carefully evaluate how to weigh evidence over time. For instance, should you consider conduct that occurred at a prior employer? Or conduct that occurred twenty (20) years ago? Where should it end?

The complaints against Senator Al Franken provide a good example. Franken was a United States Senator from Minnesota. In 2017, Franken was accused of sexual harassment of several women, including forcibly kissing and groping. One woman alleged he forcibly kissed her on a 2006 USO tour during a rehearsal for a skit. Franken was also photographed appearing to place his hands above or on the woman's breasts while she was asleep on an aircraft during the same tour.

Faced with the allegations, Franken immediately apologized. But it did not end there. Other women came forward and stated that Franken had touched them or tried to kiss them too. Franken did not recall these instances, but apologized nonetheless.

The complaints were tendered to the Senate Ethics Committee for review. Franken resigned in December of 2017, stating, "I know in my heart, nothing that I have done as a Senator, nothing, has brought dishonor on this institution, and I am confident that the Ethics Committee would agree." Indeed, the conduct had occurred over a decade prior, ***before*** Franken took public office, when his role was a comedian, not a public servant. Think about how you might have weighed these factors when investigating the claims against Franken.

Regardless of the statute of limitations, employers may be vulnerable in other ways if they decline to investigate stale claims. There are several considerations in handling them.

Most employer policies encourage reporting and do not specify a statute of limitations. Once employers are on notice of a stale claim, failure to investigate could lead to liability, particularly if the accused is still employed with the company. In the event the accused is still employed, the employer should make an effort to ascertain whether any other complaints have been filed against the individual. An

[49] Hon. Mark W. Bennett, "Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility" AMERICAN UNIVERSITY LAW REVIEW (Jan. 29, 2015).

employer's knowledge of one or more past instances of sexually harassing conduct by an individual has the potential to compound liability and result in punitive damages to an employer in the future.

If an employer does decide to investigate stale claims, it should be done on a consistent basis and according to policy. Further, if impacted by multiple complaints of harassment, it is a good idea to prioritize investigations by most recent or most severe. Additionally, where stale and recent claims are against the same respondent and similar in nature, it is sensible to consolidate the investigation and report. It follows that evidence related to one complaint is applicable to a more recent complaint against the same individual.

III. *"It Is My Time And My Dime"* – Off-Duty Conduct

How far should an employer go in responding to allegations of conduct that occur off-duty and off-premises?

The rise in social media use has largely shattered the notion that an individual's off-duty conduct can be compartmentalized from their employment activities. As off duty conduct is broadcast to wider audiences, members of the public have little difficulty identifying and associating an individual with their employer.

We are now seeing an increasing number of employers taking action against employees for off duty, off premises conduct. Consider a November 2017 case where a Virginia woman was photographed flipping off the Presidential motorcade will riding a bicycle. The woman was terminated from her position the following day after she used the middle finger photograph as her profile picture on social media. The company determined this violated the company's code of conduct prohibiting "obscene" or "malicious" content on employees' personal social media accounts. The woman's subsequent unlawful termination lawsuit was recently dismissed in Virginia. In an interesting side note, this same woman, hailed as a "she-ro" by some, has been the recipient of multiple job offers and a GoFundMe campaign.

It presents an interesting tension between an employee's expectation to be free from the bosses' governance outside of work, and an employer's desire to protect itself from liability and protect its reputation. In considering these competing interests, the company is faced with whether to investigate, and whether it would or could take action even if the alleged misconduct was substantiated. Weighing into this balance are a series of state and federal laws that protect certain off-duty conduct. By way of example, many states have laws that protect smoking, firearms, voting, and of course marijuana. Some states have enacted laws that protect broad categories of off-duty conduct, or require some connection between the business and the employee's activity before taking any action.

More to the point in this #MeToo era, where does this fall when an employer learns of claims of sexual misconduct off duty?

In considering what to do in these situations, the employer must ask a series of questions:

- Is the alleged offender a current or former employee?
- Was the conduct directed at a current employee, former employee or non-employee?
- Did the conduct occur while the alleged offender was employed with the company or elsewhere?

- How long ago did the conduct occur – two and a half years, or 22?
- How serious and egregious is the nature of the alleged conduct?

The answer to each of these may make more evident the appropriate response. In the investigative world, off-duty conduct presents a series of tricky considerations. How much can we pry about the individual's off-duty conduct without violating his/her privacy rights? Will non-employees cooperate? Do we run the risk of making the concerns more public by contacting non-employees? Will we be able to get reliable information such that we can even use it to make employment decisions?

Recognizing there are no neat and tidy answers, we can only point to the fundamentals: Employers have an obligation to prevent and correct sexual harassment and provide a harassment-free work environment. The response to a stale claim should thus ensure the employer has done so.

IV. *"But I Already Did That"* – Reopening Closed Investigations

And what if the complaint is that the *first* investigation was flawed? Does the company reopen it?

CBS's response to allegations against *NCIS: New Orleans* producer Brad Kern highlights this. In December 2017, *Variety* published an article detailing prior complaints against Mr. Kern, and calling into question two prior human resources investigations into his conduct.[50] CBS decided to reopen the investigation, hired outside counsel to investigate and formally suspended Mr. Kern pending the outcome of the investigation.[51]

In June 2018, CBS released the following statement concerning its decision to reopen an investigation into producer Brad Kern:[52]

> The 2016 allegations concerning Mr. Kern were acted upon immediately with a thorough investigation and subsequent disciplinary action … We now believe this matter merits further inquiry and therefore we have engaged outside counsel to review both the original investigation as well as the current situation.

Interestingly, a February 2018 poll by the Employment Law Alliance, as reported in Law 360, says outside counsel who responded (with a total of 382 responses from all 50 states, the District of Columbia and Puerto Rico) said they believe 81% of in-house Human Resources professionals were only "somewhat competent" and 14% were "very competent" in conducting internal investigations. Ninety-one percent

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[50] Maureen Ryan, *CBS Showrunner Investigated Twice in 2016 for HR Violations, Employees Say Behavior Continues*, VARIETY (Dec. 14, 2017), https://variety.com/2017/tv/news/brad-kern-cbs-showrunner-ncis-new-orleans-cbs-harassment-1202641474/.

[51] Michael Ausiello, *NCIS: New Orleans EP Brad Kern Formally Suspended Amid Third Misconduct Investigation*, YAHOO NEWS (Aug. 5, 2018), https://finance.yahoo.com/news/ncis-orleans-ep-brad-kern-162249541.html.

[52] 'NCIS: New Orleans' Producer Investigated Again, Even as CBS Renews Overall Deal (Exclusive), available at: https://www.hollywoodreporter.com/live-feed/brad-kern-being-investigated-as-cbs-renews-ncis-new-orleans-producers-deal-1120350

(91%) of responding counsel said outside investigators, not Human Resources, should be used when high-level executives are accused.[53]

In yet another decision to reopen the investigation, the California State Assembly released findings in May 2018 that cleared Assemblymember Cristina Garcia of allegations, including groping a male subordinate employee during a softball game. In June 2018, however, the California State Assembly approved a decision to reopen the investigation. This happened after the complainant asserted key witnesses were not interviewed, including an individual he confided in shortly after the alleged groping occurred, and lawmakers who witnessed Assemblymember Garcia's alleged intoxication at the event.

Whether to reopen an investigation depends on:

- Was there a procedural error made during the initial investigation, such as failure to interview a key witness?
- Has new evidence surfaced?
- Was there an appearance of or actual bias by the investigator, particularly involving an internal investigator investigating a high-ranking official?
- Will the outcome be different if the findings are different?

The decision to reopen the investigation should not be viewed as an admission of prior misconduct, but rather bolsters an employer's demonstration of reasonable care.

V. *"It Only Takes A Feather?"* – Burden of Proof

As investigations come under heightened scrutiny in the #MeToo era, so too does the burden of proof we use – the preponderance of the evidence standard – to reach findings. The public commentary on the heels of "Deflategate" about the standard of proof shows the distaste for making tough calls based upon the proverbial feather. This suggests that investigators and lawyers need to do a better job at educating the public about the process and standard.

Workplace investigators have a serious job. What they do impacts real people, their lives, their careers, their reputations, and their ability to feed their family. Employers rely upon an investigation in order to make informed employment-related decisions.

Sexual harassment claims can be among the most difficult for investigators, particularly when the alleged conduct takes place without witnesses. This can produce the dreaded, "he said/she said" situation. Under these circumstances, pressure is exerted on investigators to find out what actually happened, or in other words, "the truth."

Despite the most grueling effort, it is rare to uncover with complete certainty what actually happened in these cases. Workplace investigators simply do not enjoy the same wealth of resources present during litigation or criminal investigations. The investigator does not have discovery power or subpoena power, and witnesses do not testify under penalty of perjury.

[53] https://www.michaelbest.com/Newsroom/166347/Employment-Law-Alliance-Survey-Takes-American-Pulse-on-MeToo-Workplace-Harassment

The burden on the investigator is not to find "the truth." Just like a jury can award $5 million dollars to a successful plaintiff in any civil case based upon a preponderance of the evidence, so too can the investigator find the conduct did or did not occur. This, as long as the investigator can demonstrate a good faith process and a well-reasoned conclusion. The EEOC gives us this permission, as long as credibility assessments are done.[54]

What exactly is a "credibility assessment" in the context of a workplace investigation? We know what it is not. It is not reading microexpressions, or facial expressions of emotions that show up for less than a second on a person's face. Detecting truth or deception is not assessing whether the witness is lying simply because he or she is engaging in stereotypical "lying" behavior, such as shifting in a chair, refusing to look the investigator in the eye, or nervously popping knuckles. Investigators must be cautious in using the witness' attitude and demeanor as a factor in assessing credibility. These factors require training and expertise in psychology or behavioral assessment. Without that training, we cannot credibly rely on our own impressions of how a particular witness responded to the situation or questions. In fact, the EEOC cautions against relying upon these behaviors:

> The investigator should be wary, however, of relying on physical cues to determine credibility. While cues like sweating, stammering, fidgeting, and looking up to the right could be interpreted as signs of dishonesty, the opposite may be true. Witnesses might simply be nervous about being questioned by an attorney, or they could have a medical condition of which the investigator is unaware. Further, the majority of investigators are not experts in behavioral analysis and would have difficulty supporting these assessments when testifying to support their findings.[55]

Instead, a credibility analysis is an assessment of a myriad of credibility factors. Investigators can find these factors by looking to the Equal Employment Opportunity Commission, state and federal jury instructions and the Evidence Code. Here is an overview of those factors, and what they mean.

- **Inherent Plausibility.** Is the testimony believable on its face? Does it make sense? What is the extent of the witness' opportunity to perceive any matter about which he or she testifies? What is the extent of the witness' capacity to perceive, to recollect, or to communicate?
- **Motive to Falsify.** Does the person have a reason to lie? Does the person have a bias, interest, or other motive? In assessing this factor, examine relationships, explore potential biases, consider reasons for self-protection, consider carelessness of expression versus intentional lying, and evaluate mistaken belief versus untruthfulness.
- **Direct Corroboration/Lack of Corroboration.** Are there other witness statements that directly corroborate the person's statements? Is there physical evidence that corroborates the person's statements? Does the person have actual knowledge? What is the extent of the interviewee's opportunity to perceive matters about which he or she testified?

[54] https://www.eeoc.gov/policy/docs/harassment.html.

[55] *Id.*

- **Circumstantial Corroboration/Lack of Circumstantial Corroboration**. Is there witness testimony that indirectly corroborates the person's testimony? Is there physical evidence that indirectly corroborates the person's testimony? Is there documentary evidence that demonstrates contemporaneous reporting of events? Is there a lack of circumstantial corroboration when one party expected there to be some?
- **Consistency/Lack of Consistency.** Is there witness testimony or physical evidence that is consistent, or inconsistent with the person's testimony? Did the witness tell the same version of events to others, or in writing, in all material respects? (Although be aware of trauma-informed forensic interviewing, discussed above.)
- **Material Omission.** Did a person omit a material piece of evidence, despite having a reasonable opportunity to provide it, either in a narrative or in a response to a particular inquiry?
- **Past Record.** Does the Respondent have a history of similar behavior in the past? Does the Complainant have a relevant history? What weight do we give this in the present matter?
- **Reputation.** Does the interviewee have a reputation for honesty or veracity or their opposites? What is the person's reputation? Caution: what weight do we give character evidence? What motives do character witnesses have for their testimonies?
- **Attitude.** Did the person cooperate when participating in the interview and/or providing information?

A robust analysis using these factors, and informing the decisionmaker how the investigator weighs the evidence, gives an investigator the confidence to reach findings. Even by a feather.

VI. Conclusion

The #MeToo movement has resulted in an increased scrutiny into employer practices regarding investigations of sexual harassment. This is contributing to legal, as well as financial implications for many employers. Employers need to understand, now more than ever, the legal and political landscape regarding workplace investigations of sexual harassment.