#METOO: How HR Should be Responding

Three Tips for Improving Your Program

TEXAS CHAPTER
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Introduction

The United States Supreme Court first recognized a cause of action for a sexually hostile work environment nearly 32 years ago in *Meritor Saving Bank v. Vinson*, 477 U.S. 57 (1986). Since then courts have recognized hostile work environment claims based on all of categories protected by Title VII of the Civil Rights Act of 1964. Those categories are race, color, sex, national origin, and religion. 42 U.S.C. § 2000e-2(a)(1). Employees can make similar claims under the Age Discrimination in Employment Act (29 U.S.C. § 623(a); protecting employees who are 40 years old and older) and the Americans with Disabilities Act (42 U.S.C. § 12112(a); protecting employees who have a mental or physical disability).

Even though these laws have been in place for decades, employers are still struggling to create workplaces that are free of harassment. It isn't limited to local governmental entities. Seriously, all employers struggle. While that might bring us some comfort to know we aren't alone, it doesn't provide guidance on how to improve our awareness and prevention programs. In the pages that follow, I hope to give you three solid tips for improving your program.

You Need More Training

The American entertainment industry is inundated with sex. Whether it is television, movies, music, or comedy, many of the arts and artists are openly discussing sex acts and sexuality. Race is a prominent theme, too. And we have instantaneous (and often anonymous) communication. These factors contribute to the difficulty of creating and maintaining workplaces free or harassment.

Your harassment awareness and prevention training should be **mandatory**. Most people think they don't need it. We ALL know what WE find to be offensive. What we need help with is recognizing that everyone else isn't like us; therefore, what OTHERS think is offensive is probably different from what WE think is offensive.

You should **train supervisors and managers separately** from employees. Employees may not be willing to discuss such sensitive issues as race, sex, national origin, and religion with managers present. Further, supervisors and managers must understand their role in establishing and maintaining a harassment-free workplace, including how to respond if an employee reports harassment to them.

Employees should participate in training **early** in their employment. Incorporate it into the on-boarding process or new employee orientation. That shows that awareness and prevention are a high priority for your city. Require employees to go to training **often**, at least every other year. We all need a reminder. Plus, norms change over time.

Be sure to include real **examples** in your training program, especially the behaviors that may seem to be minor. The legal definition of hostile work environment is:

> When behavior is so **severe <u>or</u> pervasive** that it creates an intimidating, hostile, or offensive environment because of the complainant's sex or other protected that affects the complainant's ability to perform the job.

Most of the harassment complaints we receive are NOT the kind of severe acts that have made the news over the past year, e.g., forcibly kissing or masturbating or walking around naked in front of subordinates. Instead, most complaints are about inappropriate comments or emails. It is imperative to respond to those inappropriate comments and emails when you find out about them to prevent them from becoming pervasive.

Here are a few examples.

EXAMPLE:

Male supervisor talking to a female subordinate about her new home. Supervisor asks her, "Have you done the big nasty there, yet?"

EXAMPLE:

Male supervisor talking to male and female subordinates about another female subordinate who is not present. The group is planning a wedding shower for the absent female employee. The supervisor comments about the bride-to-be, "She's so innocent. I'll bet she's still a virgin."

EXAMPLE:

White supervisor talking to a new employee who is Arabic named Mahmoud. "I think you'll be more successful if you use a more common name. I'm going to call you, 'Manny'."

Your training and your response to complaints has to be effective and truly encourage employees to report behavior they find offensive.

<u>Don't Be Afraid to Make Findings After an Investigation</u>

I know conducting investigations is hard. I know it feels like a lot of responsibility to say, "Yes, I think this happened." And it is. I just fear that too many investigators are afraid to make a finding. I fear they think they can't make a finding unless there is "smoking gun" or "video" evidence of the alleged misbehavior. In my humble opinion, that fear leads to many unnecessary "he said-she said" or "unable to sustain" findings.

The employer's duty to investigate complaints of harassment is well-settled. In *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981), the court held that employers "should promptly take all necessary steps to investigate and correct any harassment, including warnings and appropriate discipline directed at the offending party, and should generally develop other means of preventing harassment within the agency." In *Jones v. Flagship Inter'l,* 793 F.2d 714, 719-20 (5th Circuit

1986) the Fifth Circuit held that an appropriate remedial action must be "reasonably calculated" to stop the harassment. What suffices depends upon all of the facts and circumstances of the situation.

Your investigation doesn't have to be perfect. In *Brauninger v. Motes, et. al.*, 2007 U.S. App. LEXIS 29597, 102 Fair Empl. Prac. Cas. (BNA) 563 (5th Cir. 2007) the investigation saved the day over claims of race and age discrimination filed by the male subject of a sexual harassment complaint. The employer prevailed on summary judgment even though the investigator did not prepare the investigation report until after the subject was terminated. In *Brauninger*, the complainant made an outcry in April 2004. *Id.* at *2. On May 4th the Human Resources manager interviewed seven employees, including the complainant and the subject of the complaint. She heard first hand and second hand information from the witnesses. Recognizing the seriousness of the allegations, she recommended that the subject of the investigation be fired. And he was, that very day.[1] *Id.* at *3.

Subsequently, the Human Resources manager compiled her report, summarizing the steps of her investigation, who she had interviewed, the statements the witnesses had made during the interviews, and the basis for the termination decision. The employer sent a termination letter on May 6th and notified Brauninger of his right to an administrative appeal. *Id*.

Brauninger sued his employer for race and age discrimination. The employer filed a motion for summary judgment based on affidavits by the Human Resources manager and her supervisor. The reports were attached to their affidavits. The district court granted the motion. Brauninger appealed. He argued that the affidavits were unreliably self-serving and inadmissible hearsay. The Fifth Circuit found that the lower court did not abuse its discretion in admitting all of the records. The affidavits were admissible, since they were based on personal knowledge. The investigators' reports were admissible, as well. The statements by the witnesses were not hearsay. Rather, they were offered to prove what the investigators heard about Brauninger and what they relied on in making the termination decision. *Id*. at *6-7. The court found the out of court statements by the investigators to be within the business records exception to the hearsay rule. *Id*. at *7-8. Rather than having prepared the investigation in anticipation of litigation, the employer showed that it prepared the investigation as the usual and customary response to a complaint. *Id*. at *8-9. Thus, the investigation led to victory for the employer.

Even an imperfect investigation can protect an employer against a discrimination claim. In *Wal-Mart Stores v. Canchola*, 121 S.W.3d 735 (Tex. 2003), Wal-Mart fired Canchola after an investigation into sexual harassment charges lodged against him. Canchola claimed the investigation was a sham and that his disability, a heart condition, was a motivating factor in his termination. He alleged that a more thorough investigation would have uncovered exculpatory evidence, including that the Complainant had refused an offer to work in another department, instead choosing to remain in the department where Canchola worked. Further, after a brief employment break, she even voluntarily returned to work with Canchola. Even though Canchola disputed the quality of Wal-Mart's investigation, the court held that the poor quality of the investigation, without more, did not prove that his disability was a motivating factor in his termination. *Id*. at 740.

[1] Talk about your prompt, remedial measure!

Even private employers, who don't enjoy governmental immunity, aren't liable for negligently conducting an investigation into workplace misconduct. In *Texas Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604 (Tex. 2002), the court concluded that such a claim is simply inconsistent with the at-will employment rule in Texas. The court reasoned that if an employer is not required to be reasonable, or even careful, in making termination decisions, it doesn't make sense to hold employers responsible for negligent investigations. *Id*. at 609. The court continued:

> Nearly every investigation that an employer conducts requires it to resolve factual disputes and make reasonable credibility determinations. Certainly it is hoped that employers will exercise due care in making the potentially devastating decision to terminate an employee for misconduct. But second-guessing an employer's judgment in such a situation provides a strong disincentive for companies to investigate allegations of employee misconduct in the first instance. It is simply not in the public's interest to dissuade employers from conducting internal investigation when employee-wrongdoing is suspected. Nor is it in employees' best interest to recognize a duty that would encourage employers to discharge employees suspected of wrongdoing without first attempting to discover the truth.

Texas Farm Bureau, 84 S.W.3d at 610.

Finally, some investigators erroneously fear they will face individual liability if they reach a finding that the subject of a complaint actually did the bad act. But that isn't the case. A terminated employee may not recover damages based on his termination merely because the employer communicated the reason for the termination within the company, even if the reason was defamatory. In *Exxon Mobil Corp. v. Hines*, No. 14-06-00745-CV, 2008 WL 509412 (Tex.App.—Houston [14th Dist.] Feb. 26, 2008, no pet. h.), the court concluded that allowing internal communication of the reason for a termination to state a claim for damages caused by the termination would violate the at-will employment doctrine. *Id. at* *5.

It's also important to note that oral and written communications made during a workplace investigation enjoy a qualified privilege. In *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640 (Tex. 1995), the Supreme Court noted that the privilege exists so long as the communications are made only to people who have "an interest or duty in the matter" being investigated. *Id*. at 646. In that case, Randall's store manager Johnson went through the checkout line with several items from the store. She paid for some items, but did not pay for a large Christmas wreath she was carrying. The checkout clerk asked her if that was all and Johnson replied that it was. The clerk reported the incident to management. The Store Director interviewed her about the incident and then told her that the District Manager wanted to speak with her later that day. The Director told her she should either wait for the District Manager in his office or go work on a volunteer project painting a booth for a parade while she waited. Johnson chose to stay in the office. When the District Manager questioned Johnson, she began to cry. At the end of the meeting, the District Manager suspended her for 30 days and told her that at the end of the suspension she would be transferred to another store. *Id*. at 643.

Additionally, one of Johnson's subordinates, Scottie Ketner, sent memos to a few management types complaining about Johnson's management style and reporting that she used store merchandise without paying for it. The managers forwarded the complaints to the VP for human resources, who conducted an investigation and prepared two memos, concluding that he believed the matter was no more than a personality conflict between Johnson and Ketner. The VP sent his memos to the managers who had received the complaints and to Johnson's supervisors. *Id*. at 647.

Johnson sued Randall's, the Checkout Clerk, the Store Director, and the District Manager for intentional infliction of emotional distress, false imprisonment, and slander. She alleged that the managers falsely reported to others that she had stolen a wreath from the store. The trial court granted the defendants' motion for summary judgment. The appellate court reversed. The Supreme Court, however, reversed and rendered. *Id*. at 643. **First, the court noted that none of the Randall's managers had reported that Johnson had stolen the wreath. Rather, they had all been careful to report only that she had left the store with a wreath without paying for it**. *Id*. at 646.

The court noted that, in any event, the statements were all qualifiedly privileged. The court explained that actual malice at the time of publication pierces the privilege.

> In the defamation context, a statement is made with actual malice when the statement is made with knowledge of its falsity or with reckless disregard as to its truth. *Hagler v Procter & Gamble Mfg. Co.*, 884 S.W.2d 771 (Tex. 1994). To invoke the privilege on summary judgment, an employer must conclusively establish that the allegedly defamatory statement was made with an absence of malice. *See Jackson v. Cheatwood*, 445 S.W.2d 513, 514 (Tex. 1969); *Goodman v. Gallerano*, 659 S.W.2d 286, 287-88 (Tex.App.—Dallas 1985, no writ).

Id. at 646.

Randall's though, established an absence of malice, by showing that none of its agents repeated comments with knowledge of their falsity or with reckless disregard as to the truth. Indeed, they forwarded the complaints to the appropriate managers for investigation and all of the employees who gave or received statements about the events had some interest or duty in the matter. *Id*. at 646-47.

If the Investigator is going to include findings in the report, it is absolutely essential note that the Investigator find facts, not legal conclusions, and refrain from editorializing.

Appropriate Fact Findings	**Inappropriate Legal Conclusions**	**Inappropriate Editorials**
Joe told three jokes with sexual undertones during a four month period.	Joe created a sexually hostile work environment.	Joe is a pervert.
Joe told Sarah three jokes, but they did not contain sexual innuendo.	Joe is innocent.	Sarah falsified the complaint because Joe got a promotion she wanted.

Follow-Up With the Complainant

At the end of the investigation, make sure the person who made the complaint knows that the investigation is completed. You can use a form letter, which should **thank** the employee for bringing the complaint. It should notify the complainant about whether the allegations were sustained. If they were, the letter should include a generic statement that the City took appropriate action (without saying exactly what it was.) This letter should also include a reminder of where the complainant can report it if she believes she is being retaliated against in the future.

I'm a big proponent of following-up with the person who made the complaint a few weeks later. Even if the allegations were not substantiated, someone should check in with the employee face-to-face to ask how things are going. This personal touch shows the employee that we really care about her.

Conclusion

We have to do better. We can do better. Keep striving for improvement.