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## Selecting an Investigator for Harassment and Discrimination Complaints: Considerations for a New Era

By Kyle Abraham, Andrew Narus, and Nicole Elgin

Since October 2017, employers have been reeling as they reckon with the wave of allegations of sexual harassment and other employment law-related complaints. What started as a story detailing egregious misconduct by Harvey Weinstein has become a broader movement demanding accountability from the institutions employing harassers and the harassed. This #MeToo movement has left its mark on vast swaths of American life—local, state, and federal governments; institutions of higher education; the performing arts; the media; and, of course, employers in every industry.

Naturally, employers are taking a hard look at their anti-harassment and anti-discrimination policies in addition to their complaint-reporting procedures. Specifically, many employers are reconsidering how they respond to harassment or discrimination complaints and, just as important, the process for initiating internal investigations of those complaints. Many expect a sharp increase in workplace investigations. Indeed, according to one survey, seven in ten human resource professionals believe sexual harassment complaints at their workplaces will likely be “higher” or “much higher” in 2018.<sup>1</sup>

As part of this movement, many employers are reexamining one of the most important decisions that they make throughout this process: selecting the investigator. The selection of the investigator for workplace harassment complaints is likely to come under greater scrutiny than ever before. This is true in both the courtroom and the court of public opinion. Consider Ryan Lizza, the former Washington correspondent for *The New Yorker*, who was terminated after an investigation into complaints of improper sexual conduct. Lizza strongly disputed the investigation into his actions, complaining *The New Yorker*'s investigatory process was not sufficiently thorough. Lizza publicly commented: “I am dismayed that *The New Yorker* has decided to characterize a respectful relationship with a woman I dated as somehow inappropriate.



*The New Yorker* was unable to cite any company policy that was violated.”<sup>2</sup>

This increased scrutiny both internally and from the public at large has led many employers to reevaluate how they select an investigator. One consideration is whether or not to pursue an investigator who shares similar characteristics with those of the complainant. Indeed, some employment law firms are responding to employers who seek investigators with the same characteristics of the complainant. Michelle Phillips, a principal at Jackson Lewis PC, argued that it is important for investigators to have specialized knowledge or basic literacy on issues of gender dynamics when undertaking an investigation.

“For example, if it’s a sexual harassment complaint by a woman, it’s helpful to have a female investigator,” says Phillips. “If it’s a same-sex harassment complaint, you have to have an investigator with sensitivity to LGBT issues. If it’s a complaint by a trans or gender nonconforming employee, the investigator needs to be fluent in concepts of gender identity and understand terms like ‘cisgender’ and ‘gender nonconformity.’”<sup>3</sup>

Indeed, there has been an increased interest from employers to hire investigators who share the complainant’s specific characteristics, such as a female person of color.

Of course, investigators should be aware of the biases and dynamics that are at play in investigations, whether they are related to gender dynamics or not. For example, experienced and well-trained workplace investigators should already understand and account for natural, cognitive biases that most individuals harbor and that will be present in any investigation. Such biases include

confirmation bias (the tendency to confirm a hypothesis by seeking consistent evidence and disregarding inconsistent evidence), anchoring effects (the tendency to rely too heavily on the first piece of information acquired when making decisions), and priming (an unconscious memory effect in which exposure to a stimulus influences a response to a later stimulus).<sup>4</sup> Any good workplace investigator is aware of and actively combats these biases throughout the course of the investigation.

In a similar vein, workplace investigators should be aware of and prepared to address some of the unconscious or subsurface biases, micro-aggressions, and other dynamics related to workplace sexual harassment claims, especially as those dynamics achieve greater salience among the American public. After all, a core purpose of #MeToo is to reveal just how frequently women feel harassed in the workplace and to raise awareness of how pervasive the problem is in the modern workforce. Such dynamics can affect a number of key determinations in a workplace investigation, such as evaluating an interviewee's demeanor for the purpose of making credibility determinations, assessing the credibility of micro-aggressions, and considering the inherent plausibility of allegations by a complainant. Attorney investigators are sometimes called upon to determine whether or not undisputed conduct meets legal principles, such as "severe" or "pervasive."

With those considerations about the investigator's qualifications and suitability in mind, this article presents some factors for further review and debate by workplace investigators. Among the questions examined are whether or not to use internal or external investigators, the risks of seeking an investigator with the same characteristics as the complainant, and whether or not a team approach to investigations might be worth pursuing in certain circumstances.

### Whether to Use an Internal or External Investigator

Determining whether to engage an internal or external investigator is a very important decision that employers must make early in the investigation process. Regardless of whether internal or external, the chosen investigator must be well trained, experienced, impartial, and available to promptly investigate the claim. A wrongly chosen or biased investigator may discourage candid interviews or even the reporting of illegal conduct with respect to the pending investigation or future workplace issues. Accordingly, the entire investigation may be ineffective based on the failure to select an investigator who is impartial or who is not perceived to be impartial.

Generally, an employer should have several qualified and trained investigators identified and who may be called on to investigate claims of workplace harassment or discrimination on short notice. It is important to remember that everything that an employer

does to investigate a claim of discrimination or harassment may be admissible evidence in a lawsuit. Therefore, the complainant and future plaintiff may obtain the written materials from the investigation, and the person who conducted the investigation may be called upon to testify at trial. If the investigation is conducted at the request or recommendation of an attorney, the employer may be able to make an initial argument that the investigation is protected by the work product doctrine or the attorney-client privilege. It is often in the employer's interest to at least disclose that an investigation was conducted as evidence of the employer's due diligence. In such cases, courts generally will not allow employers to electively release documents from the investigation.

Several potential sources for finding investigators are available to employers, including the human resources department. The HR representative should be trained regarding proper investigatory procedures and should be impartial to the particular complaint so he or she can obtain more accurate testimony from witnesses. However, if the employer uses an HR representative, the work will be discoverable if there is a later lawsuit, unless it is done at the direction of an attorney.

Another choice for an investigator is an in-house counsel or outside attorney. A lawyer acting as the investigator is properly trained regarding investigation procedures, impartial, more familiar with legal ramifications of the investigation, and better able to handle complaints made against higher-level managers. If an employer decides to utilize an attorney as the investigator, the employer should select an attorney who would *not* also serve as legal counsel in connection with representing the employer in a lawsuit on the subject matter of the complaint. In that case, the employer risks having to disclose its attorney's legal advice from the investigation during discovery in a future lawsuit because the lawyer was a witness to the investigation. Also, an outside attorney operating as a fact witness will be prevented from representing the employer in any lawsuit arising from the complaint. Nevertheless, an attorney may be the best choice because the attorney serves as an outside and highly experienced investigator and will develop a factual record that an employer may rely on when assessing liability with the counsel advising on this complaint.

Remember never to use an outside consultant who is not an attorney as your investigator unless the individual is a licensed private investigator, unless state law allows for an unlicensed investigator. It is a common misunderstanding among employers that outside HR consultants may serve as workplace investigators. However, such a mistake is unlawful in many states. For example, in Oregon it is a Class A Misdemeanor for an unlicensed external investigator to conduct an investigation.<sup>5</sup>

### Should an Employer Select an Investigator with the Same Characteristics as the Complainant?

In the context of increased workplace investigations, many employers wonder whether they should take into account gender dynamics when selecting the investigator in a sexual harassment or discrimination investigation. In our experience, employers sometimes justify these gender considerations by explaining that they believe a female complainant would feel more comfortable working with a female investigator or that their shared cultural experiences as women may put the investigator in a better position to understand the complainant's story. Similarly, some employers feel that they should hire a male investigator when the complainant is male for similar reasons. In this sense, employers are starting to match the identity of the complainant to the identity of the investigator. We would like to use this article as an opportunity to caution all employers against using this approach. Although it may be well intentioned, at least a few reasons exist why such an approach could backfire on the employer.

First, the experience of the investigator and the methodology the investigator uses are the most important characteristics in formulating a workplace investigation. Rather than focusing on the investigator's gender a company should focus on whether the investigator has experience investigating the specific type of issue at hand, what potential trauma-informed training the investigator may need, and other unique skill sets that make the individual the most effective investigator. Complainants are most interested in whether they have been heard and whether they feel validated, which is most likely going to occur when the most qualified investigator conducts the interviews. Those criteria are not dependent on the characteristics of the investigator, but rather the experience and professionalism that the investigator brings to bear on the specific case.

Second, in our conversations with plaintiffs' counselors, the practice of employers consistently matching the identity of the complainant with that of the investigator smacks of tokenism and may also make employees feel even more isolated than they already feel.

Third, complainants have repeatedly shared that the best way for an employee to feel more comfortable with an investigatory process is to be apprised of the findings and results of the investigation. Complainants also expressed an interest in understanding how the company selects the investigator, and that the process is an authentic and unbiased one. Explaining how the investigator is selected should come from both the company when explaining to the complainant what the company is doing to act on the complaint, and from the investigator when interviewing the complainant. All of these factors are likely to be more important to a complainant, and more effective in showing the complainant that the company and investigator take the complaint seriously, than merely ensuring that the investigator is the same gender as the complainant.

Fourth, such a practice could lead to liability for the employer. The recent *New Yorker* piece, "The Transformation of Sexual Harassment Law Will Be Double-Faced," notes that workplace sexual harassment claims are typically brought under Title VII, but that we may expect to see an expansion of Title VII protections similar to those seen in Title IX.<sup>6</sup> For example, Title IX has been interpreted to require that the accused receive a fair investigatory process and that investigatory policies or systems that favor the accusing female over the accused male may themselves be evidence of unlawful sex discrimination against males. So, it is possible that an employer who has a policy of always providing female sexual harassment complainants with female investigators may be perceived as favoring or providing more support to female complainants than to males. Therefore, employers and investigators should be careful to ensure that their investigatory procedures equally favor all classes of complainants and provide an equal opportunity for the accused to be investigated in an unbiased and thorough manner.

The importance of selecting an investigator based on qualifications rather than perceived gender dynamics between the investigator, complainant, and accused is highlighted in *Sassaman v. Gamache*,<sup>7</sup> a Second Circuit case where the male accused by a female coworker of workplace sexual harassment brought a Title VII discrimination lawsuit against his employer after being terminated at the conclusion of the investigation.<sup>8</sup> During the investigation, the accused's supervisor commented on men's propensity to engage in sexual harassment, specifically saying: "and besides you probably did what she said you did because you're male and nobody would believe you anyway."<sup>9</sup> Further, the male plaintiff's case against his employer argued that the company failed to properly investigate the sexual harassment charges lodged against him.

The court in that case found that the supervisor's comments that men often sexually harass women "show that the decision-maker was motivated by assumptions or attitudes relating to the protected class [men]." Most importantly for employers considering matching the gender of the investigator to the gender of the complainant in a sexual harassment investigation, the *Sassaman* court explained that "when employment decisions are based on invidious sex stereotypes, a reasonable jury could infer the existence of discriminatory intent."<sup>10</sup> This means that employers could be liable where a system automatically, or without more critical thought into other qualifications of the workplace investigator, selects a female to work with a female or a male to work with a male, as such an automatic pairing could be perceived as being based on sex stereotypes. Even worse would be an investigatory system that tends to favor female complainants by not thoroughly and fairly investigating the accused male. The main takeaway from *Sassaman* is that an employer's "fear of a lawsuit does not justify an employer's reliance on sex stereotypes to resolve allegations of sexual harassment, discriminating against the accused employee in the process."<sup>11</sup>



In sum, the best practice is not one of matching the complainant's gender to that of the investigator. Rather, employers should focus on the experience and quality of the investigator, regardless of the investigator's own personal traits, to ensure the best workplace investigation and to avoid any potential liability for unlawful sex discrimination.

### Whether to Use a Team of Investigators

Another consideration is the use of investigative teams, that is, using more than one investigator during the investigation to participate in interviews, develop credibility assessments, and contribute to the investigative report. Such team investigations differ from the multidisciplinary teams that are commonly used in investigations and may employ a human resources professional, information technology professional, accountant, or other professionals with specialized knowledge relevant to the investigation. Instead, in this proposed model, the investigative tasks would be completed by all members of the team.

For example, an investigative team might include one male investigator and one female investigator, who would conduct the interviews together. The female investigator might take the lead in interviewing a female sexual harassment complainant, while the male investigator would take the lead with a male respondent, but both investigators would be present for each interview. Ultimately, both investigators would compare notes and, where necessary, make credibility determinations based on the information they gathered.

One benefit to this approach is clear: any latent or unconscious biases would be more likely to be challenged and addressed by members of the team. Indeed, the AWI Institute often counsels investigators to talk through their reasoning with others to ensure they are aware of any implicit biases that may be affecting their investigation. In the current highly-charged and often public context of the #MeToo movement, the benefit of having more than one individual make the same assessment of the facts developed could lend extra credibility to the conclusions reached in the investigation. This benefit would extend to any subsequent litigation in the matter, where the testimony of two investigators should exceed that of a single investigator.

An obvious drawback to the use of investigative teams is the increased cost. However, it is possible that administrative aspects of the investigation could be divided among the investigators, which would help defray the additional costs. In any event, the importance of the investigation will likely determine whether or not the added expense is worthwhile.

A final concern is whether the investigators have a policy for resolving internal disputes regarding the evidence. Including any type of "minority report" from a dissenting investigator would decrease the authority of the investigation. This concern would also extend to any litigation relating to the investigation, where

two different investigators could be deposed to determine whether any inconsistencies exist. Consequently, we recommend that any investigative team designate a primary investigator to resolve any questions concerning the investigation.

### Conclusion

The recent cultural shift in recognizing sexual harassment will require employers to make new considerations regarding how they respond to and investigate such complaints in the workplace. Naturally, this includes a reevaluation of the selection of an investigator in workplace harassment complaints. However, although genuine questions regarding an investigator's competency regarding issues of gender dynamics exist, we find little value in diverting from the core principles when selecting an investigator—that they be experienced, impartial, and available to conduct the investigation immediately.



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