Week 1

The When? and What? of Internal Investigations

High-profile internal investigations often make the front pages and sometimes trigger their own sidebars about the quality of the investigation. In the college sports arena, for example, recent investigations include the after-the-fact inquiry into the Penn State scandal by former FBI Director Louis Freer, *The Paterno Legacy, Changed Forever*, , July 13, 2012, at B11, and the Rutgers internal investigation of allegations against Mike Rice, which resulted in an initial three-game suspension and fine. *Rutgers Officials Long Knew of Coach's Actions*, N.Y. TIMES April 7, 2013, at A1.

When videos of Coach Rice verbally and physically abusing his players went viral, the resultant public outcry caused heads to roll at Rutgers and triggered – you guessed it – another internal investigation of the incident, including an investigation of the original investigation. *A New Basketball Review at Rutgers,* N.Y. TIMES April 9, 2013, at B12.

Outside of sports, internal investigations make the headlines either because of the high profile of those being investigated, the salacious nature of the charges, or both. For example, claims of sexual harassment by high level business or political figures are often the subject of national attention, and the high stakes of such investigations explains why they are so often in the limelight.

In all of these cases, there are legal concerns. But even were there no legal ramifications, the reputational risks for the institutions and individuals involved explain the seriousness with which such internal investigation are conducted.

However important such episodes may be, they are merely the tip of the iceberg when it comes to internal investigations. Such investigations are often conducted much less formally and in much more routine scenarios, although we do not question the seriousness of the matters for those involved. And they may be conducted without the threat of liability to any third party. For example, reason to suspect embezzlement or theft is certainly grounds for an investigation, even though failure to investigate would not result in affirmative liability to anyone. Similarly, firms often investigate – or at least "audit" or "review" – internal practices and procedures that appear for one reason or another to be ineffective, too costly, or otherwise problematic. For example, as a normal part of any entity's corporate compliance program, companies conduct internal audits as a routine means to ensure an ethically and compliant business environment. This is not dissimilar to you taking your car for an annual service check, even though you have no reason to believe there is anything wrong with it. Although audit results may lead to a further investigation, these routinely scheduled audits themselves are not a focus of this course. In short, internal investigations are not always the result of legal concerns.

Yet the law – or, more aptly, the risk of legal liability – undoubtedly drives many internal investigations, and these legal implications are the focus of this course and this week's materials. Legal incentives to conduct internal investigations are varied: they arise in many different circumstances, involve many different federal and state legal regimes, and may call for varying levels of detail and commitment of resources.

The bottom line is that, when it comes to an internal investigation, there is no one-size-fits-all technique, and the investigation has to be tailored to the matter being investigated and the investigatory purpose. Indeed, it may be that some questions are so easily resolved that any real "investigation" is not indicated. That said, there are questions to be asked whenever a matter arises that may need to be investigated, and we will address these in the next few weeks.

The wide range of matters that may require internal investigation is also relevant to *who* should be involved in the investigation. For example, embezzlement may require an accountant, theft of company property may necessitate security experts, and misuse of computer equipment or systems may entail information technology expertise. In any of these cases, the investigator may be an employee or an outside consultant and may or may not be part of a team that includes other investigators, typically from Human Resources and/or Compliance and often from Legal. We turn to this "who" question next week.

This week, however, we focus on the related questions of what matters should be investigated and what triggers a possible investigation. The first thing you should note is that few legal regimes – federal or state – expressly mandate that regulated firms conduct internal investigations. Put another way, the law rarely states something like "the employer must adequately investigate complaints relating to X or be subject to Y or Z sanctions." And these kinds of regimes tend to emerge in only a few areas (e.g., securities law) and target only specific corporate actors (e.g., directors).

But do not be misled by the absence of such express mandates. Most legal regimes you will confront in your human resources work nevertheless create powerful incentives to conduct internal investigations and, if need be, redress wrongdoing by the enterprise. These incentives come in many forms, but they all tend to circle back to defending against or limiting the firm's exposure to civil or criminal liability.

You are probably already familiar with some such carrots and sticks (e.g., the role of investigations in defending against potential sexual harassment claims), but there are many others you may not have thought about or confronted. You might be less familiar with the incentives provided by the Federal Sentencing Guidelines for Organizations, which reduce the sanctions otherwise applicable to entities that are found to have violated federal criminal laws. U.S. Sentencing Guidelines, Ch. 8, Sentencing of Organizations. All in all, internal investigations, whether conducted by the entity itself or outside law firms, are a growing reality for American corporations. *See American College of Trial Lawyers, Recommended Practices for*

Companies and Their Counsel in Conducting Internal Investigations, 46 AM. CRIM. L. REV. 73, 73 (2009) (between 2001 and 2009, over 2,500 public companies have retained counsel to conduct internal investigations into suspected corporate malfeasance).

We could organize this discussion of "when" and "what" to investigate in a variety of different ways, but we thought the most straightforward would be to break it down by precipitating event. Thus, we begin with formal and informal complaints and then turn to other types of triggers, such as less formal reports, the results of audits, and other incidents suggesting exposure to legal risks.

1. *Formal and informal complaints.*

Obviously, a formal complaint to a court or administrative agency usually will trigger some kind of internal investigation (unless, as is often the case, your firm has already conducted an investigation in anticipation of the filing). Whether the complaint is a tort suit, a charge of discrimination to the Equal Employment Opportunity Commission, a qui tam suit claiming violations of the False Claims Act, or any one of a myriad of formal legal proceedings, there will be the need for an investigation. The same is true of an attorney demand letter, which usually precedes the filing of a complaint.

As an initial matter, some investigation will be necessary because such formal filings often require preparation of a formal response, which entails uncovering the details of what occurred. Moreover, an investigation often will be necessary to prepare defenses to liability, limit damages or sanctions, and reduce risks of future liability from similar conduct. Thus, a formal external complaint nearly always will spark an internal investigation.

Almost as obviously, a formal internal complaint, such as a complaint of sexual harassment lodged with HR or some other corporate official, should trigger an investigation. And that's usually true even if the person complaining asks that no investigation be undertaken or asks that a complaint be kept confidential. Although such a request may mean that that employee cannot later sue, *see Torres v. Pisano*, 116 F.3d 625, 627 (2d Cir. 1997), the employer may well remain liable to other actual or potential victims if it leaves the conduct unaddressed. *Id.* at 639. But as the formality decreases, the question of what constitutes a "complaint" becomes more complicated. Not every employee gripe to a supervisor constitutes a "complaint," but gripes and scuttlebutt can be worth looking into.

Perhaps in a class by itself is the anonymous complaint. Your company might actually encourage these – say by a suggestion box or its higher-tech equivalent, the 1-800 line. Indeed, the Sarbanes-Oxley Act requires publicly-traded companies to have a mechanism for employees to submit complaints anonymously. 15 U.S.C. § 78j-1(m)(4) ("Each audit committee shall establish procedures for. . . (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."). *See generally*

Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1 (2012).

Certainly, a company that is required to have such mechanism or otherwise invites them has to take even anonymous complaints seriously. But even companies that do not create such an avenue need to be aware that it is risky to simply ignore complaints, even anonymous ones. Of course, public outcry over unprevented wrongdoing often revolves around such failures, whether in the sports examples mentioned above or in the myriad of circumstances in which high profile firms have failed to address illegality within their operations.

But there are also critical *legal* reasons why such complaints should not be ignored. First, a firm is likely to be held to "know" whatever any of its managers "know," and knowledge of wrongdoing is usually enough to subject the firm to legal sanctions. Thus, if management (or those acting for management) knew of an alleged wrong or violation and fail to follow up, the firm could be held to account for the underlying wrongdoing. Moreover, even when managers can claim in good faith that they did not "know," the firm often still can be held liable if managers had "reason to know" or "should have known," and this can be established by evidence of unheeded complaints or red flags.

Finally, even in circumstances in which the underlying wrongdoing will subject the firm to liability automatically – say, through some doctrine of "vicarious liability" – failure to respond to complaints may be found to be egregious and, hence, could subject the firm to greater damages than if management had investigated and stopped or prevented further misbehavior or harm. For example, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545-46 (1999), held that an employer would *not* ordinarily be liable for punitive damages even "for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII'" (citation omitted).

So, once a possibility of tortious or illegal conduct within the firm is raised, you should make a conscious decision as to what to do with the matter – although it is certainly true that some anonymous complaints may be too amorphous to justify doing anything.

EEOC v. Cromer Food Servs.
414 F. App'x 602 (4th Cir. 2011)

GREGORY, J:

This case involves alleged sexual harassment in violation of Title VII of the Civil Rights Act of 1964. Homer Ray Howard, an employee of Cromer Food Services ("CFS"), claimed to suffer a daily barrage of lewd comments and gestures by employees of CFS' biggest client.

Rather than intervene, CFS told him there was nothing that could be done because the harassers were not under its control.

I.

The following facts are undisputed unless otherwise noted. We recount them in the light most favorable to the EEOC, the nonmovant.

CFS is a food-stocking company that sells snacks and beverages in vending machines that it places on its clients' premises. Its biggest client is Greenville Hospital. Howard began working for CFS in July of 2006 as a route driver. He worked on the second shift, 3:00 p.m. to 11:00 p.m., servicing the vending machines at Greenville Hospital. He had a regularized schedule where he would wind his way upstairs from the snack bar or cafeteria with scheduled stops in between.

Following an incident with a co-worker who left a note in the hospital canteen calling him gay, Howard began to be harassed on a daily basis at the hands of two hospital employees who referred to him as "Homo Howard." These two employees, John Mills and Andre McDowell, were housekeepers. Starting in early December 2006, they made unwanted sexual comments in nearly every encounter they had with Howard, including graphic discussions of oral sex that featured the two men groping themselves and propositioning Howard. Howard wanted to walk away but because the comments were made while he was stocking the vending machines, he could not leave without abandoning his duties. Mills and McDowell knew Howard's schedule and would wait for him at the machines so frequently that Howard felt "stalk[ed]." Both men deny that they harassed Howard.

CFS failed to take adequate action to combat the harassment on behalf of the hospital employees. C.T. Cromer, the chairman of the company's Board of Directors, claims this was because he was unaware of the harassment or at least unaware of the scale on which it was occurring. Howard, however, contends that he made both CFS and the hospital aware of what was going on as soon as it began. After the first incident, Howard spoke to his supervisor, Gregg Adams, telling him "there was some gentlemen at the hospital that were asking me homosexual questions, asking me was I gay." Adams made light of the events, telling Howard to let it go, that the men were only joking. He did not ask for additional information to rectify the problem. The employee sexual harassment policy, which Howard signed upon being hired, requires employees to report harassment to the president of the company. Howard never reported the harassment to Brent Cromer, who was the head of the company, and testified that he did not even know who the president was. The harassment policy also requires any employee "who becomes aware of any harassment of any employee by a non-employee [to] report such harassment to the president of Cromer Food Services." Adams did not follow this directive.

In addition to Adams, Howard also reported the problem to his direct supervisor, Brian Tyner. Howard asked if there were a way to address the problem such as switching routes. Tyner's reply was "it was just a joke" and not to take things too seriously because "faggots are ignorant, retarded people, and Homer, I know you're not retarded." The next week, Howard told

another supervisor, Gary Roper, about the problem. Roper replied that it was unfortunate that the situation was being handled as it was, but that Adams had already dealt with it.

As the harassment continued unabated, in late December or early January Howard spoke to Chet Cromer, one of the sons of the chairman of the Board of Directors and a manager with the company, and told him "what was going on." Chet told Howard he would speak with his father, which he did. That very night, Howard met with C.T., who was visibly upset by the situation. The first words out of his mouth were "[d]o you not realize this could cost me everything?" He started to "rambl[e]" so much that Howard could not get a word in edgewise. Howard does not remember whether or not he disclosed the names of his harassers in the meeting, but he knows he was never asked for their names. Howard testifies that he met with C.T. again in January to tell him the situation was getting worse. C.T.'s response, which directly contradicted the company harassment policy, was that he was not responsible for the hospital but only responsible for CFS employees.

As the harassment continued, Howard took progressively more drastic measures to stop it [reporting the harassment directly to Greenville Hospital, which did not take meaningful action. Howard continued to complain to Adams], who only laughed it off and told him not to take the comments seriously. When Howard asked if he could switch to another second-shift route he believed was available that would not entail him going to the hospital, Adams told him to quit whining and that he was under contract at the hospital. [Adams' version of the facts differs from Howard's in that he claimed he remembered only receiving one complaint from Howard in February of 2007 about a one-time incident, not a pervasive and hostile environment. He did not report the complaint as he did not consider it to be sexual harassment.]

[Only after Howard filed a charge of discrimination with the EEOC did CFS respond. The day that CFS learned of the charge] C.T. called Howard into his office and told him he got "this stupid letter from the EEOC." According to Howard, the meeting only lasted a few minutes and C.T. told Howard he did not want to hear about it. C.T.'s description of the meeting differs from Howard's. In his deposition, C.T. claims that he thought that Howard's failure to give specifics proved that he was lying about the details of the harassment. According to C.T., Howard's refusal to give names or to turn over the note suggests that he was making things up. Despite purportedly believing that Howard was a liar, C.T. acted to protect his employee. As a result of the details that C.T. claims emerged for the first time in this meeting, he decided that it was unacceptable for Howard to continue working at the hospital. Therefore, he immediately and in writing offered him a position on the first shift, which was from 4:00 a.m. to 3:30 p.m. Mondays through Fridays, with a thirty-minute unpaid lunch break.

[The new shift required more hours and perhaps a lower hourly rate, although there was some dispute about that.] Regardless of the pay, Howard declined to take the new shift, which allegedly conflicted with his childcare responsibilities. Because the shift was a "take it or leave it" offer, Howard claims he was terminated as a result of his choice.

The EEOC brought suit shortly thereafter. . . .

III.

To make out a claim for sexual harassment, the plaintiff must establish four elements: (1) the harassment was unwelcome; (2) was based on sex; (3) was sufficiently severe or pervasive to alter conditions of employment and create an abusive atmosphere; and (4) was imputable to the employer. *EEOC v. Central Wholesalers, Inc.*, 573 F.3d 167, 174-75 (4th Cir. 2009). Because the fourth element is the only one challenged, it is the only one we address here.

The Fourth Circuit has yet to consider whether an employer may be liable for the activities of non-employees in a claim for sexual harassment. Other Circuits to address the issue have adopted a negligence standard, finding that an employer can be liable if it took no steps to protect its employees and if it had actual or constructive knowledge of the situation. The analysis is very similar to the standard used by this Circuit in the context of harassment of co-workers. *See Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 333-34 (4th Cir. 2003) ("The employer may be liable in negligence if it knew or should have known about the harassment and failed to take effective action to stop it.") For the purposes of the instant litigation, and because both parties urge us to do so, we adopt a negligence standard commensurate with the above precedents. Thus CFS is liable if it knew or should have known of the harassment and failed to take appropriate actions to halt it.

Appellee argues, and the district court agreed, that CFS did not have actual or constructive knowledge of the harassment because the complaints that Howard lodged were vague and insufficiently detailed for CFS to take action. Further, it argues, Howard failed to follow the sexual harassment protocol that required incidents be made known to the company president. But such reasoning ignores the clear evidence in the record that Howard tried to communicate the nature and extent of the harassment and was effectively ignored by all levels of CFS management who scoffed at him and told him to quit being such a "crybaby." If Howard's deposition testimony is credited, as it must be [at this stage of the proceedings], then whatever paucity of details that resulted from his complaints are due to the company's own decision not to listen to him. For example, he mentions that he tried to tell C.T. but could not get a word in edgewise. He also reported the incidents numerous times to his supervisor, Adams, but was rebuffed at every turn. Furthermore, Howard did communicate details about the harassment, including recounting a couple of incidents, to Adams, who laughed at him and took it as a joke despite Howard's clear sentiments to the contrary. And, crediting Howard's testimony, the company also failed to ask him follow-up questions or request the names of the harassers.

In this situation, it is hardly fair to fault Howard for failing to communicate more information about the incidents or for ineffectively conveying their gravity. To do so would be a perversion of the law of anti-harassment, which although requires notice to the employer, does not and should not require it to be pellucid. Even if it is true that Howard refused to give names, CFS still had a duty to investigate or take other measures to combat the harassment. Indeed, other employees reported problems to the hospital which were solved, indicating that such a solution was available here as well. Further, the fact that the hospital took some [minimal] steps to combat the harassment suggests that Howard was, in fact, communicating a sufficient degree of detail to facilitate curative action.

Appellee cites *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1300 (11th Cir. 2000), for the proposition that once the employer has "promulgated an effective anti-harassment policy and disseminated that policy and associated procedures to its employees . . . it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances." (citations and quotations omitted). There, the Eleventh Circuit held that an employee who had not followed the anti-harassment policy had not effectively put the company on notice. This is not the approach taken by the Fourth Circuit. In *Ocheltree*, this Court found that claims of harassment could not be avoided through the adoption of a "see no evil, hear no evil" strategy. Rather, knowledge can be imputed to an employer if a "reasonable [person], intent on complying with Title VII, would have known about the harassment." Further, knowledge may be constructive if the employer does not provide reasonable procedures to register complaints.

On the facts here, a reasonable person would have known about the harassment given Howard's vocal and vociferous complaints to practically anyone who would listen. Furthermore, the company policy obligates those who become aware of harassment to report it up the chain of command, a protocol which fell by the wayside. Finally, the company's policy itself is somewhat questionable in requiring the employees of a 100-person cadre to report directly to the president. An employee might be easily intimidated and fail to report it such that the company would be technically insulated from liability. We do not find such a result just or proper. Finally [sic], as here, an employee may lack knowledge of the higher-ups; we do not think such ignorance is justification for inaction on the part of the company sued. . . .

CFS next contends that it acted promptly to protect Howard as soon as it had sufficient information about what was occurring in the hospital. In other words, the offer to transfer Howard from second shift to first shift, which would have changed his route not to include Greenville Hospital, was enough to fulfill its obligations to him. But the record does not include evidence that the shift would have allowed Howard to drive his young child to hospital appointments, his stated reason for preferring a second-shift slot. Even if it is true that he could have worked around it, as CFS implies, if it still resulted in Howard being worse off, it is unacceptable as a remedial measure. *See Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) ("A remedial measure that makes the victim of sexual harassment worse off is ineffective per se."). Furthermore, corrective action is not enough if it is too little, too late. That is exactly the case here. Howard endured months of inaction between when he first alerted his employer of the problem, in December, to its eventual offer to transfer him, which came in late March. Indeed, there were many alternatives that may have been available to the employer that suggest themselves when the facts are viewed in the light most favorable to the EEOC and that may be substantiated at trial. Perhaps, for example, CFS could have availed itself of its relationship with Greenville Hospital and asked the management there to investigate and, if proper, to discipline the relevant employees. Alternatively, it could have petitioned its employees who were on second shifts to see if they would switch routes with Howard. But no matter how the facts are spun, CFS' actions were hardly an effective remedy.

IV.

The next question, closely related to the previous, is whether a reasonable jury could find that CFS' decision to switch Howard from the second to first shift constituted unlawful retaliation for his decision to file an EEOC complaint. In order to support a claim for retaliation, there must be sufficient evidence that (1) the employee engaged in a protected activity; (2) the employer acted adversely; and (3) a causal connection between (1) and (2) exists. *Holland v. Washington Homes, Inc*., 487 F.3d 208, 218 (4th Cir. 2007). CFS argues on appeal that its decision to transfer was not adverse; it does *not* claim that there was no causal connection between the two. Therefore, we only address the second prong here.

In *Burlington Northern v. Santa Fe Railway Co.*, 548 U.S. 53 (2006), the Supreme Court established the framework for what constitutes adverse action. It held that it is any action that might "dissuade a reasonable worker from making or supporting a charge of discrimination." Materiality must be considered from the vantage point of someone in the plaintiff's position who shares "at least some individual characteristics with the actual victim" such as "age, gender, and family responsibilities."

Here, a jury could easily conclude that the actions taken by CFS were adverse. First, there is a dispute of material fact over whether Howard's salary per hour increased or decreased. According to the EEOC, Howard was paid $11.26 per hour for the new shift but $12.50 per hour for his original second shift position. Viewing these calculations in the light most favorable to Howard, his pay per hour decreased and his number of hours per week increased. Further, he had childcare obligations that were interfered with. As a result, someone in his position could find the material effects of the new shift adverse. . . .

Notes

1. *A Comedy (or Tragedy) of Errors*. The actions of CFS could scarcely have been better had it been trying to create a textbook case of what not to do with an employee complaint. But sometimes trying to figure out why mistakes are made can be far more instructive than looking at good models of investigation.

2. *The Employer Isn't Liable for Harassment by Others?* It may well be that CFS just didn't think that what was happening at the Hospital was its problem, even if its employee was the target. As the case illustrates, that's wrong as a matter of law. An employer must act reasonably to protect its employees from sexual or other discriminatory harassment, whether by coworkers or third parties (although what actions are "reasonable" will vary depending on who the alleged harassers are). Thus, one lesson here is not to assume that something is simply not the employer's responsibility. Indeed, employee complaints about any kind of alleged harm at or during work, including harms or harassment by nonemployees, ought to be taken seriously as an initial matter, even if firm liability is questionable. "Not our problem" might be the conclusion, but it cannot be the assumption.

3. *The Harassment Wasn't Illegal?* Oddly enough, this is a somewhat close case: harassment "because of sex" is prohibited by Title VII and state analogs (as is harassment on account of race, ethnicity and religion), but harassment on account of sexual orientation is not barred by any federal law, although a number of states have statutes prohibiting it. But there is a pretty fine line between harassment because of sex and harassment because of sexual orientation, and it is pretty clear that CFS didn't bother to find out enough information to draw any conclusions. Again, the better course is to investigate and address any issue so that the firm is in a good position if it turns out that liability is a possibility. Perhaps a further lesson is that, when it comes to alleged harassment and other discriminatory behavior, companies should not try to draw such fine distinctions – i.e., between sexual harassment and sexual orientation harassment – in any event.

4. *The Harassment Was Just a Joke?* To be actionable, harassment has to be sufficiently severe and pervasive to contaminate the work atmosphere of both the victim and a reasonable person in the position of the victim. Not every act of harassment, therefore, violates the law. But an employer who ignores problematic behavior risks not uncovering more incidents and allowing additional ones to occur that would render it liable. In any event, if Howard is credited, there was a lot of reason to believe that the harassment was pervasive. Telling employees, in effect, to "suck it up" obviously is not best practices. Of course, what might have been going on, in part, was homophobia. We don't know Howard's sexual orientation, but the comments of Tyner, Howard's direct supervisor, suggest he was part of the problem: "'it was just a joke' and not to take things too seriously because "'faggots are ignorant, retarded people, and Homer, I know you're not retarded.'"

5. *Credibility of the Complainant.* It could also be that one or more of Howard's supervisors simply did not believe him. And, who knows, it may be that there were good reasons to doubt his credibility, in whole or in part. Yet, again, this is not a good reason for taking no action at all following his complaints. For one thing, the firm bears the risk of the supervisors' being wrong. Moreover, as the case above suggests, at least at the initial stages of discriminatory harassment and retaliation litigation, the facts in the case – including matters of credibility – will be viewed in a light most favorable to the complaining party (here, Howard). Thus, if there are good reasons to doubt Howard's credibility, they need to be documented and well established by the firm – *after an investigation*. Otherwise, the firm risks longer, more expensive litigation over the matter, even if its principals believe it would ultimately prevail. Developing an adequate basis for rejecting Howard's version of the events ordinarily will require some kind of investigation of the circumstances, including, at minimum, getting his full story and talking to the alleged perpetrators and possible witnesses.

6. "*Protecting" Howard.* After months of ignoring Howard's complaints, CFS finally acted, thereby jumping out of the frying pan into the fire! The delay might itself have been a serious problem for CFS: "Furthermore, corrective action is not enough if it is too little, too late. That is exactly the case here. Howard endured months of inaction between when he first alerted his employer of the problem, in December, to its eventual offer to transfer him, which came in late March." We will explore this question in later weeks, but the lesson here is that an investigation need not only be thorough, it should also be prompt.

Ignoring the delay for the moment, one factual dispute in the case essentially centers on CFS's internal investigation – although that may be too formal a name. If Howard's version is believed, there was no effort to really determine what had happened, and there was certainly no effort to address the problem at the Hospital. Even if C.T.'s version is accepted, there wasn't much of an inquiry into the facts since it seems that the company had decided to "solve" the problem by transferring Howard.

Now, in the abstract a transfer that might be acceptable – at least when the harassment is at a customer's site – since the employer's duty is to protect its employees, not fix the world. And the firm has no obligation to give the complaining employee the precise fix or accommodation the employee is requesting. But, in this case, the "solution" could certainly be viewed as retaliating against the employee. As the court says, if a solution results in the victim "being worse off, it is unacceptable as a remedial measure."

7. *Retaliation.* Indeed, it is worse than that. A "solution" that makes the victim worse off may not merely fail to avoid liability for the harassment but may even generate a separate basis for liability. Title VII and the other antidiscrimination laws prohibit not only discrimination as such but also retaliation for reporting conduct believed to be discriminatory. Actually, it is a little more complicated than that, but it should be apparent that taking an adverse employment action against an employee for reporting prohibited conduct is highly risky. And that is true even if the employer is not acting out of anger (which maybe CFS was, given C.T.'s "stupid" comment) but just trying to address a problem. We will not explore this much more other than to note that the *Burlington Northern* standard – prohibiting retaliation in terms of actions that might dissuade an employee from complaining – could easily be met here. Howard, after all, might well have chosen to "suck it up" if the choices were unemployment or employment at a lower rate that precluded his child care responsibilities.

8. *Policies and Procedures*. Some of these issues may be explicitly addressed by your company's policies and procedures, which will probably mandate certain actions when complaints are made. But there are two caveats here. First, such policies may well be focused on particular kinds of misconduct, particularly discrimination and harassment. You should be aware, however, that much the same approach may well be appropriate when the possible wrongdoing does not fit into such categories. For example, if Howard reported back that one of his co-workers was driving erratically or threatened someone, an investigation would clearly be indicated. Secondly, and back to the theme that the firm may well be held to know what its managers know, you should consider adopting – if you do not have them already – policies requiring supervisors to report potential problems, ranging from harassment and discrimination to any kind of liability-risking behavior. Such policies may very well be developed in conjunction with the Compliance and/or Legal Departments, and should include training to ensure that the policies don't exist merely on paper. In *CFS* itself, multiple supervisors seemed to know of Howard's complaints, and not one really responded until the EEOC arrived at the doorstep.

* * *

Employee harassment complaints pose their own difficulties in both drafting an appropriate policy and dealing with problems as they arise, but they are only one example of a huge number of situations that may call for an internal investigation.

In *CFS* itself, the "investigation" (maybe it would be better to label it a "reaction") was triggered by receipt of a charge of discrimination from the Equal Employment Opportunity Commission. "Discrimination" includes but is not limited to harassment on grounds prohibited by the statute. While an EEOC charge can lead to court suit (either by the charging party or, more rarely, by the EEOC itself, as in *CFS*), it more commonly simply leads to an EEOC investigation. Any employer, however, must prepare itself for the EEOC, and that means that an internal investigation – if it hasn't already occurred – is critical. The employer will want to defend itself or, if the investigation reveals a sufficiently high probability of liability, resolve the dispute within the Commission's mandatory conciliation process.

In any event, the receipt of a "complaint," "charge," or "inquiry" – from a court or administrative agency – should almost always require an investigation. To the extent that attorneys are involved in defending a proceeding, the investigation can be "outsourced" to counsel, but in other cases the decision whether and how to investigate will need to be made internally. This is also true in cases in which the firm receives a subpoena or even hears rumors about employees being subpoenaed or interviewed by law enforcement personnel. To the extent that administrative agencies or law enforcement seem concerned about the operations of a company or its employees, a red flag is being waved.

Of course, not all of these matters directly involve HR. A product liability, antitrust, or securities fraud lawsuit will almost certainly be handled by Legal, and Compliance may well be heavily involved in many different matters that affect a company's liability to third parties.

But HR plays a distinctive role in matters pertaining to employee wrongdoing (and, of course, a firm's wrongdoing is always traceable to one or more employees) and in identifying potential problems before they grow into more serious ones. For example, HR has unique access to information that might trigger internal investigations. Several examples are obvious. First, HR typically conducts "exit interviews" of departing employees, and in this context it may well hear reasons why the employee is leaving that should lead to further action, including a potential investigation. While exit interviews are conducted for a variety of reasons, including efforts to protect employer confidential information, one purpose is to identify internal problems. It may be that the departing employee is no longer interested in legal redress, but he or she may well provide the employer with knowledge that it should act on. *See West v. Tyson Foods*, 374 F. App'x 624 (6th Cir. 2010) (failure to investigate allegations of harassment raised in exit interview relevant to jury's award of punitive damages against the employer). And, although "disgruntled" employees may be less credible than others, such a determination should be made after the facts are ascertained, not in lieu of doing so.

Second, performance evaluations may also raise questions that should be further explored. In rare instances, the manager's evaluation itself may raise such questions; more likely, however, the employee's response to criticism in the evaluation should cause HR to look into the matter further. *See Daniel v. Universal Ensco*, 507 F. App'x 434, 436-437 (5th Cir. 2013) (employee complaints about "unfair, unjust and discriminatory practices" related to performance evaluation). Again, such reactions may not be well based, and may even be frivolous, but an employer wholly ignores such matters at its peril.

Finally, beyond the exit interview and performance evaluation contexts, HR might be the first or one of the first departments to hear about alleged wrongdoing within the firm – even wrongdoing that does not directly involve human resources. Employees who have concerns regarding safety, financial, or other matters may turn to HR for guidance on whether or how to report or address such matters, particularly if a direct supervisor is initially nonresponsive. Such inquiries or reports frequently justify further exploration by HR, compliance personnel, or counsel, not only because they may involve matters that could lead to some kind of formal legal complaint or charge against the firm, but also because the employee's report itself might constitute protected whistleblowing. As in the antiharassment context addressed in *CFS*, retaliation or perceived retaliation against an employee who blows the whistle can make things far worse; thus, one aspect of reducing legal risks for the firm is taking such matters seriously on the front end, which often will justify some kind of internal investigation. We turn to these issues again in our discussion of the "public policy tort" in next section.

2. *Reports, Incidents, Episodes, and Audits*

Even where no one complains, either formally or informally, an investigation might well be appropriate. Routine reports of managers, security "incident" reports about unusual occurrences, third party letters, internal or external audits, and various other kinds of workplace incidents all may raise questions that require the company to consider whether an internal investigation is warranted.

Unlike formal complaints or charges, however, these matters typically raise a threshold question of whether an investigation is warranted. Again, where the information suggests a violation of the law, some kind of investigation is generally warranted. But even when the information does not suggest illegal conduct, there may still be a basis for investigating. For example, reason to believe company policies have been violated may be sufficient to justify a formal investigation.

But it is here that judgment enters the picture. While possible illegality will nearly always justify inquiring further, employers have innumerable policies, many of which are of marginal importance. Further, the information HR receives may suggest that the matter has been

appropriately dealt with by the manager below. An oral or written warning or even a mere "reminder" about polices might be all the response that a particular incident justifies.

Moreover, as you may very well know already, investigations have real costs. Not only to they require the investment of time and other resources (by HR personnel and others), but they can be disruptive and detrimental to employee morale. And the more extensive and formal the investigation(s), the greater these costs will be.

Thus, the key here is for the HR (or other) professional charged with the responsibility to deal with questions like this is to make an initial determination of whether potential illegality is involved or whether the matter is serious enough to justify an investigation. As the *CSF* case suggests, this decision is not always an easy one, and you should be prepared to ask for legal assistance in making that determination. Ultimately, this boils down to asking yourself the following question:

> Supposing the information is correct, does potential legal exposure or protection of company physical, intellectual property, or reputational assets justify the resources (and potential disruption) caused by further investigating the matter?

In answering that question, the HR professional's best guide is often how similar incidents have been handled in the past. Indeed, failure to treat similar incidents similarly can later come back to haunt the firm – for example, it can be used as evidence by a party complaining of harassment that the firm could have taken further action (because it did so in the past) but failed to do so in the underlying circumstances. But even here, a sensitive judgment is called for. The fact that no action was taken when a junior employee was suspected of talking to competitors does not mean that a similar stance is appropriate when the Vice President of Marketing is thought to have engaged in the same conduct.

3. *The Public Policy Tort*

Need a new, separate heading here to introduce public policy torts

Perhaps the most sensitive area of answering this question is what has been called the "public policy tort." We explore this topic in greater depth in another certificate program, MANAGING WHISTLEBLOWER RISK. For the moment, we will content ourselves with quickly summarizing the problem.

The illegality of employment discrimination on the traditional grounds of race, sex, age, and disability, among others, is well known, but less understood are other limitations on the ability of an employer to discharge or otherwise take adverse actions against their workers. The baseline at-will rule suggests that it is usually permissible to discharge an employee for any other reason. But one critical exception is what is referred to as the "public policy tort," or "wrongful

discharge." Currently, most jurisdictions recognize the termination of an employee as actionable where the employee is fired in retaliation for actions that "public policy" protects.

"Public policy" is obviously a pretty vague term, which is why an HR professional has to exercise both care and judgment. But to give you some sense of the possible reach of the tort, consider a recent effort to "restate" the law. The draft Restatement (Third) of Employment Law protects an employee who, while acting in a "reasonable manner," engaged in any of six kinds of conduct

> (a) refuses to commit an act that the employee reasonably and in good faith believes violates a law or established principle of a code of professional conduct or an occupational code protective of the public interest;
>
> (b) performs a public duty or obligation that the employee reasonably and in good faith believes is imposed by law;
>
> (c) files a charge or claims a benefit in good faith under the procedures of an employment statute or law (irrespective of whether the charge or claim is meritorious);
>
> (d) refuses to waive a nonnegotiable or nonwaivable right or agree to a condition of employment whose enforcement would violate public policy;
>
> (e) reports or inquires about employer conduct that the employee reasonably and in good faith believes violates a law or an established principle of professional conduct or an occupational code protective of the public interest; or
>
> (f) engages in other activity directly furthering a substantial public policy.

§ 4.02 (draft). There is a lot here, some of which is obvious, and some of which is not. If HR receives a manager's report, for example, wanting to discipline an employee for refusing to drive a truck because of broken safety equipment ((a) "violating a law"), being absent on jury duty ((b) "performing a public duty"), or filing an OSHA complaint ((c) "filing a charge"), alarm bells should go off. Almost certainly not only should no discipline be imposed, but HR ought to investigate whether there is a pattern of managerial conduct that poses liability problems.

The more complicated cases are situations in which there is some internal dispute that may, or may not, involve public policy as the courts define it. An employee has no right to refuse to work or to drag her feet on projects just because she disagrees with the company's approach to them. For example, as the Restatement suggests, the employee must reasonably believe the project violates a law, not merely the employee's own views of what is good for the employer or what is good social policy. Consider, for example, in *Foley v. Interactive Data Corp.*, 765 P.2d 373, 380 (Cal. 1988), where plaintiff claimed he had been discharged for reporting internally that a supervisor was being investigated for embezzlement from another company. The court rejected the public policy tort:

> Past decisions recognizing a tort action for discharge in violation of public policy seek to protect the public, by protecting the employee who refuses to commit a crime . . . or who discloses other illegal, unethical, or unsafe practices. . . . No equivalent public interest

> bars the discharge of the present plaintiff. When the duty of an employee to disclose information to his employer serves only the private interest of the employer, the rationale underlying the [public policy] cause of action is not implicated.

Id. In other words, a predicate public policy must concern the public interest, not just a private matter between a worker and employer. In an extreme example of this, *Lloyd v. Drake University*, 686 N.W.2d 225 (Iowa 2004), held that a security guard had no claim even if he was fired for reasonably trying to save a female student from assault.

But a HR professional sensitive to the potential for liability might well want to look twice before concluding that there is no risk in situations like this. Again, if you want to delve more deeply into this area, consider enrolling in MANAGING WHISTLEBLOWER RISK.

In any event your decision whether to investigate should be made promptly. As the *CSF* case warns, delaying an investigation too long may itself create problems, regardless of the quality of the investigation finally undertaken.