

InfoPAKSM

HR Investigations and the Preservation of the Attorney-Client Privilege in the Context of the *Faragher* Defense

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HR Investigations and the Preservation of the Attorney-Client Privilege in the Context of the *Faragher* Defense

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This InfoPAKSM explores the case law and best principles for handling workplace investigations into employee claims of harassment and other alleged improper treatment in light of the defense provided in *Faragher v. City of Boca Raton* and the shield that is the attorney-client and attorney work product privileges. This InfoPAK is meant to provide an overview of the *Faragher* defense (especially in light of recent developments in case law) as well as the salient privileges, and then provide employers with insight on the best practices for protecting the *Faragher* defense as well as, where possible, the privileges, while proactively addressing employee concerns.

This information should not be construed as legal advice or a legal opinion on specific facts, or representative of the views of ACC or any of its lawyers, unless so stated. This is not intended as a definitive statement on the subject but a tool, providing practical information for the reader.

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I. Introduction

It is a familiar situation for nearly every employer: An employee comes forward with a concern about how another employee is acting towards him or her. Perhaps another employee has been using sexually charged expletives with such frequency that the proverbial sailor would blush. Perhaps another employee has proven to have animus towards a particular group of people, and for some reason has chosen to channel that disdain towards the complainant. Perhaps the complainant is suggesting that her supervisor continues to flirt with her, despite her requests that he stop. Perhaps the complainant uses legal buzzwords like “harassment.”

Straining to think back on his or her training, the employee’s manager might struggle to know how to respond next. Can this be addressed in a way that respects the complainant without unduly prejudicing or prematurely judging the accused harasser? Who should handle this? How will this affect the operations? Are we liable for anything? If so, what can I do to reduce our exposure?

In the last fifteen years, ever since the U.S. Supreme Court’s decisions in *Burlington Industries Inc. v. Ellerth*¹ and *Faragher v. City of Boca Raton*,² the response to this type of allegation has changed drastically. Before *Ellerth* and *Faragher*, employers were strictly liable for any “quid pro quo” supervisory harassment (*i.e.*, this-for-that), but were only liable for hostile work environment harassment where the employer knew of the harassment but failed to take steps to prevent it. However, following *Ellerth & Faragher*, liability depends upon a multitude of frequently murky factors, including:

1. the employment relationship of the harasser to the harassed;
2. whether the harassment led to a “tangible employment action”; and
3. whether the employer can establish the affirmative defense found in *Faragher* – namely, that it exercised reasonable care to prevent harassment, acted promptly to correct harassment, and the employee unreasonably failed to avoid the harm.

In light of these factors, many employers are quick to conduct a *Faragher* investigation upon receipt of a complaint. However, once litigation inevitably begins, the employer may not want to hand over a roadmap for the now-plaintiff to follow, which, in many cases, the notes and results of the *Faragher* investigation will prove to be just that. Hence, the temptation is to assert that the communications and investigation notes are privileged under the attorney-client privilege and/or the attorney work product privilege. However, this assertion places at issue the very defense provided by *Faragher*; namely, that the employer responded promptly and appropriately.

This InfoPAK will explore the case law and best principles for handling this very situation. First, this InfoPAK will present a brief overview of the legal principles undergirding liability under *Faragher*. Then, the InfoPAK will address how the three most salient privileges arise, apply, and are waived in the context of a *Faragher* investigation. Finally, this InfoPAK will provide a series of best practices that an employer should follow in conducting a *Faragher* investigation, especially in light of recent case law developments.

II. Legal Principles of Employer Liability for Harassment under *Faragher*

Before addressing how various privileges apply in a *Faragher* investigation, each employer must consider how, if at all, *Faragher* even applies to a particular complaint. The key distinction in evaluating whether the *Faragher* defense applies – and so, an important evaluation in determining how to proceed when faced with claims of harassment – is the relationship between the harassed and the harasser. More specifically, employer liability differs based on whether the alleged harasser is the harassee’s supervisor or co-worker.

A. Employer Liability for Supervisor Harassment

An employer is typically responsible for harassment by a supervisor that culminates in a “tangible employment action.” This directly raises two important questions, namely (1) whether the individual is a “supervisor,” and (2) whether there was a “tangible employment action.”

I. Whether the Individual is a “Supervisor” under *Faragher*

The term “supervisor” is not defined in Title VII of the Civil Rights Act of 1964³. However, it is generally agreed that, at a minimum, a supervisor is defined as “not simply a person who possesses authority to oversee the plaintiff’s job performance, but a person with the power to directly affect the terms and conditions of the plaintiff’s employment.”⁴ It is only when a supervisor who has immediate (or successively higher) authority over an employee has engaged in the complained-of conduct, that an employer may be subject to vicarious liability,⁵ as only a person acting with the authority of the company can actually cause a “tangible employment action.”⁶

Federal appeals courts, however, disagreed over who may be considered a “supervisor,” and whether it matters if the supervisor is in the employee’s direct supervisory chain of command. On June 24, 2013, the issue was put to rest when the U.S. Supreme Court issued its highly anticipated decision in *Vance v. Ball State University, et al.*⁷ The Court’s 5-4 decision resolved the circuit split concerning the extent of authority an employee must exercise and be granted to be classified as a “supervisor.” The past circuit split, and this new ruling, are discussed in more detail below.

a. Harasser Within Supervisory Chain of Command

Under previous guidance from the Equal Employment Opportunity Commission (“EEOC”), when the alleged harasser is within the supervisory chain of command, the individual will qualify as a supervisor if he or she has (1) authority to undertake or recommend tangible employment decisions affecting the individual, or (2) the individual has authority to direct the employee’s daily work activities.⁸

The U.S. Courts of Appeal for the Second, Fourth and Ninth Circuits agreed with EEOC guidance, and held that liability extended to supervisors whom the employer vests with authority to direct and oversee their complaining employee’s daily work. This included the assignment of additional or undesirable tasks.⁹ This broad view of the term “supervisor” encompassed lead workers and co-workers given the responsibility to direct work on behalf of higher ranking managers, whether

or not within the supervisory chain of command. For example, in *Mack v. Otis Elevator Co.*,¹⁰ the court found that the alleged harasser qualified as a supervisor, because, as senior mechanic on site, he was responsible for assigning and directing the daily work of other mechanics on site, including the victim.¹¹

Thus, under EEOC guidance and these circuits, an individual who had authority to direct another employee's day-to-day work activities qualified as that individual's supervisor, even if that individual did not have the authority to undertake or recommend tangible employment decisions.¹² Furthermore, an individual who was even *temporarily* authorized to direct another employee's daily work activities qualifies as that person's supervisor during that time period.¹³ Conversely, an individual who merely relayed an official's instructions regarding work assignments and reported back to those officials did not have true supervisory authority. Additionally, an individual who directed only a limited number of tasks or assignments for the individual would not have been found to be a true supervisor.¹⁴

By contrast, the U.S. Courts of Appeal for the First, Seventh, and Eighth Circuits took a much narrower view, finding that an individual will qualify as an employee's "supervisor" if he or she is authorized to undertake tangible employment decisions affecting the employee, as discussed in more detail below. An individual whose job responsibility includes the authority to recommend tangible job decisions affecting an employee qualifies as his or her supervisor, even if that individual does not have final say as to the action that is implemented and it is subject to review by higher level supervisors. As long as the recommendation is given substantial weight by the final decision maker(s), the individual will qualify as a supervisor.

Specifically, the courts in these circuits held that whether an individual is a supervisor with immediate (or successively higher) authority is dependent upon whether the individual's authority was of a *substantial magnitude*. These courts have held that the essence of supervisory status is the authority to directly affect the terms and conditions of the employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline the victim.¹⁵ Absent an entrustment of at least some of this authority and the power to take formal employment actions against the victim, an employee does not qualify as a supervisor for purposes of imputing liability to the employer in these circuits.¹⁶

Under this narrower view, mere authority to assign the individual to particular tasks was insufficient for supervisory authority. For example, in *Merritt v. Albermarle Corp.*,¹⁷ an alleged harasser's authority to assign the victim to work with an "unsafe" co-worker who failed to follow proper procedures, did not make the alleged harasser the victim's supervisor.¹⁸ In addition, in *Weyers v. Lear Operations Corp.*,¹⁹ the court determined that a "team leader" who did not have the ability to take any tangible employment actions (hiring, firing, promotion, or discipline) against the victim was not her supervisor, even though the team leader could direct day-to-day work assignments and inform management of any alleged failings on the part of subordinates.²⁰ Thus, merely because an alleged harasser has authority to direct the victim's work operations, provide input into performance evaluations, or provide training to the employee, is not sufficient to make the alleged harasser a supervisor in these circuits.²¹

In *Vance v. Ball State University*, the U.S. Supreme Court rejected the EEOC's "expansive" and ambiguous definition of "supervisor," along with the rulings from the Second, Fourth and Ninth circuits. The Court held that under the EEOC's definition, "supervisor status would very often be murky." Instead, the Court ruled that an employee is a "supervisor" for purposes of vicarious

liability under Title VII of the Civil Rights Act of 1964 only if he or she is empowered by the employer to take tangible employment actions against the victim, (i.e., to effect a “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”).

The Court’s standard provides a good opportunity for employers to evaluate which of their employees have the authority to create vicarious liability on behalf of the employer before litigation commences, and therefore, which employees should be targeted for special training and direction for prevention and action when harassment occurs.

b. Harasser Outside Supervisory Chain of Command

Previously, in line with the EEOC’s expansive view of the term “supervisor”, under EEOC guidance an employer could have been subject to liability for harassment by an individual who did not have real authority over the employee to make employment decisions or to direct the victim’s work activities (i.e., outside of the supervisory chain of command), if the employee merely “reasonably believed” that the alleged harasser had such power to significantly influence employment decisions affecting that individual.²² This supported the imposition of liability where the employer does nothing to empower the harasser, and where there was no meaningful connection between any authority granted by the employer and the harassment. If the employee did not reasonably believe that the harasser had such authority, then the standard of liability was that for co-worker harassment.

With the Supreme Court’s new ruling, however, only those individuals within the supervisory chain of command and who have actual authority to take tangible employment actions against the employee can subject the employer to vicarious liability. This decision refocuses attention on the importance of job descriptions, and clearly delineated and adhered to roles in the supervisory chain of command.

2. What Constitutes a “Tangible Employment Action”?

Once the employer has determined whether the activity is supervisory harassment (and so potentially subject to the *Faragher* defense, possibly necessitating a *Faragher* investigation), the employer next should consider whether there actually was a “tangible employment action.”

The Court in *Ellerth* defined a “tangible employment action” as a “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”²³ Under *Ellerth* and EEOC guidance, it is the “means by which the supervisor brings the official power of the enterprise to bear on subordinates,” as demonstrated typically by the following:

- An official act of the enterprise;
- Documentation in official company records;
- Review by higher level supervisors; and
- Formal approval of the enterprise and use of its internal processes.²⁴

A tangible employment action typically inflicts direct economic harm, and in most instances, can be caused only by a supervisor or other person acting with the authority of the employer.²⁵

Examples of tangible employment actions include:

- Hiring and firing²⁶;
- Promotion and failure to promote;
- Demotion²⁷;
- Undesirable reassignment;
- A decision causing a significant change in benefits;
- Compensation decisions;²⁸ and
- Work assignment.

This view of the term is quite expansive. However, not all changes in the terms and conditions of employment constitute a tangible employment action under the *Faragher* rubric; positive job actions, such as a promotion or good performance review do not amount to a tangible employment action. Rather, the employment action must have a significant *adverse* change on the terms and conditions of the individual's employment.

For example, a significant change in job duties qualifies as a tangible employment action even if the employee's salary and benefits remain the same and even if that change blocks future opportunities for promotions or salary increases.²⁹ For instance, in *MacGregor v. Mallinckrodt, Inc.*,³⁰ the court found that a newly-created position plaintiff was offered after being passed over for promotion was sufficiently inferior to constitute an "adverse action" even though her salary would have remained constant, where she would have lost budgetary and supervisory responsibilities, and where her career prospects would have been diminished.³¹

Courts take a case-by-case approach in determining whether conduct rises to the level of adverse employment action when it constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.³² A denial of a promotion or transfer also may be an "adverse" employment action even though it does not affect the plaintiff's pay or benefits.³³ Similarly, some courts have found that reassignment of duties without any economic consequences to be tangible.³⁴ On the other hand, minor job detriments cannot be aggregated to constitute a tangible employment action, where alone, none would be considered a tangible job detriment.³⁵ For example, in *Morris v. Oldham County Fiscal Court*,³⁶ the court held that a downgraded job evaluation, from "excellent" to "very good," did not constitute a tangible employment action.³⁷ The plaintiff must point to a tangible employment action that he or she suffered or was in jeopardy of suffering because of the downgraded evaluation.³⁸ Similarly, a job relocation or transfer that changes nothing but the plaintiff's workplace location is not an adverse action.³⁹ In that same vein, it is significant to remember that adverse employment actions are not limited to economic loss.⁴⁰

Employers should be mindful of the fact that whether a change in a term or condition of employment is a tangible employment action is a very fact-specific inquiry to be determined on a case-by-case basis. Where no tangible employment action can be found, as in many of the cases

addressed above, employers are provided with an affirmative defense to defend against such employment claims, as discussed in more detail below.

B. Elements of *Faragher*

While the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors in *Faragher*, the Court also provided employers with an affirmative defense, in certain circumstances, to avoid liability or limit damages in cases where there has been no tangible employment action. To assert the affirmative defense, the employer must establish two necessary elements:

1. That the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and
2. That the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to otherwise avoid the harm.⁴¹

I. Employer Exercised Reasonable Care to Prevent and Acted Promptly to Correct

The first element an employer must establish to assert the affirmative defense is to show that it undertook reasonable care to prevent and promptly correct harassment.

a. Reasonable Care

Reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment.

To take advantage of the *Faragher* defense, employers should provide every employee with a copy of its anti-harassment policy and complaint procedure, and redistribute them periodically.⁴² The policies and procedures should be written in such a way that it will be understood by all employees in the employer's workforce. For example, if the workforce is mainly teenagers, more simplistic language in the policies and procedures will be required or, if the workforce is mainly Spanish speaking, the employer should provide a Spanish version of the policies and procedures.⁴³ Additionally, every time an employee receives an anti-harassment policy, including updates and revisions, the employer should require the employee to sign a notice of acknowledgment and receipt, and the employer should keep a record of the same.⁴⁴ This will prevent employees from later saying that they never received the policy in question. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks.

However, policies and procedures alone will not constitute a "safe harbor" under Title VII; having written policies and procedures in place to prevent harassment is not a guarantee that an employer will be able to successfully establish the *Faragher* affirmative defense. Employers must ensure that they implement those policies and procedures effectively.

An anti-harassment policy and complaint procedures should contain, at a minimum, the following elements described below.

i. Prohibition Against Harassment

An employer's anti-harassment policy should contain a detailed definition of conduct which constitutes harassment. The policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, national origin, religion, disability, age, and protected activity. This prohibition should cover harassment by anyone in the workplace – supervisors, co-workers, and non-employees alike.⁴⁵ It is also important that the policy encourage employees to report harassment before it becomes severe or pervasive.

ii. Protection from Retaliation

The anti-harassment policy should contain assurances that employees who make complaints of harassment or provide information related to such complaints will not be retaliated against. To that end, the person conducting the interviews of harassment allegations should remind the individuals being interviewed about the prohibition against retaliation. Also, the employer must be cautious when making employment decisions affecting the claimant and witnesses during and after the investigation to ensure there is no retaliatory motive behind the decisions.

iii. Effective Complaint Process

An effective policy should provide several avenues for an aggrieved employee to report a complaint – especially one that allows employees to bypass the harasser. Employers also need to ensure that the complaint procedures are readily available to all employees. Courts have found that a complaint procedure which only provides employees the ability to make complaints during the day is an unreasonable obstacle for employees who work the night shift. Thus, the anti-harassment policy should clearly explain the process and make sure there are no unreasonable obstacles to complaints. The process should be flexible and should keep in mind that all complaints of harassment, regardless of whether they are in writing, need to be investigated by the employer. In fact, some courts have held that reasonable care in preventing and correcting harassment requires an employer to instruct all supervisors to report complaints of harassment to appropriate officials.⁴⁶

The policy should clearly state that the employer will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer's policy. Management should inform both parties about these measures.

It is also important for an employer's anti-harassment policy and complaint procedure to contain information about the time frames for filing charges of unlawful harassment with the EEOC or state fair employment practice agency and to explain that the deadline runs from the last date of unlawful harassment, not from the date that the complaint to the employer is resolved.

iv. Assurances That Complaints Will Be Kept Confidential

The anti-harassment policy should make it clear to employees that, to the extent possible, the employer will protect the confidentiality of harassment allegations. However, an employer cannot guarantee absolute confidentiality because it cannot conduct a reasonable investigation without revealing certain information to the alleged harasser and potential witnesses. The employer

should only provide information about the allegation of harassment to those who need to know about it.

v. **Employee training**

Employee training also has become a key component of an effective policy – especially supervisory training. Training should be periodically conducted and should explain the types of conduct that violate the employer’s anti-harassment policy, the seriousness of the policy, the responsibilities of supervisors and managers when they learn of alleged harassment, and the prohibition against retaliation.

b. **Prompt, Thorough and Impartial Investigations**

Most courts have made it clear that a reasonable anti-harassment policy will not absolve an employer of liability if the employer fails to promptly and thoroughly investigate an employee’s complaint of harassment.⁴⁷ While the specifics of a qualifying investigation are discussed in much greater detail below, a few points should be stated. Courts have noted the following deficiencies with respect to investigations: failure to investigate a complaint; the timeliness of the investigation; the thoroughness of the investigation – including the failure to interview the alleged harasser and appropriate witnesses; the qualifications of the investigator; and the actions (or lack thereof) taken as a result of the investigation.⁴⁸

In some instances, it may be necessary for an employer to take intermediate measures before completing the investigation to avoid any further harassment. Such measures include, but are not limited to: making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing harasser on non-disciplinary leave with pay pending the conclusion of the investigation. Employers must be cautious not to take any action against the complainant which could be deemed retaliatory.

Disciplinary measures for those found to have engaged in harassment in violation of the employer’s policy should be proportional to the seriousness of the offense. Additionally, remedial measures should not adversely affect the complainant.

2. **Employee Unreasonably Failed to Take Advantage of Preventative or Corrective Opportunity Offered or Failed to Avoid Harm**

In addition to establishing that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, the employer also must show that the aggrieved employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm. The burden lies with the employer to prove that the employee’s failure to complain was unreasonable. However, not every complaint by an employee defeats the employer’s affirmative defense. For example, if the employee provides no information to support an allegation, gives untruthful information, or otherwise fails to cooperate in the investigation, the complaint would not qualify as an effort to avoid harm. Additionally, an employee’s unreasonable delay in bringing a complaint of harassment to the employer also may serve to mitigate the employer’s damages.

a. Failure to Complain

Whether an employee unreasonably failed to complain or otherwise avoid harm depends on the particular circumstances and information available to the employee at that time. An employee's failure to complain may not be found unreasonable if the employee has reason to believe that:

- Using the complaint mechanism entailed a risk of retaliation;
- There were obstacles to the complaints; and
- The complaint mechanism was not effective.

The employer bears the burden of demonstrating that the belief or perception underlying the employee's failure to complain was unreasonable.

b. Fear of Retaliation

An employee's failure to report harassment based on his or her reasonable fear of further harassment will defeat an employer's affirmative defense. To demonstrate that the employee's fear of retaliation was not reasonable, employers must clearly communicate and enforce their policies that no employee will be retaliated against for complaining of harassment.

The Third Circuit has held that an employee's significant delay in reporting harassing conduct is not necessarily unreasonable where the employee has a legitimate fear of aggravating the situation.⁴⁹ However, courts have required that any such fear be "credible," and based on "more than the employee's subjective belief."⁵⁰

c. Obstacles to Complaints

Employers must take care to ensure that the complaint procedure does not place an undue expense on the employee, have inaccessible points of contact for making complaints, or have unnecessarily intimidating or burdensome requirements.⁵¹ Otherwise, a failure to ensure these items may make an employee's failure to report harassment reasonable.

d. Ineffective Complaint Mechanism

An employee's failure to complain about harassment is not unreasonable if the employee's failure to complain was based on a reasonable belief that the process was ineffective. For example, an employee would have a reasonable basis to believe the complaint procedure would be ineffective if he or she had witnessed or was otherwise aware of instances in which co-workers' complaints failed to stop harassment. Thus, employers must be sure to promptly and effectively investigate all complaints of harassment.

If an employer is able to successfully establish that the employer took reasonable care to prevent the harassment and that an aggrieved employee failed to take advantage of preventative or corrective measures, and employer may assert the *Faragher* defense and avoid liability for the alleged harassment.

C. Employer Liability for Nonsupervisor Harassment (Coworker and Nonemployee)

Unlike harassment caused by a victim's supervisor, an employer cannot be held vicariously liable for harassment created by the victim's coworkers or others.⁵² However, the employer may be directly liable for negligence in failing to take adequate remedial measures.⁵³ In other words, the employer is responsible and liable for its own acts or omissions, not for the coworker's harassing conduct.⁵⁴

With respect to nonsupervisor conduct, an employer is responsible for acts of harassment in the workplace where the employer knew or should have known about the harassment, but failed to take prompt and adequate remedial action.⁵⁵ This is because if the employer fails to take appropriate action after learning of the harassment, the employer is deemed to have adopted the offending conduct as if it had been authorized affirmatively as the employer's policy.⁵⁶

Technically, the *Ellerth/Faragher* affirmative defense is limited to cases involving vicarious liability where the harassment is caused by the victim's supervisor.⁵⁷ However, the principle embodied in the defense – that an employer can avoid liability where it has an anti-harassment policy in place and acts promptly to remedy harassment – is inherent in the requirements for the plaintiff's *prima facie* case.⁵⁸ Specifically, the employee must show that the employer provided no reasonable avenue for complaint or had knowledge of the harassment but did nothing about it.⁵⁹

Therefore, while the *Ellerth/Faragher* analysis is still important in cases involving coworkers or third parties, the employee bears the burden of proving the employer's failure to promptly correct the harassing behavior.⁶⁰ On the other hand, because the *Ellerth/Faragher* is an affirmative defense in vicarious liability cases involving supervisors, the burden is on the employer in cases involving supervisor harassment to establish that the employer exercised reasonable care to take effective remedial action.⁶¹

In determining whether the harasser is a "supervisor" or a "coworker," the U.S. Supreme Court recently decided in *Vance v. Ball State University*, 570 U.S. (2013) that a "supervisor" must have the power to directly impact the terms and conditions of the subordinate's employment, such as having the ultimate authority to hire, fire, promote, demote, or transfer the subordinate.⁶² The Supreme Court explained that unless the worker can directly affect the terms of the subordinates employees, the worker is a coworker and not a supervisor even if that worker has the power to direct work, oversee performance, or provide input into performance evaluations.⁶³

The Supreme Court explicitly rejected the position asserted by the EEOC, who previously held that a worker's authority to direct work or oversee performance qualifies him or her as a "supervisor" under Title VII.⁶⁴ Previously followed by the Second, Fourth and Ninth Circuit Courts of Appeal, the EEOC position held that a coworker could qualify as a supervisor even if that worker does not have the power to impose tangible employment actions.⁶⁵ Due to the Supreme Court's limitation on the term "supervisor", it is likely that there will be a relative increase in direct liability claims based on actions by coworkers.

I. Actual or Constructive Knowledge of an Employee's Complaint.

Because any claim based on nonsupervisory conduct is based on an employer's direct negligence rather than vicarious liability, the employee must prove that the employer had knowledge of the harassment.⁶⁶ The "knowledge" requirement can be satisfied through "actual notice" or "constructive notice."

An employer has "actual notice" of harassment when sufficient information either comes to the attention of someone in the company who has the power to terminate the harassment, or it comes to someone who can reasonably be expected to report or refer a complaint to someone who can put an end to it.⁶⁷ However, merely informing a coworker or other nonsupervisor is not sufficient to satisfy "actual notice."⁶⁸ Instead, under the *Vance* definition of "supervisor", a complaint must be made to an individual with the power to make tangible employment actions, such as hiring and firing. Nevertheless, the employer has a duty to investigate and remedy the harassment whenever it becomes aware of harassment through any means. It is not necessary for the victim to lodge a formal or informal complaint to put the employer on notice of potential harassment.⁶⁹

The employee also can establish liability for harassment through "constructive notice," which is established when the harassment is so severe and pervasive that the employer should have known about it; in other words, "the harassment was obvious to everyone."⁷⁰ The more pervasive, severe, and persistent the harassment, the more likely an employee will be able to establish his or her burden that the employer had constructive knowledge.⁷¹ Likewise, if the nonsupervisor harassment occurred in public or in the open, this also will lead to a probable finding of constructive knowledge.⁷² On the other hand, nonpublic harassment with no victim complaint, even if severe, is unlikely to support a finding of constructive knowledge.⁷³

Notably, there is no prohibited harassment when a coworker engages in ordinary banter with a person who claims to be harassed even if the coworker's banter is rude. For example, it is not necessarily prohibited harassment under Title VII to call a coworker "thunder thighs,"⁷⁴ to constantly use expletives (like f**k or peckerwood),⁷⁵ or to 'take the lord's name in vain.'⁷⁶ Furthermore, as is the case with supervisor conduct, the harassment must be sufficiently severe and pervasive to constitute harassment.⁷⁷

Importantly, the lack of effective anti-harassment training or an open door policy can provide support to a plaintiff's allegation that an employer had constructive knowledge of coworker or third-party harassment.⁷⁸

2. Failure to Take Prompt and Effective Remedial Action

Because coworker or third party harassment is one of direct liability, an employer is liable for harassment only from the time it knew or should have known about the conduct and failed to stop it.⁷⁹ There is no liability for harassment that occurred before the employer's actual or constructive knowledge of the harassment.⁸⁰ Nevertheless, knowledge of prior acts of harassment by a coworker against a different victim can support a claim that the employer has constructive knowledge of later acts by the same employee.⁸¹

Once an employer has actual or constructive awareness that an employee has been subjected to harassing conduct at work, the employer has a duty to take prompt corrective action that is reasonably calculated to end the harassment.⁸² This obligation first requires the employer to take

temporary steps to address the situation while the employer conducts a “reasonable investigation” to determine whether the complaint is justified.⁸³ Next, once the initial investigation is completed, the employer is required to implement permanent remedial steps to prevent future harassment once the investigation is completed.⁸⁴

In conducting the investigation between coworkers, the employer must balance the accuser’s right to a harassment-free workplace against the accused’s right not to be disciplined without fair procedures and sufficient proof of wrongdoing (discussed in more depth below).⁸⁵ In fact, an employer may face liability by the alleged harasser for wrongful termination, libel, or slander if the harassment complaint is unsubstantiated.⁸⁶ The employer also has a legitimate interest in resolving the dispute with the least possible disruption to its operations and without risking liability if a jury later disagrees with its conclusions.⁸⁷ In conducting this balancing test, the greater the potential injury to the accuser, the greater care the employer must take in stopping the harassment.⁸⁸

In conducting the initial “reasonable investigation,” the employer should attempt to separate the complainant from the co-worker or third party pending the outcome of the investigation.⁸⁹ If separation is not feasible, the employer must take reasonable steps to expedite the investigation.⁹⁰ Importantly, in some Circuits, an investigation is required even if the alleged harasser denies the accusation and the victim wishes to let the matter drop.⁹¹ This is true even if the victim requests that the employer not to take any remedial action.⁹² However, the “reasonable investigation” may be conducted in an informal manner that will not unnecessarily disrupt the company’s business.⁹³ In conducting the investigation, the employer must make a reasonable effort to contact the alleged victim.⁹⁴

Once the employer has completed its investigation, the employer must take permanent steps reasonably calculated to end the current harassment and deter future harassment from the same offender or others.⁹⁵ The employer should consider transferring or reassigning the victim or harasser (if a coworker) to minimize contact between the parties.⁹⁶ However, an employer does not satisfy its remedial obligation by transferring the victim to a less desirable position or location.⁹⁷ An employer also has found to have responded appropriately where the employer sends alleged harassers letters emphasizing the company’s policies and the seriousness of the allegations against them, offers them personal counseling, and threatens them with serious discipline if future allegations are substantiated.⁹⁸

Of note, in cases involving alleged harassment by nonemployees, the EEOC provides that the extent of the employer’s control and legal responsibility for the third parties who commit the harassment is important in determining the employer’s obligation to take swift, remedial action.⁹⁹ However, most Circuits hold that regardless of whether a hostile work environment is created by a fellow employee or a nonemployee, the employer ultimately controls the conditions of the work environment.¹⁰⁰ Therefore, just as with coworkers, an employer has an affirmative duty to take prompt and remedial action whenever there is actual or constructive knowledge of harassment from a third party.¹⁰¹

III. Preserving the Privilege in *Faragher* Investigations

A. Investigation as a Sword, Privilege as a Shield: *Upjohn* and How a *Faragher* Investigation Might Include a Privileged Communication

While the *Faragher* defense is a key element in defending Title VII claims, employers are still caught having to weigh heavy questions in asserting the defense. First, the employer has to decide *who* will conduct the investigation. There are many potential benefits if the employer opts to have an attorney conduct the investigation (whether in-house or outside counsel). An attorney can opine as to whether the complained of conduct will actually lead to liability. This can assist the employer in determining how to proceed (and hopefully avoid litigation). Additionally, the communications between the attorney-investigator and the witnesses/decision makers, and the notes and opinions that derive therefrom, may well be privileged, and thus, precluded from disclosure. By claiming privilege, the employer can avoid giving a potential plaintiff a litigation roadmap.

However, once the employer asserts the *Faragher* defense by demonstrating that it investigated the employee's complaint and took appropriate actions, the employer puts the adequacy of the investigation directly at issue. If the investigation was conducted by an attorney, the employer implicitly waives the attorney-client privilege. "The privilege which protects attorney-client communications may not be used both as a sword and a shield."¹⁰² As one court noted, "when a party uses 'the content of privileged communications' offensively, it is troublesome for the party to subsequently claim privilege 'as a shield to prevent either testing of the claim or, if some privileged communications have been revealed, amplification or impeachment of the material.'"¹⁰³ Accordingly, "the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications."¹⁰⁴

For example, in a sexual harassment case, defendant city relied on an attorney interview memoranda in support of its motion for summary judgment as part of an affirmative defense that the city had taken steps to prevent and correct any sexually harassing behavior. The court held that defendant waived attorney-client privilege with regard to the memoranda.¹⁰⁵

Similarly, a corporate employer waived its right to invoke the attorney-client privilege with respect to the content of the attorney's investigation into a former employee's allegations of sexual harassment because the employer asserted the adequacy of its investigation as an affirmative defense to the employee's sexual harassment claims.¹⁰⁶

Whether to assert the defense – thereby waiving the attorney-client privilege – is determined on a case-by-case basis and requires weighing the likelihood of the defense's success against the loss of confidentiality that will result from disclosure. In some situations, where the employee's complaint does not amount to actionable harassment, it is preferable to maintain the attorney-client privilege by foregoing use of the *Faragher/Ellerth* defense. In other situations, the scale tips in

favor of waiving the attorney-client privilege to demonstrate that the employer investigated an employee's complaint and took action appropriate to the findings of the investigation.

Even after deciding *who* should conduct a *Faragher* investigation, the employer and investigator must decide *how* that individual should go about conducting the investigation. Namely, even if an attorney conducts the investigation, that does not necessarily mean a privilege might cover the investigation. Some courts have held that communications between an employer and its attorney during an initial investigation where the attorney is merely gathering facts (i.e., an investigation) are not protected by the attorney-client privilege.¹⁰⁷ Further, these courts also have held that reports containing facts learned in the investigation, as well as any conclusions from the investigation, are also not protected by the attorney-client privilege, reasoning that an attorney serving as an investigator is not acting in a legal capacity.¹⁰⁸

In the landmark case of *Upjohn Co. v. United States*, the U.S. Supreme Court identified several factors that are relevant in determining whether the attorney-client privilege applies to communications to and from in-house counsel:

- Whether the communications were made by corporate employees to corporate counsel at the direction of corporate superiors in order to secure legal advice from counsel;
- Whether the communications concerned matters within the scope of the employee's corporate duties;
- Whether the information needed by corporate counsel to formulate the advice was unavailable from "upper-echelon" management;
- Whether the employees were aware that the communications were made in order to allow the corporation to obtain legal advice; and
- Whether the communications were ordered and kept confidential.¹⁰⁹

Conversations with in-house counsel who serve multiple roles will be privileged communications if counsel was assuming his or her legal role when the communication was made.¹¹⁰ In *Upjohn*, the Supreme Court placed significant weight on the fact that the dominant role of counsel was to give "legal advice" and that "the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."¹¹¹ As such, in ruling on the attorney-client privilege issue, courts focus on whether the dominant purpose of the attorney investigation was to give legal advice - or conversely - business advice. Thus, the mere fact that an attorney is involved in a *Faragher*-type investigation does not necessarily mean that the investigation is protected under the attorney-client privilege.

Once the employer wishes to secure legal advice from an attorney to assist in evaluating the conclusions of the investigations and actions to take in light of legal ramifications, the employer is undeniably seeking legal advice.¹¹² These communications are protected by the attorney-client privilege, unless they are subsequently waived, as discussed below.

Accordingly, in determining whether to raise an applicable privilege, it is necessary to determine whether a privilege even arises in the context of a particular communication.

B. Which Privilege Law Applies

In Title VII actions, federal privilege law applies to attorney-client communications.¹¹³ In civil cases venued in federal court in which state law supplies the rule of decision, attorney-client privilege is determined in accordance with that state's law.¹¹⁴ For example, if a harassment claim is brought under California's FEHA statute, California state law privilege applies to attorney-client communications.¹¹⁵

Further complicating matters, federal work product doctrine applies in actions venued in federal court regardless of the rule of decision, because it is a "doctrine" not a "privilege."¹¹⁶ Thus, when a case is being heard in federal court, irrespective of the claims asserted, the federal rules govern the question of work product.¹¹⁷

C. Attorney-Client Privilege

I. Elements of Attorney-Client Privilege in *Faragher* Investigations

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law."¹¹⁸ Synthesized, the essential elements for establishing attorney-client privilege are:

- A communication,
- Made between privileged persons,
- In confidence, and
- For the purpose of seeking, obtaining, or providing legal assistance to the client.¹¹⁹

a. Communication

Communications cover oral, written, and even wordless actions between the attorney, the client, and their agents.¹²⁰ However, the privilege does not protect the underlying facts in the communication if it can be learned through a source other than the privileged communication. The mere transmittal of facts from a client to its attorney (or vice versa) does not render the fact privileged.¹²¹ As one court summarized "it is important to bear in mind that the attorney-client privilege protects the communication rather than the information; the privilege does not impede disclosure of information except to the extent the disclosure would reveal confidential communications."¹²² Thus, in the course of a *Faragher* investigation where counsel interviews an employee and the employee divulges information about an incident the employee previously witnessed, the conversation with counsel itself will be protected. However, the privilege will not extend to the incident the employee witnessed.¹²³

While courts generally accept that communications from the client to the attorney are privileged, the D.C. and Federal Circuits only extend the privilege in the context of attorney communications to the client when it:

1. Contains a legal opinion, and
2. Contains a confidence from the client upon which the legal advice is sought.¹²⁴

b. Privileged Persons

Courts have long since recognized that corporations may assert attorney-client privilege.¹²⁵ The corporate context raises numerous questions about when privilege applies and who is regarded as “privileged persons” for purposes of preserving the privilege.

Importantly, in *Upjohn*,¹²⁶ the U.S. Supreme Court provided a flexible framework for determining when employee communications with corporate counsel in the course of a *Faragher* investigation will be regarded as privileged. The Court held that when a corporation is a client, attorney-client privilege extends to communications by employees – even if they are not in a position of control or play a substantial role in determining corporate action – made to a corporation’s attorney at the direction of corporate superiors to secure legal advice for the corporation.¹²⁷

Courts also generally have extended the privilege to communications between employees of a corporate client when the communications are for the purpose of discussing legal advice and the employees have responsibility for the subject matter at issue in the communication.¹²⁸

In both instances above, the corporation is clearly the client and the holder of the privilege. However, questions sometimes arise regarding who the client is when a corporate officer confides in a corporate attorney. The First, Second, Third, Eighth, Ninth and Tenth Circuits follow a default rule that assumes that the corporation – not the individual – is the client.¹²⁹

To overcome the presumption that the privilege applies only to the corporation, the First, Third, Ninth and Tenth Circuits recognize that an individual can establish an attorney-client relationship with corporate counsel if five factors, commonly referred to as the “*Bevill* Factors,” can be established:

1. The employee approached counsel for the purpose of seeking legal advice;
2. The employee made it clear to counsel that the employee was seeking legal advice in the employee’s individual capacity rather than in representative capacity;
3. The counsel saw fit to communicate with the employee in the employee’s individual capacity, knowing that a possible conflict could arise;
4. The conversation(s) with counsel were confidential; and
5. The substance of the conversations with counsel did not concern matters within the company or the general affairs of the company.¹³⁰

In contrast, some Circuits decline to follow the default rule and permit the privilege to extend to the corporation and the individual corporate officer in limited circumstances. For example, the Fourth Circuit requires an individual to establish a “reasonable belief” that a personal attorney-client privileged relationship existed with the corporate attorney.¹³¹ The Sixth Circuit has held that an individual corporate officer may hold the privilege if he “indicate[s] to the lawyer that he seeks advice in his individual capacity.”¹³²

c. In Confidence

For privilege to apply to a communication, all parties to the communication must have a reasonable expectation of confidence and intend such confidence.¹³³

Thus, if one or both parties know or intend for the communications to be later shared with a nonprivileged third party, privilege does not attach to the communications. This situation often arises when corporate counsel conducts an investigation with the understanding that the contents of the investigation will be disclosed outside the corporate structure to a third party. For example, in *U.S. v. Ruehle*, the Ninth Circuit held that privilege did not attach to communications between the corporation's attorney and the corporation's chief financial officer during an investigation because the attorney stated in a prior meeting the attorney's intent to share the communication with the company's auditors.¹³⁴

d. For The Purpose of Seeking, Obtaining, or Providing Legal Assistance to the Client

Communications must be made for the primary purpose of obtaining legal advice or services from the attorney.¹³⁵ In the context of investigations, a critical question is whether the attorney(s) are retained to provide legal advice or in another capacity such as a business advisor or a mere fact investigator. If it is the latter, then the privilege likely will not attach. Numerous cases have held that when an attorney acts as a business advisor, privilege will not attach.¹³⁶

That is not to say that attorneys lose the privilege simply by conducting a factual investigation as part of their work. "The relevant question is not whether [the attorney] was retained to conduct an investigation, but rather, whether this investigation was 'related to the rendition of legal services.'"¹³⁷ Thus, the court will conduct a fact-based inquiry in determining the ultimate purpose of the investigation and whether it is privileged.

For example, in *Sandra T.E. v. South Berwyn School District*, the Seventh Circuit found that outside counsel acted in their capacity as legal counsel when they conducted an investigation because:

1. The engagement letter explicitly stated that the client retained the firm to provide legal services in connection with an investigation of sexual abuse in the school;
2. The firm's factual investigation of the abuse was an "integral part of the package of legal services for which it was hired and a necessary prerequisite to the provision of legal advice about how the [client] should respond;"
3. The firm acted in their capacity as legal counsel during the investigation by issuing "so-called 'Upjohn warnings'" to witnesses by emphasizing that the firm represented the client and not the employees (discussed in depth below);
4. No third parties attended the interviews;
5. The client received the firm's report during a private executive session;
6. The written executive summary was marked "Privileged and Confidential," "Attorney-Client Communication," and "Attorney Work Product;" and
7. The firm submitted affidavits attesting that the firm "had been hired to provide legal advice in the context of the facts it uncovered during the internal investigation."¹³⁸

In contrast, in *Mission National Insurance Co. v. Lilly*, a district court found that numerous communications were not privileged because the attorneys were retained “as a matter of course to conduct its claims adjustment investigations”¹³⁹ “The fact that a defendant anticipates the contingency of litigation resulting from an accident or event does not automatically qualify an ‘in-house’ report as work product ... A more or less routine investigation of a possibly resistible claim is not sufficient to immunize an investigative report developed in the ordinary course of business.”¹⁴⁰

2. Waiver of Attorney-Client Privilege

a. Waiver by Raising Investigation as a Defense

A privileged communication can be waived in numerous instances. In the context of investigations, one of most frequent instances of waiver arises when the corporation seeks to rely on the adequacy of an attorney-conducted investigation as a defense to a claim. In these cases, the investigation, including any statements made by witnesses to an attorney, become discoverable.¹⁴¹

The waiver extends to the subject matter of the defense, namely the entire investigation and documents prepared in the scope of that investigation.¹⁴² As one court reasoned, in raising the investigation as a defense to liability, the company “fused the roles of internal investigator and legal advisor.... Consistent with the doctrine of fairness, the plaintiffs must be permitted to probe the substance of [the] alleged investigation to determine its sufficiency. Without having evidence of the actual content of the investigation, neither the plaintiffs nor the fact-finder at trial can discern its adequacy.”¹⁴³

b. Reviewing a Privileged Document to Prepare for Deposition

Rule 612 of the Federal Rules of Evidence grants an adverse party certain rights “when a witness uses a writing to refresh memory: (1) while testifying; or (2) before testifying, if the court decides that justice requires the party to have those options.” Specifically, the “adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.”¹⁴⁴

The effect of Rule 612 is that a witness who uses a privileged document while testifying has waived the privilege with respect to the document.¹⁴⁵

Thus, employees who are preparing for a deposition must exercise extreme caution before reviewing any privileged document connected with a *Faragher* investigation to refresh recollection. In these instances, courts generally have found that the “interests of justice” requires waiver when the subject matter of the document “[is] likely to play a substantial role” in the suit¹⁴⁶ or impacts the witness’ testimony.¹⁴⁷

3. Who Can Waive the Privilege?

The issue of waiver of attorney-client privilege during or after an investigation often arises in the implementation of remedial action or in defense to a suit. However, only current managers and directors – not former employees – of a corporation may waive a corporation’s attorney-client privilege.¹⁴⁸ As noted by the U.S. Supreme Court, “the power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its officers and directors. The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.”¹⁴⁹

D. Attorney Work Product

I. Elements of the Attorney Work Product Doctrine in *Faragher* Investigations

The attorney work product doctrine is separate from the attorney-client privilege. The doctrine was first recognized by the U.S. Supreme Court in *Hickman v. Taylor*, as a means of allowing an attorney to “sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.”¹⁵⁰ In *Hickman*, the Court noted that the attorney work product doctrine usually arises in “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways.”¹⁵¹

As codified by the Federal Rules, the attorney work product doctrine protects “[1] documents and tangible things [2] that are prepared in anticipation of litigation or for trial [3] by or for another party or its representatives.”¹⁵² The crux of whether a document is subject to work product protection usually turns on whether the document was prepared in anticipation of litigation. “The burden of establishing that a document is work product is on the party who asserts the claim.”¹⁵³

Federal circuit courts have noted a distinction between documents created in a routine investigation and those “prepared in anticipation of litigation” by affording protection to the latter. Protection of documents created during routine internal investigations are especially problematic within the context of a harassment claim because the employer must establish the investigation and the resulting documents were prepared in anticipation of litigation, as opposed to a routine investigation. Otherwise, there is a risk that the investigation documents will not be subject to work product protection.

2. Application of the Privilege and Limitation of its Scope

a. Documents in the Ordinary Course of Business

The Advisory Committee’s Notes to Federal Rule of Civil Procedure 26 (b)(3) limit the scope of the attorney work product privilege to documents created in the ordinary course of business. Specifically, “[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity” provided by the attorney work product privilege.¹⁵⁴

Examples of documents created in the ordinary course of business may include reports assessing whether an employer is in compliance with an Equal Employment Opportunity “EEO” policy¹⁵⁵ or documents describing demographics or statistical information.¹⁵⁶

b. Dual Purpose Documents and the Circuit Split as to What is Protected

Determining whether protection is afforded to a document prepared for both a business purpose and in anticipation of litigation can prove problematic. The federal circuit courts employ differing tests to determine whether such “dual purpose documents” are protected by the attorney work product doctrine.

The least restrictive approach to dual purpose documents is the “because of litigation” test, which is most frequently used by the federal circuit courts.¹⁵⁷ Under this test, a document is “prepared in anticipation of litigation,” and thus within the scope of the doctrine, if “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”¹⁵⁸

In *Aldman*, the Second Circuit adopted the broad “because of litigation” analysis and held “[w]here a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision.”¹⁵⁹ Accordingly, the “because of litigation” test contemplates that dual purpose documents can be afforded attorney work product protection.

Unlike the majority of the federal circuit courts, the Fifth Circuit has adopted the more restrictive “primary motivating purpose” test as articulated in *United States v. El Paso Co.* This test provides that if the primary motivating purpose for a document’s creation is to aid in litigation, the document qualifies for attorney work-product protection.¹⁶⁰

Most recently, the First Circuit established the very narrow “prepared for use in litigation” analysis in *United States v. Textron, Inc.*¹⁶¹ There, the court held that “[i]t is not enough to trigger work-product protection that the *subject matter* of a document relates to a subject that might conceivably be litigated.” Instead, as interpreted by the First Circuit, “the phrase ... ‘prepared in anticipation of litigation or for trial’ did not, in the reference to anticipation, mean prepared for some purpose other than litigation: it meant only that the work might be done for litigation but in *advance* of its institution.”¹⁶²

c. Absolute vs. Qualified Protection

Although the attorney-client privilege generally provides absolute protection for communications between an attorney and client, the attorney work product doctrine provides qualified protection. In limited situations, a party can obtain documents protected by the attorney work product doctrine if the documents are otherwise discoverable and “the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”¹⁶³ Nonetheless, Federal Rule of Civil Procedure 26(b)(3) provides for nearly absolute protection “against disclosure of the mental impressions, conclusion, opinions, or legal theories of a party’s attorney.”

To circumvent the attorney work product doctrine, a party must meet a two-part standard: (1) “substantial need” and (2) “undue hardship.” To meet the standard for obtaining work-product, a party can demonstrate “substantial need” if the facts in the document are an essential

element of its case and cannot be obtained elsewhere (e.g., “contemporaneous statements taken from, or made by, parties or witnesses”).¹⁶⁴ The second prong of the standard, “undue hardship” contemplates “the burden obtaining the information from an alternate source would impose on the party requesting discovery” (e.g., “instances when witnesses cannot recall statements contained in interviews” or “[u]nusual expense involved in obtaining equivalent information”).¹⁶⁵

In *Brownell v. Roadway Package System, Inc.*,¹⁶⁶ the plaintiff sought copies of five written statements that the company’s employees provided to the company’s outside counsel because the company asserted the defense of an adequate investigation. In response, the company argued that it gathered the statements after it completed its investigation of plaintiff’s sexual harassment allegations in an effort to obtain information about plaintiff’s disruptive and inappropriate workplace behavior. Alternatively, the company argued that these statements were taken in response to the plaintiff’s threat of litigation and that they were accordingly protected by the attorney-client privilege and the work-product doctrine. The court found that the plaintiff had satisfied the standard to circumvent the attorney work-product doctrine. First, the court determined that the plaintiff demonstrated she had a “substantial need,” as the written statements provided by the company’s employees were crucial to the determination of whether or not the company could be held liable for the acts that allegedly occurred. Second, the court found that the company impliedly waived the protections of the work-product doctrine by asserting the adequacy of its investigation as an affirmative defense. Each statement was written in the first person and was signed by the applicable employee, and none reflected the impressions, conclusions, opinions, or legal theories of the attorney. The court ordered the company to produce the employee statements in their original form. Notably, in *Brownell*, outside counsel for the company began investigating the plaintiff’s allegations of sexual harassment *before* the plaintiff was terminated. Thus, the investigation conducted by the company’s outside counsel overlapped the company’s internal investigation. Furthermore, the court pointed to several statements by the outside counsel and company employees that indicated that the company was conducting a single investigation. By asserting the adequacy of that investigation as an affirmative defense, the company waived the protections of the work-product doctrine.

d. E-mail to Witnesses and Decision Makers

Whenever possible, counsel should minimize communications through e-mails and remain vigilant in communicating litigation strategies with only those individuals who need to know, as waiver issues often arise in the context of electronic communications. Each message should clearly state that the communication is confidential or privileged. In addition, strict parameters with respect to further dissemination of e-mails should be communicated and enforced. Failing to limit the distribution of e-mails may remove the confidential nature of the communications and eliminate work product protection. In addition some courts have ruled that multiple e-mails within an e-mail string should be identified separately in a privilege log, to enable the opposing party to determine whether each e-mail in the strand is entitled to privilege, on the theory that this inquiry is necessary if the court is to determine that the entire strand is to receive protection.¹⁶⁷ As such, even if an individual e-mail within a string is protected, it may otherwise lose protection if it belongs to an e-mail chain that contains unprivileged information.

3. Waiver of the Attorney Work Product Privilege

a. How Waived

Work-product protection is “not automatically waived by any disclosure to third persons;” rather, the appropriate inquiry is whether the disclosure “substantially increases the opportunity for potential adversaries to obtain the information.”¹⁶⁸

i. Raising the Defense of an Adequate Investigation

Similar to the issue of waiver with respect to the attorney-client privilege, raising the defense of an adequate internal investigation into a harassment claim can result in waiving the work product doctrine.¹⁶⁹ If the adequate investigation defense is utilized, notes, reports, and memoranda memorializing the investigation are potentially discoverable.¹⁷⁰

For instance, in *Harding v. Dana Transport, Inc.*,¹⁷¹ the court found that the company had impliedly waived the protection provided by the work-product doctrine. The company attempted to defend employer liability under Title VII based in part upon its investigation of the plaintiffs’ claims. The company’s investigation consisted of outside counsel’s interviews of employees and the reporting of the attorney’s interviews to management. The court held that “the fact that [the attorney] acted simultaneously as [the company’s] attorney does not change the significance of [the company’s] placing the investigation at issue by asserting the affirmative defense. Principles of fairness and consistency require that [the company] produce all of the underlying documentation. It would be fundamentally unfair for the plaintiffs to be required to meet an element of their *prima facie* case without sufficient information regarding the factual substance of that element. Justice requires that the plaintiffs be permitted to respond to the defenses asserted with a full spectrum of information. [The company] may not withhold essential information with regard to its internal investigation.”¹⁷² In dicta, the court also noted that waiver can be avoided. Specifically, the court stated:

Corporate litigants hoping to counter charges of respondeat superior liability may easily avoid this result in the future either by separating the role of investigator from that of litigator, or by refraining from defending themselves on the basis of reasonable investigation. Furthermore, disclosure also will support public policy considerations which seek to eradicate discrimination. Corporations which heretofore have attempted to cloak their investigations of allegations of discrimination with secrecy will be forced to unveil their remedial processes and procedures. Requiring disclosure may also engender economic benefit. The knowledge that investigations of discrimination claims—investigations used to provide the basis for a defense of employer liability—are discoverable may encourage employers to investigate early. Rather than postponing investigation until litigation is imminent and having their attorney conduct the initial investigation, employers may develop efficient and thorough procedures addressing allegations immediately. These procedures will not involve the added expense of legal fees. The efficiency of the procedures will lead to swift resolution; and any complaints not resolved will have been developed which will simplify preparation for litigation.

Notably, however, the attorney work-product doctrine has been upheld when the employer relied solely on the remedial action taken or on the fact that the investigation occurred, as opposed to placing the substance or the results of the investigation at issue.¹⁷³ And courts have held that investigations that are clearly delineated from routine investigations are protected. For example, in *EEOC v. Rose Casual Dining, L.P.*,¹⁷⁴ the plaintiff moved to compel the production of certain witness statements that were written at the request of the company's counsel, but without assistance from or communication with counsel. The witness statements were allegedly created in connection with the company's investigation of the plaintiff's claims of sexual harassment. In its answer to the complaint, the company affirmatively pled that it "properly investigated the allegations made by" the plaintiff, "took immediate and effective remedial action upon notice of discriminatory conduct against" the plaintiff, and "exercised reasonable care to prevent and promptly correct any alleged harassing or discriminatory behavior." The court noted that the company conducted two separate investigations, one that began before the plaintiff's termination, and a second that began after the company received a letter from the plaintiff's attorney threatening litigation. Because the witness statements were generated during the second investigation and only after outside counsel became involved, the court held that the statements were protected by the work-product doctrine.

Ultimately, counsel may consider waiving the protection if the adequate investigation defense is especially strong based on the facts of the case.

ii. Reviewing Privileged Documents

As noted, reviewing notes created by an attorney in preparation for a deposition can waive the protected quality of the notes if the interests of justice so require.¹⁷⁵ In *Thomas v. Euro RSCG Life*, the district court held that a plaintiff waived work-product protection where she reviewed notes of conversations she had with her attorney just before her deposition.¹⁷⁶ The court determined that because the plaintiff admitted to reviewing her attorney's notes to refresh her memory, the notes were a "central part of the deposition," and it was "clear that the notes likely had an impact on plaintiff's testimony."¹⁷⁷

b. Who Can Waive on Behalf of the Employer?

Courts take divergent views on who can waive attorney work-product protection on behalf of the employer. Some courts have determined that only a company's executive management employees may waive protection, while others have held that employees entrusted with confidential documents also may waive protection.¹⁷⁸ The majority of courts hold that a company's former employees cannot waive protection.¹⁷⁹ The Restatement of the Law Governing Lawyers provides that a company's attorney also may waive work-product protection, but only at the direction of the client.¹⁸⁰ Contrastingly, some jurisdictions consider work-product protection to belong to the attorney, and thus, only can be invoked by the attorney who created the work-product.¹⁸¹

4. Steps to Invoke Attorney Work Product Doctrine

a. **Separate Facts of an Investigation from Legal Analysis/Advice**

To minimize the risk of work product losing its protection, separate facts from the legal analysis or advice whenever feasible. If it is readily apparent that documents were created for legal advice, opinions, and or analysis, courts likely will deem such documents protected.

b. **Clearly Identify Documents for Which Protection is Desired**

When creating reports, memoranda, or notes that pertain to investigations, clearly label such documents as work product protected. In addition, indicate that investigative documents were prepared in anticipation of litigation by weaving legal analyses throughout any recitation of facts and include legal strategies. However, as a precaution, do not dilute the doctrine by overusing it—the doctrine should be used as a shield, not a sword.

c. **Avoid Verbatim Witness Statements**

As opposed to creating verbatim transcripts of witness interviews, counsel should create memoranda with an eye towards litigation. It is prudent to summarize the witnesses' allegations and note counsel's mental impressions with regard to the witnesses' credibility and demeanor. Avoiding the creation of investigation materials that resemble witness "statements" significantly diminishes the likelihood that such materials are discoverable.

d. **Limit Access to Investigatory Files**

Identify individuals within the organization who actually need to be apprised of a harassment investigation, and limit access to investigatory files to those individuals. The fewer individuals that are informed of investigatory documents the less likely courts will deem work product protection waived. Further, employers should maintain investigation documents in secure files to avoid inadvertent disclosure.

e. **Narrowly Craft Third-Party Communications to Avoid Disclosure of Protected Documents**

As the prevailing rule under federal law is that waiver occurs even when cooperating with government investigations, counsel should narrowly craft third-party communications to avoid disclosure of protected documents. In the context of harassment investigations, this situation especially arises in communications with the EEOC or similar agencies when charges of alleged harassment are being investigated at the administrative level. Counsel should take precautions to disclose information that is unlikely to waive work product protection should litigation ensue.

E. Scope of Waiver

The general rule is that "[w]hen a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter..."¹⁸² Generally, this means that any documents or materials prepared as part of the investigation may be discoverable.

With the exception of the Eighth Circuit, all federal circuits that have considered the issue of selective waiver have held that companies cannot selectively disclose privileged documents or communications to the government and maintain the privilege as to the disclosed documents or communications.¹⁸³ The First, Third, Sixth, and District of Columbia Circuits have rejected the selective waiver theory, even when the government and the company enter into a confidentiality agreement intending to eliminate waiver.¹⁸⁴ The Federal, Second, and Fourth Circuits also have rejected the selective waiver theory, but have not considered it within the scope of a confidentiality agreement.¹⁸⁵

Under Eighth Circuit case law, documents can be selectively disclosed to the government while retaining work-product protection with respect to other parties.¹⁸⁶ The Eighth Circuit based its recognition of selective waiver as a means of encouraging companies to cooperate with government inquiries and investigations.

F. Self-critical Analysis: the Dying Privilege

A select few number of courts have also recognized the existence of a “self-critical analysis privilege,” which attempts to encourage socially beneficial self-analysis by shielding certain documents from release. This privilege was first recognized by the D.C. District Court in 1970, where a hospital claimed that its investigation into the causes of a patient’s death was entitled to qualified protection due to the fact that the investigation was conducted for the purpose of improving patient care.¹⁸⁷ Thus, because there was a public interest in encouraging this sort of self-analysis, the documents related to this investigation were held to be privileged.

Not long thereafter, the U.S. District Court for the Northern District of Georgia recognized the privilege in the employment context, reasoning that failure to recognize the privilege would inhibit “frank self-criticism and evaluation in the development of affirmative action programs.”¹⁸⁸

Notably, there is no agreed-upon definition for the self-critical analysis.¹⁸⁹ Five factors that have been considered by reviewing courts include:

1. A report is generated as a result of a self-critical analysis;
2. The free flow of information of that type of information within a corporate entity supports a strong public interest;
3. Investigations which create the protected information would be curtailed if the analysis were not protected;
4. The documents to be protected by the privilege were created with the expectation of confidentiality; and
5. The information was, in fact, kept confidential.¹⁹⁰

Very few courts have recognized even a qualified privilege for documents created in the course of a self-critical analysis, and many courts have severely restricted its application.¹⁹¹ No Circuit Court has addressed the privilege in the context of a workplace investigation under *Faragher*. In the employment context, district courts continue to reach conflicting results as to whether the privilege even applies.¹⁹² Some courts have determined that it only applies to reports which are

mandated by the government, such as reports to the EEOC.¹⁹³ Other courts have determined that even these reports to the government are not covered by the self-critical analysis privilege.¹⁹⁴ Indeed, courts within the same district can and have reached conflicting results about the existence of the self-critical analysis privilege.¹⁹⁵

The privilege generally has been applied to three types of investigations:

1. Confidential evaluations;
2. Affirmative action studies; and
3. Internal corporate investigations.¹⁹⁶

However, at least one district court has determined that any privilege that may exist is waived whenever the *Faragher* defense is raised.¹⁹⁷ Thus, the employer finds itself in the position that it cannot rely upon the self-critical analysis when issues of harassment arise. That said, until a Circuit Court rules, employers are wise to assert the privilege where it cannot rely upon the attorney-client or attorney work product privileges.

IV. Best Practices in Conducting *Faragher* Defenses

A. Policies and Training

I. Employees Must Publicize and Disseminate an Effective Anti-Harassment Policy

Employers must be vigilant about harassment policies to take advantage of the *Faragher/Ellerth* defense. An employer is only able to assert the *Faragher/Ellerth* defense if the employer is able to factually demonstrate “(a) that [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁹⁸ As discussed above, the first element of the *Faragher/Ellerth* defense actually imposes two distinct requirements on an employer:

1. The employer must have exercised reasonable care to prevent sexual harassment; and
2. The employer must have exercised reasonable care to correct promptly any sexual harassment that occurred.¹⁹⁹

Beginning with the prevention requirement, courts have recognized that the existence of a valid sexual harassment policy is an important consideration in determining whether an employer acted reasonably to prevent sexual harassment.²⁰⁰ A sexual harassment policy may be insufficient because it did not require supervisors, who are notified of an employee being sexually harassed, to report that information to those in a position to take corrective action.²⁰¹

Employers must both publicize and disseminate their anti-harassment policy. “[A]n effective harassment policy should at least:

- Require supervisors to report incidents of sexual harassment;
- Permit both informal and formal complaints of harassment to be made;
- Provide a mechanism for bypassing a harassing supervisor when making a complaint; and
- Provide for training regarding the policy.”²⁰²

An employer exercised reasonable care to prevent harassment where it distributed its anti-harassment policy to all of its employees, and the policy’s complaint procedure “identifie[d] three company officials to whom harassment [could be] reported.”²⁰³

Note, mere promulgation of a sexual harassment policy that is reasonable on its face does not constitute an adequate preventative measure; the employer must also disseminate the policy.²⁰⁴

2. Employers Must Periodically Train Their Employees and Supervisors on Anti-Harassment Policies

Employers must train both employees and supervisors on the employers’ anti-harassment policies for employers to demonstrate that they acted reasonably to prevent harassment. EEOC Enforcement Guidance²⁰⁵: provides some assistance to employers as to the frequency and type of training. The EEOC recommends that employers “[p]rovide periodic training to all managers and supervisors regarding the terms of the anti-harassment policy and procedures, and their role in the complaint process. Additional training for employees would also be useful.”²⁰⁶

When a company trains its employees on its anti-harassment policies, numerous courts have determined that employers have acted reasonably and may use evidence of such training in support of their *Faragher/Ellerth* defense.²⁰⁷

Numerous courts also have held that employers acted reasonably as a matter of law when they adopted valid sexual harassment policies, distributed those policies to employees via employee handbooks, and either provided no sexual harassment training or provided training only to managers.²⁰⁸ The Seventh Circuit’s decision in *Shaw v. AutoZone, Inc.*,²⁰⁹ provides guidance on harassment training. There, the employer adopted a facially valid sexual harassment policy that it distributed to all of its employees via an employee handbook. Additionally, the employer provided training to management-level employees on the policy.²¹⁰ The Seventh Circuit concluded that these facts established, as a matter of law, that the employer exercised reasonable care to prevent sexual harassment.²¹¹

As is evidenced by the various decisions above, there is no set timing as to when an employer should train its employees on its anti-harassment policy or which employees the employer should train. Rather, to be compliant and for courts to conclude that an employer acted reasonably to prevent harassment, employers should provide training to all employees at the time of hire and then provide training to employees at least once a year. Such training will allow the employer to

assert that the employee was aware of the employers' reporting procedures when he or she felt harassed.

3. Employers Must Maintain a Well-Documented and Thorough Investigation Procedure

An employer's mere promulgation and dissemination of an adequate sexual harassment policy does not, by itself, establish that the employer acted reasonably to remedy any harassment that occurred despite the reasonable preventative measures.²¹² Rather, in order to establish that it took proper actions to correct harassment, employers are required to show that they acted reasonably promptly on an employee's complaint when they were given proper notice of allegations as required under its complaint procedures.²¹³ "The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified."²¹⁴

In *Swenson*, a mail sorter was subjected to several inappropriate remarks by a co-worker and eventually inappropriate physical contact.²¹⁵ In response, the U.S. Postal Service separated the two employees pending the outcome of a thorough investigation that had commenced immediately after the employee complained, and then kept them permanently separate even though the investigation could not sustain a charge of sexual harassment.²¹⁶ Unsurprisingly, the court determined that the Postal Service took appropriate and prompt corrective action.²¹⁷ Thus, employers should immediately and thoroughly investigate all accusations of harassment. Such an action will go a long way to proving that the employer sought to reasonably correct any harassment.

4. Employers Must Take Effective Remedial Measures

Once an investigation has been completed, employers must take effective remedial measures to protect their previous reasonable actions. The EEOC provides the following examples of remedial measures that employers may take to stop harassment and ensure that it has not continued:

- Oral or written warning or reprimand;
- Transfer or reassignment;
- Demotion;
- Reduction of wages;
- Suspension;
- Discharge;
- Training or counseling of harasser to ensure that s/he understands why his or her conduct violated the employer's anti-harassment policy; and
- Monitoring of harasser to ensure that harassment stops.

The EEOC also provides the following examples of measures to correct the effects of the harassment:

- Restoration of leave taken because of the harassment;
- Expungement of negative evaluation(s) in employee's personnel file that arose from the harassment;
- Reinstatement;
- Apology by the harasser;
- Monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the work place because of the complaint; and
- Correction of any other harm caused by the harassment (e.g., compensation for losses).²¹⁸

An employer is not liable if it takes prompt remedial action that is reasonably calculated to stop the harassment.²¹⁹ Courts consider "the amount of time between notice of the harassment and any remedial action, the options available to the employer such as employee training sessions and disciplinary action taken against the harassers, and whether or not the measures ended the harassment."²²⁰ By way of example, responses that have been held reasonable have often included prompt investigation of the allegations, proactive solicitation of complaints, scheduling changes and transfers, oral or written warnings to refrain from harassing conduct, reprimands, and warnings that future misconduct could result in progressive discipline, including suspension and termination.²²¹

The prevailing case law provides, however, that if the employer fails to take proper remedial action, then it may be culpable for harassment to which it did not adequately respond, on the theory that "the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy."²²² However, "On the other hand, it is possible that an action that proves to be ineffective in stopping the harassment may nevertheless be found reasonably calculated to prevent future harassment and therefore adequate . . . as a matter of law."²²³ In such cases, courts "consider the timeliness of the plaintiff's complaint, whether the employer unduly delayed, and whether the response was proportional to the seriousness and frequency of the harassment.... By way of example, responses that have been held reasonable have often included prompt investigation of the allegations, proactive solicitation of complaints, scheduling changes and transfers, oral or written warnings to refrain from harassing conduct, reprimands, and warnings that future misconduct could result in progressive discipline, including suspension and termination."²²⁴

It is important to note that remedial measures should not harm the employee who complained about harassment.²²⁵

Therefore, to escape liability, an employer must take prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring.

5. *Banner Health* Causes Employers to Pause And Evaluate Their Rules Prohibiting Employee Discussions Of Ongoing Investigations

When an employee reports harassment to an employer, an employer's initial reaction to such a report is to investigate the report and to inform its employees not to discuss the investigation. To protect the investigation process, employers will inform their employees both verbally and in their written policies and procedures that employees should not discuss workplace investigations. This seems reasonable.

It seemed reasonable to the employer in *Banner Health Systems d/b/a/ Banner Estrella Medical Center*.²²⁶ However, on July 30, 2012, the National Labor Relations Board ("NLRB" or "the Board") informed employers that an employer's blanket rule prohibiting employees from discussing ongoing investigations is not valid.²²⁷ The NLRB declared that such a rule is invalid because it chills employees from engaging in protected concerted activity of discussing workplace issues relating to the investigation of misconduct. The NLRB further held that if an employer wants to maintain the confidentiality of an investigation and limit its ability to chill its employees' rights regarding discussion of workplace investigations, the employer must first specifically determine whether in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up.

With such a decision, employers were placed in a difficult position to determine what investigation language in their policies and procedures is appropriate under *Banner Health*. The NLRB Division of Advice, seemingly recognizing the limbo in which it placed employers with its ruling in *Banner Health*, issued a memorandum which provided employers with needed assistance in maintaining an investigation policy that does not run afoul of the NLRB. In *Verso Paper*,²²⁸ the memorandum issued advice as to whether the following confidentiality policy was appropriate:

[The Employer] has a compelling interest in protecting the integrity of its investigations. In every investigation, [the Employer] has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. To assist [the Employer] in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

The Division of Advice came to the conclusion that the above confidentiality provision was "overbroad because the Employer cannot maintain a blanket rule regarding the confidentiality of employee investigations, but must demonstrate its need for confidentiality on a case-by-case basis." The Division of Advice provided relief to employers when it noted that the first two sentences of the policy passed muster and then suggested the following language to replace the inappropriate portion of the policy:

[The Employer] may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence.

If [the Company] reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

In providing such language for a policy, the NLRB is assisting employers in implementing policies on their face that do not prevent employees from chilling protected concerted activity of discussing workplace issues relating to the investigation of misconduct. However, employers must keep in mind that employers still must show in each particular situation “that the employer has a business justification for confidentiality that outweighs the employees’ Section 7 rights.” Thus, employers would be wise to not only include the above language in their investigation policies and procedures, but also train those who will be conducting the investigations to make the determination on each investigation that confidentiality is in fact necessary.

B. Investigation Procedure and Process

I. Who Should be the Investigator?

An early decision should be identifying the proper investigator or investigators. Ideally, the advantages and disadvantages of various personnel available to participate in investigations should be weighed.

a. **Inside Personnel: Human Resources, Legal, Internal Audit, Security or Compliance Personnel**

i. Advantages

The first advantage offered by internal investigators is low cost, as they typically are already on the payroll. Speed of deployment is also an advantage, both because they are already familiar with the organization, its procedures, and goals, and because they may already be located in or near the site of the complaint. Necessary fact finding is another key advantage to choosing such personnel as investigators. Another advantage is that with such investigators there is less interference with the ordinary course of business.

ii. Disadvantages

Among the disadvantages to selecting internal investigators is the lack of apparent impartiality and independence of such investigators. Another disadvantage is the lack of speed in completion of the inquiry. Unless the organization is large enough to dedicate sufficient numbers of employees to investigate, the regular duties of such persons make efficient conduct and completion of complex investigations difficult. Although the creation of a multi-disciplinary team can minimize the problem, another drawback of using in-house personnel is that employees’ knowledge or training may be too narrow to achieve the necessary fact-finding that is required. Additional disadvantages to consider in determining whether to use in-house personnel include that the process itself may trigger whistleblower claims by other employees and that the investigation may lead to corporate divisiveness and unwillingness of employees to talk to investigators.

b. External Personnel: Regular Outside Counsel, Accountants, or Security Personnel

i. Advantages

These individuals offer certain advantages over in-house employees. They tend to be familiar with the organization and already deployed in the geographical areas where the company regularly does business. They do not typically suffer from the problem of being otherwise unavailable when the need for sustained attention to an investigation arises.

ii. Disadvantages

The first disadvantage is the high cost. The second disadvantage is the potential lack of apparent impartiality and independence that is inherent when such professionals act as investigators. Said another way, there may be a conflict of interest, and certainly with attorneys as investigators, such attorneys generally are “conflicted out” of representing the company if litigation arises related to the investigation.

2. Competency and Skill of Interviewer / Investigator

The following must be considered in planning your investigation and in selecting your investigators. Specifically, the investigator:

- Must have the ability to understand the purpose and the issues (both practical and legal) of the investigation;
- Must formulate appropriate follow-up questions, especially when new facts at issue arise during the interview;
- Must have knowledge of company policies, procedures, practices, and corporate culture;
- Must possess effective interviewing skills, specifically in view of the personalities and background of the potential interviewees (*i.e.* ability to develop rapport, to press for admissions, and to understand interviewee);
- Must have credibility (*i.e.* no conviction record, no history of termination for misconduct or incompetence);
- Must be impartial;
- Must not act as an advocate during the investigation;
- Must have the ability to take thorough, accurate notes;
- Must have the ability to maintain confidentiality; and
- Must be effective as a witness in a jury trial.

3. Identifying the Scope of the Investigation

In most cases, a complaint by an employee (or knowledge by an employer of improper activity) will not require an in-depth investigation. If a single answer will not resolve the problem, other

employees are involved, additional facts are needed, or additional assistance is required to reach a conclusion, then a formal investigation should be conducted. Before interviewing witnesses, it is important to identify the scope of the investigation. An investigator's actions, from start to finish, are critical because they may be scrutinized by the EEOC, a judge, or a jury. The interviewing team should ensure that the following questions are answered before proceeding with the investigation:

- Who will investigate the matter?
- Who will be interviewed and what is the likely sequence?
- What is the subject matter of the investigation?
- What issues must be covered?
- Have the employment policy and procedures at issue been reviewed thoroughly?
- Are there any potential obstacles to proceeding with the investigation?
- Is there any documentation or electronic information that should be included in the investigation?
- When should the investigation be completed?

4. Written and Electronic Information

In addition to gathering standard written documentation that may be relevant to the investigation, the employer should also consider whether there are other sources of information that may be useful in the investigative process. In short, the investigator should be a detective and analyze what other non-interview-based sources are helpful. Such sources may include credit card receipts, cell phone records, time records, e-mails, computers, Blackberries, and possibly even Internet sites. Utilizing such sources may speed up the investigation, thereby requiring that fewer individuals be contacted and interviewed.

5. Conducting Interviews

a. Practical Considerations for All Employee Interviews

- Plan and prepare for the interview in advance;
- Consider getting a written statement from the witness/accused;
- An investigator should be impartial throughout the investigation; and
- Where applicable, preserve the anonymity of the alleged victim(s), if possible.

b. The Interview Itself

- Employees being interviewed should be assured that they will not be retaliated against for participating in the investigation.
- Explain the purpose of the interview (i.e. “We’re looking into concerns of unfair treatment” or “Due to a complaint, we need to ask you some questions”), and then explain the investigation process.
- Start broadly with open-ended questions and then narrow the questions.
- Avoid telling interviewees what others have said.
- Do not disclose any more information than is necessary. The investigator’s job is to gather information, not disseminate it.
- Ask about the events that transpired.
- Ask whether any other individual has information on the matter. For each source identified, ask: (1) what knowledge does this person have; and (2) from where did he or she get this knowledge.
- Ask whether the individual has any notes, documents, e-mails, or other information relevant to the matter.

c. Additional Considerations When Interviewing the “Complainant”

- Pledge no retaliation, and a fair and prompt investigation, but do not over-promise.
- Pin down the complainant’s story.

d. Additional Considerations When Interviewing the “Accused”

- Instruct the accused that this is an opportunity to tell the accused’s side of the story and advise management of any information it should consider.
- Convey the seriousness of the matter.
- Pin down the accused’s side of the story. Ask what the accused is prepared to do about the situation. Does the accused have any suggestions as to how the situation can be resolved? Probe for possible motives by the accused and the complainant.
- Do not accept a blanket denial.
- Do not give the appearance of predisposition and do not announce any decision immediately.

e. **Concluding the Interview**

- Close the discussion of each event by asking “Have you now told us everything you know about _____?”
- Make sure that you ask, “Is there anything else you want to tell us?”
- After you have finished asking questions, recount the significant points with the interviewee and ask him or her to confirm that your understanding is complete and accurate. Reflect that confirmation in your notes.
- Tell the interviewee to contact the investigator with additional information.
- Remind the interviewee to keep this information confidential and emphasize that the policy against retaliation for participation in the investigation.
- Do not hesitate to re-interview.

6. How to Deal with Complications

a. **Uncooperative Complainant**

If the complainant will not cooperate, document with a letter that the employer tried to respond, but could not due to lack of cooperation. Inform the complainant that the employer will make a decision based on all of the evidence in its possession.

b. **Uncooperative Accused**

If the accused is uncooperative, document with a letter that the accused had an opportunity to present the accused’s side of the story and vindicate the accused’s rights, yet declined. Inform the accused that the employer will make a decision based on all of the evidence in its possession.

c. **Employees Represented by Attorneys**

Courts have held that it is not a violation of public policy to discharge an employee for refusing to be interviewed by the company without a lawyer.²²⁹

7. Investigations in a Union Setting

a. **Johnnie’s Poultry Guidelines**

The rules of engagement change somewhat when interviewing employees in connection with their union activity or some related pending legal proceeding. Generally, under the National Labor Relations Act, an employer cannot question employees about their union sentiments or activities, or about what the employee knows about events which might result in a legal proceeding involving the union. Such questioning may be considered to be unlawful surveillance of employees’ union activities, or coercion or interference in the employee’s right to engage in (or refrain from) union activities. The NLRB has recognized, however, that an employer may need to ask employees such questions, that otherwise might be a violation of an employee’s labor law

rights, in two circumstances:

1. To investigate and prepare its defense to unfair labor practice charges, investigate union grievance issues or other legal proceedings such as administrative charges and pending lawsuits; and
2. To verify a union's claim of majority status in order to decide whether the union should be recognized (as where a union claims that it has signed authorization cards from a majority of the employees).

To accommodate the employer's legal needs in these two circumstances with the employee's rights to privacy and confidentiality in union matters, the Board outlined a set of guidelines for such questioning, referred to as the *Johnnie's Poultry* rules after the case in which they originated.²³⁰

The specific rules set out in *Johnnie's Poultry* are as follows:

- The company official must identify him/herself to the employee and his/her company position, if these facts are not already known.
- The employer must communicate to the employee the exact purpose of the questioning (for example, "I'm looking into the union's claim that the company allegedly asked you to resign your union membership");
- The employer must obtain the employee's participation in the interview on a voluntary basis;
- The employer must specifically state to the employee that no reprisals will take place if the employee declines to answer questions or participate in the interview;
- The questioning must occur in a context free from company hostility to union activities or support and must not be itself coercive or anti-union in nature; this means just asking questions, no editorializing about union motives, actions or positions (for example, you shouldn't say things like, "The union officials usually lie through their teeth, but I expect you will tell me the truth so that I can use your statements to confront them as liars"); and
- The questions must not exceed the boundaries of the legitimate purpose of the employer's investigation by prying into other unrelated union matters, eliciting information concerning the employee's or co-worker's subjective state of mind.

The Board consistently has enforced these rules, so that any deviation from them (for example, a failure to assure the employee that there will be no reprisals if he/she refuses to cooperate) will result in a finding of a violation of labor law, even if all the other rules are met. The Federal Courts of Appeal have not always been quite as strict, but on balance they too apply the rules in determining whether an employer's questioning is unlawful. Therefore, it is vital that supervisors understand and adhere to official legal restrictions.

Finally, these rules don't apply where a union official is present during Company questioning of an employee, for example, an investigatory interview to determine if discipline is appropriate, or a grievance meeting, where the Company, of course, will ask questions of an employee. They don't

apply as effectively when an employee is being questioned about incidents that may lead to discipline, and has “waived” or not requested his/her right to union representation at the interview. They essentially apply when a company is questioning an employee as to what he saw, heard or observed with respect to incidents forming the basis of a union-company dispute not involving the employee’s own discipline.

b. What are Weingarten rights

Another issue that is unique to a unionized employer involves the employer’s, the union’s, and bargaining unit employees’ legal rights in connection with management interviews of employees to investigate possible misconduct. The employees’ legal rights are referred to as “Weingarten” rights. *Weingarten* rights refer to a 1975 U.S. Supreme Court decision which held that a union-represented employee has the right (upon his or her specific request) to union representation in any (1) investigatory interview which he/she (2) reasonably believes may result in disciplinary action.

Who is entitled to *Weingarten* rights? Currently, only union-represented employees have these rights. However, the NLRB rule on this issue has “flip-flopped” several times over the years. When there is a Democratic majority at the NLRB, the Board will favor *Weingarten* rights for non-union employees (that is, right to a co-worker’s assistance at an investigatory interview). However, then NLRB tends to be more restrictive when there is a Republican majority at the NLRB.

Who can invoke an employee’s *Weingarten* rights? *Weingarten* rights arise only in situations where the union-represented employee specifically requests assistance. In other words, an employee may forego his/her guaranteed right and, if he/she prefers, participate in an investigatory interview without union assistance. Do not “volunteer” to have a union representative present in such an interview when the employee has not requested one. It is up to the employee in each case to decide on his/her own. Also, a union cannot make a “blanket” request to represent all bargaining unit employees at all investigatory interviews. It is the employee’s individual choice, and the union cannot make it for him/her.

What does an employee have to do to request assistance at investigatory interviews? An employee who wants assistance is not required to use any particular “magic” language to request help. An employee’s request for help may be manifested in a variety of words and actions. A valid request can be specific, such as, “I’d like to have a union representative with me at the interview.” It can also be in the form of a question: “Do I need someone with me?” Any comment by a union-represented employee about someone to assist him/her should be regarded as a formal request for assistance, which should be complied with.

Who can an employee request for assistance? An employee can request the presence of a specific union representative, and the company should respect such a request if the preferred individual is available. However, *Weingarten* does not require the company to postpone an interview because the specifically requested union representative is unavailable. In this situation, any available union representative can be asked to attend the meeting, and this will comply with the employee’s *Weingarten* rights. When the employee’s preferred union representative is available, however, the company may not insist that a union representative more to the company’s liking assist the employee.

What happens if no union representative is available to sit in on the interview? If no union representative is available to assist the employee, the company should postpone the interview until a union representative can be present, absent urgent situations.

Is an employee entitled to union representation at every management interview or meeting? No. An employee's right to request assistance and representation in an investigatory interview is limited to situations where the employee reasonably believes the investigation will result in a disciplinary action. An employee has no right to the presence of a union representative at a meeting held solely for the purpose of informing the employee of, or acting upon, a previously-made disciplinary decision, or at meetings where the employee is clearly not subject to discipline (for example, if an employee is being questioned only because he/she is a witness to an event, or an employee is being given a policy instruction (i.e., coaching, or an annual evaluation, etc.)).

Is the employee entitled to have a pre-interview consultation with the union representative? Yes. If the employee is about to participate in an investigatory interview, he/she is entitled, upon request, to pre-interview notice of the general subject of the interview, and a brief pre-interview private consultation with a union representative. A company does not have to allow such private consultations during an investigatory interview, and should not do so. For example, there may be a situation where a supervisor asks a question, and then the union representative and the employee ask to take a break in order to come back in five minutes with the "fine-tuned" answer. DO NOT allow this.

What rights does the union representative assisting the employee have at the interview? A company generally may regulate the role of a union representative at an interview, to the extent necessary, for a focused, productive interview and to avoid transforming it into an "adversarial" contest. The union representative can ask for clarification of questions, but not "object" to questions. The company can require that the employee, not the union representative, answer the questions. The company may not require the union representative to remain "totally silent" during the investigatory interview, but the union representative may not disrupt the interview. Leave time at the end of the interview for the union representative briefly to raise issues or ask questions, suggest other avenues of investigation that should be pursued, etc. However, maintain control of the actual investigatory interview at all times. Do not allow the union representative to ask questions, raise objections, "answer for" the employee, etc., during the interview.

What if the union representative breaks these rules, insists on taking breaks before answering a question, interrupts the questioning, tells the employee not to answer, answers for the employee, wants to "argue the case" as if the meeting were a grievance proceeding, etc.?

Hold your ground! Remind the union representative that this is a management investigatory interview, not a grievance proceeding, that you expect and require the employee to answer for him/herself, etc. In no uncertain terms remind the union representative of his/her proper, limited legal role. If the problem persists, perhaps try one or more of the following:

- Tell the employee and his/her union representative that the behavior of the union representative is obstructing your investigation.
- Decide whether discipline is warranted based on the facts you already have, without further attempts to get the employee's side of the story. Tell the employee that if

discipline is issued that the employee could have avoided by cooperating with the investigation, it will still stand because the employee refused to cooperate.

- Give the employee independent discipline for his/her behavior during the interview, that is, participating in or authorizing/ratifying obstructionist, disruptive and insubordinate behavior that hinders the company's investigation.
- Terminate and reschedule the interview with a very clear communication that such behaviors will not be tolerated in the reconvened interview.

In all situations, promptly document in great detail the behaviors which exceed an employee's actual *Weingarten* rights. In a case of repeated or flagrant misbehavior by a union representative, the Company may decide to "ban" the individual from all further participation in investigatory interviews.

8. How to Finalize the Investigation

a. Effecting Appropriate Remedies

Typically, it is best to separate the ultimate decision maker from the fact finder. In all cases, however, a competent investigator will evaluate all of the results of the investigation carefully before deciding what to recommend or "find." In making such an evaluation, the investigator should weigh all of the evidence, including credibility of the witnesses. The investigator should also consider key employees' situations, possible motives, and work records, while being careful not to carelessly make faulty assumptions. A good investigator will critically examine all alternatives and possible consequences of each of those alternatives. Once the investigation has concluded, the investigator should discuss the facts gathered with the person(s) who will participate in the decision-making process or who will provide advice regarding appropriate remedial action.

i. Remedial Action

Where inappropriate conduct has occurred, action must be taken to remedy the situation. If an investigation conducted in response to a complaint determines that harassment has or likely has occurred, the employer must take prompt remedial action reasonably designed to stop the harassment and address the situation.

For guidance on disciplinary action, the employer should consult company policy or the human resources department. The disciplinary action must fit the infraction. Appropriate action varies, depending on the severity of the offense, the accused's past record, the accused's position within the organization, and the type of misconduct that has occurred. Discipline may vary from a verbal warning to a disciplinary suspension or termination. Although not required, the employer also may consider separating the complainant from the accused to reduce the possibility of future problems. However, the employer must be careful not to move the complainant to a less desirable location or position as such action may be deemed retaliatory. The employer should also consider training or retraining and follow-up education on company policies and appropriate workplace conduct.

ii. Consistent Handling of Remedial Action

While each complaint and investigation should be handled on an individual basis, it is important to handle cases consistently. The employer should adhere to established disciplinary guidelines where they are in place. Deviation from standard operating procedures may prompt additional claims by either the complainant or the accused. Moreover, such deviations may not be easily explainable to the EEOC, judges, or juries.

9. Memorializing the Investigation

The employer should memorialize the investigation in writing and determine what the written document should look like. The employer should be careful to maintain the written report of the investigation and any corresponding documentation, such as statements, affidavits, or notes. The file should also document any remedial action taken. A thorough and accurate written record will assist the employer in any subsequent actions taken by the accused challenging the remedial action. Similarly, if the complainant is dissatisfied with the results of the investigation, the written record may justify the employer's actions or any action in a subsequent inquiry.

10. Responding to an Inconclusive Investigation

There may be situations in which an investigation is inconclusive. Typically, this happens when an employee's complaint about workplace misconduct occurs in a one-on-one environment and the accused denies the allegation. Where the investigation proves to be inconclusive, the employer should inform both the complainant and the accused that no conclusion could be reached, but that a confidential record of the allegation and the investigation has been made and will be retained by the human resources or personnel department.

Thereafter, a written memorandum should be prepared and given to the accused outlining the following:

- Advising the accused that management has conducted an investigation and that the investigation was inconclusive;
- Reiterating the company's strict policy against the relevant misconduct;
- Explaining that while this memorandum does not represent a disciplinary step, the company expects that no other misconduct claims will be filed against the person in the future; if any such claims are lodged, the company will take immediate appropriate action; and
- Have the accused sign the memorandum to indicate his/her understanding of the situation.

A confidential meeting then should be held with the complainant to explain that the investigation is complete, to convey the fact that the results were inconclusive, and to tell him/her about the memorandum. Additionally, the complainant should be reminded of the company's strong opposition to such misconduct and urged to come forward immediately if there is any recurrence of such activity or any retaliation for making the complaint. This meeting should be documented.

II. Is the Investigation Protected?

The attorney-client privilege protects confidential communications made by clients to their attorneys, where such communications are made for the purpose of seeking legal assistance or advice. The key question in determining whether the attorney-client privilege applies to a workplace investigation is typically whether the attorney was acting in his/her legal capacity as part of the investigation team (i.e., in the capacity where he/she was providing legal advice).

Where attorneys are conducting the investigation and participating in the investigation as a decision-maker and provider of advice, courts have concluded that the attorneys in question were acting as legal advisors and, therefore, the privilege attaches to communications made in that context. For example, in *Crutcher-Sanchez v. County of Dakota, Neb.*,²³¹ the employer sought the services of an outside lawyer to conduct an investigation into alleged harassment in the workplace. The Court held that the lawyer/investigator's communications regarding the investigation were privileged and that "when a matter is committed to a professional legal advisor, it is prima facie committed for the sake of legal advice and [is], therefore, within the privilege absent a clear showing to the contrary."²³² The court went on to conclude that "factual investigations performed by attorneys as attorneys fall comfortably within the protection of the attorney-client privilege" and that, under the facts in that case, the defendant employer had sought the services of a lawyer to provide advice and conduct the investigation as a professional legal adviser.²³³ Where an attorney is merely a bystander or minor participant in meetings related to the investigation, it is much more likely that a court could conclude that the attorney was not participating for the purposes of providing legal advice and his/her communications related to the investigation are not protected by the privilege.

Communications regarding workplace investigations prepared by attorneys can also be protected from disclosure by the work product doctrine. Rule 26(b)(3) of the Federal Rules of Civil Procedure protects from disclosure attorney work product that was prepared "in anticipation of litigation," unless the requesting party can show a "substantial need" for the materials and "undue hardship" in obtaining similar materials by other means. Workplace investigations that are conducted in the ordinary course based on the complaint of a current employee, for example, will likely not fall within the ambit of the work product doctrine because the possibility of litigation is too remote. By contrast, where the investigation is triggered by a demand letter served by an employee's lawyer, for example, courts have concluded that the work product doctrine protects materials prepared by an attorney in connection with the investigation.

As noted above, employers should consider how important it is to be able to invoke the protection of the attorney-client privilege and/or the work product doctrine in particular investigations. Where investigations are particularly sensitive, involve high-level employees, involve numerous employees (i.e., a possible "class"), or where litigation has already commenced, it may be more important to keep investigation materials subject to the privilege. By contrast, for investigations into commonplace workplace complaints, ensuring the protection of the privilege may be less important. Regardless, it remains the case that most employers will desire the protection of the privilege to ensure the candid nature of communications surrounding workplace investigations and to provide the maximum level of flexibility in discussing and choosing outcomes.

Here are some steps that employers can take to maximize the likelihood that the privilege will apply to workplace investigations:

- Document that the involvement of legal counsel in the investigation is for the purpose of providing legal advice. In one case, the Court was persuaded to apply the privilege because of a company's written policy that required the involvement of in-house counsel in workplace investigations "for the purpose of providing legal assistance and advice in connection with possible legal issues."
- Keep privileged documents separate from other investigation documents and label all documents to or from the attorney/investigator as an attorney-client communication.
- Narrow communications between non-attorney investigators and counsel to avoid the appearance that counsel is involved in every communication that may not be for the purpose of seeking legal advice. For example, internal e-mails between Human Resources and others involved in the investigation are not automatically privileged just because the in-house attorney is included in the distribution list.
- Consider using non-attorney investigators who report to counsel. The substance of the information learned by the non-attorney investigators will not be privileged (*i.e.*, they can testify to what they learned in interviewing an employee), but their communications to counsel (including written reports about information learned) likely will be privileged. This increases the chances of being able to use the privilege while also permitting discovery into the substance of the investigation without a waiver of the privilege.

V. About the Authors

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Lori Bowman is a shareholder in the Los Angeles office of Ogletree, Deakins, Nash, Smoak & Stewart. She has practiced labor and employment law for over 25 years, representing employers in hundreds of state and federal employment litigation cases, including numerous wage and hour class actions and discrimination and wrongful termination cases. She has defended employers in arbitrations and before California and federal administrative agencies including the DOL, DLSE, EEOC, DFEH and NLRB. Ms. Bowman counsels employers routinely in all areas of labor and employment law including policies and procedures and litigation avoidance. She also conducts audits, training and investigations of employee misconduct and frequently lectures on employment law issues. She represents employers in several industries including employers in the entertainment industry.

For the past several years, Ms. Bowman has been selected as a Southern California Super Lawyer and in Best Lawyers in America. She has served on the Association of Media & Entertainment Law Firm Advisory Board and is a member of the Labor & Employment law Section of the Los Angeles Bar Association.

Ms. Bowman graduated from Indiana University School of Law in 1984 where she was a Managing Editor of the Indiana Law Journal. She received a M.A. in 1979 from the University of Illinois, Institute of Labor and industrial Relations, and received an A.B. from Indiana University in 1976 where she graduated Phi Beta Kappa.

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Charles Baldwin, a shareholder in the Indianapolis office of Ogletree, Deakins, Nash, Smoak & Stewart, has 30 years of experience as an advocate for management in all aspects of labor and employment matters. He also serves as a member of Ogletree's Board of Directors.

As a trial lawyer, Mr. Baldwin serves as lead counsel defending employers at trial and on appeal in class actions, multi-plaintiff and individual lawsuits arising out of every conceivable type of workplace dispute. He was selected by AIAM and AAMA to be Counsel for Amici Curiae in the Seventh Circuit in a case of first impression under the Americans with Disabilities Act.

For many years, Mr. Baldwin served as the Seventh Circuit Editor for the "Employment & Labor Relations Litigation Newsletter" of the ABA. As a contributing author for the first and second edition of "Model Jury Instructions: Employment Litigation," published by the Litigation Section of the ABA.

Mr. Baldwin was chosen Volunteer of the Year for 2001 by the Indiana Chamber of Commerce and in 2000 was appointed to the Indiana Chamber's Board of Directors. He has been featured in the 11th-14th editions of Who's Who in American Law and selected by Chambers USA Leading

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VI. Additional ACC Resources

- Eric Quinn, “Top Ten Tips for Formulating an Anti-Discrimination and Harassment Policy,” ACC Top Ten (August 2010), *available at* <http://www.acc.com/legalresources/publications/topten/workplaceDiscrimination.cfm>
- Kim Seten and Meg Zabijaka, “Top Ten Basics of Employment Law for the Small Legal Department,” ACC Top Ten (April 2011), *available at* <http://www.acc.com/legalresources/publications/topten/Employment-Law-for-STD.cfm>
- Eric Quinn, “Preventing Discrimination and Harassment in the Workplace,” ACC QuickCounsel (August 2010), *available at* <http://www.acc.com/legalresources/quickcounsel/pdahitw.cfm>
- Eric Quinn, “Top Ten Tips for Dealing With Workplace Bullying,” ACC Top Ten (Aug 2010), *available at* <http://www.acc.com/legalresources/publications/topten/PreventingWorkplaceBullying.cfm>
- “Sample Sexual Harassment Policy,” ACC Form & Policy (June 2010), *available at* <http://www.acc.com/legalresources/resource.cfm?show=945544>
- “Adverse Employment Action Notice,” ACC Form & Policy (March 2002), *available at* <http://www.acc.com/legalresources/resource.cfm?show=14305>

VII. Endnotes

¹ *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998).

² *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

³ 42 U.S.C. §§ 2000e, *et seq.*

⁴ *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008).

⁵ *Mack v. Otis Elevator Co.*, 326 F.3d 116, 123 (2d Cir. 2003).

⁶ *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 762 (1998).

⁷ *Vance v. Ball State Univ.*, No. 11-556, 2013 U.S. LEXIS 4703, ___ S. Ct. ___ (June 24, 2013).

⁸ EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors § IIIA. (June 18, 1999), *available at* <http://www.eeoc.gov/policy/docs/harassment.html>.

⁹ *See, e.g., Mack*, 326 F.3d at 126-27.

¹⁰ *Id.*

¹¹ *Id.* at 125, 127.

¹² EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), *available at* <http://www.eeoc.gov/policy/docs/harassment.html>; *see also Mack*, 326 F.3d at 123 (concluding that mechanic-in-charge was plaintiff's supervisor even though he lacked the authority to take tangible employment actions: "Not only did he direct the particulars of each of Mack's work days, including her work assignments, he was the senior employee on the work site. He therefore possessed a special dominance over other on-site employees, including Mack, arising out of their remoteness from others with authority to exercise power on behalf of Otis. There was no one superior to Connolly . . . whose continuing presence might have acted as a check on Connolly's coercive misbehavior toward other Otis employees there.").

¹³ *See, e.g., Bunda v. Potter*, 369 F. Supp. 2d 1039, 1056-58 (N.D. Iowa 2005).

¹⁴ *See, e.g., Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999) (holding that the individual had, at most, only occasional authority to direct the employee's operational conduct while on duty, and was not considered a supervisor).

¹⁵ *See, e.g., Parkins v. Civil Constructors of Ill.*, 163 F.3d 1027, 1034 (7th Cir. 1998); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1056-57 (8th Cir. 2004).

¹⁶ *Parkins*, 163 F.3d at 1034.

¹⁷ *Merritt v. Albermarle Corp.*, 496 F.3d 880 (8th Cir. 2007).

¹⁸ *Id.* at 884.

¹⁹ *Weyers v. Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004)

²⁰ *Id.* at 1057; *see also Howard v. Winter*, 446 F.3d 559, 566 (4th Cir. 2006) (holding that an individual was not considered the victim's supervisor merely because the person could request administrative assistance from the victim).

²¹ *See Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002).

²² *See, e.g., Glover v. NMC Homecare, Inc.*, 13 F. Appx. 896, 902 (10th Cir. 2001); *Gay v. Bd. of Trs. of San Jacinto College*, 608 F.2d 127, 128 (5th Cir. 1979) (rejecting a defense of no authority because the employer "held out the supervisor as a person having authority over those under his supervision, and the plaintiff perceived him to have authority to discharge her") (footnote omitted); *cf. Parkins*, 163 F.3d 1027, 1034-35 (holding that knowledge of an earlier harassment complaint to someone the complaining employee believed had supervisory authority but who was not a supervisor could not be imputed to the company).

²³ *Ellerth*, 524 U.S. at 761.

²⁴ *See id.* at 762; *see also* EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), *available at* <http://www.eeoc.gov/policy/docs/harassment.html>.

²⁵ *Ellerth*, 524 U.S. at 762.

²⁶ *See, e.g., Tatum v. City of Berkeley*, 408 F.3d 543, 553 (8th Cir. 2005) (employee who was terminated and then reinstated without any loss of pay or rank failed to show that he suffered any adverse employment action).

²⁷ *See, e.g., Goodwin v. Bd. of Trs. of Univ. of Ill.*, 442 F.3d 611, 619 (7th Cir. 2006) (demotion, even if later rescinded, is adverse employment action).

²⁸ *See, e.g., Pantoja v. Am. NTN Bearing Mfg. Corp.*, 495 F.3d 840, 847 (7th Cir. 2007) (disciplinary warnings did not constitute adverse actions where they did not affect employee's compensation, terms, conditions, or privileges of employment).

²⁹ *Durham Life Ins. v. Evans*, 166 F.3d 139, 152-54 (3d Cir. 1999) (loss of significant job benefits such as the resources necessary to do the job was tantamount to adverse employment action).

³⁰ *MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923 (8th Cir. 2004).

³¹ *Id.* at 929.

³² *Id.* at 1217.

³³ *Stewart v. Ashcroft*, 352 F.3d 422, 426-27 (D.C. Cir. 2003) (impact of the move on opportunities for advancement; differences in supervisory responsibilities); *see also, Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996) (whether job duties are more interesting; differences in prestige; whether the position is generally more sought after); *but see Cooper v. S. Cal. Edison Co.*, 170 F. Appx. 496, 498 (9th Cir. 2006) (transfers within company, rescinded suspension, and ridicule and ostracism were not adverse actions).

³⁴ *See Ledbetter v. AllTel Corp. Servs., Inc.*, 437 F.3d 717, 724 (8th Cir. 2006) (employer took “adverse employment action” when it gave African-American employee title of “acting” manager, along with assignment of additional duties and no increase in pay); *Bryson v. Chicago State Univ.*, 96 F.3d 912, 916 (7th Cir. 1996); *but see Box v. Principi*, 442 F.3d 692, 696-97 (8th Cir. 2006) (temporary reassignment with no change in salary or benefits was not adverse action, nor was denial of request for training, denial of request for one day of annual leave, or failure to provide employee with job description for another position).

³⁵ *Reinhold v. Com. of Virginia*, 151 F.3d 172, 175 (4th Cir. 1998) (plaintiff’s evidence that she was assigned extra work and suffered other harm as a result of rejecting her supervisor’s sexual advances does not establish that she suffered a tangible employment action); *see also Traylor v. Brown*, 295 F.3d 783, 788-89 (7th Cir. 2002) (emphasizing that “materially adverse change” does not include “everything that makes an employee unhappy”) (citations and internal quotation marks omitted).

³⁶ *Morris v. Oldham County Fiscal Court*, 201 F.3d 784 (6th Cir. 2000).

³⁷ *Id.* at 789.

³⁸ *Id.*

³⁹ *See Spears v. Mo. Dept. of Corrs. and Human Res.*, 210 F.3d 850, 853-54 (8th Cir. 2000).

⁴⁰ *See, e.g., Stinnett v. Safeway*, 337 F.3d 1213, 1217 (10th Cir. 2003) (“adverse employment actions” are not limited to actions involving monetary loss).

⁴¹ *Faragher*, 524 U.S. at 778. —Short cite is okay here since case name is unambiguous. See Bluebook Rule 10.9(a)(i).

⁴² *See Hurley v. Atlantic City Police Dept.*, 174 F.3d 95, 118 (3d Cir. 1999) *abrogated on other grounds, see Pontente v. County of Hudson*, 187 N.J. 103 (2006) (noting that *Faragher* does not focus mechanically on the

formal existence of a sexual harassment policy, allowing absolute defense to a hostile work environment claim whenever the employer can point to an anti-harassment policy of some sort and finding that employer failed to prove affirmative defense where it issued written policies without enforcing them and failed to investigate sexual harassment as it investigated and punished other forms of misconduct).

⁴³ *EEOC v. V&J Foods, Inc.*, 507 F.3d 575, 578 (7th Cir. 2007).

⁴⁴ *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1314-15 (11th Cir. 2001) (denying summary judgment on the *Faragher* defense, in part, because there was a question of fact regarding the distribution of a revised harassment policy that changed the person to whom complaints were to be made, thus raising a question of notice to the employees).

⁴⁵ “With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.” 29 C.F.R. § 1604.11(d), (e) (which contains a similar provision for employer liability of acts of non-employees).

⁴⁶ *Varner v. Nat’l Super Markets, Inc.*, 94 F.3d 1209, 1213-14 (8th Cir. 1996) (finding that a complaint procedure was not effective because it did not require supervisor with knowledge of harassment to report the information to those in position to take appropriate action).

⁴⁷ *Clegg v. Falcon Plastics, Inc.*, 174 Fed. Appx. 18, 26 (3d Cir. 2006) (denying summary judgment due to a question of fact regarding the employer’s diligence and actions during the investigation).

⁴⁸ *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (finding employer’s response to complaints inadequate despite the eventual discharge of the harasser where the employer did not seriously investigate or strongly reprimand the supervisor until after plaintiff filed charges with the state agency).

⁴⁹ *Cardenas v. Massey*, 269 F.3d 251, 267 (3d Cir. 2001).

⁵⁰ *See Leopold v. Baccarat, Inc.*, 239 F.3d 243, 246 (2d Cir. 2001).

⁵¹ *Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir. 1998) (finding the complaint process deficient where the official to whom complaints were to be made was inaccessible due to hours of duty and location at a separate facility).

⁵² *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 848 (7th Cir. 2008).

⁵³ *Swenson v. Potter*, 271 F.3d 1184, 1191 (9th Cir. 2001) (“Where harassment by a co-worker is alleged, the employer can be held liable only where ‘its own negligence is a cause of the harassment.’”) (citations omitted).

⁵⁴ *Williamson v. City of Houston, Tex.*, 148 F.3d 462, 465-66 (5th Cir. 1998) (City liable for negligence after sexual harassment of female police officer by a fellow male officer after she complained to her supervisor about the harassment and the supervisor failed to act.).

⁵⁵ *Andreoli v. Gates*, 482 F.3d 641, 648 (3d Cir. 2007).

⁵⁶ *Swenson*, 271 F.3d at 1191-92.

⁵⁷ *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001) (“The Supreme Court made clear that the affirmative defense outlined in *Ellerth* and *Faragher* applies only in cases of vicarious liability, where the harasser is the victim’s supervisor.”).

⁵⁸ *Id.*

⁵⁹ *Murray v. New York Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995).

⁶⁰ *Andreoli*, 482 F.3d at 648.

⁶¹ *Swinton*, 270 F.3d at 803-04 (“[T]he chief difference is that in the negligence context, the plaintiff bears the burden of proving the employer’s failure to respond adequately to the harassment, while, in a vicarious liability regime, the defendant must establish the corrective action as an affirmative defense.”).

⁶² See also *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1056 (8th Cir. 2004) (“[T]o be considered a supervisor, the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties.”) (citations and internal quotation marks omitted).

⁶³ See also *Andonissamy*, 547 F.3d at 848 (While the worker was a “‘supervisor’ in the colloquial sense of the word, he did not possess the authority that would make him a supervisor for purposes of Title VII. He did not hire or fire[], and while he recommended disciplinary action, the record shows that human resources first had to conduct an investigation and issue a recommendation before any disciplinary action could be taken.”).

⁶⁴ *Mack*, 326 F.3d at 125 (senior coworker who oversaw daily work assignments at worksite was plaintiff’s “supervisor” even though he had no authority to fire, transfer or discipline plaintiff); EEOC “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors” § III.A.2. (June 1999) (“An individual who is authorized to direct another employee’s day-to-day work activities qualifies as his or her supervisor even if that individual does not have the

authority to undertake or recommend tangible job decisions.”).

⁶⁵ EEOC “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors” § III.A.2. (June 1999).

⁶⁶ *Id.* at 970-71.

⁶⁷ *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 690 (8th Cir. 2012).

⁶⁸ *Bombaci v. Journal Cmty. Pub. Grp., Inc.*, 482 F.3d 979, 984-85 (7th Cir. 2007) (holding that a victim’s sexual harassment complaints to another employee who had the power to direct the work of the harasser was not sufficient because the employee could not “effect the terms of the [harasser’s] employment in a way that could remedy sexual harassment”) (footnote omitted).

⁶⁹ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 70-72 (1986) (“[A]bsence of notice to an employer does not necessarily insulate [it] from liability.”); see also, *Bombaci*, 482 F.3d at 984 (“In some situations, the notice may come from someone other than the victim.”).

⁷⁰ *Jenkins v. Winter*, 540 F.3d 742, 749 (8th Cir. 2008); see also *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1265 n.3 (8th Cir. 1997) (stating constructive knowledge satisfied when “the harassment was obvious to everyone.”); *Busby v. City of Orlando*, 931 F.2d 764, 785 (11th Cir. 1991) (“[W]hen [the racial slurs] are so egregious, numerous, and concentrated as to add up to a campaign of harassment” the employer is “culpable for failing to discover what is going on and to take remedial steps.”) (citations and internal quotation marks omitted).

⁷¹ *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 471 (5th Cir. 1989) (employer had constructive knowledge of harassment where Plaintiff had received over thirty pornographic notes in her locker and had been exposed to sexually explicit pictures and graffiti on restroom walls and in the elevator, some of which were directed at Plaintiff).

⁷² *Id.*; see also *Wilson v. Chrysler Corp.*, 172 F.3d 500, 509 (7th Cir. 1999) (holding that an employer had constructive notice of sexual harassment where sexual “cartoons and fake penises were displayed in common areas or placed in open view at [the plaintiff’s] work station.... [M]uch of the alleged misconduct was public and deliberately exhibitionist”).

⁷³ *Rhodes v. Illinois Dep’t of Transp.*, 359 F.3d 498, 507 (7th Cir. 2004) (coworkers regular viewing of pornography did not support constructive knowledge because the coworkers acted as lookouts as the pornography was playing); *Bombaci*, 482 F.3d at 985 (no constructive notice of alleged sexual harassment even if the employee was the target of numerous sexual comments and regular touching over three years, where

there was no evidence that the harassment occurred in front of supervisors).

⁷⁴ *Hudson v. Norfolk S. Ry. Co.*, 209 F. Supp. 2d 1301, 1327 (N.D. Ga. 2001). Please note, however, that while weight is not a protected class under Title VII, it may still be actionable under state law. *See, e.g.*, MICH. COMP. LAWS ANN. § 37.2202. Furthermore, many insensitive comments based on weight could also support a claim for gender or sexual harassment.

⁷⁵ *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1301-02 (11th Cir. 2007).

⁷⁶ *Knox v. Neaton Auto Products Mfg., Inc.*, 375 F.3d 451, 459-60 (6th Cir. 2007) (profanity, even where sexually charged, not actionable where directed towards group as opposed to a protected characteristic).

⁷⁷ *Lucero v. Nettle Creek Sch. Corp.*, 566 F.3d 720, 732 (7th Cir. 2009) (Incidents in which one student held up photograph of another student's naked buttocks to female teacher's class, and in which three students placed 20 pornographic magazines in that teacher's classroom were not sufficiently severe or pervasive so as to alter conditions of teacher's employment.).

⁷⁸ *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 335 (4th Cir. 2003).

⁷⁹ *Swenson*, 271 F.3d at 1192.

⁸⁰ *Id.*

⁸¹ *Dees v. Johnson Controls World Servs., Inc.*, 168 F.3d 417, 423 (11th Cir. 1999); *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 340 (6th Cir. 2008).

⁸² *Milligan v. Bd. of Trustees of S. Ill. Univ.*, 686 F.3d 378, 383 (7th Cir. 2012).

⁸³ *Swenson*, 271 F.3d at 1192.

⁸⁴ *Id.*

⁸⁵ *See, e.g., id.*

⁸⁶ *See Downes v. F.A.A.*, 775 F.2d 288, 295 (Fed. Cir. 1985), *abrogated on other grounds by Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

⁸⁷ *Id.*

⁸⁸ *See Hawkins*, 517 F.3d at 340-41 (“[A]n employer’s responsibility to prevent future harassment is heightened where it is dealing with a known serial harasser....”).

⁸⁹ *See, e.g., Swenson*, 271 F.3d at 1192-93.

⁹⁰ *Id.* at 1193 n.8; *see also, Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 (5th Cir. 1987).

⁹¹ *Malik v. Carrier Corp.*, 202 F.3d 97, 106 (2d Cir. 2000); *accord Fuller v. City of Oakland, Cal.*, 47 F.3d 1522, 1528 (9th Cir. 1995).

⁹² *Torres v. Pisano*, 116 F.3d 625, 639 (2d Cir. 1997).

⁹³ *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1304 (11th Cir. 2007).

⁹⁴ *Bombaci*, 482 F.3d at 986.

⁹⁵ *Yamaguchi v. U.S. Dep’t of the Air Force*, 109 F.3d 1475, 1483 (9th Cir. 1997).

⁹⁶ *See, e.g., Milligan*, 686 F.3d at 383-84.

⁹⁷ *Swenson*, 271 F.3d at 1194.

⁹⁸ *Scarberry v. Exxonmobil Oil Corp.*, 328 F.3d 1255, 1259-60 (10th Cir. 2003).

⁹⁹ 29 C.F.R. § 1604.11(e) (1999).

¹⁰⁰ *Bodman v. Maine, Dep’t of Health & Human Servs.*, 787 F. Supp. 2d 89, 101 (D. Me. 2011).

¹⁰¹ *Id.*

¹⁰² *U.S. v. Orland*, 109 F.3d 539, 544 (9th Cir. 1997); *Musa-Muaremi v. Florists’ Transworld Delivery, Inc.*, 270 F.R.D. 312, 318-19 (N.D. Ill. 2010) (rejecting privilege claims to communications in the creation of the investigation record and to the record itself, even where the employer did “not intend to affirmatively rely” on the allegedly privileged documents).

¹⁰³ *Reitz v. City of Mt. Juliet*, 680 F. Supp. 2d 888, 892 (M.D. Tenn. 2010) (*quoting Ross v. City of Memphis*, 423 F.3d 596, 605 n. 5 (6th Cir. 2005)); *accord United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).

¹⁰⁴ *Reitz*, 680 F. Supp. 2d at 892 (*quoting Ross*, 423 F.3d at 605); *accord United States*, 926 F.2d at 1292.

¹⁰⁵ *Reitz v. City of Mt. Juliet*, 680 F. Supp. 2d 888, 892 (M.D. Tenn. 2010).

¹⁰⁶ *Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19, 25 (N.D. N.Y. 1999).

¹⁰⁷ *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977) (“A communication is not privileged simply because it is made by or to a person who happens to be a lawyer.”); *Holt v. KMI-Cont’l, Inc.*, 95 F.3d 123, 134 (2d Cir. 1996) (court concluded that a report analyzing employee retention was not protected because it provided primarily business rather than legal advice); *Bronsink v. Allied Prop. and Cas. Ins.*, 2010 WL 786016 at *2 (W.D. Wash. 2010) (court ordered production of a lawyer-investigator’s file after concluding that he was an investigator only and was not also providing legal advice to the client); compare *In re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3d Cir. 1979) (all documents prepared in connection with investigation will be protected from discovery so long as “the privilege has been (a) claimed and (b) not waived by the client”).

¹⁰⁸ *Bronsink*, 2010 WL 786016, at *2; *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 341 (Tex. App.

1999) (trial court did not abuse its discretion in determining that attorney was acting as an investigator and was conducting a routine investigation of a fire of suspicious origin); *see also Seibu Corp. v. KPMG LLP*, 2002 WL 87461 (N.D. Tex. 2002) (“Where an attorney is functioning in some other capacity—such as an accountant, investigator, or business advisor—there is no privilege.”); compare *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084, 1091 (D. N.J. 1996) (court rejected argument that attorney was acting as investigator or fact-finder, not attorney, during investigation into sexual discrimination claims).

¹⁰⁹ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

¹¹⁰ *Id.* at 390-91.

¹¹¹ *Id.* at 394.

¹¹² *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486, n.16 (3d Cir. 1995); *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*, 32 F.3d 851, 862 (3d Cir. 1994); *2,202 Ranch LLC v. Superior Court*, 113 Cal. App. 4th 1377, 1387 (2003), disapproved on other grounds; *see Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19 (N.D.N.Y. 1998).

¹¹³ *See* FED. R. EVID. 501.

¹¹⁴ *Kandel v. Brother Int'l Corp.*, 683 F. Supp. 2d 1076, 1081 (C.D. Cal. 2010).

¹¹⁵ *See Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1053 (8th Cir. 2000).

¹¹⁶ *Id.* at 1053; *Kandel*, 683 F. Supp. 2d at 1083.

¹¹⁷ *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 966 (3d Cir. 1988).

¹¹⁸ *Upjohn*, 449 U.S. at 389; One of the frequent articulations of when attorney-client privilege applies is: “(1) where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.” 8 J. WIGMORE EVIDENCE § 2292 (John T. McNaughton rev. ed. 1961); *See United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009); *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010); *United States v. Bisanti*, 414 F.3d 168, 171 (1st Cir. 2005); *In re Richard Roe, Inc.*, 68 F.3d 38, 39-40 (2d Cir. 1995).

¹¹⁹ EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE, 67 (5th ed. 2007).

¹²⁰ 8 J. WIGMORE EVIDENCE § 2292 (John T. McNaughton rev. ed. 1961); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 90 (3d Cir. 1992).

¹²¹ *Upjohn*, 449 U.S. at 395-96; *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985).

¹²² *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984).

¹²³ *Upjohn*, 449 U.S. at 395.

¹²⁴ EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE, 78-82 (citing *Tax Analyst v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997); *Evans v. Atwood*, F.R.D. 1, 3 (D.D.C. 1997); *Mead Data Cent. Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 253-54 (D.C. Cir. 1977)).

¹²⁵ *Upjohn*, 449 U.S. at 390; *Radiant Burners, Inc. v. Am. Gas Ass'n*, 320 F.2d 314, 322-23 (7th Cir. 1963); *Garner v. Wolfenbarger*, 430 F.3d 1093, 1097, n.10 (5th Cir. 1970).

¹²⁶ *Upjohn*, 449 U.S. 383.

¹²⁷ *Id.* at 393-94.

¹²⁸ *FTC v. GlaxoSmithKline*, 294 F.3d 141, 147-48 (D.C. Cir. 2002); *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977).

¹²⁹ *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001); *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 124-25 (3d Cir. 1986); *Diversified Indus. Inc.*, 572 F.2d at 611 n.5; *Graf*, 610 F.3d at 1159-60; *See also, In re Grand Jury Proceedings*, 156 F.3d 1038, 1041 (10th Cir. 1998).

¹³⁰ *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d at 123; *See In re Grand Jury Subpoena*, 274 F.3d at 571; *Graf*, 610 F.3d at 1159-60; *In re Grand Jury Proceedings*, 156 F.3d at 1040-41; *cf. In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 338 n.3, 340 n.6 (4th Cir. 2005) (noting that the Fourth Circuit has adopted the *Jones (United States v. Jones)*, 696 F.2d 1069 (4th Cir. 1982)) test instead of the *Bevill* test).

¹³¹ *See In re Grand Jury Subpoena: Under Seal*, 415 F.3d at 339.

¹³² *Ross v. City of Memphis*, 423 F.3d 596, 605 (6th Cir. 2005).

¹³³ EPSTEIN, 235-46; *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1016 n.6 (1st Cir. 1988).

¹³⁴ *United States v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009); *See also United States v. Lawless*, 709 F.2d 485 (7th Cir. 1983) (information given to an attorney for purposes of preparing estate tax return is not privileged because there is an expectation that the information will be disclosed); *cf. United States v. (Under Seal)*, 748 F.2d 871, 875-76 (4th Cir. 1984) (client communications to an attorney for purposes of exploring whether to file public papers may be privileged if the client subsequently decides not to make the public disclosure because the

client retained a reasonable expectation of confidentiality).

¹³⁵ *Upjohn*, 449 U.S. at 394.

¹³⁶ *Hardy v. New York News Inc.*, 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987) (“When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved.”); *Henson v. Wyeth Labs., Inc.*, 118 F.R.D. 584, 587 (W.D. Va. 1987) (“[F]or the privilege to apply, the client’s confidential communication ‘must be for the primary purpose of soliciting legal, rather than business, advice.’” (citation omitted) Court found that communications were not privileged because the primary purposes was ongoing business development); *N. Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 516-17 (M.D.N.C. 1986) (communications not privileged because they pertained to business information and did not contain specific requests for legal advice or services).

¹³⁷ *In re Allen*, 106 F.3d 582, 603 (4th Cir. 1997) (citation omitted).

¹³⁸ *Sandra T.E. v. S. Berwyn School Dist.*, 600 F.3d 612, 620 (7th Cir. 2009).

¹³⁹ *Mission Nat’l Ins. Co. v. Lilly*, 112 F.R.D. 160, 162 (D. Minn. 1986).

¹⁴⁰ *Id.* at 163 (citations and internal quotation marks omitted).

¹⁴¹ *Mcgrath v. Nassau County Health Care Corp.*, 204 F.R.D. 240, 245-46 (E.D.N.Y. 2001); *Brownell v. Roadway Package Sys.*, 185 F.R.D. 19, 25 (N.D.N.Y. 1999); *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084, 1096-97 (D.N.J. 1996); *See also, In re Grand Jury Proceedings*, 219 F.3d at 182-83.

¹⁴² *Brownell*, 185 F.R.D. at 25 (“The only way that Plaintiff, or the finder of fact, can determine the reasonableness of Defendant’s investigation is through full disclosure of the contents thereof.”); *Harding*, 914 F. Supp. at 1096.

¹⁴³ *Harding*, 914 F. Supp. at 1096; *Brownell*, 185 F.R.D. at 25.

¹⁴⁴ *Id.*

¹⁴⁵ *Bullion v. Fed. Deposit Ins. Corp.*, 881 F.2d 1368, 1377-78 (5th Cir. 1989); *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11, 13 (N.D. Ill. 1972) (holding that the use of privileged documents to refresh witnesses’ recollection constituted a waiver of privilege; “[C]ounsel is entitled to inspect any writing used by a witness to refresh his recollection for use on cross examination.”).

¹⁴⁶ *Thomas v. Euro RSCG Life*, 264 F.R.D. 120, 122 (S.D.N.Y. 2010).

¹⁴⁷ *Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs., Inc.*, 81 F.R.D. 8, 9-11 (N.D. Ill. 1978); *Marshall v. U.S. Postal Serv.*, 88 F.R.D. 348, 350 (D.D.C. 1980).

¹⁴⁸ *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348-49 (1985); *U.S. v. Int’l Bhd. of Teamsters*, 119 F.3d 210, 215-16 (2d Cir. 1997); *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d at 124; *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996); *Chronicle Pub. Co. v. Hantzis*, 732 F. Supp. 270, 273 (D. Mass. 1990).

¹⁴⁹ *Weintraub*, 471 U.S. at 348-49 (footnote omitted).

¹⁵⁰ *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

¹⁵¹ *Id.*

¹⁵² Fed.R.Civ. P. 26(b)(3).

¹⁵³ *Hodges, Grant & Kaufmann v. United States Government, Department of the Treasury, Internal Revenue Service*, 768 F.2d 719, 721 (5th Cir.1985).

¹⁵⁴ Fed.R.Civ. 26(b)(3) 1970 Amendment.

¹⁵⁵ *Freiermuth v. PPG Indus., Inc.*, 218 F.R.D. 694, 700 (N.D. Ala. 2003).

¹⁵⁶ *Abel v. Merrill Lynch & Co., Inc.*, 1993 WL 33348, at *2, *4 (S.D.N.Y. 1993) (holding remote possibility of litigation did not preclude discoverability of demographic reports).

¹⁵⁷ *See e.g., United States v. Aldman*, 134 F.3d 1194, 1202-04 (2d Cir. 1998); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992); *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 438-39 (6th Cir. 2009); *Binks Mfg. Co. v. Nat’l Presto Indus., Inc.*, 709 F.2d 1109, 1118-20 (7th Cir. 1983); *PepsiCo, Inc. v. Baird, Kurtz, & Dobson LLP*, 305 F.3d 813, 817 (8th Cir. 2002); *In re Grand Jury Subpoena*, 357 F.3d 900, 906-09 (9th Cir. 2004); *Senate of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 586 (D.C. Cir. 1987).

¹⁵⁸ 8 Federal Practice & Procedure § 2024, at 343 (1994).

¹⁵⁹ *Aldman*, 134 F.3d at 1202.

¹⁶⁰ *Id.* at 542.

¹⁶¹ *See generally United States v. Textron, Inc.*, 577 F.3d 21 (1st Cir. 2009).

¹⁶² *Id.* at 29.

¹⁶³ Fed.R.Civ.P. 26(b)(3)

¹⁶⁴ *Fletcher v. Union Pac. R.R.*, 194 F.R.D. 666, 671 (S.D. Cal. 2000).

¹⁶⁵ *Id.*

¹⁶⁶ *Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19 (N.D.N.Y. March 19, 1999).

¹⁶⁷ See *In re Univ. Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 673 (D. Kan. 2005); *Stafford Trading, Inc. v. Lovely*, 2007 WL 611252, at *7 (N.D. Ill. Feb. 22, 2007).

¹⁶⁸ *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125, *6 (S.D.N.Y. Dec. 23, 1993).

¹⁶⁹ See, e.g., *Brownwell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19, 25 (N.D.N.Y. 1999) (work product protection to prevent disclosure of statements during harassment investigation waived where employer raised adequacy of investigation as a defense); *Peterson v. Wallace Computer Servs.*, 984 F.Supp. 821, 826 (D. Vt. 1997) (investigative notes and memoranda not protected where employer asserted adequacy of investigation as a defense).

¹⁷⁰ See *EEOC v. Outback Steakhouse of Florida, Inc.*, 251 F.R.D. 603, 611-12 (D. Colo. 2008) (holding waiver of the attorney work-product doctrine extended to all responsive documents, including attorney's investigative notes that included mental impressions, where employer raised the *Faragher/Ellerth* defense).

¹⁷¹ *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084 (D.N.J. 1996).

¹⁷² *Id.* at 1099.

¹⁷³ *Pray v. The New York City Ballet Co.*, 1997 WL 266980, at *1 (S.D.N.Y. 1997); *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144, 146 (S.D.N.Y. 1999) (holding work-product protection is not waived where employer explicitly confirmed its position that it would not rely on its investigation as a defense).

¹⁷⁴ *EEOC v. Rose Casual Dining, L.P.*, 2004 WL 231287 (E.D. Pa. Jan. 23, 2004).

¹⁷⁵ *Thomas v. Euro RSCG Life*, 264 F.R.D. 120, 122 (S.D.N.Y. 2010).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See e.g., *United States v. Agnello*, 135 F. Supp. 2d 380, 384-85 (E.D.N.Y. 2001) (holding only management could waive protection); *Moskowitz v. Lopp*, 128 F.R.D. 624, 638 (E.D. Pa. 1989) (holding employee with access to confidential information waived protection); *Jonathan Corp. v. Prime Computer, Inc.*, 114 F.R.D. 693, 696 n.6, 698-99 (E.D. Va. 1987) (same).

¹⁷⁹ *In re Grand Jury Proceedings*, 219 F.3d 175 (2d Cir. 2000).

¹⁸⁰ Restatement (Third) of Law Governing Lawyers § 78 cmt. C (2000).

¹⁸¹ See e.g., *Hercules, Inc. v. Exxon Corp.*, 434 F.Supp. 136, 156 (D.Del. 1977) (holding the work-product doctrine protects the attorney's own work and may only be invoked by the attorney); *Federal Land Bank v. Federal Intermediate Credit Bank*, 127 F.R.D. 473, 480 (S.D. Miss. 1989), rev'd in part on other grounds, 128 F.R.D. 182 (S.D. Miss. 1989) (holding opinion work product belongs to the attorney).

¹⁸² *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982); *Peterson v. Wallace Computer Servs., Inc.*, 984 F. Supp. 821, 825 (D. Vt. 1997).

¹⁸³ *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 295 (6th Cir. 2002); *Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003); *In re Pacific Pictures Corp.*, 2012 WL 1293534 (9th Cir. 2012); *In re Qwest Comm. Int'l*, 450 F.3d 1179, 1197 (10th Cir. 2006); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981); *Genentech Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1416-18 (Fed. Cir. 1997).

¹⁸⁴ *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686 (1st Cir. 1997); *Republic of Philippines*, 951 F.2d at 1426-27; *In re Colombia/HCA Healthcare*, 293 F.3d at 295.

¹⁸⁵ *Genentech, Inc.*, 122 F.3d 1409, 1416-18 (Fed. Cir. 1997); *In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir. 1982); *In re Martin Marietta Corp.*, 856 F.2d 619, 622 (4th Cir. 1988).

¹⁸⁶ *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 599 (8th Cir. 1977).

¹⁸⁷ *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970); see also *Tharp v. Sivyer Steel Corp.*, 149 F.R.D. 177, 179-80 (S.D. Iowa 1993) (reviewing the history of the self-critical analysis).

¹⁸⁸ *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283, 285 (N.D.Ga. 1971); *Tharp*, 149 F.R.D. at 180.

¹⁸⁹ James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551, 555-56 (1983).

¹⁹⁰ *Bredice*, 50 F.R.D. at 250-51; *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992).

¹⁹¹ See, e.g., *Dowling*, 971 F.2d at 426 (rejecting the privilege in the context of a routine internal corporate review of safety issues).

¹⁹² *Compare Johnson v. United Parcel Serv.*, 206 F.R.D. 686, 693 (M.D. Fla. 2002) (rejecting the privilege under Title VII) with *Reid v. Lockheed Martin Aeronautics Co.*,

199 F.R.D. 379, 387-88 (N.D.Ga. 2001) (reviewing the split decisions regarding the self-critical analysis, and applying it to internal reports concerning work culture).

¹⁹³ *Paladino v. Woodloch Pines, Inc.*, 188 F.R.D. 224, 225-26 (M.D. Penn. 1999).

¹⁹⁴ *Etienne v. Mitre Corp.*, 146 F.R.D. 145, 147-48 (E.D.Va. 1993).

¹⁹⁵ *Walker v. County of Contra Costa*, 227 F.R.D. 529, 532-33 (N.D. Cal. 2005) (recognizing the split within districts).

¹⁹⁶ James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 GEO. WASH. L. REV. 551, 552-53 (1983).

¹⁹⁷ *Walker*, 227 F.R.D. at 532-33.

¹⁹⁸ *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

¹⁹⁹ *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1059 (10th Cir. 2009).

²⁰⁰ *See id.*; *see also, e.g., Weger v. City of Ladue*, 500 F.3d 710, 719-20 (8th Cir. 2007); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1297-99 (11th Cir. 2000); *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811-12 (7th Cir. 1999); *Helm v. Kansas*, 656 F.3d 1277, 1288 (10th Cir. 2011).

²⁰¹ *See Varner v. Nat'l Super Markets, Inc.*, 94 F.3d 1209, 1213-14 (8th Cir. 1996); *Scrivner v. Socorro Indep. Sch. Dist.*, 169 F.3d 969, 971 (5th Cir. 1999).

²⁰² *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349-50 (6th Cir. 2005) (citations omitted).

²⁰³ *Gordon v. Shafer Contracting Co., Inc.*, 469 F.3d 1191, 1195 (8th Cir. 2006); *see Williams v. Mo. Dep't of Mental Health*, 407 F.3d 972, 976-77 (8th Cir. 2005) (finding that an employer's anti-harassment policy, with a non-retaliation provision and a flexible reporting procedure, satisfies the employer's duty under the prevention prong).

²⁰⁴ *See Helm*, 656 F.3d at 1288; *Agusty-Reyes v. Dep't of Educ.*, 601 F.3d 45, 55 (1st Cir. 2010); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1314-15 (11th Cir. 2001); *see also Faragher*, 524 U.S. at 808 (holding that the employer failed to exercise reasonable care to prevent harassment where, among other things, it "entirely failed to disseminate its policy against sexual harassment among [its] employees").

²⁰⁵ EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Notice 915.002, June 18, 1999.

²⁰⁶ *See Model EEO Programs Must Have An Effective Anti-Harassment Program*, available at http://www.eeoc.gov/federal/model_eeo-programs.cfm.

²⁰⁷ *See Chaloult v. Interstate Brands Corp.*, 540 F.3d 64, 74 (1st Cir. 2008) (employee training regarding policies demonstrates an employer acted reasonably in preventing harassment); *Williams v. Barnhill's Buffet Inc.*, 290 Fed. Appx. 759, 763 (5th Cir. 2008) (Company acted reasonably when the company regularly conducted training for its employees on the anti-harassment policy); *Shabestari v. Utah Non-profit Housing*, 377 Fed. Appx. 770, 773 (10th Cir. 2010) (Employer who conducted annual anti-harassment training exercised reasonable care to prevent or correct harassing behavior in the workplace.); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 870 (9th Cir. 2001) (A training program about sexual harassment, which all employees attend when hired, and annually thereafter, defined sexual harassment and instructed employees how to report complaints, was reasonable).

²⁰⁸ *See, e.g., Dearth v. Collins*, 441 F.3d 931, 935 & 936 n.5 (11th Cir. 2006) (per curiam); *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 265, 268 (4th Cir. 2001); *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1180 (9th Cir. 2001); *Shaw*, 180 F.3d at 811-12; *cf. Thornton v. Fed. Express Corp.*, 530 F.3d 451, 456-57 (6th Cir. 2008) (stating that an effective sexual harassment policy should, among other things, provide for training regarding the policy, but then observing that there was no dispute regarding the reasonableness of the employer's prevention efforts where the employer distributed its policy via an employee handbook and the plaintiff received more than one copy of the handbook during her employment).

²⁰⁹ *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 811 (7th Cir. 1999).

²¹⁰ *Id.* at 812.

²¹¹ *Id.*

²¹² *See Pinkerton*, 563 F.3d at 1062; *see also Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 953 (7th Cir. 2005); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 188 (4th Cir. 2001) ("[A] jury could rationally conclude that, although [the employer's] institution of an anti-harassment policy represented a reasonable step toward preventing the type of abuse suffered by [the employee], the company unreasonably failed to correct [the supervisor's] offending behavior by neglecting to enforce the policy.").

²¹³ *Frederick*, 246 F.3d at 1314.

²¹⁴ *Swenson*, 271 F.3d at 1193.

²¹⁵ *Id.* at 1189.

²¹⁶ *Id.* at 1192-1194.

²¹⁷ *Id.* at 1198; *see also Cerros*, 398 F.3d at 954 ("Our cases recognize prompt investigation of the alleged misconduct as a hallmark of reasonable corrective action."); *see, e.g., Van Zant v. KLM Royal Dutch*

Airlines, 80 F.3d 708, 715 (2d Cir. 1996) (employer's response prompt where it began investigation on the day that complaint was made, conducted interviews within two days, and fired the harasser within ten days); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (employer's response to complaints were inadequate despite eventual discharge of harasser where it did not seriously investigate or strongly reprimand supervisor until after plaintiff filed charge with state FEP agency), *cert. denied*, 513 U.S. 1082 (1995); *Saxton v. AT&T*, 10 F.3d 526, 535 (7th Cir. 1993) (investigation prompt where it began one day after complaint and a detailed report was completed two weeks later); *Nash v. Electrospace Systems, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993) (prompt investigation completed within one week); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 319-20 (7th Cir. 1992) (adequate investigation completed within four days).

²¹⁸ See Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Notice 915.002, June 18, 1999.

²¹⁹ *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999); *Knabe v. Boury Corp.*, 114 F.3d 407, 411-12 n.8 (3d Cir. 1997); *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991); *Saxton*, 10 F.3d at 535; *Katz v. Dole*, 709 F.2d 251, 255-56 (4th Cir. 1983).

²²⁰ *Jenkins v. Winter*, 540 F.3d 742, 749 (8th Cir. 2008) (quotations and internal alterations omitted).

²²¹ See *Knabe*, 114 F.3d at 413; *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 578, 578 n.6 (10th Cir. 1990); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987); *Barrett v. Omaha Nat. Bank*, 726 F.2d 424, 427 (8th Cir. 1984); *cf. Ellison*, 924 F.2d at 882 (citing EEOC Compliance Manual (CCH) § 615.4(a)(9)(iii), P 3103, at 3213 (1988)).

²²² *Faragher*, 524 U.S. at 789; see *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1265 (8th Cir. 1997); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015-16 (8th Cir. 1988); *Skidmore v. Precision Printing & Packaging Inc.*, 188 F.3d 606, 615-16 (5th Cir. 1999); *Nash*, 9 F.3d at 402; *Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1029-30 (7th Cir. 2004).

²²³ *Knabe*, 114 F.3d at 411-12 n.8 (3d Cir. 1997).

²²⁴ *EEOC v. Xerxes Corp.*, 639 F.3d 658, 670 (4th Cir. 2011).

²²⁵ See *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (employer remedial action for sexual harassment by supervisor inadequate where it twice changed plaintiff's shift to get her away from supervisor rather than change his shift or work area), *cert. denied*, 513 U.S. 1082 (1995); see also *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”).

²²⁶ *Banner Health Systems d/b/a/ Banner Estrella Medical Center*, 358 N.L.R.B. No. 93 (2012).

²²⁷ *Id.* at *2.

²²⁸ *Verso Paper*, NLRB Div. of Advice, No. 30-CA-089350 (Jan. 29, 2013).

²²⁹ *TRW Inc. v. Superior Court*, 31 Cal. Rptr. 2d 460, 466 (Ct. App. 1994); see generally *Winkley v. Bristol-Myers Squibb Co.*, 793 F. Supp. 738 (E.D. Mich. 1992).

²³⁰ *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), *rev'd on other grounds*, 344 F.2d 617 (8th Cir. 1965).

²³¹ No. 8:09-CV-288, 2011 WL 612061, at *6 (D. Neb. February 10, 2011).

²³² *Id.* at *6 (citations omitted).

²³³ *Id.* at **6-7 (citations omitted).