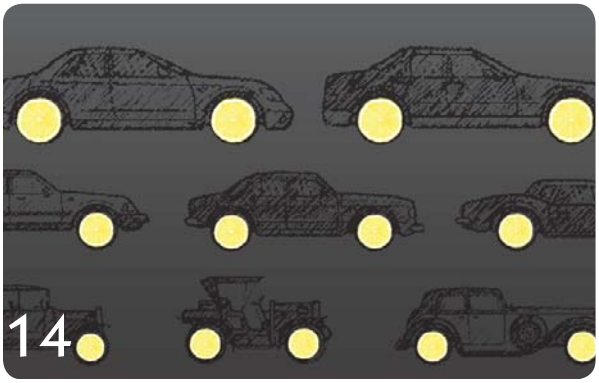
CONTENTS

VALLEY LAWYER
A Publication of the San Fernando Valley Bar Association



FEATURES

DEPARTMENTS

By Kenneth J. Rose and Robert H. Rose

Workplace Investigations in the #MeToo Era

SINCE THE OCTOBER 2017 revelations detailing decades of alleged sexual harassment and assault by Hollywood mogul Harvey Weinstein, the news cycle has been filled with one public figure after another facing accusations of sexual impropriety, followed by being placed on administrative leave, being fired or resigning—during or after an internal investigation of the alleged misconduct.

The sheer number of new accusers and individuals accused has been staggering with Hollywood, Las Vegas, and Washington D.C. particularly coming under fire for what has been described as a culture of powerful individuals taking advantage of those in their control.

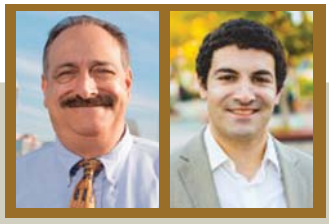
Since the accusations against Weinstein surfaced, there has been a growing list of high profile men who were fired or resigned after accusations—that they engaged in sexual misconduct toward co-workers—were corroborated to the satisfaction of their employer and Board of Directors based on an internal investigation. This list of the accused includes television personalities Matt Lauer and Charlie Rose, former U.S. Senator Al Franken, actor Kevin Spacey, and, most recently, billionaire casino developer Steve Wynn.

Even the judiciary has not been spared. Sexual harassment claims appear to have ended the judicial career of Ninth Circuit Court of Appeals Judge Alex Kozinski. On December 18, 2017, Kozinski retired from the Bench, effective immediately, after *The Washington Post* reported on claims by six women, including former judicial clerks and more junior staff members, that he subjected them to inappropriate behavior, including sexual conduct and comments.

It should come as no great shock that *Time* magazine named Silence Breakers as its 2017 Person of the Year.

Federal and state lawmakers are searching for new ways to complement existing anti-discrimination laws and help eliminate sexual harassment. Congress' recently enacted Tax Cuts and Jobs Act[1] amends section 162 of the Internal Revenue Code by removing as a business tax deduction the amount of a financial settlement related to a sexual harassment or abuse claim if the settlement is subject to a non-disclosure agreement.

Bills recently introduced before Congress include the Ending Forced



Kenneth J. Rose and **Robert H. Rose** are the principals and employment law specialists with The Rose Group APLC and TRG Workplace Investigations. Both regularly conduct workplace investigations throughout California and can be reached at krose@rosegroup.us and rrose@rosegroup.us.

Arbitration of Sexual Harassment Act of 2017,[2] which would prohibit employers from enforcing pre-dispute employment arbitration agreements with respect to employee allegations of workplace sexual harassment or any claim of gender discrimination filed under Title VII of the Civil Rights Act of 1964.[3] Instead of being compelled to litigate workplace allegations of sexual harassment before a private arbitrator, complainants would be allowed to bring their claims in court.

Before the California Senate is a bill[4] which if enacted, would invalidate non-disclosure provisions in settlements of lawsuits where the pleadings state a cause of action for sexual assault, sexual harassment, or workplace discrimination based on sex (unless the plaintiff requests the inclusion of a non-disclosure provision).

But while the famous and infamous have grabbed most of the headlines to date, accusations of sexual harassment extend far beyond the walls of Congress, casinos and Hollywood movie studios. Complaints of sexual misconduct can arise in every type of workplace, big or small, private or governmental, for profit or not-for-profit. No prudent employer can ignore the warning signs.

In corporate America, boards of directors and executive management are asking, "What should our company do when presented with an allegation of sexual harassment?" The same questions are being asked at all levels of local, state and federal government. The default answer should be that, as a first step, an impartial investigation will be undertaken immediately.

The avalanche of #MeToo sexual harassment claims across the nation has further underscored that all employers need to have policies and procedures in place to conduct prompt workplace investigations. For employers who learn of sexual harassment allegations either directly or indirectly, being proactive is crucial. To know what action to take, or to find out whether action is even necessary, the employer is compelled by law to investigate the situation and ascertain the facts.

Investigating Sexual Harassment Complaint Is the Law

The Equal Employment Opportunity Commission's (EEOC) *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*[5] states that, "An employer should set up a mechanism for a prompt, thorough and impartial investigation into alleged harassment."

In California, the Fair Employment and Housing Act (FEHA) requires employers to take "all reasonable steps necessary to prevent discrimination and harassment from occurring."[6] FEHA further makes it unlawful for an employer who "knows or should have known of this conduct and fails to take immediate and appropriate corrective action."[7]

The duty to prevent harassment and to take corrective action for any harassment an employer should have known about has been interpreted by courts as an employer's duty to thoroughly investigate complaints of sexual harassment.[8] The failure to do so can open an employer to additional liability for "failure to take all reasonable steps necessary to prevent discrimination and harassment from occurring."[9]

Investigation: An Employers' Most Effective Deterrent

Employers should investigate all reports and complaints of sexual harassment no matter what the employer thinks of the merits of the complaint. Besides the obvious strategic value in having investigations as a risk management tool, as stated, employers are required by law to promptly investigate all complaints of sexual harassment in the workplace.

Whether the accusations of sexual harassment are litigated in the court of

public opinion or in the state or federal courts, or by private arbitration, having a full view of the situation before it gets out of control makes all the difference. Undertaking an immediate thorough investigation of complaints—or even rumors—of sexual harassment ensures that before the accusations evolve into a challenging lawsuit, the employer and legal counsel are fully aware of the extent of the accusations, and the witnesses and evidence which either support or refute them. As a result, the employer will be much better prepared to appropriately respond and pro-actively manage the situation.

Conversely, should an employer react slowly or fail to thoroughly investigate a complaint or fail to investigate at all—in addition to the reputational damage such accusations can cause—the costs of defending and potentially paying substantial damages in a lawsuit for sexual harassment can be overwhelming. Once an accusation of sexual harassment has advanced to the level of a court complaint of sexual harassment, the litigation discovery process to uncover the good, the bad, and the ugly evidence of what would have been revealed by a timely and thorough investigation could cost upwards of hundreds of thousands of dollars and take a year or more to complete.

If an investigation reveals that sexual harassment has occurred, and the alleged harasser is terminated as a result, the existence of a thorough and fair investigation provides a strong defense against a wrongful termination claim.[10] The recent California Court of Appeal decision in *Jameson v. Pacific Gas & Elec. Co.*[11] is instructive on the value of workplace investigations. The employee was terminated based on an outside investigator's report which concluded that the employee had retaliated against another employee for making a workplace safety complaint.

The employee sued for wrongful termination, claimed that PG&E's investigation was inadequate, and that the investigator, who was a former in-house attorney for PG&E, was not only biased, but had failed to interview identified witnesses or sufficiently consider plaintiff employee's arguments and evidence. Affirming the trial court's grant of summary judgment in favor of PG&E, the Court of Appeals held that PG&E had good cause as a matter of law to terminate the employee because it had relied upon the investigation.

The court opined that "the issue is not whether investigator's conclusions were correct or whether her investigation could have been better or more comprehensive. The question, rather, is whether PG&E's determination…was reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pre-textual."[12]

Conversely, an investigation which exonerates the accused that is not thorough and fair may be used by the complainant as evidence of unlawful retaliation for the protected activity of presenting complaints of harassment to the employer.

Selecting an Experienced Independent Investigator

Once the decision is made to launch an investigation, the next step is to decide who should conduct the investigation.

Using external, objective, and unbiased resources is critical to protect the both the employer and the individuals involved. Without impartial scrutiny respectful of all parties, future investigations will be hampered, fewer victims will report issues, and witnesses and offenders will be less likely to cooperate. Having an efficient and respectful process will, in the end, demonstrate the employer's commitment to all stakeholders.

It is fundamental that the employer assign an investigator who is well-versed in employment law and is properly trained, experienced, objective, skilled, credible, and not inhibited from

reporting his or her findings. A good investigator must be able to develop an effective investigation plan and must be experienced in reaching only those conclusions that are appropriate to the facts.

Employers may often be inclined to conduct an investigation internally or have it conducted by outside legal counsel. However, the employer should be cautious when proceeding down this path, as it doesn't come without hurdles such as an apparent lack of impartiality and independence.

On the other hand, selecting an independent attorney investigator who specializes in employment law—but has not been providing the employer with legal advice—brings neutrality to the investigation, yet offers the option of protecting the investigation under attorney-client privilege while the investigation is ongoing. However, if the investigation is relied on by the employer to make a decision that is challenged through a lawsuit, the investigation will no longer be protected by attorney-client privilege. Instead, it would be subject to discovery, with the investigator possibly called upon to testify at a deposition or at trial.

An experienced outside attorney investigator will be able to determine the necessary depth of an investigation based on the allegations, the employer's policies, and the applicable state and federal laws implicated. The investigation should uncover the facts to make a fair determination of whether any misconduct has occurred. Through confidential interviews of witnesses and review of relevant documents, an experienced investigator will be able to provide findings which will enable an employer to take steps to prevent further harassment or to counter false accusations (oftentimes before a lawsuit has been filed), identify whether any employee is guilty of misconduct, and put a stop to further wrongful actions.

> "An employer should set up a mechanism for a prompt, thorough and impartial investigation into alleged harassment."

The Take Away

The #MeToo movement has had the effect of making everyone pay closer attention to the issue of sexual harassment in the workplace. Accusers may now be more likely to come forward and the public is poised to pounce on any hint that such conduct has not been adequately investigated and dealt with.

Although nothing can fully insulate against employees making either legitimate or unsubstantiated complaints, legal counsel should urge their clients to immediately bring in an outside investigator with legal experience to review any accusations of workplace sexual harassment. Engaging an independent investigator is not only the right thing to do, it also gives employers the best chance of protecting themselves from potentially significant financial liability and irreparable reputational harm.

---

[1] Public Law No. 115-97 (December 22, 2017).
[2] H.R. 4734 and S. 2203, 115th Cong. (2017).
[3] 42 U.S.C. §2000e et seq. (1964).
[4] SB 820, 2017–2018 Reg. Sess. (CA 2018).
[5] EEOC Compliance Manual (BNA), N:4075 [Binder 3], available at www.eeoc.gov.
[6] Cal. Gov't Code §12940(k).
[7] Cal. Gov't Code §12940(j).
[8] See, e.g., *Holly D. v California Inst. of Technol.*, 339 F3d 1158, 1177 (9th Cir 2003).
[9] Cal. Gov't Code §12940(k).
[10] *Cotran v Rollins Hudig Hall Int'l, Inc.*, 17 C4th 93 (1998); *Silva v Lucky Stores, Inc.*, 65 CA4th 256 (1998).
[11] *Jameson v. Pacific Gas & Elec. Co.*, 16 Cal. App. 5th 901 (2017).
[12] *Id.* at 910.