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9:00 AM - 10:30 AM

508 – Investigating Employee Misconduct Across Borders

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Little Mendelson, P.C., Ius Laboris Member (USA)

Ashley Watson

VP and Chief Ethics & Compliance Officer

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Faculty Biographies

Christopher Hitchins

Christopher Hitchins is a partner in the employment, reward and immigration team at the UK law firm, Lewis Silkin LLP, and is based in London in the UK. He advises on the full range of English law contentious and non-contentious employment law matters, with a particular expertise in managing senior executive exits, advising on business restructures (in particular, relating to TUPE) and managing complex projects (such as the harmonisation of employee terms and conditions across a corporate group), often with an international element.

Prior to joining Lewis Silkin, Mr. Hitchins was a partner in the London office of Morgan, Lewis & Bockius, and the London practice group leader of the labour and employment practice group. Prior to joining Morgan Lewis, he was of counsel in the employment and benefits group at Latham & Watkins. Mr. Hitchins has over 12 years' experience working in US law firms, and consequently has first-hand experience of the requirements of a multi-national employer, in particular those with a US presence.

Mr. Hitchins received a BA (honors) in Law from the University of Sheffield in the UK, and a Postgraduate Diploma in Law from the College of Law in Chester.

Heather McAllister
Special Counsel
Hilton Worldwide

Tahl Tyson

Tahl Tyson is a shareholder in Littler Mendelson. She is dual-qualified in the U.S. and U.K., and has over 20 years of experience in international employment law as in-house counsel and in private practice. Ms. Tahl provides pragmatic advice to multi-national employers based on her practical experience with a wide variety of international and cross-border matters. Examples include: multi-jurisdictional legal compliance programs, cross-border internal investigations and whistleblower hotlines, employee data privacy issues, global policies, templates such as employment contracts, new market expansions, restructuring and layoffs (including situations implicating Acquired Rights Directive and TUPE).

Just prior to joining Littler, Ms. Tyson was senior counsel and on the HR leadership team for a global publicly traded company, where she provided strategic and tactical advice to global human resources and cross-functional teams on workplace issues spanning over 40 countries. While resident in the company's Paris office, she had legal, human resources and site leadership responsibilities, including works council negotiations, and all other aspects of employment issues in France.

Ms. Tyson also has significant Asia-Pacific experience: she majored in Chinese studies at Yale, and was among the earliest Westerners to study and teach in China in the immediate post-Mao era. She was a recipient of a Congressionally-funded graduate degree fellowship at the East-West Center, where she worked on China energy research while pursuing an MA and MBA focused on East Asia. She received a JD from the University of Washington School of Law.

Ashley Watson

Ashley Watson is vice president and chief ethics and compliance officer for Hewlett-Packard Company. She oversees the strategy and implementation of HP's ethics and compliance program, which includes ethical decision making based on HP's standards of business conduct and both internal and external investigations. Her team is also responsible for social and environmental sustainability and compliance, privacy, global records management and the HP Foundation.

Before joining HP, Ms. Watson was vice president, general counsel and corporate secretary at Attenex. In this position, she was responsible for all company legal matters, including M&A, strategic alliances, IP policy, risk management and compliance. She also managed the legal department staff and outside counsel activities. She was previously senior litigation counsel at BellSouth Corporation, responsible for complex litigation.

Ms. Watson holds a JD from the University of Georgia and her undergraduate degree from the University of North Carolina at Chapel Hill.

Investigating Employee Misconduct Across Borders

Issues and Practical Steps for the Multinational Lawyer

Panel

- Fred Green, Senior Attorney, Microsoft
- Christopher Hitchins, Partner, Lewis Silkin, Ius Laboris UK
- Michelle Marchant, Associate General Counsel, Clearwire, Inc.
- Tahl Tyson, Shareholder, Littler Mendelson, Ius Laboris USA

Overview

We will cover:

- How to approach an international investigation as in-house counsel
- What to do in the first 72 hours?
- Legal and practical issue spotting; legal and ethical responsibilities
- Understand critical issues relating to global investigations

Topics



- Attorney-client privilege
- Whistleblower issues
- Ethics
- Public Relations
- Evidence gathering
- Governing laws
- Investigations
- Interim measures
- Data privacy, employee rights
- Post-investigation matters

OUR STORY BEGINS



Overview of Key Facts TryBest, Inc. and Aamil Attisha

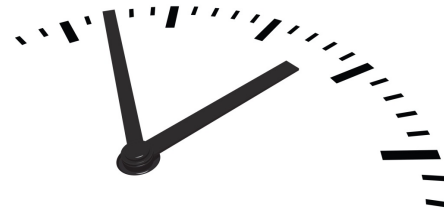
- TryBest, Inc. is a multinational IT company, with a mobile and international workforce
- Many project teams are staffed with employees based in different countries
- Consequently, reporting lines are across borders
- Employees are frequently required to travel and/or spend time overseas while assigned to client projects
- Work on these projects often requires TryBest employees to work onsite at a client's premises
- Aamil Attisha is a "First Wave Engineer"; he is based in the U.S., and reports to Ellie Parsons, who is based in the UK
- Aamil is in his fifties, and has worked for TryBest for 26 years
- He believes he has been harassed (by Ted Bacon, another First Wave Engineer); lots of online interaction
- Cast aside by Ellie during Omneez project (a big account with a high-profile client) on location at client site in India
- Alleges several "bad acts"
- Tells you he quits

Ellie Parsons and Ted Bacon

- Ellie Parson is a First Wave Manager. She is Aamil's boss, and a rising star in the organization. She is based in the UK.
- She has previously counseled Aamil on interpersonal problems
- No documentation
- She is very close friends with Ted Bacon, one of Aamil's co-workers
- She denies the "bad acts"
- Ted Bacon is one of Aamil's co-workers, also a First Wave Engineer
- He is based in France
- He is constantly playing "jokes" on his fellow employees. Aamil is a particular target

The First 72 Hours

**We have 10 minutes to plan the next
72 Hours**



The First 72 Hours - Planning Sheet

The First 72 Hours ~ Planning Sheet

ALLEGATIONS _____ _____ _____		DAY 1 1) _____ _____ 2) _____ _____ 3) _____ _____ 4) _____ _____ 5) _____ _____ _____	DAY 2 1) _____ _____ 2) _____ _____ 3) _____ _____ 4) _____ _____ 5) _____ _____ _____	DAY 3 1) _____ _____ 2) _____ _____ 3) _____ _____ 4) _____ _____ 5) _____ _____ _____
ISSUES _____ _____ _____		DAY 1 1) _____ _____ 2) _____ _____ 3) _____ _____ 4) _____ _____ 5) _____ _____ _____	DAY 2 1) _____ _____ 2) _____ _____ 3) _____ _____ 4) _____ _____ 5) _____ _____ _____	DAY 3 1) _____ _____ 2) _____ _____ 3) _____ _____ 4) _____ _____ 5) _____ _____ _____
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The First 72 Hours

- Define the allegations in detail, and assess their credibility
- Issue spot, and indentify laws and policies
- Who needs to know?
- Who will conduct investigations?
- Best use of time during the first 72 hours of an investigation



Critical Steps in The First 72 Hours of An Investigation:

Identifying Allegations Challenges:

- Identifying the allegation or issue and recognizing it as a problem
- Elevating the matter appropriately within the organization
- Ensuring those in authority appropriately respond to the issue

Example reporting procedure:

Allegation category response requirements:

Red alert – emergency issue: Report by phone within 60 minutes

Yellow alert – important issue: Report by e-mail within 24 hours

Critical Steps in The First 72 Hours of An Investigation:

Initial Triage And Planning For Investigation

Routine investigations

- At any given time, companies may have a number of individually minor investigative matters ongoing, which are typically handled by the general counsel's office, internal audit, ethics & compliance officers, and/or internal security departments

Major investigations – key considerations

- Who will sponsor the investigation and take responsibility for it?
- Will the investigation be conducted under the auspices of attorneys to reduce the likelihood that the investigation work product will be disclosed to third parties?
- Who will conduct the investigation?
- What will be the scope of the investigation?
- What will be the initial work plan?
- Who deals with the press and other outsiders?

Plan All 4 Phases Of Investigations

- Pre-investigation
- Investigation of Possible Wrongdoing
- Targeted Investigation
- Post-investigation



Time and Deadlines

- At every stage of the investigation – the employer's position in relation to the employee's position should be reviewed to determine if it is not prejudiced and time limits for applying discipline are not missed
- For example, in France discipline proceedings must be administered within two months of the misconduct



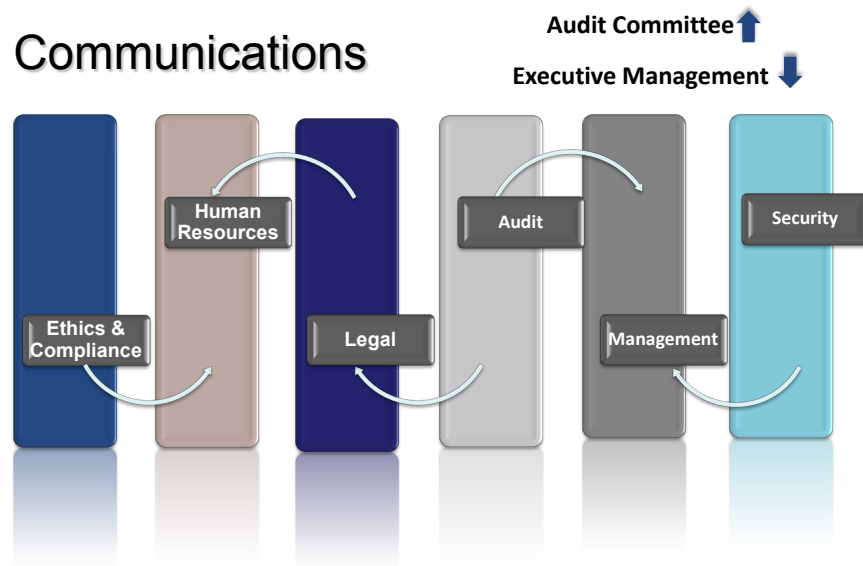
Key Questions

Who:

- HR, Legal, Compliance, Audit Committee, the Board?
- When do you get an outsider?
- In order to make an effective decision several factors must be considered:
 - is management involved?
 - are the executives implicated?
 - does the report involve financial fraud or criminal activity?

Key Questions

- Do you have cooperation across silos?
- Do you have a complete strategic overview?
- What are the allegations?
- What are the legal issues?



Interview Ellie

- Not happy about being called into a meeting; she's a busy type
- She thinks Aamil quit because he couldn't keep up with all the new technology
- She counseled Aamil on his "performance problems with clients" (too opinionated, lack of customer service savvy, bad temper); nothing documented
- She doesn't want to involve clients, especially Paul Amos at Omneez because the project is at such a crucial stage
- Ted joked a lot, and sometimes sent email jokes, "but who doesn't?"
- Ellie says she is friends with Ted outside of work – none of TryBest's business what kind of friendship they have
- Denies ever giving any government official any cash – sometimes she brings the customs folks candy and watches etc. but that is it. Aamil has a huge imagination

ISSUES TO RESOLVE Pre-investigation (1)

Will the investigation process be covered by the attorney/client privilege?

Privilege or Open?

Advantages of each approach?

If you want to maintain the privilege

- The US model
- The UK approach
- n.b. conflicts of laws



ISSUES TO RESOLVE Pre-investigation (2)

Whistleblowing

Is There A Whistleblower?

- Does the report involve specific whistleblower (from US or UK)?
- What are the rights and duties of employee and employer?
- Is the complaint anonymous and what issues does that bring?
- Ensure the whistleblower is taken seriously and think forward about any disciplinary actions

ISSUES TO RESOLVE Pre-investigation (3)

Ethics

Ethical Restrictions On Commenting

JFK and Sam Sheppard: Warren Commission

1969: DR 7-107: Gag rule for lawyers

1974: court's "no-comment" rule violates 1st Amendment
(*Chicago Council of Lawyers v. Bauer* (7th Cir.))

1983: ABA Rule of Professional Conduct 3.6

1991: *Gentile v. State Bar of Nevada* (US): strikes rule re
comments: "An attorney's duties do not begin inside the
courtroom door ... an attorney may take reasonable steps to
defend a client's reputation ... including ... in the court of
public opinion."

1994: ABA Ethics Rule 3.6 grants "right of reply" if "particularly
egregious publicity."

ISSUES TO RESOLVE Pre-investigation (4)

Public Relations

PR as “Specialized Skill”

- Legal public relations consulting
- Not merely “pitching stories”
 - Manage news
 - Work with reporters to understand litigation process
 - Significance of legal rulings, motions
 - Counsel on responding to public attacks
- Understanding of legal world – translate legalese
- Understanding case-specific protective orders

ISSUES TO RESOLVE During the investigation (1)

- **Employee Rights and Obligations**

- Evidence gathering
- Who is the employer? / Governing laws?
- Applicable corporate policies?
- Whistleblowing reporting responsibility
- Obligations to employees
- 5th Amendment issues
- Planning
- Interim measures

Preservation Of Evidence

Criminal Liability

- Obstruction of justice

Civil Liability

- Spoliation of evidence
- Adverse inference

Make a Record of Preserving

- E-mail
- Text messages
- Laptops
- Computers
- Accounting records (electronic records, paper)
- Paper documents

Governing laws

Analyze Employment Relationships

- Seconded employee working in US
- Directly employed in US from foreign parent / subsidiary
- Dual employment in US and home country
- Not or no longer working in the US

Corporate Policies

Analyze Applicable Corporate Policies / Rules

- Code of Social Responsibility
- Code of Business Ethics
- Whistleblower Policy
- Employee Handbook

Analyze if a specific law is implicated

- Analyze if a specific duties are owed

Whistleblower Policy – Reporting Responsibility

Violation or Suspected Violation Of:

- Code of Business Ethics
 - Business conduct
 - Legal/regulatory obligations
 - Use of company property
- HR Policies
 - Non-harassment
 - Anti-discrimination
 - Violence prevention
- Corporate Compliance Policies
 - Import compliance
 - Export Compliance
 - TSCA compliance

During The Investigation

- General obligations to the complainant
 - Halt the bad behavior – inappropriate payments
 - Anti-retaliation provisions
 - Participation in the process
- General obligations to the accused
 - Halt the bad behavior – ongoing harassment
 - Standards of fairness?
 - Opportunity to answer allegations?



**Asserting “The 5th” –
Where Is It Allowed?**

During The Investigation

- “Right to refuse”
 - Right against self-accusals (Netherlands/UK)
 - Right not to testify against self (Article 38 of Japanese Constitution)
- Handling a refusal to cooperate
 - Is there a duty to cooperate?
 - Difference in various jurisdictions



Planning

- Should employees be given notice of any meetings/interviews?
- Should any specific introduction be given?
 - Fact finding versus disciplinary (Germany)
- Who should run the meeting?
- Who must be allowed to attend?
- Does an employee have a right to be accompanied?
 - by a representative?
 - by counsel (Austria)

Interim Measures

- Common Interim Measures:
 - Suspension
 - Transfer of duties
 - Denial of access
- Legal Limits
 - Countries with few restrictions (Spain, UK)
 - Considered prejudicing the disciplinary decision (Belgium, France)

ISSUES TO RESOLVE During the investigation (2)

- Data Gathering
 - Documentation needs
 - Restrictions
 - Policies and Procedures
 - EU Data Privacy legislation
 - Data Transfer
 - Good practices

Documentation Needs

Employment records for the complainant, accused,
and others

Review e-mails and other electronically
transmitted/stored communications



Document-Gathering Restrictions

- Know what law applies
- Know what policies and procedures apply
- Find out if implemented/enforceable
 - Impacts purpose of investigation (ability to enforce and sanction)
 - Impacts scope and methods of investigation



Most EU Data Privacy Legislation Will Require:

- Prior consultation or agreement with employee representatives
- Filing reporting and investigation policies with local data privacy regulator
- Lawful *or legitimate* basis for collecting the data
- Proportionate data collection (searching personal documents may be disproportionate)
- Distinction between “sensitive” and “personal” data
- And impose data transfer restrictions

Avoid Disproportionate Data Collection

- No blanket monitoring of e-mails
- Monitor private e-mails in narrow cases only
- Focus monitoring on the business units most likely to raise compliance issues
- Consider allowing employees to be present when obtaining computer data

Ensure Security of Gathered Data

Protect data from disclosure

- Transfer outside of EU:
 - Anonymize data
 - Data transfer agreement (model contracts)
 - Employee consent (may be seen as coercive)
- Exemptions
 - Detect or prosecute criminal offense
 - Advance or defend legal claims

Requests to Access Data

- Individuals have a right to access any personal data held
- NARROW exemption for criminal offenses



Data Privacy – Good Practices Everywhere

- Document preservation strategies
 - Document preservation memorandum to impacted employees
 - Continual efforts throughout the investigation
- Document transfer and destruction strategies
 - Transfer outside EEA only if necessary
 - Retain no longer than necessary (2 months)



Post-investigation matters

- Conclusion of the investigation
- Role of the investigator?
 - Legal conclusions, recommendations or just facts?
- Do you go to the authorities first?
- Criminal allegations – legal and ethical responsibilities
- Post-mortem – preventative measures to prevent repeats
- Disciplinary action – right of appeal?

Final discipline - “Typical” EU Procedures

- The right to advance notice of disciplinary meeting
 - UK: Employee has the right to be notified of allegations
- Disciplinary hearing, often accompanied by a representative (Germany, Italy, UK)
- Confer with representative (Germany)
- Right to be informed, in writing, of the outcome
- Right to appeal
- All within a specified time
 - France: Must commence within two months of notice



Ethical Issues and Rules of Professional Conduct to Consider in International Investigations.

During the course of the investigation, ethical issues may arise for you or people under your direction.

- Consider whether you really understand the ethical issues presented in the relevant jurisdictions, or can spot the issues sufficiently to seek advice.
- Consider whether the issues are really just your professional conduct considerations or are they also considerations for the Company's culture, values, and reputation.
- Be prepared to draw attention to and discuss these with the appropriate internal stakeholders.

Some Common Scenarios

- You know that an employee faces serious criminal liability and once he speaks to you will be in much worse shape. Under the ABA Model Rules of Professional Responsibility you have a duty to tell them you don't represent them and that your client is the company, but there is no clear ethical obligation to them beyond that. There is a duty to your client. There is a general duty of truthfulness. Model Rules 4.1, 4.3, 4.4 are all relevant. Rule 4.1 covers truthfulness in statements to others. Rule 4.3 provides that in dealing with unrepresented parties, you shall not give advice other than advice to seek counsel where you know or should know the interests of such person are or have a reasonable possibility of being in conflict with the interests of your client. The Rule is not saying we have a duty to tell him not to talk to us. But if he is unsophisticated, is not speaking to him until he actually gets his own lawyer the only effective way to comply with the spirit of the rule? If you are clear on your own ethical obligation, what position does the client want to take?
- What if any obligation do you have to advise an employee that they may be in some trouble and if there is one, at what point are you obligated to tell them?
- Another issue is whether there is any ethical problem (or other issue) when you keep an employee on even after you have discovered that he or she has engaged in wrongful conduct because you want their continued cooperation responding to a government inquiry or related litigation- with the intent to cut them loose when the storm clears.

Relevant ABA Model Rules of Professional Conduct

Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment - Rule 4.3

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those

of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Also:

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Comment - Rule 4.4

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

In public relations situations, you may want to consider ABA Model Rule 3.6

JFK and Sam Sheppard: Warren Commission

1969: DR 7-107: Gag rule for lawyers

1974: court's "no-comment" rule violates 1st Amendment (Chicago Council of Lawyers v. Bauer (7th Cir.))

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1994: ABA Ethics Rule 3.6 grants "right of reply" if "particularly egregious publicity."

Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Additional Considerations

Additional issue to consider when the above scenarios occur are, if an employee's conduct is the subject of an investigation (not knowing whether it is criminal or not), what are the pros and cons of keeping the employee on the payroll? The advantage is control. The disadvantage is creating potential evidence of conspiracy or ratification.

Finally, a significant ethical issue for lawyers is the duty to go up the ladder to report and possibly to withdraw from representation. For an in-house lawyer that may mean quitting his or her job.

ACC 2012 Annual Meeting Orlando, Florida

Panel: Fred Green (*Microsoft*), Michelle Marchant (*Clearwire*),
Christopher Hitchins (*Lewis Silkin*), Tahl Tyson (*Littler*)

HYPOTHETICAL – FACTS

TryBest, Inc. (“**TryBest**”) is a multinational IT company, with a mobile and international workforce. Many project teams are staffed with employees based in different countries. Consequently, reporting lines are across borders. Employees are frequently required to travel and/or spend time overseas while assigned to client projects. Work on these projects often requires employees to work onsite at a client’s premises.

Aamil Attisha (“**Aamil**”) is a “First Wave Engineer” for TryBest. He is based in the U.S., although he grew up in Iraq. He reports to Ellie Parsons (“**Ellie**”), who is British and based in the UK. Aamil is in his fifties, and has worked for TryBest for 26 years. He believes that he has been harassed (based on his national origin/ethnicity and his religious practices, as well as his age and possibility his disability (he is partially deaf)) over a prolonged period by Ted Bacon (“**Ted**”), another First Wave Engineer, and that Ellie knew about this. He can report a lot of online interaction regarding this.

More recently, he has been cast aside by Ellie during the Omneez project (a big account with a high-profile client) on location at the client’s site in India. This was the first project that TryBest did for Omneez and was therefore very important for the development of the client relationship. Omneez contracted with TryBest to lay their entire tech infrastructure. This was a three-month project. Aamil claims that he started out as the lead engineer on the project but at the end of the first month he was relegated to the basement, literally, where he was reduced to helping with manual installation of cables and making sure the blueprints were updated with the change orders. He was also held back from several presentations to the client, including the final presentation.

Aamil alleges that he has witnessed several “bad acts”: Ellie making a cash payment to a Government official in India during the Omneez project; Paul Amos (the president of Omneez) passing checks to Ellie made out in her name; and Ellie giving confidential company information to a hedge fund employee at a dinner meeting.

Aamil bursts into a meeting that you (in-house counsel) are having with HR and tells you his account, before walking out and telling you that he quits.

