ASSOCIATION OF CORPORATE COUNSEL

Title: ***Handling Harassment Complaints and Managing the New Retaliation Standards: Tips on Avoiding Employment Lawsuits***
Date: July 12, 2007
Presented by ACC's Nonprofit Organizations Committee, sponsored by Pillsbury Winthrop Shaw Pittman LLP
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(Steve Garrett): OK. I'd like to welcome everyone to the (Association of Corporate Counsel Non-Profit Organization to Committee) Webcast entitled "Handling Harassment Complaints and Managing The New Retaliation Standards: Tips On Avoiding Employment Lawsuits." My name is (Steve Garrett) and I will be the moderator for today's presentation. I am the Associate Vice President and General Counsel for the Texas A&M Research Foundation. I also serve as the chair of the Webcast subcommittee of the Non-Profit Organizations Committee of ACC.

Our panelist today is Ms. (Julia Judish), a Senior Associate of the law firm of (Pillsbury, Winthrop, Shaw, Pittman). The firm is the sponsor of the ACC Non-Profit Organizations Committee. Julie is located in the firm's Washington, D.C., office where her practice covers all facets of the employment relationship. Representation includes advice and counseling, litigation in state and federal court, defending client before the Equal Employment Opportunity Commission, and local human rights agencies, and representation and arbitration and mediation proceedings. She advises clients that are federal contractors on affirmative action obligations and requirements established by the office of Federal Contract Compliance Program. Julia frequently represents clients in areas such as discrimination, harassment, retaliation, disability accommodation, and employment -- employee compensation claims. Her practice also includes advising clients regarding non-competition agreements, restructurings and reductions in force, employment policies and employee discipline. She's experienced in conducting internal investigations relating to harassment complaints and employee misconduct. In addition, she conducts management training for clients to ensure compliance and avoid litigation. Julie has been practicing this area of law for over 10 years and is the author of several publications.

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course of this Webcast you will a satisfaction survey on your screen. Please take a moment or two to respond to this survey. It's a very useful tool for ACC to organize and present Webcasts that are interesting and informative to ACC members.

And now let me turn the presentation over to Julia.

(Julia Judish): Thanks, Steve.

What I wanted to talk about today as the title suggests is harassment and retaliation and tips for associations to avoid liability for those claims. Our agenda today includes understanding the contours of harassment law, understanding the new broader standard for retaliation claims that is in place after a June 2006 Supreme Court decision, going through how to steps for responding to harassment complaints, and practical steps for reducing the risk of retaliation lawsuits, and as well addressing special issues for non-profit, including liability issues relating to the presence of volunteers in associations, how to meet legal standards with small organization resources, and responding to claims against past officers of the organization.

First let's talk about harassment. Harassment is a form of illegal discrimination. So it is prohibited by the federal anti-discrimination statutes, like Title 7, the Americans With Disabilities Act, the Age Discrimination and Unemployment Act, and any state or local laws prohibiting discrimination. Harassment claims are premised on mistreatement that is based on the protected status of the complainants. So simply being treated badly is not necessarily a legal harassment. It has to be based on the protected status. And that can be race, religion, sex, age, disability, nation origin, or any other status protected by discrimination laws. You need to be aware of what the state and local laws of your jurisdiction prohibit. I'm resident in D.C. where there are over 20 protected statuses in the D.C. Human Rights. Common statuses that are protected by state and local laws but not by federal law include sexual orientation and marital status.

The same legal framework applies to any harassment complaints. So if someone brings a race-based harassment claim the courts are going to apply the same tests as if they're bringing an age-based harassment claim, although there are some additional issues that arise in sexual harassment claims which are the most common claims filed with the EEOC. In fiscal year 2006 alone there were over 12,000 sexual harassment claims. Fifteen percent of those were sexual harassment claims brought by men even though the typical view is that it's a woman bringing a sexual harassment claim against a man. They may be brought by both men and women.

Harassment law has different tests that the courts apply to it depending on the factual circumstances of the claim. The relationship of the alleged harasser and the complainant is key. There's a different legal test that courts apply if a supervisor is doing the harassment versus a coworker or a third party, a client or a volunteer. Also determinative as to liability issues in the test that's applied is whether it involves a tangible employment action. So whether the harassment is related to failure to promote or a termination decision or a setting someone's compensation. Whether the harassment creates a hostile working environment also affects what test is used. Employees can bring harassment claims based on the conduct of anyone who may encounter as part of their regular working environment. So it's usually the boss or the coworker, but it can also be volunteers, members or other third parties. The

key is whether the conduct affects the employee's working condition, and who is perpetrating the harassment affects what action the employer is expected to take as a matter of law to protect that employee and correct the harassment.

Another reason that different tests apply and different outcomes may occur in harassment claims based on the relationship between the harasser and the complainant is that social scientists studying harassment have determined that employees perceive the same conduct differently depending on the status of the alleged harasser. So a comment that may be accepted as friendly and welcome by coworker or someone without authority over the employee can be viewed very negatively if that comment is made by a boss. An example that I like to use is that there's -- the guy who works in the deli in the cafeteria in my building calls every woman he sees honey. Do you want mayonnaise with that, honey? And that's not conduct that anyone that I'm aware of finds offensive. But it would be a very different issue, at least for me, if the managing partner came to me and told me I'd you to do this assignment, honey. It's perceived differently even though the -- it's the exact same comment.

I want to go briefly over the two primary different tests for assessing liability for harassment. The first is quid pro quo harassment. This is the classic situation of if you don't sleep with me you won't get hired or you won't get that promotion. Or else more vengefully, because you didn't sleep with me I'm going to deny this employment benefit. And the best for quid pro quo harassment has four elements. A tangible employment action. And that can be hiring, firing, promotion. But it can also be an assignment to a less desirable person with less responsibility. It can be a reduction in a merit increase, so affect the compensation. It doesn't just have to be hiring and firing. It has to be implicitly or explicitly based on the employees acceptance or rejection of unwelcomed sexual behavior. So quid pro quo harassment does not deal with consensual sexual relationships in the workplace. And that doesn't mean that those relationships are without risk. Often there's not a happily ever after to consensual relationships and when they end it's unusual that it's truly mutual on both parties' behalf and amicable. The risk comes from an employment standpoint when the consensual relationship ends and one party wishes that it still goes on and the other person doesn't. And if the party who still wants the relationship to continue is in a position of authority, such as a supervisor over the party who ended the relationship, and there's any overflow of those feelings into the working relationship, the person who broke off the relationship can bring a sexual harassment claim and state that the reason that he or she is suffering these adverse actions is because they're no longer granted sexual favors to the party that they dumped. So even if the relationship starts out in a mutual fashion it can end up in a harassment claim.

There is no defense to vicarious liability for an employer against a quid pro -- quid pro quo claim that results in a tangible employment action by the supervisor. The reason for that is the supervisor is cloaked with the authority and agency of the agency of the employer, and therefore even though the employer may not have authorized and wanted this harassment to occur, the supervisor is embodying the employer's authority in doing that.

I want to take minute and go through an example of how what appears to be a classic quid pro quo situation may be in fact innocently intended. I think there's a sense sometimes of complacency that my employees are all good people and none of them is going to be a cad

and condition employment benefits on sexual favors. And I certainly hope that's true of all of our workplaces. But that doesn't mean that there is no risk of quid pro quo claims.

I'd like you to imagine the situation in which Jane, an executive, has an executive assistant, Sam, whom she obtained through a temporary agency. And Sam is a fairly good worker. But there are quality issues with his work. I mean, he's not terrible but there are these persistent quality issues. And Jane is one of these hard-charging executives who's very busy and is not very good, like many of us, in giving feedback. So Sam is unaware that he has these issues, and being unaware of them he's unable to correct them.

Jane one day is staying late, realizes she's going to have to be getting dinner to continue her work and decides that maybe a friendly way to address these issues with Sam finally would be to ask him to stay and have dinner with her. And her intention, though she doesn't tell it to him, is that she'll take that opportunity to discuss ways he can improve his work. She asks Sam to stay to dinner, he declines, interpreting it as a request for a date, and Jane just never gets around to discussing the issues with him. Because Sam's unaware of it he never has the chance to improve. In fact, he doesn't improve. And at the end of his assignment, Jane says she doesn't want him back, or she wants him given a position with less responsibility because of these persistent quality issues.

This is a situation where Sam can easily in good faith assert a quid pro quo harassment claim because it's his belief that he's now being let go by Jane because he turned down her request for a date. So this is just a reminder that even with the best of intentions it's important to be clear communicators and not create potential misunderstandings that could result in quid pro quo claims.

The slightly more common (beast) of harassment claims is the hostile work environment claims. And the legal hostile work environment consists of six elements. It must consist of unwelcome contact. It has to be of a verbal or physical nature. And of a sexual nature that -- either of a sexual nature, if it's sexual harassment, or based on the protected status, including gender, race, religion. And it has to be sufficiently severe or pervasive that it creates a hostile or offensive working environment. That's another way of saying it alters the terms or conditions of employment for a reasonable person of the same characteristics of the complainant.

I want to unpack this (test) a little. Verbal or physical conduct -- there are many ways to create this. This can be jokes, comments, remarks about a person's personal appearance, remarks about their religion, national origin. Or sexual harassment it can be touching. It can be displaying calendars or screensavers. It can be someone seeing the Web sites that a coworker visits. And the severity of the behavior -- there's a sliding scale. The severe or pervasive test means that a single incident, if it's severe enough, such as unwelcomed groping, can be sufficient to support a hostile work environment claim. I've never seen a case where one off-color joke is sufficient for a sexual harassment claim, but there are multiple cases where comments over the course of a year or more have been held enough to create liability for the employer even though one or two of them alone would not be enough, it's so pervasive that it does alter the terms and conditions of employment.

If a hostile work environment claim is asserted as being created by a coworker, then there's a simple negligent standard that is applied to the employers. They have to take reasonable

steps. Is it reasonable that they should have known about it and ((inaudible)) reasonable steps to prevent. If a hostile work environment is created by a supervisor, the issue becomes whether the employer -- whether it was accompanied by a tangible employment action, in which case it gets converted to a quid pro quo situation.

The perspective of the victim is always key in judging a hostile work environment claim. So very often in defending claims like this the accused harasser I find is mortified that they've been accused of creating a hostile work environment. They certainly had no intention of offending anyone. I meant it as a joke, I meant it as a friendly comment. But unfortunately that is not determinitive. Certainly malicious intent is something courts take into account, but innocent intent does not get you off the hook.

The hostile work environment test includes both a subjective and an objective element. So a ceiling and a floor for liability. The conducts have to be subjectively unwelcomed to the complainant. This means the exact same behavior can offend one person and not offend another. After I did a sexual harassment training one day someone came up to me afterwards and said this is unfair, it creates an un-level playing field. Very attractive people are less likely to be accused of sexual harassment than people who are deemed unattractive. And then that may be the case because the attractive people's overtures may be more welcome, but it's not that the law is saying attractive people get off. What they are saying is that it has to be subjectively unwelcome. The rule of thumb I usually advise people is to assume that no one in the workplace finds you the last bit sexually attractive. And if we all behave that way then hopefully we'll be immune from sexual harassment suits.

The objective element is that the conduct must be considered unwelcome by a reasonable person in the victim's shoes. So there's a reasonableness standard, but if it's a woman who's being harassed it's a reasonable woman. If it's an executive being harassed or if it's someone who's newly hired, the jury is asked to placed themselves in that person's shoes and assess whether the person's reaction is reasonable. And one example I like to give is that a senior executive at an organization who's worked with another executive for 20 years, if he comes up and puts his arm around her while he's discussing something, she is much less likely to be offended and is much less likely for it to be reasonable for her to be offended if they socialize outside of work and they've known each other for years than a brand new receptionist that he comes up to and puts his arm. And the courts will take that into account.

Another thing to keep in mind that people often forget is that anyone who overhears or observes your interactions as part of their workplace experience can claim harassment. And so you have to be aware of your unintended audience. And it may be the case that two people in a workplace have a friendship, have a rapport, and it's not subjectively unwelcome for them to make off-color jokes to each other or discuss their weekend dates, et cetera. But the people who are sitting around in the other cubicles and who must listen to this conversation as part of their workplace may be offended by it. and they can bring a claim of sexual harassment. And so it's a good caution to everyone to be aware of the unintended audience.

I'm going to give two examples of the subjective and the objective element from cases that I handled myself. One of them is the example of how the reasonableness standard can be a protection. In this claim there was a woman who made a sexual harassment claim against one of her coworkers. They had as part of a group of coworkers gone out to lunch, and

everyone had been talking, and this gentleman had made the comment -- he was married -- he made the comment that he envied butterflies because apparently butterflies are not monogamous and have more than one partner at once. And he made this comment just in the general group discussion. But this lady believed that he was directing that comment at her and that he was essentially inviting her to have a sexual affair with him. And she brought a claim for $6 million. Her claim was dismissed because it was considered unreasonable for her to be offended even though she truly was distressed by this comment and his comment was subjectively unwelcome.

On the flip side, ((inaudible)) had the sexual harassment claim dismissed brought by a woman who worked in a sales department in which the behavior was such that -- I hope none of you have workplaces with environments like this -- the supervisor e-mailed jokes, very graphic sexual jokes, would come back from sales trips and bring fertility dolls, totems with very explicit body parts and leave many on people's desks. And I had to read through all of these e-mails, and it was really like a Penthouse environment. But we discovered that the complainant gave as good as she got and she initiated these discussions and these jokes. And the crowning piece of evidence was testimony from her coworkers that she was in the habit of distracting her supervisor who worked in one of these offices with glass walls. When he was on a phone call with sales prospect she thought it was funny to go up, lift up her shirt and press her bare chest against the glass wall. And that claim was dismissed on the grounds that this environment, although perhaps highly professional, was not subjectively unwelcome to her. And so while this is not a defense that is necessarily the best one to have to bring, it shows that there are both these -- of these two elements have to be met.

If the hostile work environment is created not by the coworker but the supervisor and there's no tangible employment action, then an employer can assert an affirmative defense. There are two necessary elements to the affirmative defense. If either of those elements is missing, the employer does not escape vicarious liability for the supervisor's acts. First the employer has to show that it has taken measures designed to prevent and correct harassment. And usually those measures include a readily accessible and effective policy for reporting and resolving harassment complaints. And second, the employer has to show that the employee unreasonably failed to avail herself of those measures or to avoid harm otherwise. Usually this prong is met with the employee not following the complain procedure, not making a complaint. There are other ways that it can be established. There's a fourth circuit case in which an employee who was going to various conferences with her boss had -- after the conference day was over, had gone drinking with him and gone up to his hotel room and he had tried to kiss her. She had filed the complaint. The company reprimanded the boss for this and -- but this was not the basis for her lawsuit. The basis for her lawsuit was that the following month when she went to a conference she again went drinking with him and she again went back to his hotel room and he again tried to kiss her. And the court held that the employer had an affirmative defense ((inaudible)) his conduct because she had placed herself in harm's way knowing that after-hours drinking in the hotel room had elicited this behavior once, she should not have gone back to his hotel room with him. And so in that case even though she had filed a complaint the court held that the second prong of the test had been met.

As I said, both men and women are legally protected from sexual harassment. Same sex harassment can also be illegal if it's motivated by the victim's gender. And it can be sexual in content, and often is, but it does not have to be sexual in content. There have been cases in

which male supervisor bullies women harshly but not men, or even women who have much higher standards and are -- and yell at their female subordinates but don't do that to male subordinates. As long as the -- there's a harassment going on and the harsh treatment is distinguished based on gender or the other protected status, it can be a legal harassment.

I'm going to move on now to retaliation. Retaliation protects employees from reprisal for raising or communicating -- or communicating an intent to raise an internal or external complaint of unlawful treatment. Almost every employment statute that confers a right against discrimination on employees contains an anti-retaliation provision. And so do a host of other statutes that don't have discrimination components. They all have protections against the employee being -- suffering retaliation because they exercised the legal right. For the discrimination and harassment statutes, the legal right is to make a complaint internally to oppose unlawful conduct by bringing it to the employer's attention, or to participate in the formal filing of a charge with the EEOC or a government human rights agency, or to assist someone else in doing so.

There's slightly different standards depending on whether it's opposition activity making the internal complaint or whether it is participation activity filing the EEOC's charge. Participation activity is absolutely protected, even if the employee is doing it for ulterior motives in bad faith. It's absolutely protected against retaliation. Opposition activity, complaining to the employer that the employee feels harassed, is also protected against retaliation provided it is made in good faith. That means that the employee may be mistaken about what happened, and it could be that after investigation the employer concludes that there was no unlawful action, but if the employee in good faith made the complain they're protected against reprisal.

They must -- the employee must engage in opposition controversy in a reasonable fashion. That means no throwing things, for example. I had a case where an employee thought that she was being discriminated against and harassed based on her race, and she went into the call center where she worked and where the supervisor happened to be at that moment, and at the top of her voice she yelled that the organization was a hotbed of racism and she picked up a bowl and she threw it at the supervisor. It was quite clear that she was opposing what she believed to be unlawful conduct. She said it was a -- there was race discrimination going on. But the EEOC dismissed her charge -- she was terminated after this -- and dismissed her retaliation charge because they said that she had failed to raise her concerns in a reasonable fashion. And having all the customers hear her shouting that it was a racist hotbed and throwing the object at her supervisor meant that her opposition activity was no longer protected activity and they could take action against her on that basis.

I call retaliation the new frontier of claims because it's really taking over the plaintiff's world. Over a third of all EEOC charges now include a retaliation charge. Over 22,000 retaliation charges were filed with the EEOC in fiscal year 2006. Compare that to 12,000 sexual harassment claims.. And more retaliation claims are successful than the underlying charges of discrimination. It's a very common pattern to see verdicts reported where someone sues based on harassment and retaliation that occurs after they complain of the harassment. And the harassment claim is dismissed as a matter of law with the finding that the behavior they complained about was not in fact illegal, but they prevail and get substantial damages on the retaliation component of the claim.

Another reason that retaliation claims are on the rise is that the Supreme Court broadened the standard for retaliation in June 2006 in the case called Burlington Northern Railroad versus White. Prior to the Burlington Northern decision, retaliation claims like discrimination and harassment claims had to be shown to be related to the terms and conditions of employment. So courts analyzed whether someone had been retaliated against by having their salary reduced or some other tangible employment action taken against them.

In the Burlington Northern case, the plaintiff had filed a complaint of unfair treatment, illegal treatment against her supervisor. And during the investigation into her complaint she had been placed on unpaid suspension for over 30 days. Eventually she was brought back, she was given her job back, she was given back pay, and nonetheless she filed a retaliation claim. The lower court had dismissed her retaliation claim and said you didn't -- you don't have the retaliation claim because you really didn't suffer any adverse action in terms of your employment. You got your pay back, you got your position back, you haven't been hurt. And the Supreme Court said, no, that's wrong. The retaliation language in the statute is not limited to terms and conditions of employment. And they focused on the plaintiff's testimony of how difficult it had been during the period of unpaid suspension not knowing if she'd get her job back. And going without the check during Christmas season, even though she eventually got all that money back, and held that she could bring a retaliation claim.

The new standard now is that any action that is materially adverse to a reasonable employee or job applicant can be retaliatory. Not all actions are material. The court emphasized that the retaliation law cannot immunize employees from those petty slights or minor annoyances that all employees experience. So that is still a major grounds for defense for employers that the action taken is not material. But the retaliation does not need to be related to employment or occur in the workplace. The test that the Supreme Court articulated is whether the action would be likely to dissuade a reasonable worker from making or supporting a charge of discrimination. In other words, if the worker knew that this consequence would happen, would they be (chilled) from making that complaint. And in the Burlington Northern case, the Supreme Court held, and I think correctly under the standard, that the prospect of being placed on unpaid suspension for over 30 days would likely have dissuaded her from making the complaint in the first place.

The Supreme Court also said, in what I think is the shortest sentence they've ever written, context matters. In assessing whether it with dissuade a reasonable worker, the court will like at the context, at who the worker is. The same action might be retaliatory for one employee but not for another. The court gave the example of a one-hour shift in schedule. So someone who's scheduled to work from eight to four, the employer changes the shift to a nine to five shift. In most circumstances the court said that might not rise to the level of a retaliatory action, it's not material enough. But if the job shift is done to a worker with young children, you have to make entirely new child care arrangements because of the one-hour shift, that can be sufficient for that affected employee to constitute retaliation. There's still the issue, of course, of causation with the shift change done because of the employee's protected conduct, and without causation there's no retaliation claim. But the kinds of incidents which can be used to bring retaliation claims are much broader in the wake of this decision last summer.

Another reason I think that retaliation claims are on the rise is that unlike I hope discrimination and harassment, retaliation is much more of a natural response. It's not necessarily nefarious in intent. If someone accuses you of acting in an illegal manner it's unlikely that you feel that that is justified and you're likely to perceive this person as a trouble-maker. Many complaints of unlawful treatment are mistaken or sometimes they're made by employees who see a bad review or reprimand coming down the pike and they think the best thing to do is to lash out against the supervisor as a good offense. Well, maybe I am behaving poorly, but it's because my supervisor is harassing me. And the -- I can't count the number of times I've had conversations with employers who've had a employee raised a complaint against a supervisor and there is a fear that there will be future complaints, future potential liability, future investigation, and in any case more what is perceived as false accusations. And the reaction is to want to isolate that complaining employee or to get rid of that complaining employee. Because the supervisor feels that he or she is walking on eggshells around them and that anything they say or do could be misconstrued and used as fuel for a future complaint. But those actions, certainly getting rid of the employee, but even isolating them, ostracizing them, keeping them away from what otherwise would be job opportunities they have, is now action that could be viewed as retaliatory and likely to dissuade future complaints. So it's absolutely critical if a complaint is made that those who are the subjects of the complaint be made to understand that no retaliation will be tolerated. Even if they were innocent of the original complaint, that by their reactions they can be creating liability where none existed before.

So I want to move on to what would be basic prevention steps that you can take. You want to adopt and publicize policies against harassment and retaliation. When you get an EEOC charge, they want to see your policy, but they also want to see proof that this went out to the employees, it wasn't just something that was in their first-day packet and they were unaware of, or it wasn't just posted on your intranet, that you got that anti-harassment policy out there and the complaint procedure out there. You want to make sure that you have a complaint procedure with multiple reporting options. If your complaint procedure is just if you feel harassed tell your supervisor, your employees aren't going to be able to rely on that if the supervisor is the one who's doing the harassing. So you want there to be several outlets for them to go to. And you want to be able to use that affirmative defense if they fail to complain. And the only way to do that is to have a procedure that they're supposed to follow.

You also want to require of supervisors that they inform human resources of any incidence of harassment or discrimination that they see or that someone confides in them. It's often the case that employees don't want to be confrontational. They want the problem to go away, but they don't want the person to get into that much trouble. So they may tell their supervisor that something's happening, to try and get some protection from it. But they ask that it not be told to HR, because they don't -- they don't want to make an uncomfortable working situation.

The problem with that is that it means HR doesn't know what's going on. And there's one case against a law firm that I often like to talk about -- it's against the law firm (Baker & McKenzie) in California -- in which there was a $3.5 million punitive damages award against the law firm based on the sexually harassing behave of a partner in a case brought by a secretary who had worked for the partner for one month and had worked for the firm for a total of two months. It was five percent of the net value of the firm was awarded and upheld

on appeal based on the secretary's claim. And the reason for that punitive award being so large was that she was not the first one. There were at trial accounts of at least seven other incidences where this same partner had harassed primarily junior attorneys and support staff. And he was still there and it was still going on. And the law firm had objected at trial to the testimony of all but two or three of the witnesses on the grounds that the managing partner committee, which had power over the offending partner, hadn't known of these other complaints of harassment, that these employees had complained to the staff supervisor or to their supervisor but hadn't complained up to the managing partner committee. And the court said, no, that's your problem, law firm, it's your job to know. If they had complained to one of their appropriate supervisors you have to channel that knowledge and make sure that something gets done to stop this partner from harassing anyone else. And so as a matter of protecting the organization, it's critical that human resources or some other central repository of knowledge have information about any other allegations about any of the individuals you employ. Because when the managing partner committee did get one or two complaints about him, they thought those were the first ones and they just did a slap on the wrist, and they didn't realize that this was a repeat offender and they would have been far better off getting rid of him long ago and this lawsuit never would have been brought.

You also want to train all of your employees about harassment and discrimination law, you want them to know what behavior is unacceptable and what their rights are and what your policies and complaint procedures are. When you have the training, make sure that you have an attendance sheet and everyone signs in so you can established that you took reasonable steps to create an atmosphere free of harassment.

What happens when a complaint is made. You need to promptly investigate all complaints. You need to do this even if the alleged victim has left the organization. One of -- some of the testimony in the (Baker McKenzie) case involved a secretary who was harassed by this partner and she was so disgusted that she left that day and threw her office keys in the dumpster and she never came back to the firm. She did, however, tell her former support staff boss what he had done. If that firm had moved on that complaint in taking necessary steps, there would be multiple other people whose employment at that firm would not have been marred by being harassed by this fellow.

You need to decide who should conduct the investigation. It usually may be your HR staff. But depending on the nature of the allegation and who the subject of the allegation is, you might want to bring in your general counsel, you might want to bring in outside counsel.

You want to document all of your interviews. Remember, in the affirmative defense you need to show that you took reasonable steps to correct and prevent harassment. Part of that is showing that you did a good -- a good investigation and that what -- your action and your conclusion was reasonable. So you want to have down on paper that you interviewed these people and what they said. You want the employees that you interview to review the summaries of their statements to you and sign it making sure that -- attesting that it's accurate. Because you don't want the stories to change later on. So even if one person is conducting the interview, it's often a good idea to have someone else there who's doing the note taking so the person primarily in charge of the interview can focus on listening and asking appropriate questions.

You want to keep the allegations confidential to the extent practical. You don't want to blab all over the office that Suzie says that John is a harasser. But you cannot promise absolute confidentiality. The reason for that is you have a duty to investigate, and the only proper way to investigate when someone accuses someone else of wrongdoing is to give that person a chance to respond to the allegations and also in many cases to interview witnesses. So while you can promise that you'll try to be discrete, there's a certain amount of disclosure that you'll have to do in conducting the investigation.

It's very, very important that you preserve and review all relevant records when a claim is made. Under the newly amended federal rules of civil procedure, you have an obligation to preserve evidence when you're on notice of the potential claim, and an internal complaint of harassment or retaliation puts you on notice.

So what happens if you don't do that. If you fail to have your IT people save all relevant e-mails and they get deleted, even though you know you have this obligation the court can impose an adverse inference on you in any litigation that those deleted e-mails may have had inculpatory evidence on it. And so you want to be sure that you follow your obligation. And often those e-mails, you need them for your defense. Sometimes they're exonerating. So make sure that whenever a claim comes in your first instinct is to talk to the IT people and tell the affected people that they need to stop deleting any relevant e-mails.

You have to take appropriate corrective action if wrongdoing is found. Appropriate corrective action, obviously there's not a prescription I can give ahead of the fact. Sometimes it's termination, sometimes it's re-assignment, sometimes it is sending someone to management training and a written warning, a last-chance warning, sometimes it's docking the bonus. You can't dock wages, those are earned and protected from the -- by the state wage payment statutes. But if someone has a discretionary bonus and they've gone around harassing or retaliating against people, it's absolutely appropriate to take that into account just as much as their other productivity.

You want to document the findings of your investigation and the actions you took. There is a 300-day statute of limitations for claims under the employment laws, and sometimes people leave and sometimes -- we all have a lot of things we have to remember. So you want to make sure it's there in the file. And especially critical because of the retaliation law, you want to ensure that there is an independent review of all subsequent personnel actions against that complainant. I'm not talking about just special ones, but the annual performance review, the annual salary setting. Any decision that is made where a period of -- a reasonable period of time, at least a year or two, involving someone who has made a complain, you want HR or the general counsel to review that and have the supervisor be able to articulate the reasons why this is motivated by legitimate business purposes and that it's really not a retaliatory action.

I know we're running short on time, so I'll try and talk fast. Special issues involving volunteers. As I mentioned earlier, you have a duty to protect your employees from a hostile work environment even if it's created by a volunteer or other third party. Obviously you have more control over your employees, but you have to take reasonable steps. The most basic of those reasonable steps is to have guidelines that are applicable to volunteers and tell those be willing to step up on behalf of your employees and tell those volunteers that you expect them to live by their guidelines. If you don't want them hugging your employees, you

have to get up and be willing to speak on behalf of your employees that hugging your employees is not considered professional. And it may be that the volunteers are offended, but that is a harm that you -- that the law requires you to accept in order to protect your employees.

(Steve Garrett): Julie, let me break in here for just a second for a question. What about the situation where it's the volunteer who's working for, say, a non-profit organization who is the one who is -- feels harassed by, say, a third party or another one of the employees. The volunteers aren't employees as such, but they're in the environment and being treated that way in terms of the work being performed. What about that situation? Sort of the reverse of what you have here.

(Julia Judish): They will not have standing to bring suit under the employment laws, so they can't bring a Title 7 claim, for example, against an association. But they can bring other sorts of claims depending on what the harassment is. If one of your employees is groping a volunteer, then there are assault claims and they can try to -- or other tort claims that they can bring against both that employee and against the association under the vicarious liability theory.

(Steve Garrett): OK.

(Julia Judish): So, yes, you also want to protect your volunteers as well as your employees. And one of the (cruciables) where this comes up is often in the conference setting. They are -- it's much less easy to differentiate between working time and play time at conferences. People are staying overnight, they eat meals together, there's often alcohol, there's a more relaxed sense. So it's really a good idea to make sure your employees understand what is -- what is and is not expected of them, that they have no obligation. Even though they're ambassadors of the organization, if they what want to go drinking with some of the conference attendees they don't have to. And that the attendees, you may need to eject some of them and hold them to attendance guidelines.

You want to make clear to you employees -- when I do training for associations, I always get questions from the employees saying, well, what do -- what do I do? There's these people, I've worked with them, but they always come up and they're much touchier than I want them to be. And I don't want to offend them. Those employees should know that it's okay for them to move behind a table when they see someone coming or simply just say -- hold out there hand so that it's a handshake rather than a hug, or that they can say, no, I'm so sorry, I just would really rather not. You want to train, especially your board members and your officers, on the harassment policy. They should know what the harassment policy of the organization is and that they -- that the employees of the organization will expect them to abide those same standards. Remember, higher-status individuals, their conduct is often viewed very differently than lower-status individuals. And the board members are not technically supervisors, they're viewed by employees as having power over them. And so they are special targets sometimes for harassment suits.

Many associations are small organizations. That doesn't exempt you from these laws. Well, if you're very, very small, if you have fewer than 15 employees, it does exempt you from Title 7, you won't be covered. But most state and local laws, their human rights acts cover even the smaller employers. But the definition of what you have to do takes into the

context your size. What is reasonable for you to do? If you're an organization of seven employees, having an elaborate complaint procedure and bureaucracy may not be what you want to do. And the Supreme Court has expressly said that in such cases an open door policy, if there's more than one outlet for the complaint, can be sufficient. And you may need to look outside of your organization for the complaint procedure, look to your external counsel, look to your board members and make sure that employees know that they can go to them with complaints. Sometimes you have fewer options when it comes to how to deal with a complaint and you're really forced with terminating someone, where in a larger organization they could simply be moved to a different department because what you need to do is protect that employee from continuing to have to work closely with someone who they feel is harassing them.

And you cannot as a small organization just use we're a friendly place as a defense. This is the kind of place we are, we're all comfortable joking around this way. Courts never accept that as a defense. There's -- well, almost never. There was one case involving the script writers for the Friends TV show where the court held that it was necessary given the creative process and the sexual content of the show for their to be sexual anecdotes in the script writing room. But unless your association is -- has that as part of their business, that's not going to be a defense that's available to you..

You don't want to let small problems mushroom. No employer does, but especially for small employers. You want to nip issues which may not seem that big in the bud before it rises to the level where you're left with two people who really cannot work together anymore and you have to let someone go. And you want to consider allowing anonymous complaints to an outside party. That will only work, however, if the anonymous complainer provides enough detail that it can be investigated. I've worked with associations who've received literally an anonymous complaint that was along the lines of (DH and ML) are bad. And how are you supposed to -- we knew who DH and ML are, but how are we supposed to know how they're bad. Do they not take out their recycling, are they embezzling money? What's going on? There has to be something that you can investigate or you can't act on it.

If the claim is against the leader, then you absolutely need to bring in outside counsel. You need to bring in someone from outside to investigate, because the only other people who can investigate report to that leader. You want to adapt a whistleblower policy. So any -- not just harassment and retaliation, but financial improprieties, et cetera, that there's an outlet to uncover that. And you want to ensure if you have contracts with your executives that they have termination for cause provisions that are broad enough to cover violation of organization policy. Sometimes executive contracts have termination for cause that seems limited to conviction of a felony or a crime of moral turpitude or failure to follow written instructions of the board. But you want to be able to termiate an executive who's commiting harassment or retaliation in the good faith judgment of the organization after an investigation. You don't want to have to wait for it to be proven in court.

(Steve Garrett): Julie, I want to jump in here. I think we're about to run out of time.

(Julia Judish): Well, we're on to questions.

(Steve Garrett): ((inaudible)) run out of time for our questions. We've got several of them that have been -- that have come in pretty good. I do want to just reiterate that we're going to be addressing questions. And maybe some of these came in -- will be posting the answers on the -- on the -- for the Webcast in the archives on this thing. I've got a few myself. I was going to break in, but you're going in such a good mode I didn't want to kind of spoil the moment.

(Julia Judish): Well, we started a little late, so I'm happy to stay on a little late.

(Steve Garrett): OK. Well, I've got -- I've done that, too. So we've got to stay with our timelines. But I do have some questions that came in. One of them that did, I'd like for you to talk just real briefly about it -- (and I think we're going to have to close.) I says should supervisors be required to report witness harassment outside of work at a happy hour? And I know a lot of this has to do with if it's work-sponsored type activity it's not going to be considered much different from the workplace itself. But what about other ones that are not quite, you know, mandated after-hours type thing?

(Julia Judish): Well, that's an excellent question, because it -- if it is between coworkers and it's happening entirely outside of work, harassment law doesn't cover that. It's not there to regulate people's private lives. But if it's behavior that involves a supervisor, that supervisor is always wearing the supervisor hat, even if they're actually dressed in shorts and a tee-shirt and the person who reports to them encounters them in the grocery store on the weekend. Because comments and the actions of that supervisor are going to stay in that employee's mind when it's Monday and it's back in the workplace. So if you witness something that is supervisory harassment outside of the workplace, that's something you want to make HR aware of. And reporting is not necessarily lead to the guillotine for everyone. It's just -- HR should know how to -- should just be aware of it and can investigate or act appropriately.

(Steve Garrett): Yes, I -- let me ask -- pose one more question to you and then, like I say, I think we're going to have to close. I'll put my own questions on the -- on the Webcast archive, too. This question says when and how should the accused be notified of the complaint? I know that's always been the kind that arises and it depends on circumstances. But can you give us a real quick answer or just say save some of it for later on.

(Julia Judish): Well, it does -- it does depend on the circumstances, but -- because there may be times when there are -- you want to ask the complaintant if there are other witnesses. And it is sometimes better to get fuller facts -- well, first you want to interview the complainant first. The complaint comes in, you want to get more detail because you want to be able to present that to the accused. And there are times when you want to tell them that there's an individual who complained about them. There are other times when you can just say there have been reports that you have been having sexual relationships with individuals who report to you, and I need to know if that's the case. And if the person denies it and there are witnesses who say this, you don't have to necessarily identify Suzie said that she knew -- knows that you've been sleeping with these employees. What you're trying to do is a fact-finding investigation. But you have to let them respond, you have to let them explain.

(Steve Garrett): All right. Well, let me use that and just the closing question so we can go ahead and wrap this up. And so that will conclude today's Webcast. And I'd like to take Julie for her time and an excellent presentation. I've got still, like I say, a thousand other questions.

I'd also like to thank her firm, (Pillbury, Winthrop, Shaw, Pittman), for sponsoring our Webcast. And let me remind everybody in the audience that the audiofile for the Webcast will be available on the ACC Web site for about three hours from now and it will be archived there for about a year. And just in case you don't know, it's www.ACC.com. And I want to thank our audience for attending our Webcast. Remember, if you have any questions related to today's topic that you didn't get around to sending during the Webcast, you can send them to Julia and Julia.(judish)@pillsburylaw.com. If you'd like to send any questions to me, my e-mail address is srg@refer-mail(M-A-I-L).T-A-M-U.E-D-U. And I'd like to remind everybody, please don't forget to complete the survey. It's very important for ACC to know how to better serve it's members.

And thank you so much for attending today's Webcast.

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