Workplace Disciplinary Investigations and Confidentiality: Striking the Right Balance

Gerard Morales and Barbara McCloud

Employers need to thoroughly investigate claims of workplace misconduct, and to maintain confidentiality. But how much confidentiality is enough? And how much is too much?

Employers face a difficult dilemma. They need to implement workplace harassment and conduct policies to avoid serious and potentially crippling exposure. And to encourage employee cooperation—and avoid additional tort liability—they have to make sure that investigations into disciplinary matters are kept confidential. So far so good. The dilemma arises from the requirements of the National Labor Relations Act (“NLRA”). The National Labor Relations Board

Gerard Morales is a partner, and Barbara McCloud is an associate in the Phoenix offices of Snell & Wilmer, practicing labor and employment law. The authors gratefully acknowledge the research and helpful comments provided by Allyn Langford, an associate in the Phoenix office, and summer associate Jeff DeBruin, a 2004 J.D. candidate at the University of Minnesota.

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 (“NLRB” or “Board”) interprets many of these confidentiality provisions as irreconcilably conflicting with the employees’ statutory rights to engage in concerted activities for mutual aid and protection. See National Labor Relations Act §§7-8, 29 U.S.C. §§157-158. So, if the employer fails to keep the information confidential, it could lead to expensive tort liability. But if the employer maintains confidentiality, it could face an unfair labor practice charge.

Although there are no cut-and-dried answers, this article suggests several ways that an employer can implement and maintain a confidentiality policy that does not invite trouble under the NLRA.

WHY THE EMPLOYER NEEDS THE DISCIPLINARY POLICY: DEFENSE

Employers are not legally required to create or implement formal procedures for disciplinary investigations. Such programs are critical, however, because they can provide an affirmative defense against claims of discrimination. Pointedly, in cases involving allegations of harassment, the United States Supreme Court emphasized in Faragher v. City of Boca Raton, 524 U.S 775 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), that an employer can avoid liability for harassment if it promptly and adequately responds to such accusations. Faragher, 524 U.S. at 807-09; Burlington, 524 U.S. at 764-65. (For the defense to work, the harassment must not result in tangible employment action such as discharge, demotion, or undesirable re-assignment. Faragher, 524 U.S. at 807-09; Burlington, 524 U.S. at 764-65.)

Making The Defense Work

For an employer to be able to assert this defense:

• The employee cannot unreasonably fail to take advantage of the corrective procedures provided by the employer.

Faragher, 524 U.S. at 807-09; Burlington, 524 U.S. at 764-65. The Court explicitly stated that while employers are not required to create such programs, the existence of reasonable programs is evidence of meeting the first element of the defense.

Although the Supreme Court did not describe the ingredients for a “reasonable program,” it seems clear that at a minimum, employers should create an effective policy, make the employees aware of the policy, conduct awareness training for management and other employees, promptly investigate claims, and establish viable remedial measures. Dolores Y. Leal (ed.), The Faragher/Ellerth Affirmative Defense, 7 Sexual Harassment Litig. Rep. (Andrews) 1, 1-2 (Dec. 2001). For an example of a successful harassment investigation policy, see Kohler v. Inter-Tel Technologies, 244 F.3d 1167, 1180 n.10 (9th. Cir. 2001). For practical recommendations on creating a policy, see Ronald M. Green & Richard J. Reibstein, Employer’s Guide to Workplace Torts, 257-59 (BNA, 1992). Practically speaking, formal policies will assist an employer in promptly investigating allegations and will force employees to utilize the established procedures to avoid having their suits dismissed for failing to comply with the second requirement of the defense.

What The “Recommendation” Really Implies

The reality of the Supreme Court’s “recommendation” is that an employer is much more susceptible to liability if the employer does not have a formal policy that it distributes to its employees. See, e.g., Meriwether v. Canusco Packaging Co., 326 F.3d 990, 994 (8th Cir. 2003). The Meriwether Court recently reiterated that “[p]rompt remedial action shields an employer from liability when the harassing conduct is
committed by a co-worker rather than by a supervisor.” Id. The court noted that reasonableness of remedial actions, closeness in time to action, and the measures taken, are all factors to consider in evaluating the reasonableness of response. Id. One of the most effective ways an employer can meet this defense is by having in place and making known to all employees a formal investigatory procedure for harassment allegations.

In fact, the Supreme Court denied certiorari in a case that imposed liability on an employer based partially on the employer’s failure to distribute an existing harassment investigation policy. Harrison v. Eddy Potash, Inc., 158 F.3d 1371, 1377 (10th Cir. 1998), appeal after remand, 248 F.3d 1014 (10th Cir. 2001), cert. denied, Eddy Potash, Inc. v. Harrison, 534 U.S. 1019 (2001). Even though Harrison suggests that policies should be in place, the courts have made clear that having a policy is not legally required. See Faragher, 524 U.S. at 807-09; Burlington, 524 U.S. at 764-65; Kohler, 244 F.3d at 1180. In economic terms, formal investigation programs are a cost-effective way to avoid potentially damaging levels of liability, for reducing negative publicity, and for creating a positive work atmosphere. See, e.g., Marley S. Weiss, The Supreme Court 1997-1998 Labor and Employment Law Term (Part I): The Sexual Harassment Decisions, 14 Lab. Law. 261, 286 n.144 (1998) (discussing several large-dollar sexual harassment lawsuits); William C. Martucci & Robert B. Terry, Sexual Harassment in the Workplace: A Legal Overview, 3 Lab. Law. 125, 134 (1987) (noting that harassment suits often have non-monetary costs such as negative publicity and wastes of time and energy).

Without Confidentiality, Employees Won’t Cooperate

As discussed above, in an effort to encourage employees to report misconduct by fellow employees or supervisors, and to cooperate in disciplinary investigations, many employers require confidentiality by and between those individuals involved in the investigation. See, e.g., Phoenix Transit System, 337 N.L.R.B. 510 (2002); IRIS U.S.A., Inc., 336 N.L.R.B. 1013 (2001); Desert Palace, 336 N.L.R.B. 271 (2001). In the Fall of 2000, labor lawyer Shirley Feldman-Summers empirically examined the circumstances that affect the reporting of harassment. See Shirley Feldman-Summers, Analyzing Anti-harassment Policies and Complaint Procedures: Do They Encourage Victims to Come Forward? 16 Lab. Law. 307 (2000). In her analysis, Summers critiques and explains the results of several studies that examined the factors that affect the likelihood of reporting sexual harassment. Summers postulates that the four most commonly cited reasons that affect the decision not to report are:

- The expectation of adverse consequences;
- The expectation that “nothing would be done”;
- A fear of embarrassment; and
- A desire not to hurt the harasser.

Id. at 309-14. Based on a survey conducted by the U.S. Merit Systems Protection Board, Summers concludes that assuring confidentiality and privacy is an influential factor in encouraging employees to report harassment. Id. at 315-16 (interpreting U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Trends, Progress and Continuing Challenges (U.S. Government Printing Office, 1995)). According to Summers and the U.S. Merit Systems Protection Board survey, 19 per cent of harassed employees who did not report the harassment indicated that a lack of confidentiality played a part in their not reporting the harassment. Id. In another survey of women in management, over 80 per cent of those surveyed indicated that they believed that an assurance of privacy or confidentiality would encourage employees to report harassment. Id. (citing Ellen R.
Moreover, the second prong of the Burlington/Faragher affirmative defense, which is based on Title VII’s policies of encouraging the reporting of and reducing the incidence of sexual harassment, requires employees to use their employer’s harassment investigation procedures. See Martha S. West, Preventing Sexual Harassment: The Federal Courts’ Wake-up Call for Women, 68 Brook. L. Rev. 457, 487-89 (2002) (arguing that the private nature of harassment and fear of adverse consequences discourages women from reporting harassment, thus creating a situation where a claimant will always lose a harassment claim because the claimant will not have made use of an employer’s investigation procedures). Without the assurances of confidentiality that are so critical to reporting harassment, the studies suggest that a large number of employees will not report harassment. As a result, it is possible that an employer who can show that it exercised reasonable care under the first prong of the affirmative defense to harassment claims, will be absolved of any wrongdoing by the second prong of the affirmative defense; that is, employees may fail to avail themselves of the employers’ policies, because of fear of the consequences of reporting when confidentiality is not guaranteed.

Confidentiality Makes The Defense Workable

From a policy standpoint, employers will best support the policies underlying Title VII and the Burlington/Faragher affirmative defense by maintaining confidentiality policies that encourage the reporting of harassment. One of the goals of Title VII is to encourage employers to create mechanisms by which harassment can be remedied. As the Burlington Court noted, “Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.” Burlington, 524 U.S. at 764 (citing EEOC v. Shell Oil, Co., 466 U.S. 54, 77 (1984). The Court likewise noted that Title VII endorses early reporting of harassment to avoid situations in which harassment becomes severe or pervasive. Id. (citing McKennon v. Nashville Banner Publ’g Co., 513 U.S. 352, 358 (1982)). As noted previously, studies have shown that if employees do not believe that their reports will be held in confidence, they are less likely to report the harassment. If harassment is never reported, an employer will never be able to fully address the policies supporting Title VII.

POTENTIAL TORT EXPOSURE FOR LACK OF CONFIDENTIALITY • In addition to serving the goals of Title VII, confidentiality policies provide employers with a measure of protection against a variety of claims based on tort theories. The following are some of the tort theories which employers may face for failure to impose restrictions on the dissemination of sensitive information obtained and discussed during disciplinary investigations and as a result of taking action based on the results of that investigation.

Defamation

Employers face liability for defamatory statements made by the employer and for those made by one employee about another. See, e.g., Chisholm v. Foothill Capital Corp., 3 F. Supp. 2d 925, 938 (N.D. Ill. 1998) (holding that “a corporate defendant is jointly and severally liable for defamatory statements actionable against its employee when the employee is acting within the scope of his employment”); Haigh v. Matsushita Elec. Corp. of Am., 676 F. Supp. 1332, 1348 (E.D. Va. 1987); Mullinax v. Miller, 531 S.E.2d 390, 393 (Ga. Ct. App. 2000) (stating that “a principal is liable for the libel committed by his employees in the scope of their employment”). In the context of harassment investigations, an employer might incur liability for defamatory
statements made by those involved in the investigation to others. (Defamatory statements are those that tend to harm the reputation of another or deter others from associating or dealing with that person. Restatement (Second) of Torts §559 (1977).) To establish a claim for defamation, a claimant must prove that:

• There is a defamatory statement;
• The statement must be published to a third party;
• The statement must be one of fact and not opinion;
• The statement involves the claimant;
• The statement turns out to be false; and
• The statement results in harm to the claimant. Restatement (Second) of Torts §568 (1977). Employers should be especially concerned when the employee making the statement is judgment-proof and the injured person seeks to recover from the employer. But see, e.g., Kibbe v. Potter, 196 F. Supp. 2d 48, 53 (D. Mass. 2002). The court in Kibbe held that sexual harassment complaints as well as statements made by the employer investigating claims of harassment are privileged. Accordingly, a defamation claim against an employer or an employee based on defamatory statements associated with a claim of workplace harassment is subject to the conditional privilege so long as the complaint is:

• Of a kind reasonably calculated to protect or further the employer’s interest in maintaining a workplace free of sexual harassment; and
• The complaint is not made recklessly.

One way employers might reduce the potential for defamatory liability is to enforce a confidentiality policy.

Invasion Of Privacy
Through False Light Publicity

Closely related to defamation is liability for false light publicity. To be liable to another for invasion of privacy via false light publicity, two elements must be satisfied:

• First, the false light in which the other person was placed must be highly offensive to a reasonable person;
• Second, the actor must have knowledge of or act in reckless disregard as to the falsity of the publicized matter and the false light in which the other is placed.

1 Mark A. Rothstein et al., Employment Law §4.14 (2d ed. 1999) (quoting the Restatement (Second) of Torts §652E (1977)). False light publicity is a species of invasion of privacy and it differs from defamation in that the claimant need not be actually defamed to support a claim of false light publicity. All that is required is that the claimant must be the subject of highly negative false publicity concerning the claimant’s characteristics, conduct, or beliefs. Holly M. Polgase & James J. Chiapciak, Employment Law Basics, 3 Def. Res. Inst. 44 (1997). When an employee is unable to meet the stricter requirements of a defamation claim, that employee may have a viable invasion of privacy claim. Although employers are less likely to incur liability based on this theory unless the employer actively publishes the negative statement or is the party who starts the negative rumor that leads to publication, the potential does exist. One way prudent employers attempt to minimize the potential for these types of claims is by enforcing confidentiality policies.

Negligent Investigations

An employer may face liability for the way in which the investigation is conducted. See Green & Reibstein, supra, at 219-25 (1992) (discussing how hasty, incomplete, or improperly conducted investigations greatly increase the potential for employer liability). Employers must recognize that when it becomes involved in investigations which may lead to some action taken against an employee, and the employer faces the possibility of legal action from both of the
parties involved in the investigation. See Kim S. Ruark, Note, Damned if You Do, Damned if You Don't? Employers' Challenges in Conducting Sexual Harassment Investigations, 17 Ga. St. U. L. Rev. 575, 584 (2000) (citing John Accola, Coors Runs into a Minefield, Denver Rocky Mountain News, Mar. 28, 1999, at 1G, reporting on a case where Coors spent almost $600,000 investigating a single sexual harassment complaint and protecting the accuser; citing John Accola, Jury Orders Coors To Pay Fired Worker; Man Fights Accusation of Sexual Harassment, Denver Rocky Mountain News, Aug. 10, 1999, at 1B reporting on a case in which the victim sued Coors for sexual harassment, and the accused sued for defamation and breach of contract. The company settled with the victim for $200,000. A federal jury ordered the company to pay $730,000 to the accused.) Thus, it is predictable that claims of negligent investigations be part and parcel of the aforementioned causes of action against an employer. Id.

Although many courts have declined to recognize a cause of action for negligent investigation, the employer’s failure to adopt measures to avoid unnecessary distribution of sensitive information is clearly a factor considered by the courts in defamation-type cases. See, e.g., Gonzales v. CNA Ins. Co.; 717 F. Supp. 1087, 1090 (E.D. Pa. 1989), Williams v. Continental Airlines; 943 P.2d 10, 18 (Colo. Ct. App. 1996), and O’Connell v. Bank of Boston 640 N.E. 2d 513 (Mass. App. Ct. 1994).

**HOW CONFIDENTIALITY CAN INVITE TROUBLE UNDER THE NLRA** • The NLRB has long held that the maintenance of rules which could be interpreted to inhibit employees from engaging in concerted activities is violative of the NLRA. Farah Mfg. Co, 87 N.L.R.B. 601 (1970), enforced per curiam sub nom. Farah Mfg. v. NLRB, 450 F. 2d 942 (5th Cir. 1971). In this connection, it is important to remember that to be “concerted,” it suffices to show that the activity of one employee was “on behalf of” other employees, or was undertaken with the object of inducing or preparing for group action. It is not necessary to show that the activity was a “group act,” or even that the activity of one employee was authorized by others. An activity is concerted if it is related to group action for the mutual aid or protection of other employees. See, e.g., ARO, Inc. v. N.L.R.B., 596 F. 2d 713 (6th Cir. 1979), and Computware Corp. v. N.L.R.B., 134 F.3d 1285 (6th Cir.), cert denied, 523 U.S. 1123 (1998).

**It’s A Matter Of Interpretation**

Several recent cases illustrate the Board’s application of this well established principle:

- In Iris U.S.A, Inc., 336 N.L.R.B. 1013, the employer maintained a rule which instructed employees to keep information about employees strictly confidential. The Board affirmed the Administrative Law Judge’s conclusion that maintenance of such rules constituted an unfair labor practice, as it “would reasonably tend to chill employees’ right to engage in concerted protected activities. N.L.R.B. v. Vanguard Tours, Inc., 981 F.2d 62, 67 (2d Cir. 1992); IRIS, supra, 336 N.L.R.B. at 1019. The unionizing rights to which the board refers are those protected by 29 U.S.C. §157, which governs that “[e]mployees shall have the right to self-organization, to form, join or assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” National Labor Relations Act §7, 29 U.S.C. §157 (2003). Section 8(a)(1) of the NLRA is the enforcement mechanism for protecting those rights and prohibits any employer from interfering with them. National Labor Relations Act §8(a)(1), 29 U.S.C. §158(a)(1) (2003). Confidentiality policies cannot “chill” employees in the exercise of their rights to organize or participate in concerted or union activities;
• In *Lafayette Park Hotel*, 326 N.L.R.B. 824, the NLRB examined a confidentiality provision that stated that “[d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information” is impermissible. *Id.* at 826. The NLRB affirmed the enforceability of that provision, but indicated that confidentiality provisions that bar discussions of terms and conditions of employment or of employment problems likely restrict the employees’ statutory rights under the NLRA. *Id.*;

• *Flamingo Hilton-Laughlin* involved another challenge to an employer’s confidentiality requirement. *Flamingo Hilton-Laughlin*, 330 N.L.R.B. 287 (1999). In relevant part, the confidentiality policy required that employees “not reveal confidential information regarding our customers, fellow employees, or Hotel business…[and that] Hotel business is confidential and must not be discussed with any party not associated with the Hotel.” *Id.* at 291. The NLRB noted that this provision was ambiguous and could be interpreted as “limiting employee discussion of wages and other terms and conditions of employment.” *Id.* at 292. Accordingly, the NLRB struck down the provision because it impermissibly restricted employees in exercising their Section 8(a)(1) rights. *Id.*

No “Gag Rules” For Harassment Investigations

The NLRB has likewise prohibited employers from requiring confidentiality during harassment investigations. *Phoenix Transit System*, 2002 NLRB LEXIS 170 (May 10, 2002), enforced per curiam sub. nom. *Phoenix Transit System v. N.L.R.B.*, 2003 U.S.App. LEXIS 9429 (D.C. May 14, Cir. 2003). In *Phoenix Transit System*, several employers accused a supervisor of harassing behavior. 2003 U.S. App. LEXIS 9429, at *3. The employer directed the employees “never to talk about the matter, at any time, to anyone, even about their own observations and complaints.” *Id.* at *3-4. One employee discussed the investigation in a company newsletter and was dismissed for violating the confidentiality directive. *Id.* at *3. Although Phoenix Transit cited using inflammatory remarks as the reason for termination, the NLRB considered whether the employer’s confidentiality directive constituted an unfair labor practice. *Id.* The NLRB concluded that the author/employee was engaged in protected activity under Section 7. *Id.*

It is clear that under Board law, employers cannot prohibit discussions regarding wage rates and other employment information. *Id.* at *3-4. It follows that “[e]mployees have a right protected by the [NLRA] to discuss among themselves their sexual harassment complaints.” *Phoenix Transit System*, supra, 2002 NLRB LEXIS 170, at *23. *All American Gourmet*, 131 N.L.R.B. 1111 (1989)). The facts of *All American* were similar to those in *Phoenix Transit* in that the Board found invalid an oral statement from a supervisor to an employee that the employee should bring complaints of harassment to a supervisor but not discuss the complaints with anyone else. *All American Gourmet*, 292 N.L.R.B. at 1130 (1989).

Broad Policies Invite Problems

Taken together, the NLRB has defined some difficult and broad limitations for any confidentiality policy. An employer’s confidentiality policy cannot chill employees’ exercise of statutory rights under either Section 7 or 8 of the NLRA, and it cannot prohibit discussion of the terms or conditions of employment including employment problems such as harassment complaints. With respect to keeping harassment investigations confidential, although *Phoenix Transit* and *All American Gourmet* can be read as fact-specific cases involving overly broad prohibitions on confidentiality, both readily state that an employer cannot have a broad policy prohibiting
employees from talking about harassment complaints with other employees.

**RESOLVING THE DILEMMA** • So given the tension between the need for confidentiality in investigations, and the unfair labor practice risk it can pose, what can the employer do? While the NLRB’s aforementioned decisions appear to set an absolute standard against which such policies will be evaluated, language in each of the opinions provides several clues to how an employer can maintain an enforceable confidentiality policy.

In *Phoenix Transit*, the court affirmed the NLRB’s recognition that employers often do have valid confidentiality interests. *Phoenix Transit System*, 2003 U.S. App. LEXIS 9429, *3-4. However, the court also noted that the employer’s “assertion that the success of its sexual harassment policy depends on confidentiality lacked evidentiary support, and is particularly unconvincing in light of the fact that the confidentiality directive’s effect was to silence sexual harassment witnesses and victims.” *Id.* at *4. This cautionary language reaffirms prior decisions in which narrowly tailored and applied confidentiality policies survived NLRB scrutiny. In a few opinions, the NLRB has held that a “reasonable” confidentiality policy can be enforced. See, e.g., *Desert Palace, Inc.*, supra, 336 N.L.R.B. at 272; *Bell Federal Savings & Loan*, 214 N.L.R.B. 75, 78. However, what the Board means by “reasonable” in this context is very difficult to decipher.

Indeed, in *Desert Palace*, the NLRB held that a confidentiality policy can be legally enforced when the employer’s legitimate and substantial business justifications outweigh the employee’s interests in discussing the terms and conditions of their employment. *Desert Palace, Inc.*, supra, 336 N.L.R.B. at 272 (emphasis added). See also Matthew Bender & Co., *National Labor Relations Act: Law and Practice §4.04(a)* (2002) (noting that the NLRB performs a balancing test when employers have legitimate interests in maintaining confidentiality but when the subject matter of that speech is protected under the NLRA). The policy at issue in *Desert Palace* was created to avoid potential cover-ups by management, retaliatory violence, destruction of evidence, and fabrication of testimony during a workplace drug investigation. *Id.* The NLRB held that the preceding reasons were of substantial enough concern to outweigh the employees’ interests in unrestricted speech. *Id.* The administrative judge stated that he had “great sympathy for [an employer’s] legitimate concern…with maintaining a drug free work environment” and was “quite ready to grant great weigh to confidentiality efforts aimed at controlling employees who are drug impaired.” *Id.* at 276. The judge indicated that an emergency situation might supply one substantial justification, and that the viability and enforcement of, as opposed to non-enforcement, of a policy is also indicative of a substantial business justification. *Id.* The following are some of the important hallmarks of an appropriate and narrowly tailored policy.

**Investigate Promptly, and Invoke Confidentiality Just As Promptly**

When the employer needs to maintain the confidentiality of an investigation—particularly into allegations of workplace harassment—the confidentiality has to be part of a quick response to the conduct complained of. The administrative judge in *Desert Palace* was troubled by the fact that the information placed under a confidentiality provision was known to several employees for a long time before it was made confidential. *Desert Palace*, supra, 336 N.L.R.B. at 272. By promptly investigating claims and implementing a narrowly tailored confidentiality requirement after learning of the allegations, an employer might be addressing the concerns an-
nounced in Desert Palace, and the timely response to the allegations may weigh in favor of upholding an employer’s confidentiality policy.

“Confidential” Does Not Mean “Forever”

Another problem the NLRB had with a number of confidentiality policies they struck down is the policies prohibited employees from talking about the information forever. See, e.g., Phoenix Transit System, supra, 2002 NLRB LEXIS 170, at *14 (noting the management personnel who announced the confidentiality requirement “gave no explanation for [the] instruction, and placed no time limit upon it”). Although there is little language that provides insight into the question of how long is too long, a narrowly tailored confidentiality requirement put in place for a defined period of time would be more likely to find Board support.

Allow Discussions Of The Process, Not The People

The NLRB has held that employers cannot prohibit employees from discussing “terms and conditions of employment.” See, e.g., Flamingo Hilton-Laughlin, supra, 330 N.L.R.B. at 292 (1999); Iris, supra, 336 N.L.R.B. at 1016 (2001). In enforcing this limitation, the NLRB aims to prevent employers from creating an atmosphere that “chills” employees from exercising their unionizing rights. A policy that permits abstract discussions of the progress of harassment investigations, but at the same time prohibits employees from revealing the identities of others, arguably does not conflict with either of the NLRB’s goals, and can in fact co-exist with those goals.

Prohibiting employees from revealing identities will not chill the employees from exercising their statutory rights. The NLRB in Phoenix Transit mentioned that “day-to-day discussions and interchange of ideas” are extremely important and that attempts to “arouse consciousness and indignation among [the fired employee’s] fellow employees concerning the perceived injustices among his fellow employees” are definitely protected. Phoenix Transit System, supra, 2002 N.L.R.B. LEXIS 170, at 18-19. Allowing employees to talk about the progress and validity of investigations will comply with Phoenix Transit’s requirements because no such chilling effect will occur. An employee can speak of the employer’s injustices as effectively in the abstract as in the first person. Although knowledge of the identities of those involved might provide a means to verify the story, inquiring with the employer should serve as a more than adequate avenue by which allegations and injustices can be confirmed.

As noted above, the NLRB struck down a number of confidentiality policies because they prohibited employees from talking about the information forever. See, e.g., id, at *14 (noting the management personnel who announced the confidentiality requirement “gave no explanation for [the] instruction, and placed no time limit upon it”). Although there is little language that provides insight into the question of how long is too long, by allowing employees to abstractly speak about a harassment investigation, an employer could likely require keeping information confidential for a much longer period of time.

Permit Legitimate Inquiries

Create a procedure that provides for the release of reports detailing the progress of investigations, and likewise permit employees to make inquiries about the status of those investigations. The NLRB in Phoenix Transit stressed that Phoenix Transit did nothing to reveal the progress of the investigation. It is highly plausible that the troublesome speech in that case and the challenge to the policy would have never arisen had Phoenix Transit provided procedures whereby employees could obtain general information on
the status of the investigation. See West, supra, Preventing Sexual Harassment: The Federal Courts’ Wake-Up Call For Women, 68 Brook. L. Rev. at 497-504 (2002) (recommending that employers create a procedure whereby employees can look into the progress of investigations). As suggested above, it is entirely plausible to keep individual identities and specific disciplinary decisions confidential, yet reveal the general status of an investigation.

Permitting Inquiries
Encourages Concerted Activity

There is an important reason to permit employees to check into the progress of claims that are under investigation. While the other recommendations about the confidentiality policy do not actively encourage the right of employees to engage in concerted activities, permitting them to find out about the status of investigations does encourage the right. While the employee in Phoenix Transit was able to base his articles on personal experiences, this mechanism will provide employees with assurances that the employer has not simply abandoned the matter. Employers may criticize such a mechanism as being too costly and as a way of drawing attention to evidence that could lead to a lawsuit. However, a number of additional practical reasons favor providing such a release valve.

Employee Morale

By providing a way for employees to learn the status of investigations, employers will more likely be able to maintain a confidentiality requirement because employees will be less likely to challenge such a policy and the NLRB will be more likely to uphold the policy. Additionally, two of the goals of Title VII are to prevent and remedy sexual harassment, and studies show that one factor that influences whether victims will report harassment is whether the employee perceives action will be taken on his or her complaint. See Feldman-Summers, supra, at 309-16. A procedure by which employees can confirm, even if in general terms, the progress of an investigation, will best comply with the goals of Title VII and will likely cast an employer in a better light when faced with a lawsuit.

Offer Explicit Justifications For The Policy

Give credit to the policy by creating a full record of the reasons and justifications for the breadth of the policy. Desert Palace held that a confidentiality policy might be upheld when an employers’ legitimate and substantial business justifications outweigh the employees’ interests in discussing the terms and conditions of their employment. Desert Palace, Inc., supra, 336 N.L.R.B. at 272. Accordingly, in drafting confidentiality policies, employers should refer to the justifications for the policy. Potential justifications include:

- Productivity;
- Employee happiness and quality of work;
- Reduction of costs associated with litigation;
- Compliance with the goals of Title VII; and
- A desire to create an equality-based workplace with a positive public image.

In addition to citing numerical justifications for such policies, an employer may also wish to cite to social science literature examining this issue. For examples of such studies, see Feldman-Summers, supra.

Other Limitations

Although the NLRB has not tested all aspects of confidentiality policies, there are a number of additional considerations an employer should examine. For example, prohibiting an employee from revealing identifying information about him- or herself will potentially conflict with that employee’s freedom of expression. An employer should also be aware that law enforcement or other private investigators may be involved in
investigating a particular claim and that cooperation with outside authorities might be required. Generally speaking, an employer should remember that the NLRB takes a strong position when protected speech is regulated, and every restriction or limitation on speech should be examined to ensure that it is absolutely necessary and narrowly tailored to meet the employer’s legitimate business needs.

CONCLUSION • To take advantage of the affirmative defense against sexual harassment liability, an employer needs a formal mechanism for investigating the claims. As part of these investigations, many employers try to maintain confidentiality in an effort to protect all those involved and to avoid liability. Employers fail to realize, however, that restricting employees’ speech can conflict with the National Labor Relations Act and that any confidentiality requirement must be narrowly tailored. Although an employer could choose to not require confidentiality, this may also expose the employer to liability, and potentially deter employees from disclosing harassment, contravening the goals of Title VII. In sum, while confidentiality policies are necessary as part of disciplinary investigations, they must be narrowly tailored and enforced to diminish the risk that their maintenance or enforcement may be found unlawful as unfair labor practices.

PRACTICE CHECKLIST FOR Workplace Disciplinary Investigations and Confidentiality: Striking the Right Balance

Employers can avoid liability for workplace harassment by conducting prompt investigations. But if the investigations lack confidentiality, the employer faces tort liability. And if the restrictions of confidentiality discourage concerted activity, the employer faces a potential unfair labor practice charge. There are some things the employer can do to strike the right balance, though.

• Investigate promptly, and invoke confidentiality just as promptly. By promptly investigating claims and implementing a narrowly tailored confidentiality requirement after learning of the allegations, an employer can more effectively address the conduct complained of, and minimize the need for restrictions surrounding the investigation.

• Allow discussions of the process, not the people. Prohibiting employees from revealing identities will not “chill” the employees from exercising their statutory rights.

• Permit legitimate inquiries. Create a mechanism that allows employees to formally inquire into the progress of an investigation and release regular reports detailing the progress of those investigations. While the other recommendations about the confidentiality policy do not actively encourage the right of employees to engage in concerted activities, permitting them to find out about the status of investigations does encourage the right. Also, by providing a way for employees to learn the status of investigations, employers will more likely be able to maintain a confidentiality requirement because employees will be less likely to challenge such a policy and the NLRB will be more likely to uphold the policy.

• Offer explicit justifications for the policy. Potential justifications include:
  __ Productivity;
  __ Employee happiness and quality of work;
  __ Reduction of costs associated with litigation;
  __ Compliance with the goals of Title VII, and
  __ A desire to create an equality-based workplace with a positive public image.