So Your Employee Is Accused of a Sexual Assault—Now What?

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It is the telephone call no business manager or in-house legal officer wants to receive: the report that a client, customer, employee or visitor has been sexually assaulted by a company employee. These situations develop quite quickly, and how they are initially handled could affect the inevitable future civil case that gets filed, not to mention the negative press and disruption to business operations that can such an event can generate.

This article addresses how to deal with the person accused of committing the sexual tort. Of course, each situation is different, and a company's approach to the situation will depend upon multiple factors, not the least of which is the amount of evidence tending to show (or not show) whether the employee committed the assault in

question. We hope, however, that this will be helpful in identifying best practices and highlighting the inevitable dilemmas that face employers in these situations.

Act Quickly and Investigate Thoroughly

While the particulars of how to conduct an internal investigation is beyond the scope of this paper, some initial comments on that front are appropriate. An employer that receives notice of a sexual assault by its employee must act quickly. This sounds obvious, but sometimes layperson concerns about negative publicity, ignorance about the civil or criminal process, or basic inertia generated from the shock of the event can cause delays, especially if the evidence is less than clear. Corporate counsel and senior management should ensure that their entity's employees are aware that *any* suspicion of sexual abuse must be reported immediately to the company's compliance or legal department. Specific policies should be in place for reporting such events.

The first task when facing a report of sexual misconduct is to ensure that the victim or potential victim is safe and has received any required medical attention. If other potential victims exist, they must be identified and cared for as well. It is essential to treat a victim with care and compassion, not only in terms of basic humanity, but also to ensure that an employer and provider of the care do not later appear to a jury as callous or indifferent to the victim. The next critical steps are to sensitively engage the victim's family or primary caregivers and to notify applicable law enforcement or regulatory bodies as required. All of these actions demonstrate that an employer has taken the situation seriously and has responded in appropriate ways, which may help mitigate the victim or family's anger as they react to what is always a difficult situation.

Once these fundamentals have been addressed, an investigation should take place immediately. Delay in investigating can similarly cause the employer to appear insensitive or inept to a jury in a subsequent civil case.

As a first step, the employer should preserve all documents related to the care of the victim and the employment of the accused. All potentially relevant staffing notes, schedules, visitor sign-in sheets, charts, patient reports, employee files, and similar operational documents should be secured and protected from alteration or destruction. "Informal" notes, e-mails, texts, and other documents from nurses, caregivers, schedulers, or managers must be identified and preserved. Confidentiality should be emphasized with all potential witnesses. Employees should similarly be admonished not to make any unauthorized statements to the press or to parties outside of the organization and to notify management of any requests by law enforcement personnel for interviews. Potential witnesses should also be instructed not to create any *new* documents or summaries regarding the event unless specifically requested to do so by the company's counsel or senior management. Once all of this is done, an employer will be ready to conduct witness interviews.

An initial decision must be made about whether an attorney will conduct the investigation. Cloaking the investigation under the attorney-client privilege and work product doctrine has several advantages. When an investigation is conducted by counsel, a plaintiff's attorney is generally not entitled to discover the identity and number of witnesses that defense counsel selects for interviews, the identity of documents selected for collection and review, or the process and structure of the investigation in general. This makes it very difficult for plaintiff's counsel to criticize the employer's investigation or to characterize it in negative ways. Further, attorneys are

typically more skilled than the average layperson in pinning down witnesses about what they actually know, in contrast to conclusions based on speculation. Generally speaking, having an attorney conduct the investigation is the preferred approach.

Obtaining Statements and Information from the Accused

Ultimately, the accused person will be a key witness in every sexual tort case. Getting information from the accused can be difficult, especially once he is charged and a criminal action is underway. The immediate availability of the accused for an interview may depend upon whether or how soon he is incarcerated or whether he has retained criminal defense counsel.

Regardless, before interviewing the accused, defense counsel must give the employee all appropriate "*Upjohn*" warnings and make any disclosures required by state-specific ethical rules. *See* ABA Model Rules of Professional Conduct 1.13 (representation of corporations and employees) and 1.17 (conflicts of interest) *See also Upjohn Co. v. United States*, 449 U.S. 383 (1981). Counsel should be cognizant that it is unlikely that the attorney-client privilege will protect an interview itself with an accused person. Having an attorney conduct the interview, however, generally protects the attorney's notes of the interview from discovery under the work product doctrine. This allows the employer and its counsel to find out how the accused responds to questioning without the risk of creating damaging and discoverable evidence of the accused's responses. Once an initial privileged interview is conducted, the employer can then decide whether to obtain a formal, discoverable statement.

Defense counsel should be mindful that there is little to prevent a civil plaintiff's attorney or his or her investigator from communicating with the accused , either before or after a criminal case has run its course.

> As explained in a recent article from the American Association for Justice's *Trial*,
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> > the criminal prosecution is a rich source of information that can support the victim's civil suit. You might have the opportunity to interview the criminal defendant about information central to your tort case. For example, a defendant can disclose where he or she was drinking before a drunk-driving collision, enabling you to identify a potential defendant in a dram shop action. A defendant could reveal who negligently entrusted him or her with a firearm before the crime, or explain that he or she targeted victims in a particular parking lot because there were fewer security measures than at other shopping centers, thus establishing inadequate security as a proximate cause of the victim's injuries.
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> > The right time to seek a sworn statement from the criminal defendant is after guilt has been established through a conviction or guilty plea but before sentencing, because that is when a criminal defense attorney will be most cooperative. As plaintiff attorney Elliot Glicksman of Tucson, Arizona, explains, the defense attorney wants to be able to argue at sentencing that the defendant feels remorse. When seeking a defendant's statement, Glicksman tells the defense attorney that if the defendant gives a statement before sentencing, the defense can tell the judge that the defendant has cooperated with the victim's investigation. If the defense attorney won't allow the sworn statement, Glicksman will tell the judge that the defendant has refused to cooperate.

Jeffrey R. Dion, When Torts and Crimes Overlap, Trial Vol. 47, No. 12, December 2011), available at

http://www.justice.org/cps/rde/xchg/justice/hs.xsl/17234.htm (last visited Mar. 6, 2014) .

As reflected by the analysis above, obtaining helpful testimony from an accused may come down to which side is able to speak to him first. If the post-conviction, presentencing time period is the best time for a plaintiff's attorney to mine information from the accused, the best time for defense counsel to obtain information from him is before he is formally charged with a crime or is incarcerated, periods during which the employee has an incentive to deny wrongdoing and to appear cooperative with respect to the employer's internal investigation.

If the accused employee is available and cooperative, and his criminal defense counsel has permitted him to be interviewed, a potential civil defendant can get the employee's confirmation in an affidavit of facts helpful in defending a subsequent negligent hiring, retention, or supervision claim, before the incentives for assisting the employer disappear. Depending on the situation, the affidavit need not stray into areas that could affect the criminal defense, that is, whether the employee actually committed the crime in question. Rather, the affidavit can focus on facts that confirm, for example, that an employer met all of its hiring and supervision obligations under applicable law, no prior complaints were made against the employee while employed, and the employee was adequately trained. None of those factors should be damaging to the accused's criminal defense, improving the chances that criminal defense counsel will allow the accused to sign the affidavit. Indeed, it is likely advisable for an early affidavit to stay away from addressing criminal guilt because the credibility of the affidavit as a whole could be undermined by a profession of innocence by the employee if he is ultimately convicted of a crime.

As referenced in the *Trial* article quoted above, however, once a conviction or guilty plea has been entered, the ex-employee's priorities change, and he has every reason to deflect responsibility for the bad acts that he committed. We recently deposed a client's ex-employee who had been convicted of sexual assault and admitted to committing the crime. For a variety of reasons, we were unable to communicate with the employee before he pleaded guilty. Before the ex-employee's deposition, the plaintiff's counsel met with the assailant in prison and obtained an affidavit from him. In the affidavit, the ex-employee claimed that a lack of adequate training left him unable to care for his victim properly, which caused him to become so frustrated that he assaulted the client. While this post-hoc justification for his actions is trite and unbelievable, and was significantly undermined during the deposition, it demonstrates how a criminal defendant's propensity to blame others for his own actions can be leveraged by a plaintiff in a civil action to argue for a significant percentage of fault to be allocated to an assailant's employer.

The lesson to be learned from this is that gaining access to the accused and locking up his testimony as soon as possible can be invaluable in defending a sexual tort claim. Frankly, sometimes that access is not possible, as in the case described above, but if the avenues are open for communication with the accused, counsel for the accused's employer should take advantage of it.

Representation of the Accused in the Criminal Case

Often, an employee accused of sexual misconduct is unable to afford criminal defense counsel and is therefore represented by the local Public Defender's office. No

disparagement to public defenders is intended here, but generally speaking, public defenders have enormous caseloads, do not view it as part of their job to cooperate with civil defense counsel, and the quality of their representation varies. Our experience is that appointed public defenders are particularly unhelpful in making a client available and concerned that statements made to civil defense counsel could be used against the accused in a subsequent criminal hearing.

With that in mind, in some limited situations an employer may want to assist the accused in retaining and paying for private criminal defense counsel, if only to ensure access to him during the criminal process and cooperation from his criminal defense attorney. This often occurs in the Title VII sexual harassment context: the employer pays for separate defense counsel to defend both it and its employee accused of harassment. Candidly, we have not been presented with a real-life situation where we have recommended hiring defense counsel for an employee accused of criminal sexual misconduct. There are good reasons, however, for civil defense counsel to consider whether such a step is warranted in particular cases.

There are, of course, downsides, potentially significant downsides, to this approach, and we deal with those first. An initial one is cost. Defense of a criminal claim is expensive, and an employer or insurer that pays for an employee's criminal defense cost is essentially doubling its attorney fee expense. Second, it is more difficult for an employer to disassociate itself from the actions of the accused if it pays for his attorney. The fact that an employer has paid for the accused's criminal defense attorney may be discoverable and admissible in a subsequent civil trial and would be subject to exclusion solely at the discretion of a trial judge under relevance or undue prejudice evidence theories.

The upside, on the other hand, is increased cooperation between civil and criminal defense counsel, better access to the accused by civil defense counsel, and preventing civil plaintiff's counsel from having access to the accused. Hired criminal defense counsel should be more willing than a public defender to cooperate and to communicate with civil defense counsel during the criminal process to the extent that doing so is consistent with the criminal defense counsel's ethical obligations to his or her client. Moreover, even if an employee is convicted, a company's assistance in hiring criminal defense counsel could make an employee less predisposed to provide testimony damaging to the employer in a later civil trial. This makes the most sense when there are serious questions about the guilt of the accused employee: an employer or insurer may be more inclined to incur the cost of hiring criminal defense counsel when a successful criminal defense could forestall a subsequent tort lawsuit.

Another situation where the hiring of criminal defense counsel may be appropriate is when there is the potential for respondeat superior liability for the employer. In most states, intentional sexual misconduct is automatically deemed to fall beyond the course and scope of employment, but the plaintiffs' bar has made creative arguments to the contrary. If there is a real potential for the employer to be held vicariously liable for the actions of its employee, then hiring criminal defense counsel should be considered strongly.

With all that said, it will be the unusual case where an employer or an insurer agrees to provide a defense to an employee accused of criminal sexual misconduct, especially when there is significant evidence of a crime. The option, however, should always be considered, and the previous discussion is intended to highlight situations in

which employers or insurers should weigh the costs and the benefits of hiring criminal defense counsel in a given case.

Monitor the Criminal Proceedings

Regardless of who represents an accused employee, the employer should carefully monitor all associated criminal proceedings and have a representative attend all substantive hearings. A good plaintiff's attorney certainly will. The article from *Trial* cited above explains the views of the plaintiffs' bar about this:

> The victim's lawyer should always attend the sentencing hearing. Mitigating testimony offered at the hearing may reveal evidence of diminished cognitive abilities or other mental deficiencies. While the criminal defense is offering this evidence to explain why the perpetrator should not be judged too harshly, the plaintiff attorney can use the same evidence to argue that an intentional-act exclusion in a liability insurance policy should not prevent coverage for the incident. Sentencing hearings might also bring prior incidents to light that the civil attorney can use to establish critical notice requirements in a subsequent negligence suit against a third party.

Dion, *supra.*

Civil defense counsel often can do little to control what is said during a sentencing hearing, but they will always be in a better position to evaluate a potential civil case having such information. Further, a victim or his representatives may make testimonial admissions that will help a defense in a later civil trial. Particularly in the health-care context, victims or their families often express shock and dismay over an event, and they make statements to the effect that "We had no idea that something like this could happen," essentially conceding that neither they, and by extension, a

defendant company, had notice of previous acts that would suggest a propensity for sexual assault by the accused. Further, the transcripts of such proceedings should be obtained as quickly as possible to use ti evaluate and defend against a future civil action.

Take Necessary Employment Actions

If an alleged assailant has been identified, his employer must quickly make a decision about continuing his employment. This decision is generally dictated by the amount and the quality of the evidence suggesting that the employee, in fact, committed the act in question, and the seriousness of the injuries suffered by a victim. Initially, if someone identifies an employee as a perpetrator, the employer *must* immediately suspend the employee pending its initial investigation. A suspension could be with or without pay, depending upon the situation and jurisdiction. In either scenario, an initial suspension should be a short-term event, and a more permanent decision should be made and communicated after a company completes an internal investigation.

Option 1: Immediate Termination

Our experience has been that the most appropriate response when an employee has been taken into custody by law enforcement, or when there is significant evidence of sexual misconduct, is to terminate employment immediately. In these situations, an employer simply must disassociate itself from an alleged criminal and potential tortfeasor as quickly and completely as possible. If it is later determined that an employee was falsely accused and there is no question about his innocence, an employer has the option of rehiring the employee and providing him with back pay.

We make this recommendation even though terminating an employee could, in theory, be to the advantage of a plaintiff in a subsequent civil lawsuit. To prevail on a sexual assault or negligence claim, a plaintiff will have the burden of proving that improper sexual contact occurred. When the very act itself is disputed ,the employer's termination of the employee suggests strongly to a jury that the employer believes the plaintiff's version of events. On the other hand, an immediate termination, even before any criminal conviction or plea, demonstrates to a jury that an employer has zero tolerance for such conduct, is serious about protecting its clients, customers, or other employees, among others, and acted promptly and decisively in the best interests of them all. A prompt termination is also helpful in disassociating an employer from its former employee. It also insulates an employer from liability should an employee engage in any additional improper conduct should he remain employed.

Unless the plaintiff's claims are frivolous, we believe that the advantages of terminating the accused's employment usually outweigh any potential defense by the employer that the assault did not occur. If there is sufficient evidence to warrant the filing of a civil lawsuit, which often occurs *after* a guilty plea or criminal conviction of the accused, an employer is usually in a better litigation position if it has promptly terminated an employee.

Our firm recently handled a case involving a rehabilitation center where a long-time, high-performing employee was accused of having sexual relations with a mentally compromised client. The employee denied the misconduct, was initially incarcerate,d but then was released on bail. There was some question, based upon the facts available to the employer at the time, about whether the accusations of the victim were true.

Despite uncertainty about the validity of the claims, our client decided to fire the employee.

Inevitably, company management was asked during subsequent depositions why they fired the accused employee if they were not sure whether the plaintiff's allegations were true. The only correct answer to that question is the truthful one: "Even though the criminal investigation was ongoing and no determination of guilt had been made, we could not afford to take the risk of continuing to employ [the accused] if the allegations turned out to be true." Preparing company witnesses for these sorts of questions when the accused's guilt remains uncertain minimizes the negative effects of the termination decision and portrays an employer in a positive light.

Option 2: Suspension

A step down from immediately terminating the accused employee is to suspend him without pay. From a practical perspective, this has the same effect as a termination of employment: the accused does not come to work and does not get paid . Employers may be inclined to use this option under the theory that an employee is "innocent until proven guilty," but we usually recommend against this option. Nothing really changes from an employee's perspective, and an employer has not fully disassociated itself from the employee's potentially illegal acts.

An employer can also suspend an employee with pay. The particular circumstances of each individual case will dictate the approach, but our view is that this option should be reserved for situations involving substantial and serious questions about the validity of the allegations made against an accused. This approach would also

usually be reserved for times when an accusation has been made, but an employee has not been formally charged with a crime and a criminal investigation is ongoing.

Option 3: Continued Employment with Reassignment of Duties

A third option, reserved only for situations in which a victim's allegations are *highly* questionable, is to continue the employment of the accused, but to reassign him to duties that prevent him from having contact with the alleged victim or other vulnerable persons. Employers must take all allegations of sexual abuse seriously, and a *minimum* precaution pending an investigation into allegations, questionable or not, is to separate a victim from the accused. In these situations, however, it is often more appropriate to suspend an employee with pay pending an investigation, if only for the sake of prudence in case a victim's allegations ultimately are substantiated.

Conclusion

Handling someone accused in a sexual tort case is all about balancing the tension between appearing too aligned with a potential wrongdoer and obtaining information and testimony that could be critical to the defense of a subsequent civil action. Each case is different: an alleged assailant could admit or contest guilt; he could be cooperative or not; he may or may not try to blame others for his actions. Defense counsel's role is to evaluate how the accused is likely to react in a particular case, approach the accused for information at the appropriate time, and to try to minimize potentially negative testimony before it is obtained by counsel for a plaintiff.