THE TRIALS AND TRIBULATIONS OF SLICK WILLIE CLINTON - A STUDY OF SEXUAL HARASSMENT

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Whitewater Consulting is a political consulting company based in Totally Hot Springs, Arkansas. The sole shareholder is Mr. Webster Rubble. Slick Willie Clinton is regional manager for the geographic territories in the southeast U.S. extending from Louisiana-Florida. Whitewater Consulting employs ninety-five (95) employees nationwide. Slick Willie Clinton's ex-wife is Hillary Rodeham, a former cookie baker and housewife at the White House. Since leaving the White House, she began career in politics.

Slick Willie Clinton opened a satellite office for Whitewater Consulting in Baton Rouge, Louisiana. Whitewater Consulting was retained to consult Mr. Green Peace, a candidate for the 2003 Gubernatorial Election. Mr. Green Peace is a nominee from the Tree-Lover Party. The following is the platform of Mr. Green Peace in the 2003 Gubernatorial election:

1. A constitutional amendment repealing the oil and gas industry and outlawing hunting and fishing in Louisiana;

2. Adopting worker's compensation reform formulated by a think tank from San Francisco, California directed by Karl Marx IV and Barbara Streisand;

3. Abolition of collegiate athletics in the State of Louisiana. Mr. Green Peace believes that the losing team's participants suffer from irreparable self-esteem problems and post-traumatic stress syndrome after a loss.

Slick Willie Clinton hired Ms. Monica Budenski as a Special Assistant to the Regional Manager in Baton Rouge. In creating the position of Louisiana Special Assistant to the Regional

Manager, Slick Willie was reluctant to draft a detailed job description. Slick Willie believed that the position may encompass additional duties and was an evolving position. Accordingly, there were no educational requirements for said position. Ms. Monica Budenski attended four (4) years of college while working as a Special Assistant to the Life Guard at the Sand Destin Inn in Destin, Florida. During the four (4) years, she attended college part-time. Accordingly, on her employment application for Whitewater Consulting, Ms. Budenski indicated she completed four (4) years of college.

At the time of her hiring, Whitewater Consulting did not provide Ms. Budenski with any written policies pertaining to sexual harassment. Slick Willie Clinton simply told Ms. Budenski to let her know if any problems arose in connection with her employment.

At Whitewater's office in Baton Rouge, Ms. Monica Budenski had several strange encounters with Sweet Willie at the water cooler. The first encounter occurred two (2) weeks into her employment. Ms. Budenski just returned from visiting her old friends at the Sand Destin Inn Resort. She returned to work with a sunburn. At the water cooler, a co-employee asked whether Slick Willie and Monica Budenski wanted a smoothie from the Smoothie King. Monica declined the offer. However, Slick Willie stated he wanted a strawberry smoothie because "the redder the berry, the sweeter the juice". Sweet Willie made the comment while looking at Monica Budenski and chuckling.

The following day, Monica Budenski erroneously sent out a press release stating Mr. Green Peace would support lifting the band for offshore drilling in Lake Pontchartrain and University Lakes at LSU. Slick Willie orally reprimanded Monica Budenski, but failed to reduce the reprimand in writing.

Approximately three (3) weeks later at the water cooler, Sweet Willie asked what Monica did the prior weekend. Monica told Slick Willie that she bought a new necklace which she was

wearing. Shortly thereafter, Slick Willie inspected the necklace hanging below her neck for an extended period of time.

Approximately three (3) days later, Monica erroneously sent out a press release stating Mr. Green Peace supports new policy allowing wild game hunting in the Audubon Zoo and fishing at the Aquarium of the Americas. Again, Slick Willie orally reprimanded Ms. Budenski for the faux pau.

Several weeks later at the water cooler, Slick Willie asked whether Ms. Monica Budenski would like to go the Past Times Lounge for drinks with the office staff. At first, Ms. Monica Budenski stated she had to attend a protest at Free Speech Alley at LSU to discuss disbanding the football and baseball programs at LSU. However, Sweet Willie was insistent on her going to the Past Times Lounge with the rest of the office staff. Ms. Budenski stated the protest rally must wait. At the Past Times Lounge, Slick Willie discussed the campaign schedule for Mr. Green Peace for the next three (3) months. Also, he would discuss how the waitresses at the Past Times Lounge have similar attributes to the interns working at his previous job. Also, Slick Willie mentioned that Monica Budenski reminded him of a person who often visited the White House while his wife was traveling abroad.

The following day, Ms. Budenski filed an EEOC claim with the Equal Employment Opportunity Commission against Whitewater Consulting for employment discrimination/sexual harassment. Ms. Budenski alleged Slick Willie Clinton created a hostile work environment. The following week, Mr. Webster Rubble of Whitewhite Consulting was informed of the EEOC claim. Sweet Willie responded to the EEOC claim by stating that an investigation conducted by Hillary Rodeham indicated that there was not a “single shred of evidence which could prove” that Slick Willie was sexually harassing Ms. Monica Budenski.

Approximately two (2) weeks after filing the EEOC claim, Ms. Monica Budenski

erroneously sent out a press release stating Mr. Green Peace supports taxpayer financing for the expansion of Tiger Stadium to a capacity of 120,000 people. Further, Ms. Budenski stated in the press release that Mr. Green Peace supports the taxpayers' financing of luxury suites at Tiger Stadium for oil and gas companies and their risk managers. Ms. Budenski was fired on the spot.

Six (6) months later, the EEOC issued a Right to Sue Letter. Ms. Monica Budenski obtained an attorney to institute a lawsuit against Whitewater Consulting, Sweet William Clinton and their liability insurers. The lawsuit was filed in state court in East Baton Rouge Parish.

ISSUE NO. 1-VENUE

Plaintiff, Monica Budenski instituted a lawsuit in state district court for employment discrimination/sexual harassment. LSA-R.S. 23:332 et. seq., the state anti-discrimination statute, does not provide a cap for general damages. The state statute does not provide for punitive damages. However, 42 USCA Section 2000e, the federal anti-discrimination statute, does provide a cap for general and punitive damages. The cap for compensatory and punitive damages in federal court are as follows:

$ 50,000.00	-	15-100	Employees
$100,000.00	-	101-200	Employees
$200,000.00	-	201-500	Employees
$300,000.00	-	500+	Employees

In this case, the cap for the Whitewater Consulting in federal court for ninety-five (95) employees is $50,000.00 in combined compensatory and punitive damages. Please note, state law (LSA-R.S. 23:341) provides the employment discrimination statute applies to employers with more than 25 employees in 20 or more calender weeks in the current or preceding calendar year. Therefore, it would be beneficial to the employer to attempt remove this matter to federal court via diversity and/or federal question. The issuance of a Right to Sue Letter by the EEOC

allows federal law to apply the dispute. Please note, as per any state court claim, the employee/plaintiff may file in any judicial district whereby an alleged violation occurred. LSA-R.S. 23:333(A). Luckily, Slick Willie did not harass Ms. Budenski in New Orleans.

Please note, the following are elements of damages pursuant to state and federal anti-discrimination statute:

- back pay;
- front pay;
- general damages - past and future - subject to federal cap;
- medical bills - past and future;
- attorney fees of plaintiff;
- punitive - federal only - subject to federal cap.

ISSUE NO. 2-"QUID PRO QUO" AND/OR "HOSTILE WORK ENVIRONMENT"

The applicable standard for sexual harassment must be examined. Louisiana's anti-discrimination statute is similar to the federal statute prohibiting sex discrimination in Title VII of the Civil Rights Act of 1964, U.S.C. § 2000e, et. seq. As such, Louisiana courts have properly looked to the federal statute to ascertain whether a valid claim for sexual harassment has been asserted. Alphonse v. Omni Hotels Management Corp., 94-0157 (La.App. 4 Cir. 9/29/94), 643 So.2d 836.

Under Title VII, the jurisprudence recognizes two (2) types of sexual harassment which affect the "compensation, terms, conditions, or privileges of employment" namely:

(1) quid pro quo harassment, which occurs when an individual explicitly or implicitly conditions a job, job benefit, or the absence of job detriment, upon the employee's acceptance of sexual conduct; and

(2) hostile environment harassment, which consists of verbal or physical conduct that has the effect of creating an intimidating, hostile, or offensive work environment.

Meritor Savings Bank v. Vinson,, 477 U.S. 57, 106 S.Ct 2399, 91 L.Ed.2d 49 (1986); Bustamento

v. Tucker, 607 So.2d 532 (La. 1992).

To prevail in a hostile environment harassment claim, the plaintiff must assert and prove that:

(1) she belonged to a protected group;

(2) she was subject to unwelcome sexual harassment;

(3) the harassment was based on sex;

(4) the harassment affected a term, condition or privilege of employment; and

(5) the employer knew or should have known of the sexual harassment and failed to take proper remedial action. (Citations omitted).

A hostile work environment affects a term, condition or privilege of employment in the following manner:

> The type of conduct constituting such harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Such misconduct constitutes sexual harassment regardless of whether it is directly linked to the grant or denial of an economic quid pro quo, if the purpose or effect of the misconduct is to unreasonably interfere with an individual's work performances or to create an intimidating, hostile, or offensive work environment. Every act of harassment, although reprehensible, does not necessarily give rise to a hostile environment claim. To be actionable, the harassment must be sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive, hostile environment.
>
> In general, hostile environment harassment is characterized by multiple and varied incidents of offensive conduct which have the cumulative effect of creating a hostile working environment for the employees thus victimized. (Citations omitted).

In determining whether an environment is hostile, several factors are relevant in the inquiry: (1) frequency of the discriminatory conduct;

(2) severity;

(3) whether the conduct is physically threatening, or a mere offensive utterance;

(4) whether the conduct unreasonably interferes with an employee's work performance; and

(5) whether the conduct has an effect on the employee's psychological well-being.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

Quid pro quo sexual harassment is anchored in an employer's sexually discriminatory behavior which compels an employee to elect between acceding to sexual demands and forfeiting job benefits, continued employment or promotion, or otherwise suffering tangible job detriments. In a quid pro quo harassment action, the employee bears the burden of proof to support charges that submission to the unwelcome sexual advances of supervisory personnel was an express or implied condition for receiving job benefits, or that a tangible job detriment resulted from the employer's failure to submit to the sexual demands of the supervisory employees. (Citations omitted).

Unlike quid pro quo sexual harassment claims which may be predicated upon a single incident of sexual harassment, hostile environment claims are characterized by varied combinations and frequencies of hostile sexual exposures. (Citations omitted).

Ms. Monica Budenski contends that Sweet Willie made a sexually explicit remark in regards to getting a smoothie. Secondly, Ms. Budenski contends that Sweet Willie, in an unwanted manner, touched the upper portion of her chest when fondling her necklace. Thirdly, Ms. Budenski contends that Sweet Willie was discussing sexually explicit attributes of a waitress at the Past Times Lounge comparing them to his prior conquest in Washington, D.C.

Whitewater Consulting contends the first remark was simply a statement as to why Sweet Willie likes strawberries in his smoothies. Whitewater Consulting contends the second incident involved Ms. Budenski inviting Sweet Willie to examine her new necklace. The third incident involved Sweet Willie simply commenting on the cultural differences between Louisiana and Washington, D.C. Summarily, if any remarks were inappropriate, it was simply a "stray remark".

Such dispute will be a question of fact. In order to prevent this factual question to be decided by a judge or jury, a strong employment discrimination policy must implemented.

ISSUE NO. 3 - EMPLOYMENT DISCRIMINATION POLICY

Ms. Monica Budenski contends there is no written employment discrimination policy prohibiting sexual harassment. Therefore, Whitewater Consulting is strictly liable for any and all conduct of its employees including employment discrimination and/or sexual harassment. Whitewater Consulting contends that a written sexual harassment policy is unnecessary due to the fact the Baton Rouge office is a small office.

The courts generally require employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. The Supreme Court noted in Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998).

> "While the courts rule it is not necessary in every instance as a matter of law to establish a written employment discrimination statute, it will be difficult to prove an employer exercised reasonable care to prevent and correct the harassment. Ellerth, 118 S.Ct. at 2270.

In order to preclude liability, an employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees within their

workforce. Other measures to ensure effective dissemination of the policy and complaint procedures include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure they understand their rights and responsibilities.

An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues for complaints;
- Assurance that the employer will protect the confidentiality of harassment complaints to the fullest extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation;
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

In addition to implementing an anti-harassment policy and complaint procedure, the EEOC recommends that employers take the following preventive and corrective measures in exercising reasonable care:

- Instruct all supervisors and managers to address or report complaints of harassment regardless of whether they are officially designated to take complaints;
- Correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome;

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- Ensure that supervisors and managers understand their responsibilities under the company's anti-harassment policy and complaint procedure by providing periodic training;

- Keep track of its supervisors and manager's conduct to ensure they carry out their responsibilities under the organization's anti-harassment program.

- Screen applicants for supervisory jobs to recognize a previous record of engaging in harassment. If so, and they are hired, the employer must take steps to prevent future harassment;

- Keep records of all harassment complaints and follow-up on any patterns of harassment developing;

- Encourage reporting harassment to management before it becomes severe or pervasive;

- Employees sign an acknowledgment of receipt of the employment discrimination policy.

In some cases, it may not be necessary for an employer of a small workforce to implement the type of formal complaint process described above. If a small business employer puts an effective, informal mechanism into place to prevent and correct harassment, such employer could still satisfy the first prong of the affirmative defense to a claim of harassment. As the Court recognized in Faragher, an employer of a small workforce might informally exercise sufficient care to prevent harassment. For example, such an employer's failure to disseminate a written policy against harassment on protected basis would not undermine the affirmative defense if it effectively communicated the prohibition and an effective complaint procedure to all employees at staff meetings. An owner of a small business who regularly meets with all of his or her employees might convey to them at monthly staff meetings that he or she will not tolerate harassment and that anyone who experiences harassment should bring it "straight to the top." If a complaint is made, the small business, like any other employer, must conduct a prompt, thorough, and impartial investigation and undertake swift and appropriate corrective action where appropriate.

ISSUE NO. 5 - DEFENSES TO EMPLOYER

An examination is necessary as to the possible liability of the employer in the context of possible defenses entitled to the employer.

In Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles:

1) an employer is responsible for the acts of its supervisors; and
2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment.

In order to accommodate these principles, the courts generally hold that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

(a) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and

(b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise.

The question of liability arises only after there is a determination that unlawful harassment occurred. Thus, federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not "extremely serious." Rather, the conduct must be "so objectively offensive as to alter the 'conditions' of the victim's employment." The conditions of employment are altered only if the harassment culminated in a tangible employment action or was sufficiently severe or pervasive to create a hostile work environment. (Citations omitted).

If an employer can prove that it discharged its duty of reasonable care and that the employee could have avoided all of the harm, but unreasonably failed to do so, the employer will avoid all liability for unlawful harassment. For example, if an employee was subjected to a pattern of harassment that created an unlawful hostile environment, but the employee unreasonably failed to complain to management before she suffered emotional harm and the employer exercised reasonable care to prevent and promptly correct the harassment, then the employer will avoid all liability. (Citations omitted).

If an employer cannot prove that it discharged its duty of reasonable care and that the employee unreasonably failed to avoid the harm, the employer will be liable. For example, if unlawful harassment by a supervisor occurred and the employer failed to exercise reasonable care to prevent it, the employer will be liable even if the employee unreasonably failed to complain to management or even if the employer took prompt and appropriate corrective action when it gained notice.

In most circumstances, if employers and employees discharge their respective duties of reasonable care, unlawful harassment will be prevented and there will be no reason to consider questions of liability. An effective complaint procedure encourages employees to report harassing conduct before it becomes severe or pervasive, and if an employee promptly utilizes that procedure, the employer can usually stop the harassment before actionable harm occurs.

The first prong of the affirmative defense requires a showing by the employer that it undertook reasonable care to prevent and promptly correct harassment. Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. The steps described below are not mandatory requirements - - whether or not an employer can prove that it exercised reasonable care depends on the particular factual circumstances and, in

some cases, the nature of the employer's workforce. Small employers may be able to effectively prevent and correct harassment through informal means, while larger employers may have to institute more formal mechanisms. (Citations omitted).

There are no "safe harbors" for employers based on the written content of policies and procedures. Even the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively. (Citations omitted). If, for example, the employer has an adequate policy and complaint procedure and properly responded to an employee's complaint of harassment, but management ignored previous complaints by other employees about the same harasser, then the employer has not exercised reasonable care in preventing the harassment.

The employer may assert the second prong of the affirmative defense requiring a showing by the employer that the aggrieved employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 118 S.Ct. at 2293; Ellerth, 118 S.Ct at 2270.

This element of the defense arises from the general theory that a victim has a duty to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute. Faragher, 18 S.Ct. at 2292, quoting Ford Motor Co. v. EEOC, 458 U.S. 219, 231 n.15 (1982). Thus, an employer who exercised reasonable care is not liable for unlawful harassment if the aggrieved employee could have avoided all of the actionable harm. If some but not all of the harm could have been avoided, then an award of damages will be mitigated accordingly.

A complaint by an employee does not automatically defeat the employer's affirmative defense. If, for example, the employee did not provide information to support his or her allegation, gave untruthful information, or otherwise failed to cooperate in the investigation, the

complaint would not qualify as an effort to avoid harm. Furthermore, if the employee unreasonably delayed complaining, and an earlier complaint could have reduced the harm, then the affirmative defense could operate to reduce damages.

Proof that the employee unreasonably failed to use any complaint procedure provided by the employer will normally satisfy the employer's burden. However, it is important to emphasize that an employee who failed to complain does not carry a burden of proving the reasonableness of that decision. Rather, the burden lies with the employer to prove that the employee's failure to complain was unreasonable.

Summarily, if the employer has an adequate policy and complaint procedure, but an supervisor failed to carry out his or her responsibility to conduct an effective investigation of a harassment complaint, the employer has not discharged its duty to exercise reasonable care. Alternatively, lack of a formal policy and complaint procedure will not defeat the defense if the employer exercised sufficient care through other means.

In Ms. Budenski's case, Whitewater management would probably be held strictly liable for the conduct and action of Slick Willie Clinton because employers are generally responsible for the conduct of its supervisors. Kolstad v. American Dental Association, 119 S.Ct. 401 (1988).

ISSUE NO. 6 - SUFFICIENCY OF INVESTIGATION

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into an alleged harassment. As soon as management learns about the alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. If a fact-finding investigation is necessary, it should be launched immediately.

Before completing the investigation, it may be necessary to undertake intermediate measures to ensure that further harassment does not occur. Examples of such measures include

making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should possess well-trained skills required for interviewing witnesses and evaluating credibility.

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. When interviewing parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses.

Questions to Ask the Complainant:

- Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?

- How did you react? What response did you make when the incident(s) occurred or afterwards?

- How did the harassment affect you? Has you job been affected in any way?

- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episode(s) of alleged harassment?

- Did the person who harassed you harass anyone else? Do you know whether

anyone complained about harassment by that person?

- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complaint might lie?
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did she/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

- **Inherent plausibility**: Is the testimony believable on its face? Does it make sense?
- **Demeanor**: Did the person seem to be telling the truth or lying?
- **Motive to falsify**: Did the person have a reason to lie?
- **Corroboration**: Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party's testimony?
- **Past record**: Did the alleged harasser have a history of similar behavior in the past?

Reaching a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether the harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above. If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.

Assurance of Immediate and Appropriate Corrective Action

An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in

violation of the employer's policy. Management should inform both parties about these measures. Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not reoccur.

Summarily, a thorough and impartial investigation consist of the following elements:

a) Appoint an Impartial Individual to Conduct an Investigation;

b) Interview of Complaining Employee, Accused Employee and Witnesses;

c) Company take appropriate interim action;

d) Establish an Investigation File;

e) Establish a time limitation for concluding investigation;

f) Conclude investigation;

g) Conduct appropriate follow-up investigation.

In Ms. Monica Budenski's claim, Whitewater Consulting's investigation would be deficient due to the lack of an impartial investigator.

ISSUE NO. 7 - RETALIATORY DISCHARGE

Ms. Monica Budenski would attempt to attach liability based on the separate cause of action for retaliation. Any employee may maintain a retaliation cause of action even if the underlying sexual harassment claim is without merit.

A plaintiff must show three (3) things to establish a prima facie case of retaliation:

(1) that she engaged in an activity protected by Title VII;

(2) that an adverse employment action followed; and,

(3) there was some causal connection between the activity and the adverse action.

Collins v. Baptist Memorial Geriatric Center, 937 F.2d 190, 56 Emp.Pract.Dec. 966 (5th Cir. 1991). Plaintiff need not have established that her protected activity was the sole factor

motivating the termination, but the burden was on her to show that "'but for' the protected activity, she would not have been subjected to the action which she claims". *Id*.

A factual determination must be made as to whether Ms. Budenski was fired due to her inability to perform her job or due to the filing of the EEOC complaint. An employer should be hesitant to fire an employee who filed a complaint of discrimination or filed an EEOC claim until resolution of the complaint. The lack of written reprimands and/or written warnings is detrimental to Whitewater Consulting's defense that Ms. Budenski was fired for non-discriminatory reasons and/or failed to achieve expectations.

ISSUE NO. 8-MONICA BUDENSKI'S QUALIFICATIONS FOR POSITION

Whitewater Consulting asserts that Ms. Monica Budenski is not qualified for the position of Louisiana Assistant to the Regional Manager. Further, Whitewater Consulting may attempt to assert Ms. Monica Budenski was not qualified for the position because the position requires a bachelor's degree. Further, she mislead Whitewater Consulting on her employment application by implying she was a college graduate by stating she had four (4) years of college. Thus, Ms. Budenski is precluded from asserting an employment discrimination claim.

Ms. Monica Budenski will assert there was no written job description stating that a bachelor's degree is required for the position. Further, Ms. Budenski would assert the employment application was vague and only requested the number of years she attended college rather than asking whether applicant obtained a bachelor's degree.

Ms. Budenski will probably prevail on said issue. Whitewater Consulting would not be able to successfully assert Ms. Monica Budenski was not qualified for the position in responding to her employment application.

For Whitewater Consulting to prevail on said issue, it should have prepared a written job description specifically stating the educational requirements and qualifications for said position.

Also, Whitewater Consulting should prepare an employment application with specific and detailed requests for information pertaining to the employee's qualifications.

ISSUE NO. 9 - INSURANCE COVERAGE

Generally, employment practices insurance policies provide coverage for employment discrimination claims. In the absence of such policy, the employer and/or employee may look to the employer's general liability policy and employer's liability policy to attempt to obtain indemnity and/or defense of the employment discrimination claim. The insurance policy (especially older form policies) may not have a specific exclusion specifically excluding coverage for employment discrimination and/or sexual harassment. Further, the intentional act exclusion may not be sufficient to exclude insurance coverage.

Ms. Budenski may assert the claim for employment discrimination and sexual harassment not only arises from intentional the acts of Slick Willie Clinton, but also arises from Whitewater Consulting's failure to implement a sexual harassment policy. Further, Ms. Budenski may assert Whitewater Consulting was negligent for failing to monitor the activities of Slick Willie Clinton after the sexual harassment was initially reported. Ms. Budenski may further allege Whitewater Consulting failed to take remedial action after the sexual harassment was reported. Such allegations could be interpreted and/or construed as negligence at a trial on the merits. Therefore, Ms. Budenski may assert the insurer's intentional act provision in the insurance policy is not applicable since the conduct arose from negligence of Whitewater Consulting.

In Breland v. Schilling, 550 So.2d 609 (La.1989), the Louisiana Supreme Court construed the "intentional act" exclusion as not precluding coverage when a more severe injury results when a minor injury was intended. Breland v. Schilling, 550 So.2d 609, 613 (La.1989). Further, in Breland, the Louisiana Supreme Court ruled whether a given resulting bodily injury was intended "from the standpoint of the insured" is a question of fact for the fact-finder. Please

note, the application of Breland has been limited by subsequent cases.

Nevertheless, this tort-based standard may expose insurers to liability for injuries the insured did not specifically envision or desire to produce. For example, in Caudle v. Betts, 512 So.2d 389, 392 (La.1987), when a company officer administered an electric shock to a worker, intending to play a good-natured practical joke, yet nonetheless producing serious injury to the victim, the court held the actor liable for all consequences flowing from his act. By contrast, the contract of insurance between this defendant and his insurer excludes coverage only for those injuries which the defendant subjectively desired to inflict. Thus, the court ruled the intentional act exclusion did not apply.

A supervisor's intent could not be inferred, as a matter of law, so as to preclude coverage for a supervisor's acts of sexual harassment under a policy's intentional act exclusion. Lawson v. Strauss, 684 So.2d 959 (La.App.4th Cir.1996). Intentional acts exclusion which excluded bodily injury or personal injury that "is" expected or intended requires a determination of a subjective state of mind and precludes summary judgment. Id. Further, in Ballex v. Naccari, 663 So.2d 173 (La.App.4th Cir.1995), the appellate court ruled a motion for summary judgment is not suitable for disposition of a sexual harassment case requiring a judicial determination of subjective facts such as intent, knowledge, motive, malice and good faith. In Ballex, the court ruled a fact question existed as to whether the intentional act exclusion applies to alleged sexual advance to an employee.

Accordingly, an uninsured employer may look to his general liability insurance or employer's liability insurer to provide coverage. Conversely, an insurer must specifically exclude claims for employment discrimination and/or sexual harassment in its applicable exclusions.