Blake J. Burgan
317/713-3596
bburgan@taftlaw.com

Taft/
One Indiana Square, Suite 3500 / Indianapolis, IN 46204-4609
Tel: 317.713.3500 / Fax: 317.713.3699
www.taftlaw.com

[redacted]

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Via Electronic Mail (george.angelone@iga.in.gov)

George T. Angelone, Executive Director
Legislative Services Agency
200 W. Washington St., Ste 301
Indianapolis, IN 46204

Taft Stettinius & Hollister was retained by Legislative Services Agency ("LSA") to advise it, the Indiana House of Representatives ("House"), and the Indiana Senate ("Senate") regarding an investigation into alleged inappropriate conduct by a third party. The purpose of this memorandum is to set forth our understanding of the allegations and the results of the investigation. We also include our legal advice regarding the situation. This memorandum is a confidential document protected by the attorney-client privilege and is not to be shared with any third parties.

I. Background

A. [redacted]

In the early morning hours of March 15, 2018, several legislators and legislative employees attended a sine die party at AJ's bar in Indianapolis. On or around May 14, 2018, Rep. [redacted] requested a meeting with the Speaker Brian Bosma. In response, Speaker Bosma, Majority Floor Leader Matthew Lehman, Chief of Staff Tyler Campbell, and Rep. Terry Goodin met with Rep. [redacted] At the meeting, Rep. [redacted] reported the following: At the sine die party Attorney General Curtis Hill ("AG Hill"), who was very intoxicated, put his hands on her back, slid them down to her buttocks, put them under her clothes and "grabbed a handful of ass." [redacted] told AG Hill to "back off" and she walked away. Later, however, AG Hill approached Rep. [redacted] again and again put his hands under her clothes and grabbed her buttocks. She again told him to "back off."

Rep. [redacted] also noted that she had witnessed AG Hill act inappropriately with House and Senate employees, including telling a group of staffers waiting on drinks that they needed to "show a little skin" to get their drinks faster. Rep [redacted] also reported that she witnessed AG Hill make inappropriate advances and inappropriately touch the staffers, including putting his arm around one female staffer in a way that made it hard for her to get away from him. It is our understanding that Rep [redacted] has no contact with AG Hill during her workday and that this is the first time AG Hill has engaged in such conduct with her.

In a conversation later that day, Rep. [redacted] informed Speaker Bosma that a Senate legislative assistant was involved in the situation. Upon hearing this information, and after discussing it with Sen. David Long, Speaker Bosma and Sen. Long determined that there would be an investigation of the allegations, including interviews of employees of the House and Senate.

B. The Investigation Results

1. Legislative Employee A

On May 15, 2018, Sen. Long, Sen. Ryan Mishler, Chief of Staff Skip Brown, and Majority Attorney Mitchell Osterday interviewed Legislative Employee A. She reported that while she was ordering a drink at the sine die party, AG Hill came behind her a group of females and said, "Don't you know how to get drinks? You have to show a little skin!" Legislative Employee A was shocked by the statement and noticed that the other females looked unsettled by the remark. Legislative Employee A walked away from the group but returned when she noticed the other females looked uncomfortable. At that time, AG Hill put his arm around her and began sliding his hand down her back. When Legislative Employee A tried to remove his hand, AG Hill grabbed her hand and groped her on the buttocks. Legislative Employee A noted that she witnessed AG Hill, who appeared to be intoxicated, making advances toward other females throughout the bar. Legislative Employee A has never had any previous issues with AG Hill and there is no reason for her to have contact with him as part of performing her job.

2. Legislative Employee B

On May 15, 2018, Sen. Long, Senate Minority Leader Tim Lanane, Majority Chief of Staff Brown, and Minority Chief of Staff Lenee Carroll met with Legislative Employee B, who shared that she was at AJ's in the early morning of March 15, 2018. She was seated at a stool when AG Hill sat down next to her and appeared to be intoxicated. He asked her if she knew who he was, and then placed his hand on her back and began rubbing it up and down her back for approximately two minutes. She was very uncomfortable and gave non-verbal cues expressing her discomfort to her intern who was sitting with her at the bar. The intern asked Legislative Employee B if she wanted to go to the restroom and they both left. Legislative Employee B had no further contact with AG Hill that evening. Legislative Employee B has never had any previous issues with AG Hill and there is no reason for her to have contact with him as part of performing her job.

3. Legislative Employee C

On May 15, 2018, House of Representatives Chief Counsel Jill Carnell and Principal Clerk Caroline Spotts interviewed Legislative Employee C, who reported that upon entering AJ's around 1:00 a.m. on March 15, 2018, she witnessed the alleged event involving AG Hill and Rep [redacted] and wondered if it was some kind of "cultural thing" that she did not understand. When AG Hill engaged in the same conduct with Rep. [redacted] a second time, Legislative Employee C realized that AG Hill was engaging in inappropriate behavior. When Legislative Employee C was later at the bar with a group of females waiting to order a drink, AG Hill approached her and asked if she

knew who he was. She said that she did and that she had attended college with his daughter. AG Hill later announced to the group of females at the bar that they would get free drinks or faster service if they showed more knee or more leg. AG Hill later put his arm around Legislative Employee C's waist and somewhat "hugged" her to him. She was standing by a bar stool, so she tried to move away from him and sit up on the stool (which had a back) so that he was no longer able to hug her. She sat there until she was served her drink and then moved away from the bar area. Legislative Employee C has never had any previous issues with AG Hill and there is no reason for her to have contact with him as part of performing her job.

4. Legislative Employee D

On May 16, 2018, Chief Counsel Carnell and Principal Clerk Spotts interviewed Legislative Employee D, who reported being with the group of females at AJ's in the early morning of March 15, 2018, waiting on drinks when she heard AG Hill's comment about getting free drinks or faster service if they showed more leg or knees. She interpreted AG Hill as a really drunk guy as opposed to someone who was trying to harass her or the other females, but she thought because of his position he should be held to a higher standard. Legislative Employee D has never had any previous issues with AG Hill and there is no reason for her to have contact with him as part of performing her job.

5. Legislative Employee E

On May 17, 2018, Chief Counsel Carnell and Principal Clerk Spotts interviewed Legislative Employee E, who reported that she was also at AJ's in the early morning of March 15, 2018. Although she heard about the alleged event between AG Hill and [redacted], she did not witness it. AG Hill did approach her and asked if she knew who he was. When she told him that she did, he abruptly left her. While she believed AG Hill was very intoxicated and acted inappropriately, she did not feel that she had been harassed. Legislative Employee E has never had any previous issues with AG Hill and there is no reason for her to have contact with him as part of performing her job.

II. Legal Analysis

A. Title VII's Prohibition of a Hostile Work Environment

1. Conduct Must Be Severe and Pervasive

It is well settled that hostile or abusive work environments are forms of sex discrimination actionable under Title VII of the Civil Rights Act of 1964. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986). To establish a prima facie case, an employee must show that "she was (1) subjected to unwelcome sexual conduct, advances, or requests; (2) because of her sex; (3) that were severe or pervasive enough to create a hostile work environment; and (4) that there is a basis for employer liability." *Erickson v. Wisconsin Dep't. of Corr.*, 469 F.3d 600, 604 (7th Cir. 2006).

Whether conduct is severe or pervasive enough to establish a hostile work environment involves the analysis of several factors, including the frequency of the conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 806-07 (7th Cir. 2000). Additionally, an employee must subjectively believe that the harassment was sufficiently severe or pervasive to have altered the working environment, and the harassment must be sufficiently severe or pervasive, from the standpoint of a reasonable person, to create a hostile work environment.

While AG Hill's alleged conduct toward the legislative employees was inappropriate, it was likely not severe or pervasive enough to result in a hostile work environment. Indeed, the Seventh Circuit has rejected sexual harassment claims involving conduct by *supervisors* that was more egregious. For example, in *McPherson v. City of Waukegan*, 379 F. 3d 430, 439 (7th Cir. 2004), the Seventh Circuit found conduct not severe enough where the plaintiff's supervisor made inquiries about what color bra she was wearing, asked plaintiff whether he could "make a house call" in a suggestive tone of voice when she called in sick, and once pulled back her tank top with his fingers to see what color bra she was wearing. While this conduct was "lamentably inappropriate, we agree with the district court that, due to the limited nature and frequency of the objectionable conduct, a hostile work environment did not exist . . ." *Id. See also, Baskerville v. Culligan International Co.*, 50 F. 3d 428, 430-31 (7th Cir. 1995) (supervisor had not engaged in actionable harassment even though over a seven-month period he had: (1) called the plaintiff a "pretty girl," (2) made grunting sounds when the plaintiff wore a leather skirt, (3) said to the plaintiff that his office was not hot "until you walked in here," (4) stated that a public address announcement asking for everyone's attention meant that "all pretty girls [should] run around naked," and (5) alluded to his wife's absence from town and his loneliness, stating that he had only his pillow for company while making an obscene gesture); *Hilt–Dyson v. City of Chicago,* 282 F.3d 456, 463–64 (7th Cir. 2002) (holding that plaintiff's allegations that supervisor rubbed her back, squeezed her shoulder and stared at her chest during a uniform inspection while telling her to raise her arms and open her blazer were isolated incidents that, even when taken together, did not create a sufficient inference of a hostile work environment); *Weiss v. Coca-Cola Bottling Co.*, 990 F. 2d 333, 336-37 (7th Cir. 1993) (no actionable harassment although plaintiff's supervisor jokingly called her a "dumb blonde," placed his hand on her shoulder several times, place "I love you" signs in her work area, attempted to kiss her, and asked her out on dates).

AG Hill's conduct toward [redacted], however, likely was egregious enough to meet the threshold of "severe." [redacted] reported that AG Hill twice placed his hand under her clothing and grabbed her bare buttocks. The fact that he placed his hand under her clothing on an intimate body part is likely sufficiently severe meet that element of a prima facie case. *See, e.g., Worth v. Tyler*, 276 F.3d 249, 268 (7th Cir. 2001) (touching the "breast near the nipple for several seconds" is severe enough to constitute a hostile environment by itself); *Patton v. Keystone RV Co.*, 455 F.3d 812, 817 (7th Cir. 2006) (defendant groping under plaintiff's shorts and touching her underwear "might be sufficient alone to create an abusive working environment").

2. The Conduct Must Have Some Impact on the Workplace

Even assuming AG Hill's alleged conduct were sufficiently severe and/or pervasive, it took place outside the employees' workplace. Indeed, it happened during the early morning hours at an informal social event (which was not officially scheduled or sanctioned by the Legislature) at a bar in downtown Indianapolis. While harassment does not have to take place within the workplace to be actionable, it must have consequences in the workplace. *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008). That is because "Title VII is limited to employment discrimination, and therefore sexual harassment is actionable under the statute only when it affects the plaintiff's conditions of employment." *Doe v. Oberweis Dairy*, 456 F.3d 704, 715 (7th Cir. 2006). The harassment does not have to occur in the workplace to have consequences there. "But at the very least the harassment must . . . . be an episode in a relationship that began and grew in the workplace. Had [the harasser] met [plaintiff] on the last day of his or her employment at the ice cream parlor and later asked her for a date that eventually culminated in sexual intercourse, the connection to the workplace would have been too attenuated to constitute workplace harassment. It would have been no different from his asking a customer for a date." *Id.* at 716 (citations omitted).

Here, AG Hill does not work for LSA, the House, or the Senate. He is employed in another branch of government and has no authority over [redacted] or the legislative employees. The conduct of which he is accused did not take place in the workplace, and there is no reason to believe that any of these employees will have any contact with him at work. As a result, even AG Hill's conduct was severe enough to establish a claim, it could not have created a hostile work environment under Title VII because it had no consequences in the workplace.

3. There Must Be a Basis for Employer Liability

Even if there were a hostile work environment, there must be a basis for employer liability. For purpose of harassment by a third party, an employer can be liable if it is negligent in preventing harassment. *Wiseman v. AutoZone, Inc.*, 819 F.Supp.2d 804, 814 (N.D. Ind. 2011). In other words, an employer can be liable for a third party's harassment of one of its employees if it "unreasonably fail[ed] to take appropriate corrective actions . . . reasonably likely to prevent the misconduct from occurring. The emphasis is on the prevention of future harassment." *Chertoff*, 517 F.3d at 984 (citing *McKenzie v. Illinois Dep't. of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996)). The "'hallmark of a reasonable corrective action' is a prompt investigation." *Id.* (citations omitted).

Here, the investigation was initiated immediately upon learning of the alleged conduct. Although the incidents allegedly occurred on March 15, 2018, it was not reported and neither LSA, the House, nor the Senate had any reason to know of such conduct until approximately two months later. Now that the investigation is complete, the next step is to determine what remedial action, if any, should be taken under the circumstances to prevent similar conduct from recurring.

B. Conclusion on Potential Liability

If any of the employees were to initiate an action, we believe the risk of liability is very low. First, we believe that the conduct directed at the employees other than Rep [redacted] while certainly inappropriate, simply was not sufficiently severe or pervasive to establish a valid claim. And while the conduct toward Rep. [redacted] was more egregious, none of AG Hill's alleged conduct took place in the workplace or had any impact on the workplace. As a result, there is very little risk of liability. Additionally, LSA, the House, and the Senate are further protected from liability due to the prompt and thorough investigation. The final step is to take appropriate action reasonably calculated to prevent future harassment.

III. Response to Specific Questions

Question 1: Whether the employer's investigation meets the standard of being a prompt and effective investigation, including recommendations related to the need to interview the individual who is the subject of the complaint and any other needed or desirable additional investigative steps, advice concerning keeping the complainants informed about the progress and conclusions related to the investigation, and the pros and cons of employing outside counsel to assume control of the investigation.

Answer: In our opinion, LSA, the House, and the Senate's investigation, which was conducted consistent with the House's and the Senate's anti-harassment policies, was sufficiently prompt and effective. All witnesses were interviewed and gave detailed statements. Going forward, we recommend the following:

1. Although AG Hill is not an employee and the conduct did not occur in the workplace or have an effect in the workplace, we recommend that the allegations be brought to his attention and that he be notified that such conduct will not be tolerated in the future with any legislators or legislative employees. We recommend requesting a meeting with his counsel to address these concerns as soon as possible. We believe that while such contact with AG Hill may not be legally required, it is a good step to take so that you can tell the legislative employees you have addressed their concerns with AG Hill and notified him that such conduct is not tolerated. Also, in the unlikely event that someone challenges the investigation, you will be able to state that while not legally obligated to do so, you addressed the issues with AG Hill.

2. With respect to communicating to the legislative employees, we recommend that you meet with each of them and stress that you fully investigated the allegations and that while the conduct reported was certainly inappropriate, it did not create a hostile work environment under the laws that prohibit such conduct. With that being said, we recommend informing them that LSA, the House, and/or the Senate intends to meet with AG Hill to address the concerns to stress that such conduct is strictly prohibited and will not be tolerated, and to remind him that no retaliation is permitted.

3. We also recommend that you thank the legislative employees for bringing the issue to your attention and that you assure them that no work-related retaliation will be tolerated. We recommend that you encourage them to immediately report any additional concerns. You should document your conversations with the legislative employees and note their responses.

4. Finally, we see no reason to employ outside counsel to continue the investigation. We are of the opinion that the investigation was sufficient and prompt and that you should simply take the additional recommended steps that we believe are reasonably likely to prevent the misconduct from occurring.

Question 2: Whether the circumstances amount to unlawful sexual harassment under Title VII or whether any combination of the location and nature of the event, the isolated nature of the unwelcome conduct, or the limited impact on the workplace of the offending individual justify a conclusion that the conduct does not amount to unlawful harassment.

Answer: As described in more detail above, we do not believe the conduct amounted to a hostile work environment. With respect to everyone except Rep [redacted] the alleged conduct likely was not severe or pervasive enough to be actionable. The alleged conduct toward Rep. [redacted] if true, is more egregious and likely would be sufficiently severe enough. But all of the alleged conduct occurred outside the workplace; AG Hill was a third party and not an employee of LSA, the House, or the Senate; AG Hill has no supervisory authority over any of the legislative employees or Rep. [redacted] and the conduct had no impact on the workplace. As a result, there should be no viable hostile work environment claim. Finally, because there was an immediate investigation and there will be reasonable measures taken to prevent similar conduct in the future, there should be no employer liability.

Question 3: Whether the General Assembly is legally obligated to take any further action to protect legislative employees against speculative future unwelcome sexual statement or conduct by the same individual.

Answer: Because there was no conduct that had an impact on the workplace, we do not believe there is any legal obligation to protect employees from future inappropriate conduct by AG Hill. Even if not legally obligated to do so, however, we recommend that you address AG Hill in the manner outlined above. This will let your employees know that you take the matter seriously and that you are taking steps to protect them from similar conduct in the future.

Question 4: Does Rules of Professional Conduct, Rule 8.3 (Reporting Professional Misconduct) require a lawyer involved in the investigation to submit a complaint to the Attorney Disciplinary Commission concerning any of the offending conduct?

Answer: We do not believe so. The Rule requires that a lawyer "who *knows* that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" shall inform the Disciplinary Commission of such conduct. First, while several

employees have complained about AG Hill's conduct, we are unaware of any attorney who actually *knows* that he indeed engaged in such conduct. Moreover, even if an attorney knew that AG Hill engaged in such conduct, we do not believe that such conduct on an isolated basis raises a substantial question as to his honesty, trustworthiness or fitness as a lawyer in other respects. So at this point we do not believe there is any obligation to report AG Hill to disciplinary authorities.

Question 5: Options, required or otherwise, that might be desirable to prevent further sexual harassment in the ordinary and usual social events that legislators and staff attend during the time of year that the General Assembly is in session.

Answer: While it is difficult to police off-duty conduct, we recommend that you conduct regular (at least yearly) harassment training for your employees so they know that any inappropriate harassment is strictly prohibited. You should explain to employees that they should report any inappropriate conduct immediately without fear of retaliation. As you have done here, you should take all complaints seriously and investigate immediately. By creating a culture of respect, you will hopefully avoid harassment by co-workers or supervisors both at work and at social events.

Question 6: Advice concerning the best practice on how to relate the conclusions of the investigation to the complainant and other affected legislative employees, assure them that no adverse action will be allowed as a result of bringing the complaint, and assuring them that the General Assembly has heard their concerns and is acting to protect them.

Answer: Again, we believe it is important to communicate to the affected employees that you consider their allegations to be very serious, that you fully investigated their claims, and that you appreciate their bringing them to your attention. We recommend that you notify them that while you do not believe there is any legal obligation to do so, you are going to address the concerns with AG Hill so that no future conduct will take place. You can assure them that their names will be kept confidential. Finally, you should remind them that retaliation is strictly prohibited and that if they have any additional concerns in the future they are encouraged to immediately report them.

I hope this addresses all of your questions. If you would like to further discuss, please let me know.

Sincerely,

Blake J. Burgan