



Employment Investigations From A to Z

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Cell Phones

We all have them. If you have to use yours, please do so in the hallway.

Thank you.



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- Represents ND employers
- Discrimination (Title VII, ADEA, ADA, FMLA and NDHRA)
- Discipline - discharge
- Handbooks
- Wage and hour
- Whistleblower issues

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- Wage and Hour/Compliance
- Policy Development
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- Litigation /Administrative Complaints – Discrimination
- Employment Mediation – Qualified Neutral

Agenda



- The Complaint & Pre-investigation Measures
- Planning & Investigating
- Findings, Reporting and More
- Case Study

I. The Complaint & Pre- Investigation Measures



What Triggers a Workplace Investigation?



Triggers for Workplace Investigations

- Reported or suspected misconduct:
 - Harassment
 - Discrimination
 - Whistleblower
 - Bullying
 - Employee theft
 - Impairment due to drugs or alcohol



Title VII and Duty to Investigate

- Title VII standards: anti-harassment policies and effective grievance mechanisms.
- Complaint process;
- Prompt, thorough, and impartial investigations;
- Immediate and appropriate corrective action when harassment is identified.

Duty to Investigate

- Affirmative Defense – claims of supervisor harassment where employee suffered no adverse employment action.
- Proof of employer's efforts to *prevent and correct* unlawful conduct;
 - Policy: prohibition of harassment; effective complaint procedure; zero tolerance of harassment;
 - Effective investigation
- Employee's failure to use available mechanisms to report harassment.

Duty to Investigate

Vance v. Ball State University (S.Ct. 2013)

Liability for non-supervisor harassment: requires proof of employer's negligence in failing to prevent harassment.

- No monitoring of workplace;
- Poor reporting systems
- Inadequate response to complaints;
- Discourage complaints from being made.



Objective of Effective Investigations

- Gather information
- Determine merits of complaint;
- Assess legal obligations;
- Maintain confidentiality
(to the extent possible).



Objectives: Effective Investigations

- Protect complaining employee or victim;
- Correct/prevent misconduct through prompt, remedial action;
- Avoid liability or lay groundwork for defense;
- Instill confidence in complaint process and encourage employee reporting.

Risks

- Bias, conflict of interest, undue influence
 - Tendency to disregard complaints against owners/executives or highly regarded respondent
- Trivialize complaint from e.g. chronic complainer or if allegation is considered trivial or outlandish
- Too busy to investigate
- Fear of unknown



Planning the Investigation



**Failure to
Plan**
Is planning
To Fail

Getting Started

- What are you dealing with?
 - Identify policy violations, legal issues, performance/conduct,
- Who is involved or affected?
- Define general scope of the investigation
 - By timeframe
 - Locations/departments affected
- Choose the investigator



Preliminary Steps

- Define the issue, reason and scope of investigation
 - How and when should interviews be conducted
 - Identify potential witnesses
 - Identify documents for review
 - Preliminary timeline

Selecting the Investigator

- Critical thinking skills
- Human Resource experience
 - Policies and procedures
 - Company operations
 - Harassment/discrimination
- Objective and unbiased



Selecting the Investigator

- Avoid investigator with personal interest in outcome
- Outside investigator may be necessary if allegations involve senior management
- Company attorney as investigator
 - Potential conflict of interest
 - May threaten attorney-client privilege

Selecting the Investigator

- **Assume the investigation will be evidence in any lawsuit; the investigator will be company's key witness.**



Initial Interview of the Reporting Employee

- Ice Breaker:
 - Complaint taken seriously - express appreciation for coming forward
 - Provide assurance about non-retaliation
 - Commitment to confidentiality to the extent possible
 - Explain process and reasonable timeline

Initial Interview of the Reporting Employee

- Begin with neutral background questions;
- Ease into specifics: who/what/when/where/how
- Avoid interrogation
- Leave door open for second interview, as additional information comes to light

Common Concerns

- The reluctant reporter:
 - “Just a heads up ... please don’t say anything to him/her/them”;
 - “Please keep this confidential”;
 - “I don’t want to see anyone lose their job”;
 - “It’s not that big a deal”;
- “I’ve changed my mind. I’ll deny it ever happened.”

Pre-investigation Measures

- Document initial interview
 - Reporter verification
- Protections for reporting employee or other potential victim(s);
 - Separation/reassignment;
 - Instructions to respondent;
 - Administrative leave
 - Respondent or reporting employee;
 - Sensitive issues;
 - To protect integrity of investigation



Pre-investigation Measures

- Protecting company assets
 - Restrict employee access to financial accounts
 - Report to law enforcement
- Preserve information – documents and electronic records
 - “litigation hold”



Pre-investigation Measures

- Determine company's obligation to report to state or local authorities;
- Assess need for additional security
 - Onsite or otherwise
- Report to EPLI carrier/determine and calendar ongoing reporting requirements

II. The Investigation



Planning the Investigation



- How you conduct the investigation is as important as its ultimate outcome
- Scope of investigation
- Pre-Interview Checklists
- Notices
- Obtain and preserve documents and information
 - Regarding the accused and the reporting employee (motive or history)
 - HR or supervisor information
 - Any pattern or earlier issues



Planning the Investigation

- Identify applicable policies or handbook provisions
- Past practice – similar circumstances
- Who must be informed of allegations?
- What are investigative questions?
- Who needs to be interviewed?
- To whom will report be provided? In what form?

The Basics of Employee Interviews



- **Deciding Interviewing Order - General**
 - Pros/cons of interviewing subject first or last
 - Preliminary interview with subject before witness interviews
 - Final interview with subject
 - Responsive interview with complainant

The Basics of Employee Interviews



- **Deciding Interviewing Order** - Other
 - Relationships between witnesses
 - Likelihood of information spreading informally
 - Material witnesses first
 - Character/bystander witnesses
- **Document Reasons** – Witnesses were selected for interview and NOT selected

The Basics of Employee Interviews

- **Notice to witnesses** – every participant should receive clear and accurate information about nature of investigation, limits on confidentiality, expectations for their participation and ban on retaliation
- **Interview questions** – developed in pre-interview process; follow from nature of allegations and purpose of investigation (develop pre-interview checklist)
- **Mechanics of Investigation** – location, two interviewers present, timing

5 Stages of Interview

- Stage 1 – opening and tone setting
- Stage 2 – uninterrupted initial narrative
- Stage 3 – reconstruction
- Stage 4 – deconstruction/push
- Stage 5 - closing

Credit – Fran A. Sepler
“Finding the Facts”



“Must” cover subjects



- The importance of obtaining complete and accurate information – “we take this very seriously.”
- Retaliation not tolerated
 - What retaliatory conduct may look like
 - Person to report any retaliation
- Not to discuss the interviews with other employees
 - NLRB challenges

Interview methods



LISTEN

- **Stage 1** - Open-ended questions - from general subjects to more specific questions
- **Stage 2** – Let employee tell story
 - Be patient
 - Acknowledge feelings without appearing to validate
 - Ask “have you told me everything you know?”

Interview methods



- **Stage 3** – Visit narrative again to get details:
 - “Where were you when this happened?”
 - “Who else was present when this occurred?”
 - Ask witness to demonstrate or clarify
 - Have witness draw diagrams
 - “Are there any documents, emails, texts or other information that relate to this issue?”

Interview methods



- **Stage 4** – Most challenging; maintain rapport while testing accuracy of facts:
 - Confront inconsistencies
 - “Columbo” style
 - “I am having a hard time understanding . . . ”
 - “Maybe you can help me out . . . ”
 - Direct confrontation

Interview methods



LISTEN

- **Stage 5** – Involves confirmation of information gathered and restating of “ground rules”:
 - Review information provide – make separate, “stage 5” corrections rather than altering notes
 - May mean re-examining some areas
 - Review ground rules
 - May be called upon again and means to contact investigator with further information

General Interview Considerations

- **Taped versus written records of interviews**
 - May inhibit candor
 - May be discoverable
 - Employee signed statements
 - Note taking and reporting



Tips for Note Taking



- **Notes must be**
 - Contemporaneous
 - Objective
 - Clear enough to you to be able to interpret later
 - Consistent in level of detail

Tips for Note Taking



- **Other tips**

- Take minimal notes during uninterrupted initial narrative
- After initial narrative, take more detailed notes
- Never put your opinion in the body of your notes
- Keep credibility notes separate
- Put observations in parentheses (angry, crying, etc.)
- Review and refine as soon as possible following interview
- May be on PC, tablet or handwritten

Special Considerations



- **Reluctant witnesses**

- Explain the importance of cooperation
 - “Getting it right”
 - Maintaining a productive and professional workplace
- Prospect of making decisions without all the information
- Identify highest priority information and focus on answers to it
- May require closed end (yes/no) questions

Interviewing the Subject



- Retaliation will not be tolerated
- Give you the opportunity to respond
- Ask to respond to the specific allegations or circumstances
- Suggestions of other witnesses or facts to investigate
- Follow up or process

Special Considerations

- **Interviewing the subject**
 - Dealing with denials
 - Disputes about facts (get details & make notes)
 - Declaring charges false or malicious
 - Forgetting
 - Counterclaims/diversionary tactics
 - Admissions



Follow Up and Finalize

- Compile and review witness interview notes and other related information
- Follow up on inconsistencies
- Conduct 2nd interviews or interview follow-up witnesses
- Weigh conflicting information
- Evaluate credibility of witnesses

The Whole Truth



- 1. White Lies** – to help or protect someone
- 2. Self-serving lies** – to make yourself look good without hurting others
- 3. Selfish lie** – benefits you at expense of another (Jim didn't do the work. I had to do it myself.")
- 4. Anti-social lie** – told deliberately to hurt another without necessarily benefitting teller

Credibility Assessments



1. Motive for untruthfulness?
2. Unrelated lack of truthfulness?
3. “Game playing” – evasiveness, manipulation?
4. Forthcoming?
5. Reliability – does the individual provide follow up information as promised?



Credibility Assessments

6. History between parties?
7. Past conduct/misconduct?
8. Interviewer feedback – what do you observe?
9. What makes sense? Chronology?
10. Corroboration – witnesses, documents, “rule out” corroboration

III. Findings, Reporting & More



The Investigation Report

- Elements of Report:
 - Purpose and scope of investigation
 - Summarize
 - Allegations
 - Relevant policies
 - Witness interviews
 - Other evidence or information reviewed and relied upon
 - Identify facts (findings)
 - Conclusions based upon entire record



The Investigation Report



- Use clear, simple and persuasive language.
 - If credibility is determinative, explain how and why one witness or description of events was deemed more credible than another.
 - Avoid legal conclusions: “hostile work environment” or “discrimination”. Instead, identify specific instances of unacceptable conduct violating workplace policies.

The Investigation Report

- Keep jury in mind
- Don't editorialize, speculate or guess
- Third party or legal counsel review
- Incorporate all important supporting information by reference

Now What Do You Do? Remedial Action



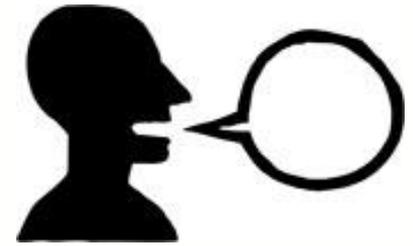
- Based upon the investigation and report
 - Make back-up material available to the decision-maker
- Is more investigation/fact finding necessary before making a decision?
- Consensus decision-making for remedial measures
- Legal considerations

What do We Tell Employees?



- To the reporting employee:
 - A summary of the findings
 - Remedial action being taken
 - Appreciation for reporting; reemphasize no retaliation
 - Keep the investigation and results confidential

What do We Tell Employees?



- To the investigated employee:
 - A summary of the findings, in writing.
 - Identify remedial or other actions resulting from investigation
 - Stress no retaliation
 - Follow up

Investigation Results

- What if you can't reach a conclusion?
 - Explain conflicts and discrepancies
 - Assure reporting and investigated employees –
 - Monitoring will continue
 - Report any other incidents



Post-Investigation Follow Up

- With the reporting or affected employee as well as other interviewees
 - Stress importance of confidentiality;
 - Insure no retaliation;
 - Any post-investigation fall-out;
 - Any questions or comments?



Post-Investigation Follow Up

- With the investigated employee
 - Discuss post-investigation events
 - Still monitoring the situation
 - Re-emphasize non-retaliation
 - Any questions or comments?



Avoiding Retaliation Claims

- Unsubstantiated complaints
- Protect the Victim
- Confidentiality



IV. Case Studies



Case Study



A local medical clinic employed 4 physicians, 5 nurses and 15 support staff members. Dr. Know and Dr. How were the founding members and shared Clinic oversight duties. Dr. How handled Clinic financial matters and Dr. Know handled human resource duties - and prided himself on regular interaction with the Clinic employees.

For several months, unbeknownst to anyone else, Dr. Know had been carrying on a romantic relationship with one of the insurance and billing clerks, Carrie Mee. Both Know and Mee were married. The romantic interludes occurred outside the clinic during off-duty hours.

Case Study



Late one Saturday evening, Clinic Nurse Nozee spotted Know and Mee getting cozy in Know's pickup, parked at the local Kum & Go convenience store. Both Know and Mee were married, so Nurse Nozee thought their behavior was wrong.

She mentioned seeing Know and Mee together to Dr. How the next Monday morning. How confronted Know (without disclosing Nozee's identity). Know offered a plausible explanation and How reluctantly gave Know the benefit of the doubt.

Case Study



Two weeks later, Blue Cross Blue Shield called Dr. How about significant insurance billing errors in claims from the clinic. The errors were traced back to claims processed by Mee.

Rather than let Dr. Know handle this as an HR matter, Dr. How met with Mee and her supervisor, Omy. During the meeting, Mee admitted to Omy and How that she had been seduced by Dr. Know – and he had taken advantage of her. She was an emotional wreck – couldn't eat or sleep and was fearful of losing her job.

Mee's counselor sent her to an attorney who "confirmed" that Mee was a victim of Know's sexual harassment. Mee threatened to sue the Clinic if "something wasn't done".

Case Study



- Is an investigation warranted?
- What potential issues exist?
- Who should investigate?
- What subjects/facts should be addressed through the investigation?

Case Study



- Would any preliminary information help the investigator?
- Should Mee be reassigned? Put on administrative leave?
- Who should be interviewed? In what order?
- Mee's husband wants to participate in the investigation. How should the investigator respond?

Case Study



- During the investigation, it is apparent that most of the Clinic employees know about the allegations and are discussing them in the workplace.
 - What, if anything, can be said to the Clinic employees about these discussions?
 - What steps can be taken to retain confidentiality of the investigation and deter employees from discussing it?

Case Study



- During a witness interview, one of Mee's co-workers tells the investigator that Mee had an affair with the boss at her last job. Mee bragged about the relationship and the cash settlement she walked away with.
 - Does this disclosure affect the investigation?
 - What, if anything, do you do with this information?

Case Study



- During the investigation, Dr. Know presents dozens of e-mails in which it is apparent that Mee not only welcomed, but initiated the relationship with Dr. Know.
 - Does this disclosure affect the investigation?
 - What potential remedial action(s) would you consider?
 - What are the risks to the employer of each action?

Questions & Answers



Thank You!

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