

## Practice Pointers for Workplace Investigations

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The co-authors have combined experiences in conducting over 500 workplace investigations and attacking or defending in litigation countless workplace investigations of others. Based thereon, they offer the following practice pointers for employers and investigators to consider before, during, and after conducting any workplace investigation.

### Investigate Upon Actual or Constructive Notice of the Alleged Wrongdoing

The employer's knowledge of a claim of wrongdoing can be obtained through any means, including among others, direct complaints, anonymous tips, rumors, hearsay, or third party statements. Further, an employer may be charged with constructive notice of the wrongdoing, even if no one complains of the conduct, where the conduct is so pervasive that the employer should have known of it.

### Investigate Promptly

The investigation should be commenced immediately and completed as soon as reasonable circumstances will allow. Investigations commenced within a day or days of a complaint and completed within a two-week period have been routinely upheld as timely. Waiting until after the complainant files an administrative charge or a lawsuit, on the other hand, will present a rebuttable presumption of inadequacy. Such a presumption can be rebutted if the employer has a reasonable explanation for the delay. Reasonable explanations might include a situation where legal counsel represents the complainant and counsel files an administrative charge before allowing his/her client to be interviewed. Also, there are times when the complainant files an administrative charge while out on disability leave and is not available for an interview. In all events, the employer's goal should be to initiate the investigation and ensure it is completed as soon as reasonable circumstances allow.

### Choose the Right Investigator

*Neutrality and Objectivity:* Someone who has no stake in the outcome should conduct the investigation. This can be someone within the employer's human resources department or an outside neutral investigator, whichever is more appropriate in view of the following considerations:

- The alleged wrongdoer should have no supervisory authority over the investigator, or any direct or indirect control over the investigation. If an alleged wrongdoer outranks the investigator, the investigator may fear retaliation. In such a case, the actual ability to fairly investigate or to take appropriate remedial action may be compromised.
- The complainant or alleged wrongdoer should not be a direct subordinate of the investigator. Such an investigator may be more inclined to merely keep the peace (i.e., "Can't we all just get along?"), rather than thoroughly investigate the complaint. Such a supervisor/investigator may not want to face the possibility of losing one of his/her subordinates or be forced to take other disciplinary action against a favored employee.
- The investigator should not be someone who has had any prior negative experiences with either party so as to avoid any actual or apparent bias.
- The investigator must act in good faith and listen fairly to both sides.

*Knowledge of the Law pertaining to the Subject Matter of the Investigation:* The investigator should be trained in the subject matter under investigation (for example, sexual harassment, discrimination, disability/accommodation, whistle-blowing, workplace violence, theft, expense fraud, trade secret, privacy violations, etc.). Such knowledge will enable the investigator to better understand the elements of a prima facie case and the shifting burdens of proof. Although the investigator is not bound by trial procedures, legal burdens of proof, or evidentiary rules, knowledge of these matters will assist the investigator in making factual findings based on trustworthy, reliable, and credible evidence.

### Protect the Complainant during the Investigation

During the pendency of the investigation, the employer should take steps to avoid contact between the complainant and alleged wrongdoer to ensure that further claims of wrongdoing or retaliation do not arise. Such steps would include rescheduling or temporarily transferring the alleged wrongdoer, or placing the alleged wrongdoer on a paid leave of absence, sometimes referred to as "administrative leave." No such measures, or any other potentially adverse actions, should be taken against the complainant, since such measures could be deemed retaliatory.

### Investigate Thoroughly

- Get the complete story from the complainant before you interview anyone else, assuming you are able to interview the complainant. If an attorney already represents the complainant, you will need to make a request with the attorney for an interview with his/her client. Rarely is this request denied, but it can happen. In that case, request that the attorney provide you with as much detail about the complaint as possible. Use the attorney's report as the basis for the claim, together with any written or verbal complaints or statements the complainant has made to co-workers, supervisors, Human Resources, or others. If possible, before you interview the accused employee(s) and witness(es), you should obtain the full story from the complainant or from his/her representative if the complainant is unavailable for any reason.
- Obtain all relevant documentation from all sides. This includes, for example, documentation related to the comparator employees if you are investigating a disparate treatment claim.
- Due to privacy rights, do not seek medical/diagnosis information of the parties, comparators, or witnesses. Be mindful of all persons' privacy rights in their medical records, including HIPAA (Health Insurance and Portability Act of 1996), CMAA (California Medical Information Act found at Cal. Civil Code Section 56, et seq.), and other state constitutional protections.
- Do not review the personnel files of the parties prior to conducting the investigation so you do not prejudice the current claim. However, the personnel file might later become important to a credibility assessment.
- Interview all witnesses identified by the complainant and alleged wrongdoer, unless a witness is clearly irrelevant. If the identified witness is irrelevant, document the reason you do not interview that witness. For example, when asking the party to identify all the witnesses who he or she would like to be included in the investigation, also ask to what facts he/she expects the witness can attest. If the job performance of the party is not an issue in your investigation, then you do not need to interview a named witness whose only knowledge is how great a performer the party was at his/her job.
- Document the amount of time you spend interviewing each witness and spend a sufficient amount of time with each important witness. Recently, an attorney colleague advised that he was defending a lawsuit where his workplace investigator had only spent 10-15 minutes with one of the major witnesses. The attorney was worried about how he was going to handle the defense of this case because the investigator had spent so little time with this particular witness. Avoid this vulnerability to attack by spending the appropriate amount of time to conduct a thorough interview, and document that time along with the interview.
- Interview witnesses to whom the complainant may have made contemporaneous statements. The investigator is not bound by evidentiary rules, and in any event, contemporaneous statements are a possible exception to the hearsay rule. If a credibility issue arises, contemporaneous statements should be obtained and documented in the investigation. You can balance this information with your other evidence and decide how much weight to give it later. When interviewing the complainant, be sure to ask if he/she contemporaneously reported the incident to any peers, family members, or other third parties, as this may be evidence that the alleged wrongdoing occurred.
- Sometimes the witnesses may be former employees, customers, students, or clients. Understandably, the employer may be reluctant to get these individuals in an internal employee issue. In that case, you have to weigh how important the information is against the employer's desire not to unnecessarily involve customers in their private personnel matters. Can the information be obtained from another source without involving one of these individuals? Is the information to be sought duplicative of undisputed information you already have? If so, you may not need to involve them.
- You may need to circle back and re-interview witnesses to clear up new issues that have come up with other witnesses. Tell witnesses at the end of the interviews that you may need to call them back later for follow-up questions. Sometimes you may need to only ask one follow-up question, which might be handled quickly in a telephone call. However, if you have a large amount of follow-up questions or a question on a significant issue, a follow-up interview in person is advised.

### Be Mindful of Special Issues

- Most employees are reluctant to complain of wrongdoing by their coworkers or supervisors. They are fearful of retaliation, ostracism, and/or that they will not be believed. The California Supreme Court has recognized these as legitimate reasons for a victim not to complain. Do not assume because a victim has not complained or took a long time to complain that the claim does not have validity.
- Harassment or discrimination claims are rarely established by direct evidence (e.g., witnessed racist statements, or videotapes of harassing conduct). The fact that there is no eyewitness to sexual harassment is the norm, rather than the exception. This conduct generally takes place behind closed doors. Indirect evidence, such as a pattern of mistreatment of a protected class of persons, arbitrary enforcements of rules, similar complaints by others of the wrongdoing, contemporaneous complaints by the complainant to friends or family, may be relied upon as evidence of wrongdoing.
- The appropriate burden of proof to apply to your fact-finding is by a "preponderance of evidence" (i.e., a feather's weight of evidence on one side), and not the criminal standard of "beyond a reasonable doubt."

### Properly Document the Investigation

- Take detailed written notes of your interviews *or* tape record the interviews. If you prefer the note-taking method, then ask the interviewee to read the notes and acknowledge (by signature on each page) that the notes are accurate and complete regarding the interview.
- Follow the same note-taking *or* tape-recording procedure for all of your witnesses (absent some unforeseeable circumstance), including the complainant and the accused employee.
- You may tape record the interviews if, for example, you are concerned about future claims of inaccuracy of your notes, or criticism of the manner in which you conducted the interview. Certain collective bargaining agreements or other laws, such as investigations of law enforcement officers, may require tape recording. California law requires you to ask permission to tape record any two-way conversation before you do so. There are pros and cons to tape recording interviews. It is more likely to be expensive and time-consuming to have the tapes transcribed and/or reproduced. More importantly, tape recording an interview could have a chilling impact on the parties and witnesses' willingness to be forthright. Before deciding to tape record, you may want to inquire of the witnesses/complainant about his/her comfort level with tape recording. If the witness expresses discomfort, then you can switch to detailed note taking, with the accompanying witness' verification of the accuracy and completeness of the notes. Of course, if you tape record interviews, an accurate and complete record of the interview will be preserved.
- Avoid too much paraphrasing in the written report, if one is requested, because that can be the subject of attack if you get it wrong or if you do not incorporate enough relevant information into your summary.

### Make Credibility Assessments

- When there are conflicting versions of events, the investigator must weigh the credibility of the witnesses. Factors to consider include the inherent plausibility of one version or another, the witness' demeanor, the motive to lie, corroborative evidence, and past record. While the fact that the alleged harasser has a past record of inappropriate or harassing conduct may be evidence of guilt, it is not a conclusive presumption of guilt.
- Conduct face-to-face interviews to observe the interviewee's demeanor and assess credibility.

### Conduct Thorough and Complete Interviews

- Conduct face-to-face interviews (see above paragraph) unless there is a reasonable and justifiable reason you are unable to do so.

- Interview the complainant, alleged harasser, and third parties who could reasonably be expected to have relevant information.
- The personal lives of the parties are not relevant, except in unusual circumstances.
- You should not offer any opinions or suppositions to any witness; however, you may need to elicit opinions or suppositions from witnesses if you believe it could lead to the discovery of relevant facts.
- Ask non-leading, open-ended, and relevant questions.
- The EEOC has issued guidance on its website (EEOC.gov/policy/docs/harassment.html#VC1e) on the minimum questions that should be asked of the complainant, alleged harassers, and third party witnesses. These questions should be asked, if relevant to the facts of your particular type of investigation, to help ensure thoroughness.

**Keep the Process Confidential**

The complainant should be advised that the information concerning the allegations of the complaint will be kept confidential to the extent possible. The complainant should be advised that the investigator will share information or accusations with those who need to know, which would include the alleged wrongdoer, and as necessary, potential witnesses. Records relating to the complaint should be kept confidential on the same basis. No guarantees should be made respecting confidentiality, however. The investigation confidentiality may be lost, for example, if the matter proceeds to legal action and the employer asserts that it properly conducted an investigation. Advise all witnesses, including the complainant and the alleged wrongdoer, to keep the subject, questions and answers of the investigation confidential. It is advisable to have all parties and witnesses sign an acknowledgement and agreement that they will keep the interview confidential and understand they may be disciplined, up to and including termination, if they violate this agreement.

**Make Factual Findings**

The investigator's report back to the employer should always include a determination as to whether the wrongdoing occurred. Where there are conflicting versions, and a lack of corroboration, a credibility assessment may form the basis for the determination. Some factors to consider include whether the testimony is believable on its face, whether the interviewee seemed to be telling the truth or to be lying, whether there is a motive for the interviewee to lie, whether there is any corroborative evidence, or whether there are other complaints of similar misbehavior. No one factor is determinative as to credibility, but the investigator must consider all information in light of all the circumstances.

**Take Appropriate Remedial Action**

- If it is determined that wrongdoing has occurred, the employer must take immediate and appropriate corrective action that is designed to: (1) stop the wrongdoing; (2) correct its effects on the complainant; and (3) ensure that the wrongdoing does not recur and does not adversely impact the complainant.
- If no determination can be made because the evidence is inconclusive, or if the determination is that the complaint cannot be substantiated, the employer should still undertake further preventive measures, such as training and monitoring.
- Both parties should be advised of the results of the investigation and that corrective action, if any, has been taken. Such disclosure sends a message to employees that complaints of wrongdoing will be taken seriously and that appropriate remedial action will be taken where such wrongdoing has been found to occur. Such disclosures are privileged and a complete defense to any defamation claims.

**Protect Against Retaliation**

The employer should monitor the workplace after the investigation, for six months to a year, to ensure that no further wrongdoing occurs and no retaliation is taken against the complainant or any of the witnesses. The employer should have someone from the human resources department or management check in with the complainant on a regular basis to follow up on the resolution of the issues.

**Follow Company Policies and Procedures**

The employer must ensure that all company policies and procedures regarding complaint procedures and investigations are followed and applied consistently.

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