

WORKPLACE INVESTIGATIONS

Appropriately Handling Thorny Situations



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Workplace Investigations: Topics To Be Addressed

- Introduction
- Duty to conduct investigations
 - Legal Issues
 - Requirements
- How to conduct effective workplace investigations
- Common pitfalls and how to avoid them
- Questions



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What is a Complaint?

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What Might Prompt The Need For An Investigation?

- Employee complaints about harassment or discrimination
- Complaints about retaliation
- Allegations of misconduct concerning employees (e.g., theft)
- Safety issues, accidents, on-the-job injuries
- Whistleblower complaints
- Litigation



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What is a “Complaint”?

- Written or verbal communication from employee specifically complaining of harassment or other objectionable conduct
- Employee says that he/she has been treated badly or unfairly
- Supervisor reports that inappropriate acts or misconduct have occurred



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What is a “Complaint”?

- What constitutes a complaint is often less obvious and harder to recognize.
- Less obvious examples:
 - Statement in exit interview that he/she is “fed up” with the “crap” he/she has put up with while employed there
 - Comment from employee overheard by supervisor about inappropriate conduct in the workplace
 - Employee mentions to his/her supervisor that co-workers “have been going at it”



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What is a “Complaint”?

No Magic Words Required

- No buzz words that make a statement an official complaint
- Complaints not required to come through a formal channel (e.g., must come through HR first)
- Writing not necessary; a complaint can be verbal
- Mere knowledge, without any specific complaint, may be enough to trigger duty to investigate



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Duty To Investigate

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Duty to Investigate

- Whistleblower laws require investigation by employer.
- Safety laws may impose duty to investigate accidents or unsafe working conditions.
- Federal and state harassment/discrimination laws impose legal duty on employer to investigate employee related complaints.
 - No discretion to decide whether or not to investigate
 - Chronic complainant does not relieve employer from duty
- Provisions in written employment agreement may impose contractual duty to investigate “good cause” for termination.



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Duty to Investigate

- What if conduct complained of occurs outside of workplace or off duty?
 - Social media: a possible forum for harassment
 - If conduct has implications in the workplace, investigation may be appropriate or necessary
 - Example: online harassment by one employee toward another that is so severe that it affects the victim’s job performance at work.



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Duty to Investigate

- Effective investigation may limit liability or damages recovered by employee.
 - Title VII of the Civil Rights Act of 1964: Investigation can be used by employer to limit or avoid liability with respect to claims for hostile work environment if no adverse employment action.
 - U.S. Supreme Court established affirmative defense.
 - Employer exercised reasonable care to prevent and promptly correct any harassing behavior; and
 - Employee unreasonably failed to avail himself/herself of preventive or corrective opportunities provided by employer.



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Duty to Investigate

Vance v. Ball State Univ., 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013):

- African-American state university employee brought action against university, asserting Title VII claims for hostile work environment and retaliation stemming from complaints he made about racial harassment.
- An employee is a “supervisor” for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.
- “An employer will always be liable under Title VII when its negligence leads to the creation or continuation of a hostile work environment.”



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Duty to Investigate

- **Investigation can serve as basis to establish “good faith belief” by employer that employee violated workplace policy to defeat claim of alleged discrimination by terminated employee.**
 - McCullough v. University of Arkansas for Medical Sciences, 559 F.3d 855, 862 (8th Cir. 2009): “The critical inquiry in discrimination cases like this one is not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge.”
- **Even if personnel action based on mistake, a sufficient investigation might insulate employer from liability.**
 - Waters v. Churchill, 511 U.S. 661 (1994): Focus is on reasonableness of employer’s investigation of statements made and whether factual conclusions as to what was said were reached in good faith.
- **If employment is not at will, then investigation may serve as basis for “good cause” termination.**



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Duty to Investigate

- **Investigation may become focus of litigation.**
 - Ogden v. Wax Works, Inc., 214 F.3d 999 (8th Cir. 2000): Female employee sued former employer, alleging sexual harassment by her male supervisor and retaliation in violation of Title VII.
 - No affirmative defense where investigation improperly focused on complainant’s performance, rather than harasser’s conduct.
 - Employer could not prove that it exercised reasonable care to promptly correct male supervisor’s sexual harassment of female employee, as required to establish affirmative defense to employee’s Title VII sexual harassment claims; employer minimized employee’s complaints, performed a cursory investigation which focused upon employee’s performance rather than supervisor’s conduct, and forced employee to resign while imposing no discipline upon supervisor for his behavior.
- **Alleged acts of harassment/discrimination may be minor, but focus of lawsuit becomes employer’s failure to fully or properly investigate claims.**
 - “I complained, but the company did nothing.”
- **Improper investigation can make employer look bad even if underlying claims are without merit.**



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Duty to Investigate

- Investigate issues or facts that may be problematic regardless of whether or not specific law imposes duty on employer to investigate.
- Proper investigation can help employer identify and prevent a problem from becoming a liability.
- Proper investigation followed by appropriate and prompt remedial action can cut off damages and sometimes eliminate liability altogether.
- Greer v. Mondelez Global, Inc., 590 F. App'x 170 (3d Cir. 2014):
 - In response to email from African-American employee complaining of harassing comments from co-workers, employer met with the employees involved in the alleged incident and ordered them to stop making the comments.
 - Accordingly, no vicarious liability exists, as employer's response addressed employee's concerns and was "reasonably calculated to prevent further harassment."



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Duty to Investigate

- Importance of Conducting a Proper Investigation
 - Legally required
 - Helps to establish that employer acted reasonably and objectionably
 - May yield admissions from the wrongdoer
 - Can help establish extent of conduct to limit expansion of complaint in subsequent litigation
 - Provides basis for corrective action taken
 - Helps to limit claims and potential liability
 - Boosts employee morale



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Failure to Conduct Prompt and Fair Investigation

- May be used as basis to show that employer failed to prevent harassment/discrimination.
- May show employer ratified or condoned unlawful conduct.
- May be used by aggrieved employee as an independent cause of action if harassment/discrimination actually occurred.
- May create an inference of malice, which could serve as basis to award punitive damages.
- Discourage employees from coming forward with complaints, depriving employer the opportunity to remedy conduct before litigation.
- Leads to inconsistent application of meaningless policies.



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Conducting an Effective Investigation

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Conducting an Effective Investigation

- Impartial investigator
- All witnesses interviewed and all relevant facts uncovered
- Prompt and thorough
- Documentation, documentation, documentation.
- Confidentiality to extent permitted under the law*
- Results of investigation communicated to complaining party and alleged wrongdoer
- Action taken is effective to end inappropriate conduct and deter future similar conduct



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Conducting an Effective Investigation

- Who Should Investigate?
 - Inside or outside counsel
 - Human resources professionals
 - EEO department
- Considerations:
 - Positions of employees involved in complaint
 - Type of conduct involved
 - Should be well trained in interviewing witnesses
 - Possible witness in future litigation
 - Investigator's prior or existing relationship to individuals involved



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Preparing for the Investigation

- Review all applicable policies, rules and documents at issue.
- Identify issues to be investigated.
- Review personnel files of individuals involved.
- Determine which witnesses should be interviewed and in what order.
 - All witnesses identified by complainant and alleged wrongdoer should be interviewed.
 - Follow up as necessary.
 - Interview witnesses identified during course of investigation.



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The Investigation

- Interview the complainant.
- Interview alleged wrongdoer.
- Interview other witnesses.
- Document all steps of investigation.
- Reach a conclusion and prepare investigation report.
- Take appropriate corrective action.
- Communicate results to complainant and accused.
- Follow up as necessary.



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The Investigation

- What to communicate to all employees being interviewed:
 - Brief nature and reason for investigation
 - Legal obligation to conduct investigation
 - Summary of investigation process
 - Confidential nature of ongoing investigation
 - Prohibition against retaliation
 - Employee's duty and obligation to participate in investigation – (voluntary)
 - Seeking facts not opinion of employee being interviewed



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The Investigation

- Discussion of the ongoing investigation among employees
 - The NLRB has ruled that employers *may not* broadly prohibit discussion of ongoing investigations between employees.
 - Phoenix Transit System, 337 NLRB 510 (2002): The local union filed charges and on appeal the NLRB affirmed the administrative judge's finding that the employer violated Section 8(a)(1) of the NLRA by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment claims among themselves.
 - Fresh and Easy Neighborhood Market, Inc., 361 NLRB No. 12 (2014): Individual brought action and NLRB stated that employees have a Section 7 right to discuss with one another ongoing employer investigations into alleged employee misconduct, including allegations of sexual harassment. The employer bears the burden of showing that it has a legitimate business justification that outweighs the employees' Section 7 rights.



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Conducting an Effective Investigation

- Example “Notice of Employee’s Rights and Responsibilities” to be given to employee before an interview:

Please review the following information:

1. Your participation with the Investigation is voluntary. You will not be disciplined in any way for refusing to answer any question(s) asked by the Company. Questions asked of you will be limited to the scope of the investigation.
2. The Company will not retaliate or otherwise punish you because of your participation with the Investigation or for reporting inappropriate or unlawful behavior by co-workers, supervisors/managers, or administrators.
3. Providing knowingly false information during the Investigation violates Company policy and will result in discipline up to and including termination.
4. While you are not restricted from discussing the Investigation with other employees, please exercise discretion when doing so.



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The Investigation: Special Union Rules

- Weingarten Rights (N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251 (1975))
 - In Weingarten, the Supreme Court held that pursuant to Section 7 of the NLRA, a union employee is entitled to request that a union representative be present at an investigatory interview, which the employee reasonably believes might result in disciplinary action.



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The Investigation: Special Union Rules

Confidentiality: American Baptist Homes of the West d/b/a Piedmont Gardens, 362 NLRB No. 139 (2015)

- The NLRB overruled the longstanding *Anheuser-Busch* standard which protected the confidentiality of witness statements and adopted the *Detroit Edison* balancing test. The new test places the burden on the employer to prove that it has a legitimate and substantial confidentiality interest in keeping witness statements private and that the interest outweighs the union's need for the information.
- The Board reserved the work product doctrine defense as a separate defense that the employer may raise in response to a union's request for information, including witness statements. Work product includes any documents prepared in preparation or anticipation of litigation by or for a party representative regardless of whether the representative is an attorney; this may include HR notes regarding employee interviews.



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Conducting an Effective Investigation

- Interviewing Guidelines
 - Prepare a written outline of questions to ask.
 - Seek facts, not opinions.
 - Ask open ended questions.
 - Do not argue or express an opinion one way or the other.
 - Ask for all supporting evidence (calendars, notes, emails, etc.).
 - Ask follow up questions when responses are confusing or suggest additional information.
 - Ask, “is there anything else you think I need to know?”
 - Conduct interview in private location.
 - Have two people present during interviews: one asking questions and one taking notes, if possible.
 - Interview employees one at a time.



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Interviewing the Complainant

- Be sensitive but objective and neutral to issues raised.
- Identify all alleged wrongdoers.
- Identify all potential witnesses.
- Details of each incident of misconduct and related time frame of each incident.
- Ask about any delay in reporting.
- Ask whether he/she complained to anyone else and when.
- Ask about effects of alleged wrongful acts on complaining employee.
- Ask what remedy he/she is seeking.
- Explain process and that his/her identity will be disclosed to alleged wrongdoer.



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Interviewing the Complainant

- Take detailed notes of the complainants statements.
- May ask for written statement (not a substitute for interactive interview).
- Read notes back to him/her to confirm accuracy.
- Be sure notes only include facts and not opinion or subjective comments.
- Date all documents and notes.
- Include name of interviewer on all documentation.
- Keep record of documents received from employee and dates.



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Interviewing the Alleged Wrongdoer

- Briefly disclose nature of investigation and complainant.
- Explain investigation process.
- Explain confidentiality issues.
- Emphasize prohibition against retaliation and consequences.
- Do not speculate as to outcome.
- Ask open ended questions.
- Do not speculate as to merits of the complaint.
- Ask him/her if there is any other reason employee may have made complaint (i.e., what is the relationship between employees).
- Ask about other witnesses.



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Interviewing the Alleged Wrongdoer

- Verify accuracy of notes.
- Confirm he/she doesn't have any other facts or information that may assist in resolution of the complaint.
- Ensure notes only contain facts and not opinion.



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Conducting an Effective Investigation

What if alleged wrongdoer or complainant asks that his/her attorney be present?

- Remind employee that counsel may become a witness.
- Set clear rule that attorney cannot interfere in investigation, if choose to allow attorney to be present.
- Could choose not to allow it as long as consistent.



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Conducting an Effective Investigation

- Self check fairness and thoroughness of investigation
 - Did you get both sides of the story?
 - Did you check documentation/investigation notes for accuracy?
 - Did you interview all witnesses?
 - Did you obtain copies of all supporting documentation from employees?
 - Did you conduct follow up interviews if needed?
 - Are the facts clear?
 - Did you check investigation notes for objectivity?



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Investigation Report

- Prepared by interviewer(s)
- Should summarize the facts
- Details of all witness interviews (dates, locations, persons present)
- May include separate statement concerning interviewer's assessment of credibility of witnesses
 - Stick to observable or objective indicia.
 - Describe basis for assessment in detail.



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Analysis

- Analysis and discussion limited to those who need to be involved in decision
 - HR Director
 - Attorney (inside and/or outside counsel)
 - Other appropriate department heads
- If possible, interviewer not involved in final employment decision or action to be taken
 - Keeps outcome separate from investigator



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Conclusions/Actions

- Conclusions based on facts and information from report with appropriate advice and guidance from counsel
- Prepare memo to complainant reporting conclusions and what, if any, action will be taken
 - The memo should confirm prohibition against retaliation and encourage immediate reporting of retaliatory conduct.
 - Remind employee of avenues available if dissatisfied with outcome.



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Conclusions/Actions Alleged Wrongdoer

- If discipline or termination is appropriate, meeting should include HR.
 - Avoid arguing with wrongdoer.
 - Remind him/her of redress if dissatisfied with outcome.
- Regardless, even if no discipline is issued, remind employee of prohibition against retaliation and consequences.
- Provide information on appeal or grievance policy if disagree with results or action taken.



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Conclusions/Actions

- If harassment occurred:
 - MUST remedy situation involving harassment and/or discrimination
 - Remedies may include the following actions against the harasser:
 - Termination
 - Discipline
 - Training
 - Counseling
 - Transfer, demotion, loss of promotion, etc.



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Remedies

- Remedies for victim of harassment/discrimination may include:
 - Paid leave
 - Provide counseling
 - Offering a transfer (use caution to avoid retaliation concerns)



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Documentation After Investigation

- Keep all investigation documentation, including interview notes, witness statements, and correspondence gathered during investigation in separate file.
- Mark documents as investigation materials.
- Keep investigation materials confidential and limit access to information and file.



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Investigation File

- Investigation file will be discoverable if lawsuit filed.
- All interviews are discoverable.
- Attorney-client privilege may not apply.
- Use of email should be limited.



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Common Mistakes and How to Avoid Them

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Common Mistakes

- Wrong focus during investigation
- Failure to properly document investigation
 - Document even if minor complaint
 - Be sure to date all documents
 - Include names and positions of all persons present during interviews and meetings
- Promising employees complete confidentiality
 - Be sure to explain limitations on confidentiality
 - Discoverable if litigation
 - Disclosure to others on need-to-know basis



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Common Mistakes

- Cutting corners
 - Don't substitute witness statements in lieu of investigator notes
 - Important to have interactive interviews to assess credibility
 - Do not forget to follow up with complaining employee and wrongdoer
 - Do not skip steps; investigation may not be viewed as fair and thorough
 - Complete same process for all complaints; don't pick and choose which complaints to investigate
 - Don't forget to come to a conclusion
 - Important to reach a conclusion based on best information available



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Common Mistakes

- Failing to talk to accused prior to reaching conclusion
 - Important to get accused employee's side of the story
 - Employee may make admissions or give false statements that can be used as further basis for disciplinary action taken
- Not training supervisors and employees
- Not having and updating effective harassment policies and reporting procedures



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Questions?

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