Employee Investigations: “Best Practices”

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When Employer’s Decisions Are Examined, the Focus is on the Investigation And Complaint Process
“Let’s face it, when you do an investigation, almost always, one of the parties believes you got it wrong. In litigation, brought by either the complainant or the accused, the focus is not only the alleged underlying wrong, but also how it was investigated.”

“Minefields for HR Professionals in EEO Investigations”
What Are We Going to Cover Today?

1. Why employers conduct workplace investigations
2. How to decide when to initiate an investigation
3. Best practice tips for effective investigations
4. What to do after the investigation is over
Issue No. 1: Why Employer’s Conduct Workplace Investigations?
Why?

• Learn what happened in on a matter of consequence
• Comply with law
• Comply with employment policies
• Correct a problem/prevent future problem
• Show all employees that our policies/laws enforced
• Reinforce employer values and identity
• Encourage other employees to report
• Positively impact morale
• If there is litigation, it can supports a defense
• Helps decide what type, if any, corrective action needed
Issue No. 2: When Do We Initiate An Investigation?
Deciding When To Investigate

- **Easy** – received complaint of illegal activity or policy violation
- **Easy** – third-party report of such activity/violation
- **Easy** – outside agency notifies employer of a complaint
- **Easy** – employee confides in you as HR professional or manager, but wants no formal complaint or investigation
- **Less easy** – anonymous tip/unsigned note sent to management
- **Difficult** – rumor mill or gossip
Factors To Consider in the Less Easy or Difficult Situations?

• Does the matter involve allegations of serious workplace misconduct?
• Is the rumor or tip corroborated by other information?
• Has victim of the rumor or tip asked for an investigation to “clear his/her name”?
• Who is the subject of the rumor/tip (and could the rumor or gossip itself be considered harassment or retaliation)?
• Do less intrusive or disruptive methods exist to address the situation?
• Ask yourself if your reason for not investigating sounds objectively reasonable and can you explain it?
When Employee Does Not Want An Investigation or To File Complaint

- General rule is to investigate
  - Because a legal duty likely arises from notice in most cases
  - Other employees may be subjected to same behavior

- Not advised, but if agree not to investigate
  - More than one witness should hear/document this was complainant’s request and why decision made
  - Advise employee always there for him/her and of policy against allowing retaliation
  - Advise employee to report if problem continues
  - Do not promise absolute confidentiality
Issue No. 3: Best Practices Tips for A Workplace Investigations
Step 1: Investigate Promptly

Employers who do not promptly investigate complaints suffer legal consequences.

Employer’s defenses require prompt investigation and “prompt remedial measures,” if required by investigation.

- *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (not adequate investigation where employer waited until women quit jobs)
Step 2 – Selecting The Right Investigator

• Before assuming you know who will investigate, stop and think

• Checklist for each investigation:
  – Actually objective and appear objective?
  – Disciplined, observant, ability to understand subtleties and to distill information
  – Experience/training in investigation
  – Understands relevant policies and legal principles
  – Good interpersonal skills
Step 3 – Review All Applicable Policies

• Don’t assume you know them

• Collect and follow all relevant policies

• Know difference between “policy” and “practice”

• Collect other related rules and policies (eg., work rules, harassment, computer use, general employee conduct policies)
Step 3 – Map Out Investigation Plan In Advance

• List of people to interview and evidence to assemble
• Decide whether interim measures needed
• List of the material facts and questions at issue
• Create file and label “confidential”
• Decide interview specifics: (1) where to hold, (2) in what order, (3) recorded or supported by your notes/memo, (4) who present, (4) whether to use documents during a particular interview.
Investigation Plan (Cont’d)

• Plan in advance for what *could* happen: (1) witness asks to record, (2) asks for a lawyer or witness to be present, (3) asks “do I need a lawyer?” (4) lack of cooperation, (5) witness becomes emotional, threatening or violent, (6) offers or demands polygraphs.

• Plan *consistent* introductory comments: (1) purpose of investigation, (2) don’t promise absolute confidentiality -- disclosure will be only made to those with a legitimate business reason to know, (3) employer will not tolerate retaliation *for participating in investigation*, but don’t promise or imply immunity for conduct discovered during investigation.
Step 4 – Assemble Materials and Documents

• Preserve evidence, suspend normal document retention policy, and issue “hold” instruction

• For electronic material, remember it goes beyond email (thumb drives, CD’s, back-up tapes, temp files, swap files, iPhones, voice messages, security cameras, maybe text messages)

• Evidence showing comparisons of how complainant treated v. others

• Issues when search involved – “reasonable expectation of privacy”
Step 5: Conducting the Interviews

- Follow plan but update it as required
- Attitude: polite, professional, serious, neutral, independent, and direct
- Use a consistent procedure, including same introductory comments
- Ask open-ended questions 1st, but more specific questions later
- Questions asked should allow the investigator to determine facts, assess the credibility, and determine remedial measures needed
Interviews (Cont’d)

• Take very complete notes (or record) – repeat back and confirm key points

• For each witness, get description of job, relationship with complainant and accused, how often interact with either, dates of employment and in current position

• Distinguish between personal knowledge and what witness has heard from others

• Get specifics (date/time/who present) for key information and underlying basis of any opinions

• Do’s and Don’ts on subject matter
Interviews (Cont’d)

• Avoid promises of confidentiality and instead, explain information will be shared on a need-to-know basis.

• Communicate that there will be no retaliation for registering a complaint or for participating in the investigation.

• Ask for leads on other documents/people with knowledge.

• Thank witnesses for their cooperation.

• You may want to ask: “I would appreciate your letting me know if anyone tries to contact you concerning this investigation or our interview.”

• Conduct follow up interviews as needed.
Examples of Questions for Complainant

• Who, what, when, where, and how and how often?
• How did you react?
• How did it affect you or your job?
• Are there any persons who have relevant information? Did you tell anyone else about it?
• Did person commit this conduct towards anyone else?
• Are there any notes, evidence, or other documentation?
• How would you like to see the situation resolved?
• Do you know of any other relevant information?
Examples of Questions for Accused

• After explaining complaint, “What is your response to the allegations?
• If says false, ask “Do you know why the complainant might lie”? 
• Ask for same level of detail regarding incident as was asked from complainant.
• Are there any persons who have relevant information?
• Are there any notes, evidence, or other documentation?
• Do you know of any other relevant information?
Examples of Questions to Ask Third Parties

• What did you see or hear and when?
• Describe the accused’s behavior toward the complainant and toward others in the workplace.
• Same for complainant?
• What did the complainant tell you about incident/complaint? When?
• Do you have reason to believe complainant/accused truthful or untruthful?
• Do you know of any other relevant information?
• Are there other persons who have relevant information?
Step 6 – What to do with “He Said/She Said”?
Factors to Consider in Making Credibility Determinations

• **Inherent plausibility**: Is the version of events believable on its face and make sense?

• **Demeanor**: Seem to be telling the truth or lying?

• **Motive to falsify**: Did the person have a reason to lie?

• **Corroboration**: Is there witness testimony, physical evidence, or documentation that corroborates one side’s statement?

• **Past record**: Did the accused have a history of similar behavior in the past? Does the complainant make repeated unsupported allegations?
Step 7: Concluding the Investigation

• After weighing all evidence, come to final conclusions

• If the evidence is inconclusive, consider undertaking further preventive measures, such as training and monitoring.

• Report back generally to complainant and accused, taking care with language used.

• Promptly implement discipline, or corrective and/or remedial measures
Concluding the Investigation

• A final written report should document the complaint, the steps followed, information obtained, decisions reached, and any actions taken
• The report often is Exhibit A
• Do not purport to come to legal conclusions, if what you have investigated is a policy violation. (Eg, “Regardless of whether X’s conduct constitutes sexual harassment as a legal matter, we found X’s conduct to violate our policy on workplace conduct”)

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Issue No. 4: What to Do After the Investigation?
Evaluate the Effectiveness of Complaint/Investigation Process

- Conduct a “lessons learned” exercise
- Evaluate whether complaint process and all relevant policies were effective and if not, what can be done to improve?
- Did the investigation reveal further training needed?
- Did the investigation reveal any weaknesses that should be documented or noted in evaluations?
- Assure confidentiality of the investigation file and related documentation.
- Is any post-investigation monitoring needed, and if so, what and when? Calendar it.
Thank you