

They Said What!?!?! Effective Workplace Investigations



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Effective Investigations Produce Results



Avoid or
Minimize
Legal
Liability



Improve
Morale



Improve
Factual Basis
for Decisions



Set Example



Demonstrate
Company
Commitment
to Enforce
Policies

Investigation Process

1. When to conduct and why
2. Select investigator
3. Planning the investigation
4. Conducting interviews
5. Reaching a conclusion
6. Creating a written report
7. Making a recommendation to management
8. Following up



When Should You Conduct An Investigation?

Misconduct Observed By Management

- Even when there is no “complaint” the employer must investigate
 - Just witnessing the conduct is enough to require a response by the employer
 - An employer may be obligated to conduct investigations in the absence of an employee complaint if the employer “knows or should have known” of the conduct. See 29 CFR § 1604.11(d) (2003) (emphasis added).

When Should You Conduct An Investigation?

OR Misconduct Reported By Employees, Clients, Third Parties

- Even when an employee requests no action, the employer must respond:
 - Even when an employee makes “off the record” reports, the employer must respond
 - Anonymous Complaints
 - Vague Complaints

When Should You Conduct An Investigation?

Always Investigate Complaints

- Coordination between HR and management
- Consider low key responses to complaints which do not afford protection (*i.e.* simple whines and gripes). Even the whines and gripes can be signs of future troubles
- Take all other claims very seriously and investigate thoroughly

When Should You Conduct An Investigation?

Conduct Investigation Promptly!

- May Prevent Charge or Litigation
- Establishes Employer Defense to Claims
- Prevents Further Misconduct
- Shows the Company takes its policy seriously



Why Should You Conduct An Investigation?

- Opportunity to solve the problem and avoid lawsuit
- Affirmative defenses to claims
- Minimize/Avoid Negligence claims
- Removes bad actors from the workplace



How Should You Conduct An Investigation?

Investigation Must Be **Adequate** And **Thorough** ... or else...

- Fairness
- Consistency
- Thoroughness
- Lack of Bias
- Documentation



Interim Steps



- Safety of the victim
 - Temporary leave
 - Temporary transfer
- Interim suspension or transfer of the alleged harasser
- Criminal conduct – police report

How Should You Conduct An Investigation?

Select Your Team....

- Internal Investigation (HR and/or In-house Counsel)
- External Investigation (Attorney or HR Consultant)
- If in-house counsel or outside attorney is used, be aware of privilege issues.



Select An Investigator - Considerations

- Avoid arguments that employer selected an obviously biased investigator and not interested in fairness.
- Someone will be mad and looking to assign blame – don't make the company an easy target.
- Outside investigator – sometimes requested; consider case-by-case.

Prepare For Investigation

Gather Documents

- Confirm reported complaint with complaining party
- Encourage complainant to prepare thorough, accurate, legible, signed, and dated statement
- Ask complainant to send you any documents that relate to the complaint:
 - Texts, emails, recordings, pictures, videos, etc.

Prepare For Investigation

Gather Documents

- Personnel Files:
 - Complainant
 - Accused
 - What are we looking for?
 - Recent evaluations
 - Discipline
 - Pay issues
 - Promotion/demotion



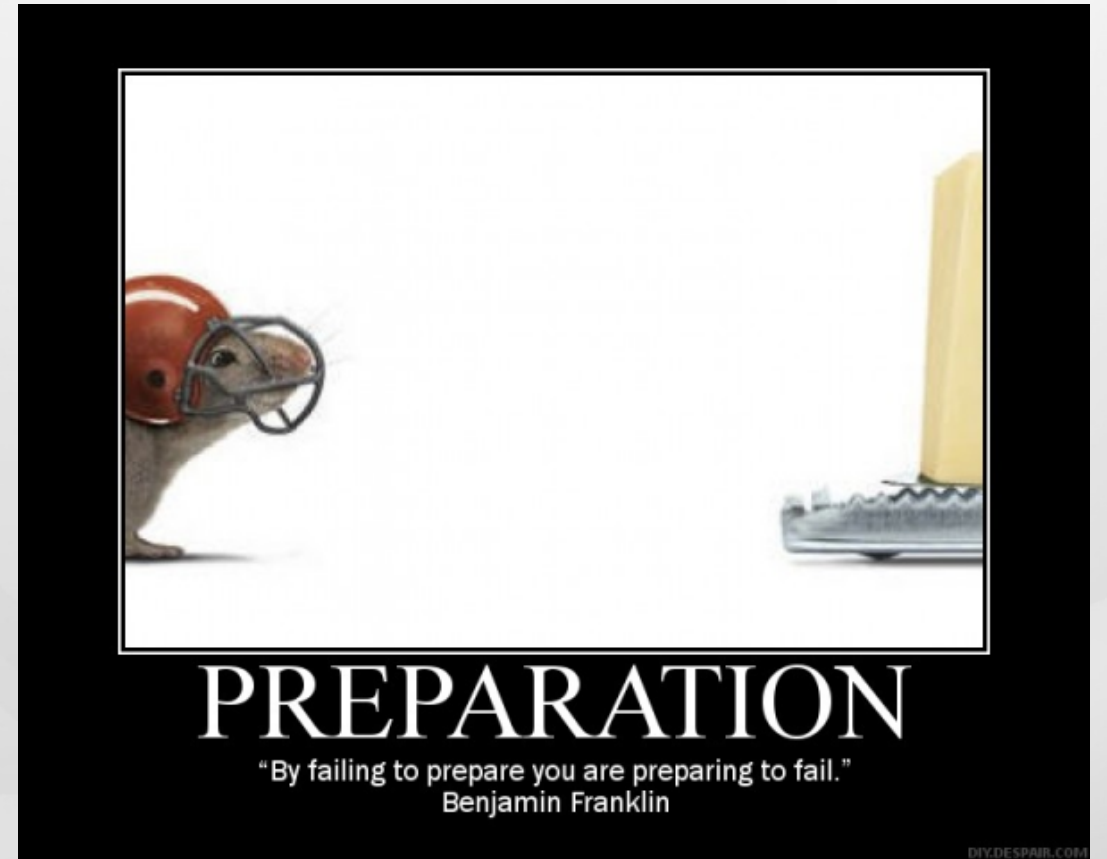
Prepare For Investigation

Gather Documents

- Electronic Records:
 - Emails
 - Texts
 - IMs
 - Assess need for IT involvement
- Video Surveillance
- Result = educated and prepared before interviews!

Prepare For Investigation

- Create witness list
- Outline questions
- Determine order of interviews
- Set timetable



Prepare For Investigation: Interviews

- Interview ALL witnesses
- Plan for multiple interviews of some witnesses
- Select setting carefully
- Arrange for a witness/note taker at interview
- Interview individually – no groups; separate notes for each witness
- If any witness has English as their second language, is an interpreter needed

Conduct The Investigation: Interviews

- Complainant
 - **GOAL** – get entire story
 - Open ended questions
 - Build a timeline
 - Do NOT interrupt or cut off answer
 - Listen
- Witnesses
 - **GOAL** - confirm/refute knowledge
 - Learn biases (e.g., friendships)

Conduct The Investigation: Interviews

- Accused
 - **GOAL** – get entire story and defense(s)
 - Notice and opportunity to be heard



Conduct The Investigation: Interviews

- Don't expect “break-through admissions”
- Prepare for refusals to cooperate:
 - Cooperation, truthfulness are conditions of employment
- Plan for unexpected interviewee reaction:
 - Tape recording request
 - Request for representative
- Nothing is “off-the-record”

Conduct The Investigation: Interviews

- Don't promise confidentiality
- Can you ask witnesses to keep interview confidential?



Confidentiality And The NLRB

- NLRB held that instructing or even asking witnesses not to discuss investigation with others until after the investigation has been completed violated NLRA Section 7 rights for employees to engage in concerted activity. (*Banner Health System, July 2015*).
 - **Board:** While disapproving of blanket discussions, stated that such a prohibition may be justified by showing “a legitimate business justification” that outweighs an employee’s Section 7 rights.
 - **Possible Considerations:** witness protection, danger of evidence destruction, danger of fabrication of testimony, need to prevent cover-up.

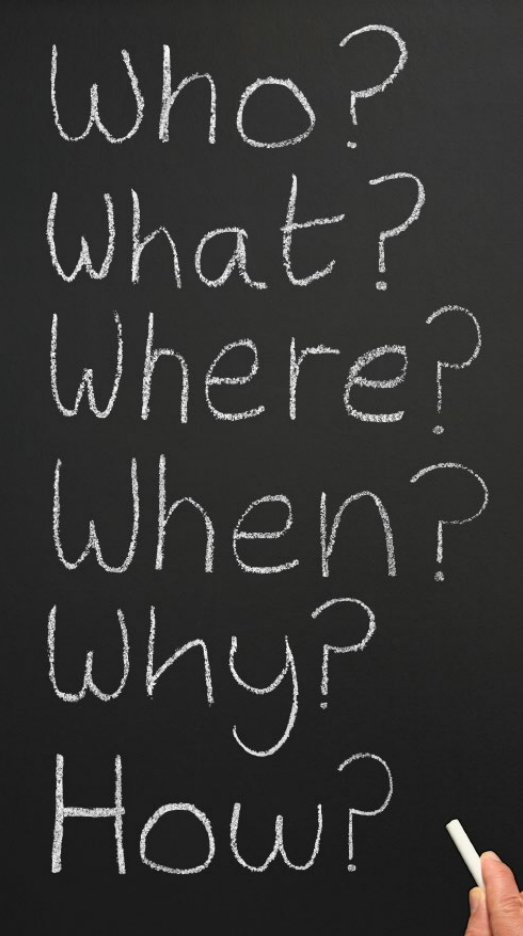
Confidentiality And The NLRB

- December 2019, NLRB reversed course
- *Apogee Retail LLC* resolved conflicting commands from the Board and the Equal Employment Opportunity Commission
- Board found that investigative confidentiality rules, which are limited to the duration of the investigation, do not violate the NLRA
 - Attempt by NLRB to dial this back in early 2022

Conduct The Investigation: Interviews

Remember the five W's and an H

- **Who** was present when it occurred; who have you told
- **What** happened; what was said; what would you like to see happen
- **Where** did it occur
- **When** did it occur
- **Why** did it occur; why would someone accuse you of this
- **How** did you respond



Who?
What?
Where?
When?
Why?
How?

Interviewing Suggestions

- Explain Role of Each Investigator
 - Role of legal counsel
- Treat Interviewee with Dignity
- Questions:
 - Open-ended and broad
 - Then go to specifics
 - Chronological
 - Tough or embarrassing questions last

Upjohn Warning

- I am a lawyer for the Company.
- I represent only the Company and I do not represent you personally.
- I am conducting this interview to gather facts in order to provide legal advice for the Company.
- This interview is part of an investigation to determine the facts and circumstances of X in order to advise the Company on how best to proceed.
- Your communications with me are protected by the attorney-client privilege. But the attorney client privilege belongs solely to the Company, not you.
- That means the Company may elect to waive the attorney-client privilege and reveal our discussion to third parties.
- The Company may decide to waive the privilege and disclose this discussion to third parties as federal or state agencies, at its discretion, and without notifying you. In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the Company.
- You may discuss the facts of what happened, but you may not discuss this discussion. Do you have any questions?
- Do you understand? Are you ready to proceed?

Conduct The Investigation: Interviews

- Disclosures of purpose & seriousness
- Explain presence of witness, note taking
- Don't put words in witnesses' mouth
- Don't identify who said what
- Don't discuss "your" opinions
- If witness is emotional, take breaks
- Don't disclose more than necessary
- Maintain control of the interview
- Avoid accusatory statements

Interviewing Suggestions

Opening and Closing Statements

- “I’m here to look into some allegations that have been made.”
- “I want to understand what you have seen or heard.”
- Participation is voluntary
- Limited confidentiality
- Anti-retaliation

Interviewing Suggestions

Closing Questions

- Anything else I should know?
- Any other documents I should review?
- Anyone else I should speak with?

Interviewing Suggestions

Keep Your Eyes on the Road

- Look for contradictions
- Consider the interviewee's motives
- Be curious. Leave no questions unanswered
- Provide adequate time
- Ask about other witnesses
- Take objective notes (may be discoverable in the future)
- Consider written statement or signed interview summary

Documentation Of Interviews

Options

- Prepare statement and have witness review and sign
- Have witness sign questionnaire upon completion
- Witness prepare statement
- Investigator notes - NOT as effective (easy to dispute)
- Electronic recording? Maybe. Consent on tape; transcribe and have witnesses sign as accurate
 - Recording is a double-edged sword
 - Dual consent required in Florida

Post-interview

Follow Up with Main Players

- Important to do this BEFORE reaching decision or giving “initial findings” to parties
- Opportunity to ask more questions from complainant and accused, and given them opportunity to provide additional information
- Consider having parties confirm additional information in writing

Reaching A Conclusion

Decision Based On...

- Evidence
- Credibility
- Previous behavior
- Logic and consistency
- Applicable policies
- Compare notes
- Testimony of multiple interviewees
- Re-interview witnesses, or interview new ones

Reaching A Conclusion

Consider Whether to Take Corrective Action

- No discipline
- Written discipline up to, and including termination
- Training
- Demotion, suspension and changes in rates of pay

Reaching A Conclusion

Risk Management Considerations

- What have we done in the past, (e.g., prior violations of policy)?
- What risk factors/protected categories do the parties belong to?
- What operational considerations do we need to consider, (e.g., transfers, office culture, etc.)?

Investigation File

- Confidential investigation file should be maintained separate from personnel file
- Files can be discoverable
- Mark privileged documents as “attorney-client privileged”
 - Keep in separate part of investigation file or keep in separate file altogether
 - Communications with counsel; reflecting advice, instructions, etc.

Creating A Written Report

Purpose of Written Report

- Evidence of an **immediate** and **appropriate** response by employer
- Accurately **document** the investigation conducted
- Provide decision-makers with **facts**, **policy** and **analysis** needed to decide further action
- Ensure a successful and effective investigation
- **Defend** the investigation outcome

Creating A Written Report

Organization and Content

- Factual issue
- Relevant policies/procedures of the Company
- Evidence
- Analysis
- Conclusion

Creating A Written Report

Beginning

- Executive Summary
- Complainant Summary

Middle

- Scope of Investigation
- Evidence Considered
- Factual Background
- Analysis

End

- Conclusion
- Sign & Date
- Exhibits

Creating A Written Report

Analysis of the Evidence

- Acknowledge positions of each party
- Describe evidence in support of each position
- Identify the facts
- Weigh the facts
 - Dismiss irrelevant facts
 - Address credibility of disputed facts

Creating A Written Report

Documenting Your Conclusions

- More likely than not that alleged conduct occurred
- More likely than not that alleged conduct did **not** occur
- Some of the alleged conduct occurred; some did not
- Unsubstantiated / inconclusive / cannot determine either way

Creating A Written Report

What Makes a Good Report? “The 3 C’s”

1. Clear

- Language
- Logic

2. Complete

- Documents all aspects of investigation
- Addresses/resolves all issues

3. Concise

- Direct, succinct
- In “plain English” and easy to read

Creating A Written Report

Pitfalls to Avoid

- Failing to consider audience
- Unresolved biases
- Failing to resolve contradictions or conflicting statements
- Working towards one conclusion (confirmation bias)
- Making promises or reassurances
- Failing to get all relevant evidence
- Gathering irrelevant evidence
- Not coming to a conclusion
- Coming to “legal conclusions”

Communicating The Written Report

Letters to both complainant and accused

- Summarize basis for complaint (high-level detail)
- Discuss relevant policies and procedure to conduct fair and prompt investigations
- To complaining party, indicate generally that if warranted, “corrective action has been taken;” be more specific with accused
- Discuss employer’s anti-retaliation, confidentiality, and open-door policies

Final Steps

- Don't disclose results to anyone who doesn't need to know
- Follow-up with complainant/accused
 - Inform complainant and accused of investigation result
 - Let them respond
 - If inconclusive, assure that you will monitor situation
 - Remind of anti-retaliation policy
 - Obtain signed acknowledgment
- Follow-up on corrective action, if any
 - Investigate further if necessary

Following Up

Follow-Up

- Periodically check in with the complaining party
- Document follow-up
- Document effectiveness of remedial measures



What Remedial Action Should You Take?

Knowing When To Hold Them,
And When To Fold Them...



What Remedial Action Should You Recommend?

Identify Standard

- Harassment: What action is necessary to prevent further harassment or other wrongdoing?
- Discipline: Is there a good faith belief misconduct occurred or was there a violation of a policy?

What Remedial Action Should You Recommend?

Appropriate Standard

- **Consistency & Fairness**
- If not, document thoroughly why not
- Inconsistencies may create disparate treatment claims



Short of Disciplinary Action...



Recommendations

- Anti-harassment/discrimination training
- Diversity training
- Executive coaching
- Republishing policy

What Remedial Action Should You Recommend?

Discipline And Discharge As Needed

- It's a good thing!
 - Necessary to prevent future misconduct
 - Improves morale when employees see good/bad behavior recognized
 - Limits potential negligent retention, constructive discharge claims



Selecting The Recommended Discipline

- Nature & seriousness of the offense
- Length or duration of conduct
- Employee's record
- Employee's position
- Disciplinary precedents
- Employee's conduct during investigation

Documenting The Discipline

- Put the appropriate Corrective Action in **WRITING**
 - Juries will only believe you if you put it in writing
 - When its just your word against theirs, you lose most of the time



Issue Disciplinary Notice/ Termination



- Issue Disciplinary Notice/Termination
 - Be specific and objective
 - Do not make legal conclusions
 - Identify misconduct

Be Prepared for Questions...

- Discrimination Issues
 - All in protected class
 - Why investigate me and not others?
 - Why am I being disciplined and not others?



Practical Considerations for Reducing the Likelihood of Retaliation Claims

- Protected Activity is Broadly Construed
 - Complaining party
 - Coworkers
 - Witnesses
 - Family members
 - Third parties

Practical Considerations for Reducing the Likelihood of Retaliation Claims

- Instruct others not to retaliate and tell the employee they are to report any attempted retaliation for the complaint
- Issue documents that explain retaliation is prohibited
- Confidentiality obligations:
 - Need to know
- If complainant complains about discipline after initial complaint, investigate whether complainant was coached or disciplined before initial complaint:
 - Consider who is issuing the discipline:
 - Avoid “Cat’s Paw” problem
 - Independent investigation

The Cat's Paw

- When an employee or supervisor, motivated by discriminatory intent, influences an otherwise unbiased decision-maker to take an adverse employment action against another employee. In the end, the employer is still held responsible.



Steps To Minimizing Risk

The ability to show that a prompt and thorough investigation was done may make the difference between winning and losing:

- Prompt
- Prepared
- Thorough
- Well documented
- Conclusions supported
- Follow-up



Risk

Final Questions



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