

CONDUCTING BULLET PROOF WORKPLACE INVESTIGATIONS

Alia S. Wynne
Fisher & Phillips, LLP
Two Allen Center, Suite 620
Houston, Texas
(713) 292-0150
awynne@laborlawyers.com

The Hospitality Law Conference
February 9-11, 2011



Alia Wynne is an attorney in the Houston office of Fisher & Phillips LLP. In her everyday practice, she provides clients with counseling, advice, and strategies to address numerous employment issues. She has defended employers against a variety of disputes involving gender, race, age, and disability discrimination, hostile work environment, ERISA retaliation, FMLA violations, breach of contract and restrictive covenants, and other claims before state and federal courts, agencies, and administrative tribunals. She graduated law school *cum laude* and was a member of the editorial board of the Loyola Law Review. She is licensed to practice in Texas and Louisiana.

**FISHER & PHILLIPS, LLP
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Houston, Texas 77002
(713) 292-0150
awynne@laborlawyers.com**

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I. INTRODUCTION/SCOPE OF THE ARTICLE

A. The Challenge Of Workplace Investigations

One of the most difficult jobs for human resource professionals and managers is to properly handle the investigation of a harassment or discrimination complaint or other potential employee misconduct situation. It also can be one of the most valuable services performed for an employer in terms of avoiding or successfully defending lawsuits.

The difficulty often lies in the fact that the complaint presents a volatile and complicated situation and the fact that every step taken by the employer, or not taken by the employer, potentially will be subject to strict scrutiny in a court of law. Documentation is crucial, but every document prepared may some day be picked apart line by line by an attorney for the employee and ultimately blown up on the screen in a court of law.

B. Why A Proper Investigation Is So Important

Despite the challenges of an investigation, an internal harassment or discrimination complaint should be viewed as an **OPPORTUNITY TO AVOID A LEGAL PROBLEM**. Every serious lawsuit starts with some type of complaint, either internally or through an outside agency or attorney. Even if the complaint comes from the outside, your internal investigation may still be crucial to avoiding or defending a claim.

Today, more than ever before, employers are finding it necessary to conduct internal investigations. In a society where so many people seem to be looking for a lawsuit to provide them a bountiful living, competent, well-done investigations can avoid lawsuits, or at least help in defending against them. Of course, the benefits to be derived are only as good as the underlying investigations, and a poorly conceived or ineptly executed investigation can be more of a liability than a benefit. In short, when employers undertake investigations, they had better be done well.

The most common scenarios leading to internal investigations involve misconduct, such as theft or suspected violation of some company policy, and employee complaints, such as those alleging violation of some law, e.g., harassment or discrimination. These scenarios arise in a variety of ways, including through internal audits, circumstantial evidence of wrongdoing noticed by managers or employees, and outright complaints by employees and customers. Regardless of how they arise, they must be evaluated carefully and taken seriously. Failure to do so can cause great harm to the employer, as well as to individual employees and managers. Employers, and even individual managers and employees, may be liable for misconduct and wrongdoing, not just for what they actually know, but even in some cases, e.g., harassment, for what they did not know but “should have known.”

The following materials focus upon what to consider when contemplating the need for an investigation, how to plan for an investigation, and what to do in an internal investigation. It will cover some of the most commonly used investigative techniques and tools, and will examine

various legal and practical pitfalls associated with investigations. It also reviews the ever-broadening area of employee privacy as it relates to employee investigations. Even this discussion, however, can hardly make a reader fully aware of all the issues inherent in undertaking such investigations, and employers are well-advised to consult with competent labor counsel prior to beginning an investigation or before adopting general policies and guidelines that relate to this subject.

C. Developing An Investigative Strategy

The first step whenever you are faced with a situation involving possible misconduct or violation of law is to step back and try to look at the situation as objectively as possible. Any given scenario must be logically assessed as to its potential detriment or liability to the employer. This exercise and analysis needs to be carried out as logically and as free of emotion as possible, to allow the employer to recognize what it is confronted with and to determine how best to deal with the problem.

There are a number of factors and possible courses of action that have to be considered in such situations. You must determine whether the company has a legal obligation to undertake an internal investigation, e.g., in the case of complaints of harassment. Also, prudent employers will determine whether it would be more appropriate to involve others in the investigation, e.g., contacting the police in the event of a theft, or involving counsel to undertake an investigation. Thoughtful reflection is important, indeed, vital, whenever you contemplate scenarios involving misconduct or potential violations of law.

As a preliminary matter, you should assess what resources are available for the investigation. For example, it may be prudent to involve Human Resources personnel, internal auditing personnel, or other in-house employees. Similarly, in appropriate cases, the company should consult with counsel. Input from counsel is important not only to understand the underlying legal issues, but also because of the possibility that, through such consultation, the memoranda, notes and findings of an internal investigation may be protected from disclosure under the attorney-client privilege or as attorney work-product.

You should also keep in mind that there often is a great deal of discretion and subjectivity in the development of an investigation strategy. This is especially true in situations involving internal employee complaints, such as a sexual harassment complaint. Many times, the complaining employee is just asking for help and, if treated in a respectful and reasonable manner, will never assert a claim.

You should welcome the employee bringing a problem to the internal complaint procedure. It is much more favorable than the employee going outside the organization to an attorney or government agency for assistance. And under the law related to alleged supervisor harassment, and even to some extent in fellow harassment cases, an effective investigation and remedial action can actually absolve the employer of liability for harassment that occurred prior to the complaint. Thus, an employer's response to an internal complaint may mean the difference between effectively preventing a lawsuit from happening or, on the other hand, adding fuel to the fire of a possible lawsuit.

II. PREPARING FOR THE INVESTIGATION

A. Determine What Issues To Investigate

Depending upon the nature of the complaint or suspected misconduct, you should determine and outline the specific issues that need to be investigated and determine where to search for the needed information.

B. Collect And Review Relevant Materials

After determining the issues to investigate and where to search for relevant information, you should assemble all relevant documentation and other materials. Such materials commonly include:

- documentation reflecting the complaint(s) or suspicion of misconduct at issue;
- relevant company policies;
- personnel files of the accuser and the accused, which should include performance evaluations, incident reports, as well as acknowledgments of company policies;
- prior investigation files involving the same employees or claims;
- records of prior complaints against the accused, or of prior complaints by the complainant;
- business records (time cards, schedules, calendars, expense reports);
- notes or diaries of the parties involved;
- emails or voice mail messages pertaining to the alleged misconduct;
- photographs, posters, etc. that are allegedly offensive;
- public records – If considering gathering information from public records, the employer must be aware of the disclosure requirements imposed by the federal Fair Credit Reporting Act (FCRA).

C. Decide Who Will Conduct The Investigation

Potential investigators may include a member of Human Resources, a member of management, an outside investigator, or in-house or outside counsel. The investigator should have the following characteristics:

1. Unbiased And Neutral

The investigator should not favor one party over the other, and should not have a personal interest in the outcome of the investigation.

2. Experienced In The Area

The investigator should have a thorough knowledge of company policies and procedure and should also have good interviewing skills, and an ability to accurately record witness interviews.

3. Good Rapport

Should be someone that both the accuser and accused, as well as the potential witnesses, will be comfortable with.

4. Ability To Maintain Confidentiality

Confidentiality is critical to the investigation because it helps to ensure that the information gathered is truthful and accurate and to preserve the attorney-client and work product privileges. It is equally important in order to protect the privacy interests of the investigation participants, and to prevent statements being made about them that could spawn subsequent defamation lawsuits against the company.

5. Credible

The investigator must have a credible and trustworthy background. Also must be someone who will make a good witness in future legal proceedings, e.g., deposition or at trial.

D. Plan The Investigation Strategy

The investigator must determine who to interview, and what types of searches, if any, need to be done. You must also decide whether the allegations necessitate suspending the accused pending the investigation, and if calling the police is necessary. The investigator should consider the following to determine its interview strategy:

Who should be interviewed? Accuser, accused, eye witnesses, supervisors of accuser and accused, co-workers, authors of documents, persons identified by accuser or accused, persons accuser or accused ask to have interviewed, other persons reportedly subjected to similar misconduct, former employees, friends and relatives of accuser and accused.

What benefits will be gained by conducting interviews in a particular order? Typically it is more advantageous to interview the complainant first, then the relevant witnesses, the accused, the witnesses referred to by the accused, etc.

Determine the most effective, and most confidential place to conduct the interviews.

III. TAKE PRECAUTIONS TO PROTECT THE ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGES

The attorney-client privilege protects communications that a client makes in confidence to its inside or outside counsel for the purpose of obtaining legal advice. The attorney work product privilege protects the thoughts and impressions of an attorney generated during the course of the attorney's legal duties and in anticipation of litigation. Confidentiality of an investigation is highly important because these privileges may be lost if the company waives the privilege by disclosing the information to others.

Protection by these privileges over the adequacy of the investigation may also be lost if the employer decides to disclose its investigation to establish the *Ellerth/Faragher* affirmative defense or to establish that it had good cause to terminate an employee. However, the legal advice provided during and after the investigation may still be protected. To help ensure that the privileges will apply to the attorney-client communications and legal advice, the employer should do the following:

- document in writing that counsel has been consulted regarding the complaint or suspected wrongdoing prior to the investigation and that counsel is directing the investigation for purposes of providing legal advice to the employer client;
- mark documents prepared during the investigation as “prepared in anticipation of litigation;”
- mark documents that contain or reflect communications with counsel as “attorney-client privileged” and “attorney work product” and keep these documents in a file labeled “Investigation File: Privileged Information,” separate from the regular “Investigation File” which contains materials and documents the investigator obtains and creates throughout the investigation;
- allow only the individuals with a legitimate need to know the investigatory information to communicate with counsel. And only allow those with a legitimate need to know the information to view the documents marked as privileged.

IV. CONDUCTING INTERVIEWS

A. Opening Statement

1. Purpose

Before commencing the interview, the investigator should inform the witness that the purpose of the interview is to thoroughly investigate the complaint and take appropriate corrective action because the company takes complaints and reports of wrongdoing seriously. (The investigator can cite to the applicable law or company policy if applicable.) Reassure the

accused that no conclusion has been reached, and will not be reached until all facts are gathered and analyzed. Finally, ask the witness if they feel you can be an objective and unbiased interviewer.

2. Confidentiality

The investigator should also inform the witness that the information revealed will be kept as confidential as possible so as to protect everyone's privacy, but do not promise absolute confidentiality. Inform the witness that the witness must also keep information and allegations confidential.

3. Anti-Retaliation

Inform the witness that pursuant to the company's anti-retaliation policy, the witness shall not be retaliated against for participating in the investigation. Tell them that they should contact you if they feel they are being retaliated against. However, the investigator may wish to inform them that employees who are untruthful are subject to discipline, up to and including discharge.

4. Result

Inform the accuser and accused that you will report the results of the investigation to them at the conclusion of the investigation and that appropriate action will be taken.

5. Instructions

Instruct the witness of the following:

- take your time answering questions;
- be truthful and accurate;
- if you don't understand a question, say so;
- if you remember something later, come back and tell me;
- if you have a question, please ask it;
- ask the witness if he/she has any questions before beginning the interview;
- even if complainant requests it, never agree to do nothing;
- the investigator may wish to have the witness sign a memorandum acknowledging that he/she received the opening disclosures regarding purpose, confidentiality, anti-retaliation, result, and instructions.

B. Key Interview Techniques

- use a separate sheet for each interview;
- prepare a detailed outline of key issues and questions;
- observe body language;
- don't let the witness leave without getting needed information;
- ask questions that corroborate or refute what other witnesses have said;
- determine if a complaint was made to a supervisor;
- if harassment is alleged and the accused is complainant's supervisor, determine if complainant was recently given or denied job benefits such as raises, promotions, etc.;
- to ensure that you get all the information you need, and that you do not forget to record key points: take your time, ask questions one at a time, repeat the answers back as they are given, and review your notes as you go;
- don't stick to your outline if it's not working. Be flexible (If other issues come up, address them);
- ask hard questions at the end, not the beginning;
- take a break if it gets too heated;
- do not make accusations – and do not convey your opinion, strategy, or impressions of what happened and whom you believe – this is unfair to the witness AND such communications could be discoverable in subsequent litigation;
- at the end of the interview, repeat the witness' story back to the witness to confirm its accuracy, and allow witness to change or add to it;

You may want to send the witness a statement of what was said in the interview for his/her review and signature. If so, be sure to explain this to the witness and obtain a promise to cooperate. You may alternatively prepare this declaration at the end of the interview for the witness to review and sign at that time. Alternatively, ask the complainant to provide a detailed written description of all incidents of which he or she is complaining.

C. Interview Questions

The goal in interviewing is to 1) get the witness to open up to you, and 2) gather the facts. Do not prepare canned questions because each complaint is different. Do not reveal your understanding of the facts at the beginning – let the witness talk first.

1. Begin With Broad, Open-Ended Questions

- Tell me what happened.
- Describe the incident.
- Were you at work on [date]?
- What happened on [date]?
- What happened next?
- (For non eye-witnesses) Please describe the working relationship between the employees.

2. Next, Hone In On The Details

- Who said or did what?
- When?
- How long did it last? –So you stayed for 10 minutes?
- Where?
- How did it happen?
- Why do you think it happened?

3. Clarify Answers

- What do you mean by (ladies' man, talker, psycho, boozier)?
- Do not allow the witness to state conclusions, e.g., "he was mad." Make witness state the facts that gave witness that impression, e.g. "he put his fist through the door."

4. Clarify Any Inconsistencies In Their Story

- "I'm confused about something you told me. Could you please explain . . ."

5. Save The Zingers For Last

- "Did you ever grab her inappropriately?"

6. Use "Sum-Up" Questions

- Have you told me everything you remember?
- Is there anything else you think I should know?
- Ask for the names of eyewitnesses.
- Ask for any documents.
- Ask if the person has talked to anyone about this.
- Ask the accused why the employee would accuse him or her of this.

D. Closing Statement

Remind the witness of the confidentiality and anti-retaliation policies. Inform the witness that you may have to speak with him/her again, and to contact you if he/she thinks of anything further. Finally, ask the witness if he/she has any questions.

V. CONDUCTING SEARCHES AND ELECTRONIC SURVEILLANCE

A. Searches

A public employer's ability to conduct searches is subject to the limits imposed by the Fourth Amendment's proscription against unreasonable searches and seizures. In making the determination of whether a search was reasonable, courts will generally examine all of the circumstances and focus upon both the reason for the search and the scope of the intrusion.

The Fourth Amendment does not apply to private employers. As a result, private sector employers are substantially more free to search company property at will, provided employees have not been allowed to develop an expectation of privacy in the property to be searched. All employers should exercise the right to search judiciously to avoid invasion of privacy lawsuits, as well as unnecessary damage to employee morale. Further, some state statutes and court cases impose restrictions or limits upon searches and invasions of privacy.

Where an invasion of privacy is alleged, a court's principal focus will be on the reasonableness of the search. The more intrusive the search, the greater the risk that a court will conclude that the individual's privacy was invaded.

To help insulate searches from subsequent invasion of privacy claims, you should take steps to reduce any expectation of privacy your employees may have in specific work areas or company property that the employee utilizes. For example, a company policy that forbids employees from putting personal locks on company-owned lockers and tool boxes is a legitimate means of reducing employees' expectation of privacy in the items they choose to store in such places. Another step involves keeping master keys and combinations for all lockers, desks, and vehicles on company property and making certain employees are aware that master keys are maintained.

Searches of employee personal property, e.g., lunch boxes, purses, tool boxes, vehicles, employees' pockets, etc., either on or off the employer's premises will likely be viewed as an invasion of privacy unless the company maintains a clearly stated inspection policy. You should inform employees of the circumstances under which searches of desks, lockers, purses, or other personal employee property will occur. This policy should be conspicuously posted in the workplace, should be included in an employee handbook, if any, and ideally, should be communicated to employees through a consent form that each employee signs. You must recognize, however, that even a signed consent form may not limit liability if the search is unreasonable.

The safest course of action is to obtain the employee's consent again at the time the search is initiated, even where an inspection policy has been previously articulated to employees. Searches of private property should be conducted in the presence of the employee unless the risk of not searching outweighs privacy considerations, e.g., in the event of a bomb threat. Where you have published a policy subjecting employees to discipline or termination for denying permission to search personal property, an employee who refuses to permit a search in accordance with the published policy may be disciplined, suspended pending the outcome of an investigation, or terminated.

It is permissible to ask an employee to remove the contents of his or her pockets. It is a riskier course of action for an employer to conduct a “pat-down” type search of an employee because a court would likely find it more intrusive. When theft is suspected, for example, you must weigh the cost of the loss of the stolen material against the potential liability that may arise from an invasive search of the employee's person.

Automation in the workplace creates new privacy issues as employees begin to believe that items stored on a computer are personal. Here, again, you are best served by publishing a policy that makes it clear that computers in the workplace are to be utilized for work, and not personal matters. This policy should make it clear that the employer reserves at all times the right to inspect, copy, or delete any items stored on a computer in the workplace. This policy can be included in an overall employment policy addressing searches of company and/or personal property.

A more troubling issue arises with respect to computers that are not provided by the employer. Today, many employees purchase laptop computers or home computer systems which can communicate directly with the employer's computer(s) from remote locations. In this situation, the employer may never know the extent to which company data or documents have left the employer's premises. In cases where an employee is accused of misappropriating company data or documents by means of a computer, a thorough investigation would clearly include a search of the employee's laptop or home computer system. Unless the employer has published a carefully worded policy permitting such a search, however, conducting one is fraught with risk. It is often safer to try to establish a mechanism for monitoring and logging the nature and volume of information transferred from one computer to another. This permits the employer to establish that data was transferred by the employee and will lend credence to the need to search the employee's personal computer(s).

In summary, when conducting searches, it is best to observe the following guidelines:

- searches should not be overly intrusive and should be based upon a “reasonable suspicion” that the premises or property to be searched will actually yield results;
- you should not confiscate personal property;
- avoid searches of an employee’s person except in the most extreme situations;
- do not use or threaten force against an employee when searching person or property;

- require that more than one employer representative be present during any interrogation or search related to theft;
- do not prevent an employee from leaving the room or the workplace during a search or interview, since doing so may create potential liability for false imprisonment;
- do not move illegal substances discovered during a search, but rather contact the police;
- maintain the confidentiality of the search results to the greatest extent possible;
- release information or discuss the search results only with persons who have a “legitimate need to know”;
- keep search and investigation information in a secure area with limited access.

B. Electronic Surveillance

Electronic surveillance can be useful in the investigation of certain forms of employee misconduct. Included among the surveillance tools available are video cameras, various listening devices, and telephone monitoring equipment.

Surveillance equipment can be used as a deterrent to misconduct, for instance where it is set up to monitor employees handling cash. On the other hand, electronic surveillance raises significant privacy issues and is restricted by various federal and state laws.

1. Wiretapping And Listening Devices

The federal Omnibus Crime Control and Safe Streets Act prohibits the interception of certain wire communications, e.g., telephone conversations, and interception of certain oral communications by means of listening devices. This law prohibits use of wiretaps or extension phones to listen to telephone conversations and the use of listening devices to overhear oral communications in situations where the employee has a justifiable expectation of privacy. Violation of this law may result in federal criminal prosecution and/or a private lawsuit by the person whose conversation was overheard.

The law **does** permit employers to monitor and record routine business-related telephone conversations of employees who deal with the public, such as salespersons and customer service personnel. To avoid the possibility of liability, the employer should make clear to employees that their telephone communications are subject to monitoring. The employer loses the right to eavesdrop once it becomes clear that the call or conversation is of a personal nature. To reduce the risk of accidentally overhearing a personal call, employers can prohibit employees from conducting any personal business using the employer’s telephone system.

2. Video Or Photographic Surveillance

There does not appear to be any generalized prohibition against video or photographic surveillance in public places. Employers may photograph employees in work areas for legitimate purposes without their consent. Such surveillance has been viewed as an extension of the normal supervision management is entitled to exercise.

3. Email Monitoring

The law currently does not prohibit monitoring of email by employers when the email is provided by the employer. This may change, however, as the popularity of email escalates and as more privacy issues become apparent. Employers are therefore well advised to consider developing and communicating to employees a written policy concerning email and use of the Internet. The policy should include a warning to employees that email and the Internet are to be used for business purposes only, that email may be monitored, that deleted email may be retrieved after deletion, and that passwords do not ensure confidentiality.

Employers should also publish a policy prohibiting offensive or unwelcome email traffic. Such messages can be just as potent a source of harassment claims as actual sexual propositions, and these messages are far more concrete and reliable than the testimony of a witness.

C. Defamation Liability

Defamation generally is defined as any false or malicious communication that tends to harm a person's reputation, lowers him/her in the estimation of the community, or deters other people from associating or dealing with him/her. The term "libel" describes written defamatory statements, while "slander" is oral defamation.

As a general rule, if a defamatory statement falls within one of the following four categories of "defamation per se," the plaintiff does not even have to prove specific harm: 1) commission of a crime; 2) infection with a loathsome disease; 3) imputation of unchastity; or 4) inability or lack of integrity in the carrying out of one's employment duties in a trade or profession. These types of defamatory statements are considered so reprehensible that injury to reputation is presumed.

Employers generally enjoy a limited immunity from defamation claims based upon truthful disclosure of facts relating to the employment relationship. In essence, so long as such disclosures are not made maliciously, i.e., with intent to harm the individual, the employer has a qualified privilege which precludes defamation liability.

Employers should, nevertheless, be very careful even when communicating truthful information about employees or former employees to other parties. Disclosure of positive drug test results – even if accurate – to parties without a "need to know" may nonetheless result in other liability if the plaintiff can show malice. Thus, test results should be maintained in strictest confidence.

D. Conclusion

To minimize liability, employers must know the applicable laws and should establish and publish realistic and reasonable policies that can and will be consistently enforced. Such policies should put employees on notice of the rules for searches, electronic communications, information disclosure and the like. All information garnered during an investigation should be covered with a blanket of confidentiality except where there is a legitimate need to disclose the information or a specific written request from the subject employee.

VI. DOCUMENTING THE INVESTIGATION

Each investigation you do should have its own file. As stated earlier, this file may consist of a separate “Investigation File: Privileged Information” for purposes of containing and protecting attorney-client communications and attorney work product from being discovered during subsequent litigation. The rest of the file, however, may not be protected by the privileges or may be waived by the employer in order to establish the *Ellerth/Faragher* affirmative defense. For this reason, it is critical that the documentation included in the file, namely the interview notes and the investigator’s report, be carefully created and maintained. To this end, it is also important that the investigator check their notes and their report for proper grammar and spelling, so as to support their credibility as an investigator.

A. For An Internal Complaint, Get The Complaint In Writing

When the situation involves an employee making a complaint about his or her treatment, such as a sexual or racial harassment complaint, it is almost always helpful to secure a written complaint. Sometimes the employee will start the process by submitting a written complaint, which ordinarily is a good development. If that is not the case, you should figure out a way to secure a written statement. The preferred statement is one written by the complainant, but if that is not practical, you can prepare a written account of the complaint and have the employee review, edit and sign it.

B. Taking And Keeping Notes

Keeping in mind that the notes may be discoverable in subsequent litigation, it is important not to include things that will detriment the employer.

1. Key Things Interviewers Should Not Include In Their Notes

- conclusions, interpretations, beliefs or assumptions about what really happened, or about the witness;
- inappropriate comments about the witness or the events;
- the interviewer’s personal to-do list of other things that need investigating, etc.

2. The Following Things Should Be Included When Taking Interview Notes

- interviewer's name;
- witness' name;
- date on which the interview was conducted and the notes prepared;
- other people present;
- location of the interview;
- opening statement to witness about the purpose of the investigation, the importance of confidentiality, the anti-retaliation policy, and what to expect after conclusion of the investigation;
- the company policies you gave the witness;
- what the witness said during the interview, including important quotes, e.g., "We used to date, but then things went sour";
- whether the witness took notes;
- credibility of the witness – Note your observations (but not your conclusions based on those observations) about the witness' demeanor, whether they were evasive or defensive, whether their story was consistent and if it was corroborated or refuted by other witness' statements. Also include any prior acts or behavior that make the witness less credible;
- interviewer's signature and date.

C. Preparing The Investigation Report

In most cases, a summary report of the investigation is useful to inform the company decision makers of the investigator's findings. The investigator's report should be thorough, brief, concise, and written in an objective, neutral style. The investigator should report facts, free of assumptions or legal conclusions. For example, in a sexual harassment complaint investigation, think and write in terms of the facts and the conduct that occurred; do not attempt to reach conclusions regarding legal concepts of "harassment" or a "hostile work environment." The report also should never mention the content of communications with legal counsel.

The report may include the following:

- the event or complaint giving rise to the investigation, including the date, the name of the complainant and accused, and their respective positions in the company;
- date the investigation commenced and terminated, and names of investigators;
- issues investigated;
- list of interviews, including dates, names and positions;
- identify any relevant documents;
- factual findings on each of the issues investigated – Identify any unresolved questions and any inconsistent information given. If inconsistent information is given, the investigator may wish to report

on the witness' credibility, e.g., did the witness have first-hand knowledge or just hearsay, and did the witness do or say anything, which made him/her appear untruthful;

- whether the conduct violates any applicable company policies;
- the applicable company policies may be attached to the report;
- identify any injuries sustained;
- identify any corrective action already taken;
- state the conclusion reached – and identify the key facts used in reaching that conclusion – or state that the investigation was inconclusive;
- identify what corrective action, if any, has already been taken, the date of its implementation, and who was involved in that decision.

D. Creating The Investigation File

Remember that only one investigation file should be kept. It should be labeled “Confidential” and access to it should be limited to those with a legitimate need to know; this does not include the accuser or accused. As mentioned earlier, the file may include a sub-file, labeled “Privileged” for attorney-client communications and attorney work product.

The investigation file should include the following:

- written documentation setting forth the complaint;
- any company policies relevant to the complaint or suspected misconduct;
- witness interview notes, signed declarations, and other documentation that supports the key facts and conclusions in the investigator's report;
- written statements documenting that the accuser and accused were notified of the investigation results. This may include a signed memorandum by the accuser, acknowledging that corrective action was taken, or acknowledging that the investigation was inconclusive and the situation is being monitored;
- notice to the accused of disciplinary action, if any is taken;
- investigation report (only keep the final version);
- previous complaints against the accused, or made by the accuser;
- the written interview questionnaire, if one was used, and questionnaires can be a very efficient and helpful method, particularly in a “hostile environment” type investigation;
- signed statement by the witness, acknowledging that he/she received the opening interview statement regarding confidentiality, anti-retaliation, etc.

VII. MAKING A RECOMMENDATION/TAKING REMEDIAL ACTION

While the investigation report is useful, before corrective action is taken, it is also wise for the investigator to meet with members of Human Resources, management, and/or legal counsel to discuss the findings, any further facts to be obtained, and the credibility of the

witnesses. Furthermore, the company decision makers should review the interview notes, witness declarations, personnel files, and other key documents before making a decision about what corrective action to take.

To determine the appropriate action, the decision makers should consider the following:

- Was the accuser's complaint supported by evidence?
- Does the conduct constitute a violation of the law, or of a company policy?
- What action, if any, does the law or your company policies require you to take?
- What is the accused's history at the company?
- How many other complaints or incidents of wrongdoing, if any, have there been in the past against the accused?
- How has the company disciplined employees in the past for the same misconduct? Keep in mind the need for consistency in disciplining employees. If the employer disciplines differently for the same wrongdoing, it leaves itself vulnerable to charges of discrimination.
- Make sure that the facts, which support the discipline decision, are documented in writing.

The following types of discipline may be appropriate:

A. Training And/Or Counseling

This may be appropriate to educate the accused about what types of behavior are inappropriate, and how to stop the behavior.

B. Written Warning

Clearly informing the accused that he/she behaved inappropriately and any recurrence will not be tolerated.

C. Termination

If the investigation reveals that serious misconduct occurred and violates the law or company policy, and no circumstances exist to excuse the misconduct.

D. Letter Of Inconclusive Findings

A letter to the accused stating that the results of the investigation were inconclusive, reiterating the company policy against the particular wrongful conduct, and stating that if any such misconduct is demonstrated in the future it will not be tolerated.

E. Transfer

Transferring the accused and/or the accuser to a different position or office in order to prevent future incidents. However, because the party transferred may feel unfairly treated and subsequently bring a lawsuit against the company, the company is well advised to seek the advice of counsel before making this decision.

F. Suspension

Suspension may be appropriate pending training or counseling. Of course it is often appropriate pending investigation of the complaint, particularly if there is a potential threat to health and safety.

VIII. REPORTING BACK/FOLLOWING UP

A. Reporting Back

At the conclusion of an investigation, it is important to report back to the accused and the accuser in order to inform them of the conclusion arrived at after the investigation, and what type of corrective action, if any, will be taken. Remember that you assured the parties during their interviews that you would follow up with them regarding the results of the investigation. If the investigation is inconclusive, or if the accused has not been terminated, assure the accuser that you will monitor the situation and instruct him/her to immediately report any recurring harassment. Also, remind the accuser of the anti-retaliation policy.

Be sure to obtain a signed memorandum in which the accuser acknowledges that he/she has been informed 1) that corrective action has been taken or 2) that the investigation was inconclusive and the situation is being monitored and 3) that accuser should immediately report recurring harassment.

B. Following Up

If the investigation is inconclusive, be sure to monitor for the alleged wrongdoing and for retaliation against the accuser and other participants in the investigation. If the investigation revealed that there was no evidence to support the accuser's allegations, monitor the accuser for his/her possible bad faith or ulterior motives in making the complaint. If new evidence surfaces later, conduct more interviews, etc. if necessary and revise the investigation report. Also, show an interest in the complainant by periodically checking back with him or her to ensure that the harassment has been eliminated and is not continuing.

IX. ADDITIONAL CONSIDERATIONS WHEN CONDUCTING HARASSMENT INVESTIGATIONS

The law requires that the employer promptly and thoroughly investigate complaints of harassment, and take immediate and appropriate corrective action to remedy the problem, up to and including termination. You should note that termination is not always required – what *is* required is that the harassment cease. If an employer fails to investigate, conducts an improper investigation, or chooses ineffective corrective action, it could be held liable for the harassment. The difficulty often lies in the fact that the complaint presents a volatile and complicated situation and the fact that every step taken by the employer, or not taken by the employer, potentially will be subject to strict scrutiny in a court of law.

In many internal complaint situations, the complaining employee is just asking for help and, if treated in a respectful and reasonable manner, will never assert a claim. You should welcome the employee bringing a problem to the internal complaint procedure. It is much more favorable than the employee going outside the organization to an attorney or government agency for assistance.

When interviewing witnesses about harassment complaints, do not use the words “harassment,” “harasser,” and “victim.” Instead use the terms “incident,” “accused,” “person complaining” or “complainant.”

Documentation is also crucial, but every document prepared may some day be picked apart line-by-line by an attorney for the employee and ultimately blown up on the screen in a court of law. You should document all corrective action taken and such documentation should include a sufficient summary of the investigation so as to support the appropriateness of the particular corrective action taken.

A. Accuser/Complainant Interview Tips

1. Take all complaints seriously, even if the individual has made repeated complaints or the individual implies, but does not expressly state, that “retaliation, harassment or discrimination” has occurred.

- failure to investigate a claim may be seen as “tacit approval” of the activities;
- thorough investigations help to insulate the employer from the accuser’s potential claims that his or her discharge or discipline was unlawful.

2. Remain objective.

3. Specific questions to ask.

- Did the incident occur more than once? (For each incident,

ascertain and document what occurred).

- If so, how many times?
- If so, on what dates and at what times did they take place?
- Did the accused touch the accuser? If so, where?
- Was the accuser touched more than once?
- Did the accused threaten the accuser in any way? If so, how?
- How long did the incident(s) last?
- Where did the incident(s) take place?
- Were there any witnesses to the incident(s)? If so, who?
- Does the accuser know of any others subjected to similar behavior?
- Does the accuser know of a motive for the incident(s)?
- How did the accuser respond to the incident(s)? Did he or she try to stop it?
- Did the accuser tell anyone else about the incident? If so, get details.
- Does the accuser have any relevant documents or materials, which support his/her claim?
- Did accuser seek medical treatment or counseling as a result of the Incident(s)?
- Is accuser aware of the company's harassment policy and complaint procedure?
- Did accuser make a complaint? To whom? When? What did he/she say?

4. Ask the accuser to write and sign a detailed description of all events to support his/her claim.

B. Accused Interview Tips

1. Remain objective.

2. If the accused refuses to be interviewed, consider either discharging him/her or advising him/her that this is an opportunity to tell his/her version of events, and that if he/she remains silent, the only version on record will be the accuser's, and that the accused's unwillingness to speak will create an inference of wrongdoing.

3. Consider using a written questionnaire (rather than oral interview) to document the accused's responses to the allegations.

4. Begin with open-ended questions (only after you get the accuser's story at least once, should you focus on the details.)

- How frequently do the accuser and accused work together? Were the accused and accuser working together on the date(s) the accuser says the incident(s) occurred?
- Does the accused recall any interaction with the accuser on those

- dates? If so, what was the context of the interaction?
- What was the substance of any conversations between the accused and the accuser?
- Were there any witnesses present?
- If the accused denies the allegations, request him/her to identify witnesses or “alibis” to support those denials.
- What is the level of supervision of the accused and accuser at work?

5. If the accused acknowledges any conduct, figure out what happened.

- Did the accused touch the accuser? If so, on what part of the accuser’s body?
- Was the accuser touched more than once?
- Was the touching done at the request of the accused or the accuser?
- Did the accused threaten the accuser in any way? If so, what was the threat?
- How long did the incident(s) last?
- Where did the incident(s) take place? When?
- Did anyone witness the incident(s)? If so, who?
- How did the accuser respond to the incident? Did he or she make any effort to stop it?
- Did the accused or the accuser do or say something that could have been misunderstood by the other party?

6. Ask the accused to identify persons he/she believes has relevant information.

7. Ask the accused about his or her beliefs as to why the reports or complaints have been made (i.e. ulterior motives, prior consensual relationships, retaliation by the accuser, attempts at job security in the face of poor performance evaluations, etc.)

8. Has the accused previously (at current or prior employment) been accused of inappropriate conduct? If so, what were the circumstances?

9. Provide the accused with a copy of the company’s harassment policy, emphasizing the employer’s commitment to enforcing the policy. Investigator should do this even if he/she suspects the allegations are false.

10. After interviewing all witnesses, give accused a final opportunity to comment on the information obtained.

C. Co-Worker Interview Tips

1. Remain objective.
2. Did the co-worker personally witness the incident(s)? If so, what

happened?

3. Get as many details as possible.
 - What did the accused say?
 - Did the accused touch the accuser in any way?
 - When did this happen? Where?
 - Who else was present?
 - What (if anything) did the accuser say or do in response to the accused's conduct?
 - Did anyone else say or do anything during the incident(s)?
 - Did the co-worker tell anyone about the incident? Who? What was said?
4. Has the co-worker seen any other incidents between the accused and the accuser?
5. Did the accuser or accused ever discuss the incident(s) with the co-worker? What did the accuser say he/she did in response to the incident? Did the accuser say he or she made any effort to stop it?
6. Has the co-worker noticed any change in the accuser's behavior? Has he/she been more or less emotional, upset, moody or distant at work, specifically with or near the accused?
7. Has the co-worker witnessed or heard of the accused engaging in similar conduct with/against other employees?
 - If co-worker only heard about it, who told him/her about it?
 - Who was allegedly harassed?
 - What was the form of the alleged harassment? When? Where?
 - Who else was present?
 - What did anyone allegedly say or do during the incident?
8. Does the co-worker know of any reason why the accuser would fabricate allegations?
9. In cases where the accused completely denies the allegations, whom does the co-worker believe? Why?

D. Immediate Supervisor Interview Tips

1. Determine the parties' discipline problems or behavior patterns.
2. Determine whether the parties' supervisors had any knowledge about any relationship between the complainant and the accused.

3. Determine if the complainant ever reported the conduct to the supervisor.

Attachment

EEO POLICY INVESTIGATION CHECKLIST

The following general guidelines apply to investigations of discrimination, harassment or retaliation complaints. Depending on the facts and circumstances, certain steps may be omitted or additional steps may be taken during the investigation.

- Interview the Complainant and obtain a detailed, dated, signed account of the facts. Ask Complainant to identify all the facts that support the complaint.
- Provide written communication to the Complainant acknowledging the complaint, confirming commitment to the EEO policy, advising that the investigation is underway, and assuring no retaliation.
- Gather any documents relating to the complaint.
- Interview witnesses (including anyone alleged to have engaged in misconduct) and obtain witness statements or otherwise document the witness interviews. Consider the use of questionnaires to facilitate the investigation.
- Determine if there is a need for additional witness interviews, document review or other further investigation. If so, complete and document those steps.
- Review the information obtained during the investigation, reach conclusions based on the evidence, and prepare a written summary of your conclusions. Consider consulting legal counsel at this stage, or earlier in the process, to help ensure the protection of the legal rights of the employee and the employer. Written conclusions ordinarily should not state “legal conclusions,” such as: “engaged in illegal harassment or discrimination” or “violated the law.” Accurate and appropriate alternative terminology might be “engaged in unprofessional conduct.” Conclusions should focus on facts. Sometimes, the evidence is inconclusive on what occurred, which should be stated in your written summary.
- If the information established misconduct, determine appropriate action necessary to ensure no future misconduct and to discipline the employee who engaged in misconduct (e.g., warning, transfer, demotion, suspension, discharge, training, monitoring, probation). If the evidence did not establish misconduct, determine whether further communication of expectations still is necessary to ensure professional and respectful conduct. Prepare appropriate written documentation, including statement that retaliation is prohibited.

- Meet with the Complainant to explain conclusions and actions taken related to the complaint. Always reaffirm the Company's commitment to the EEO Policy, including the anti-retaliation provision.
- Written follow up communication to the Complainant, including conclusions, thanks for making report, assurance of no retaliation, and expectation to report promptly any further concerns.
- If appropriate, follow up at a future date with the Complainant and others as necessary to ensure no future problems.
- Document necessary follow up steps, such as training or other communication steps taken to help prevent any future problems.
- Maintain a log of communications and actions throughout the investigation.
- Retain documents in separate file relating to the investigation.