

# CONDUCTING BULLETPROOF WORKPLACE INVESTIGATIONS

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# Presenters

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- Alia S. Wynne, Attorney with Fisher & Phillips
- Counsels and advises clients on numerous employment issues
- 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.
- Licensed to practice law in Texas and Louisiana

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# **Why A Proper Investigation Is Important**

# Lawsuits

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- Most Investigations Involve Potential Lawsuits
  - Claim evolves from complaint and/or investigation
  - Trial focuses on investigation

# Even If No Lawsuit

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- Matters of Great Importance to Employees
  - Jobs
  - Careers
  - Personal feelings

# Even If No Lawsuit

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- Great Importance to Your Company
- Environment
- Employee Retention
- Morale/Productivity
- Public Image

# Very Difficult Job

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- People/Emotions
- Detailed
- Time Consuming
- Legal Issues
- Hindsight Scrutiny by EEOC, Judges, Jurors, Lawyers

# Rewards of Good Investigation

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- Problem Solved
- Lawsuit Avoided
  - Save \$100's k
  - Prevent litigation distractions

# Rewards of Good Investigation

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If Lawsuit Results:

- Help provide successful defense
- Lower defense and settlement costs

# Types of Lawsuits

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- Harassment/Hostile Environment
- Retaliation
- Whistleblower
- Employee Misconduct
- Discrimination

# Consequences of Botched Investigations

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- Lost Opportunity
- Legal Liability
- Constructive Discharge
- Retaliation Claims

# Consequences of Botched Investigations

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- Defamation
- Invasion of Privacy
- False Imprisonment

# Investigation Principles

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- Fairness
- Documentation
- Promptness
- **BUT NO QUICK TRIGGER**

# Investigation Tools

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- Interviews
- Written Statements
- Questionnaires
- Searches
- Surveillance
- Polygraphs?

# Strategy Elements

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- Review employee files
- Collect and review documents
  - Relevant policies
  - Electronic communications
- Create list of persons with knowledge
- Determine information to collect
- Set time table
- Seek counsel

# Who Conducts the Investigation

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- Insider vs. Outsider
  - Attorney issues
  - Protect privilege
- Qualifications issues
  - Training
- Bias issues
- Confidentiality issues

# Documenting the Investigation

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- Create an Investigation File
  - Only one, labeled “Confidential”
  - Separate file for “Privileged” information

# Documenting the Investigation

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- Written Statements
- Taking and Keeping Notes
  - Probably discoverable
  - Important to document

# Documenting the Investigation

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- Should You Record Interviews?
  - Probably not
  - If you do, record parties' consent
- Written Statement Usually Safer

# Interviews

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- Determine Order
  - Complainant
  - Alleged Perpetrators
  - Co-Workers and Others

# Conducting Interviews

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- Who should be present?
- Opening Statement & Disclosures
  - Disclose purpose of interview (interest in determining facts)
  - If attorney, explain who you represent
  - Confidentiality
  - Anti-retaliation

# Interview Techniques

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- Keep Separate Notes for Each Interview
- Prepare Outline of Subjects to Cover
- Avoid Accusations/ Defamation

# Interview Questions

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- Begin With Broad Questions
- Then hone in on details
- If important, cover
- Clarify inconsistencies

# Get Statements

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- Handwritten statement
- Typed declaration
- Initial notes
- Questionnaire

# Interviewing the Complainant

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- Determine Complainant's Response to Incident
- Determine if Complainant Told Others About Incident
- Witnesses/Documents

# Interviewing the Complainant

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- Ask What They Would Like to See Happen
- Consider Leave of Absence During Investigation
- Don't Allow Complainants to Quit During the Investigation

# Interviewing the Accused

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- Start Broad and Work Down to Specifics
- Give Them a Chance to Fully Explain Their Side
- Ask for Witnesses and Documents

# Interviewing Co-Workers

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- Be Prepared For Reluctant Witnesses
- Ask About Similar Incidents
- Ask About Hearsay In Addition to What They Witnessed

# Concluding Interviews

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- Closing Statement
  - Is there anything else we should know?
  - Confidentiality
  - Anti-retaliation
  - Contact you if they remember more information

# Use of Questionnaires

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- Consider use of a carefully drafted questionnaire
  - Efficient
  - Create documented record
  - Especially effective if issue relates to work environment

# QUESTIONNAIRE

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Our Equal Employment Opportunity Policy (“EEO Policy”) prohibits any sex discrimination, sex harassment, sexually offensive comments or conduct, and retaliation. This questionnaire seeks information related to the company’s investigation of a complaint. We want you to answer the questions truthfully and completely. You have our assurance that you will be protected against any retaliation for any information you report to us. We are only interested in determining the truth.

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Since the start of your employment, have you understood that ABC Company has an EEO Policy that prohibits sex discrimination, sexual harassment, sexually offensive comments or conduct, and retaliation?

15 – Yes

0 – No

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Have you been subjected to any type of sex discrimination, sexual harassment, sexually offensive comments or conduct, or retaliation on the job by any ABC Company employee and/or any member of management? If yes, explain incident(s).

15 – No

0 – Yes

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Do you know of any ABC Company employee who has been subjected to any type of sex discrimination, sexual harassment, sexually offensive comments or conduct, or retaliation on the job by any ABC Company employee and/or member of management? If yes, explain incident(s).

14 – No

1 – “Yes, I heard Jane and John exchange inappropriate sexually suggestive remarks.”

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Do you know of any situation when ABC Company failed to take appropriate action in response to a complaint about sex discrimination, sexual harassment, sexually offensive comments or conduct, or retaliation on the job? If yes, explain situation(s).

15 – No—one employee volunteered “during our Spring 04 store meeting on many issues, which harassment was addressed, we are obligated to inform management of such issues”

0 --Yes

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Did you ever hear John make the comment that cleaning was woman's job or words to the effect? If yes, explain incident(s).

15 – No

0 – Yes

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Did you ever witness Jane being sexually discriminated against or harassed, or being subjected to offensive comments or conduct or to retaliation on the job by John? If yes, explain incident(s).

11– No

3 – Did not know Jane

1 – “Yes, but she was involved in the exchange. She was not offended, nor was she an innocent victim.

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Did you ever hear Jane complain about being sexually discriminated against or harassed, or being subjected to offensive comments or conduct on the job by John? If yes, explain complaint(s).

15 – No

0 – Yes

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Were you ever aware of any employee having pornographic video tapes in the store or talking about pornographic video tapes? If yes, please explain incident(s).

12 – No

3 – Heard conversations regarding video tapes – “heard Jane joking about tapes.”

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Did you ever witness John touch or grab Jane in a sexual or inappropriate manner? If yes, explain incident(s).

15 – No

0 – Yes

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Did you ever witness Jane touch or grab John in a sexual or inappropriate manner? If yes, explain incident(s).

11 – No

4 – Yes

“Jane grabbed John’s butt”

“Sometimes when John would walk by Jane would grab his butt”

“I saw Jane go up and hug him a couple of times. Just one arm hug. John did not instigate the action”

“Jane grabbed Mike’s butt, she uninvitingly flirted with most men she encountered here”

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Are you aware of John inviting any female employee to his home to join him in his hot tub while his wife was away? If yes, list person(s) and explain incident(s).

14 – No

1 – “Overheard John and Jane joking as John left the store for the day. He asked Jane if he would see her tonight and she said yes and he said better not stand me up. The next day at work John kidded around about Jane not showing up.”

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Please list any other information you think may be relevant to this investigation.

John had the personality of a brick wall.”

“I should be the first to try to hurt John. He forced me to quit the best job I ever had and I’ve had many great jobs! . . . I went with John to Missouri and I went with him to his home to redecorate his living room as a surprise for his wife and he is quite a gentleman. I can’t believe John would do anything to jeopardize his family life or a job he was very ‘devoted’ to. He loves his job & family!”

## Contd...

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“In April or May 2004, Jane blatantly told Steve that she wanted to have sex w/him.”

“Jane initiated sexual conversations when she could. She flirted with almost every male employee that worked here. I saw her giving her phone number out to guys, married or not. A male employee of two days told me he had sex with her. On one instance she approached my work area where I was standing and just stood there next to me. I asked her “Can I help you?” She replied, “Baby you can’t give me what I need help with.” Very flirtingly, knowing I had a girlfriend.”

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The above answers are true and complete. No one has suggested the answer to any question. No one has tried to influence my answers. The person giving this questionnaire to me emphasized that my answers should be true and complete. No one has made any promises or threats to get me to answer these questions. I have voluntarily filled out this questionnaire.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

# Recommending / Taking Remedial Action

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- Avoid legal conclusions
- Focus on what happened
- Results may be inconclusive
- What is appropriate action
  - Alleged perpetrator
  - Alleged victim
  - Future work environment

# Searches

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- Maintain clearly stated inspection/search policies
- Base search on “reasonable suspicion”
- Memorialize scope of search through witnesses or video

# Electronic Surveillance

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- Wiretapping and Listening Devices
  - Federal Omnibus Crime Control and Safe Streets Act prohibits interception of certain wire communications
  - State laws may have different requirements

# Electronic Surveillance

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- Email Monitoring
  - Monitoring of email allowed when email is provided by employer
  - Nevertheless, employers should maintain written policies informing employees of monitoring, etc.

# Polygraphs

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- Very Limited Use
  - EPPA of 1988
- National Defense/Security
- Persons With Access to Controlled Substances
- Security Guards
- On-Going Investigations

# Polygraphs

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- Even if allowed, cannot take action based solely on polygraph or on refusal to take
- Normally, better to use traditional methods of investigation

# Scenario 1

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**You bring John into your office to discipline him for poor performance. He complains that his performance is bad because he is distracted by Jamie, his co-worker, who is constantly telling racist jokes and making racial slurs. You think that John is making this up as an excuse for his poor performance.**

**Do you discipline John for poor performance?**

**What should you do about John's complaint about Jamie?**

# Scenario 2

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**You call Jamie into your office to investigate John's complaints. After you explain what you want to speak to Jamie about, Jamie demands to have another employee, Sara, in the interview with him.**

**What should you do?**

# Scenario 3

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**While interviewing several other employees about John's allegations that Jamie engages in racially harassing behavior, Sam, a supervisor above Jamie's level, claims that Jamie "harasses me too."**

**What is your next question?**

**What would your notes read?**

# Scenario 4

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**In the course of your investigation, Rebecca, a potential witness to the harassing behavior, asks if she can record the interview.**

**What do you say?**

**What should you do if Rebecca refuses to participate in the investigation unless you allow her to record the conversation?**

# **EEO POLICY INVESTIGATION CHECKLIST**

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**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.**

# EEO POLICY INVESTIGATION CHECKLIST

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**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.**

# EEO POLICY INVESTIGATION CHECKLIST

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\_\_\_\_\_ 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 terminology might be “engaged in unprofessional conduct.”

# EEO POLICY INVESTIGATION CHECKLIST

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- \_\_\_\_\_ If the information established misconduct, determine appropriate action necessary to ensure no future misconduct and to discipline associate 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.

# **EEO POLICY INVESTIGATION CHECKLIST**

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- \_\_\_ 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.**
- \_\_\_ If appropriate, follow up at a future date with the Complainant and others as necessary to ensure no future problems.**

# EEO POLICY INVESTIGATION CHECKLIST

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- \_\_\_ 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.

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# Questions?

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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.