

# Effective HR Investigations

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# Components of an Effective Investigation

- Prompt
- Confidential
- Independent investigator
- Thorough
- Post-investigation follow-up
- Monitoring for retaliation

# Timing – How quickly?

- The law requires a prompt and not an instantaneous investigation.
  - Quality matters
- Timing upheld by Court's as prompt:
  - Confronting accused on same day as complaint
  - One week to complete investigation
  - 11 days to complete investigation
  - Harasser fired within 10 days of complaint
  - 20 days to complete investigation adequate

# Not prompt enough

- Where a court found the investigation to be inadequate based on timing:
  - Four-week delay before interviewing complainant and co-worker
  - Interview of complainant and witnesses four months after complaint and interview of alleged harasser 8 months after complaint
  - Investigation not closed for seven months, during which harassment/intimidation continued

# The Real World – Bad Timing

- *E.E.O.C. v. Mgmt. Hosp. of Racine, Inc.* (7th Cir. 2012)
  - Teen female employee told management about co-worker harassment (twice in March), and another person reported harassment (three times in April).
  - Manager said he'd take care of it but did not address it
  - In May, employee's attorney hired a private investigator to start asking questions
  - Management told HR about PI, and HR immediately launched investigation
- Was two month delay too much?

# Confidentiality

- Why is it important?
  - Protects the complainant (e.g., retaliation)
  - Protects the respondent (e.g., not guilty until proven innocent)
  - Protects the integrity of the investigation
  - Protects against unproductive work environment (e.g., rumor mill; drama)

# Confidentiality

- Can you guarantee confidentiality?
- What are your obligations?
- Should you identify the complainant during the interview with the respondent?
- Should you notify the complainant's manager about complaint if it is not about the manager?
- What can you do if your witnesses don't maintain confidentiality?

# Any immediate action required?

- Contacting legal counsel?
- Outreach to government agencies
- Transferring or suspending complainant or accused, or other notification to accused
- Internal reporting to upper management, security, communications team
- Safety concerns for the public or employees



# Planning

- Preplanning
  - Identify the Investigator
  - Identify Potential Witnesses
  - Identify Documents
  - Organize Issues and Establish Outline
  - Set a Timeline

# Interviews

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# The Order of Witnesses

- Typical order
  - Complainant
  - Witnesses
    - Eye-witnesses
    - Supervisors
    - Comparators
    - Confidants
  - Respondent
- Remember, complainant is not always the victim

# The 5Ws and an H

- What happened?
- Who is involved? Who accused, who was affected?
- Who else may have seen or heard?
- When did the incident(s) occur – date(s), time(s)?
- Where did the incidents occur?
- Why did the incidents occur (if known)?
- How do you know (if not one of those affected)?

# The Initial Interview – Do's

- Meet with complainant as early as possible.
- Give complainant full opportunity to tell his/her story.
- Explain general investigative plan.
- Instill confidence in the process.
- Ask complainant for suggestions regarding witnesses/documents.
- Get copies of relevant documents.

# The Initial Interview – Don'ts

- Do not act as if you believe or disbelieve the complainant
- Do not suggest the complainant withdraw the complaint
- Do not express concern about the effect of the complaint on the organization
- Do not express concern about how the complaint will affect the respondent's job/family

# The Initial Interview (con't)

- Remind the employee that the entity does not permit any retaliation or reprisal and ask the employee to come to you if that happens.
  - If you think there's any risk of this being lost in translation, follow-up with something in writing that reaffirms it.
- Remember, you cannot promise complete confidentiality but can reinforce that you'll inform only those who need to know
- Maintain a line of communication with complainant throughout investigative process.

# Witness and Respondent Interviews

- Follow the complainant's chronology
- Don't allow blanket denials
- Address every allegation by complainant
- Confront with documents and ask for explanation
- Give respondent a chance to identify documents/witnesses of his/her own



# Respondent Interviews:

- Can employee have a bargaining representative present?
- Can an employee have a co-worker witness present?
- Can an employee have his/her own attorney present?

# Conducting Investigation Interviews

- Before you start
  - Pay attention to the setting
  - Establish rapport
- Knowing how to ask questions is crucial
  - Don't be overly accepting or overly negative
  - Explain the importance of accurate and truthful information

# Conducting Investigation Interviews (con't)

- Knowing how to ask questions is crucial
  - If helpful, prepare an outline of the issues to cover – also supports consistency through witness interviews.
  - Consider beginning by asking some background questions.
  - Start with broad questions and narrow them.
  - Look for bias.

# Conducting Investigation Interviews (con't)

- Knowing how to ask questions is crucial
  - LISTEN to what is said. Follow up.
    - Follow your outline, but be flexible
  - Save unfriendly, embarrassing or hostile questions until the end of the interview.
  - Distinguish perception from direct observation/hearing

# Conducting Investigation Interviews

- Beware of compound questions.
- Watch out for leading questions.
  - You are there to be informed, not to inform.
- Try to record demeanor or behavior without including your interpretations, feelings, or assumptions.
  - “The employee squinted and looked away.”
  - Not: “The employee looked guilty.”

# Conducting Investigation Interviews

- Summarize your understanding of what you are being told without leading.
- Ask for any relevant documents.
- Close the barn door.
  - “Are there any questions that I haven’t asked or that I should have asked?”
  - “Is there anything else you think I should know?”

# The Real World – What Not to Do

- *Pollard v. E.I. DuPont De Nemours Co.* (6<sup>th</sup> Cir. 2000)
  - Investigator prepared a list of “yes” or “no” questions
  - Each employee replied “no” to each question and denied knowledge of incidents
  - Investigator asked no further questions
- Court ruled investigation inadequate

# Closing the Interview

- Tell the employee that if he/she remembers anything else, he/she should contact you.
- Assure witnesses that retaliation will not be tolerated.
- Reiterate prohibition on retaliation to respondents.



# What to do about “scope creep”?

- What is “scope creep”?
- How to manage it:
  - Stay focused – finish your investigation
  - Don’t ignore new allegations
  - Don’t try to investigate all issues at once
  - Refer to another investigator if completely unrelated
  - Prioritize issues if it is somewhat related
  - Keep good documentation

# The re-interview

- Don't be afraid of doing more than one interview
- When to re-interview
  - Complainant – rebuttal to respondent's statement
  - Witnesses – to corroborate additional information uncovered later in the investigation
  - When new documents are located
- Effective investigations are thorough

# Good or Bad question?

- Sally alleges that her she bumped into her boss at a bar after work, and he tried to kiss her.
  - Were you with anybody at the bar?
  - When he tried to kiss you did you kiss him back?
  - Was the boss slurring his words or stumbling?
  - Do you often go out for drinks on work nights?
  - How long have you worked for the company?

# Good or Bad Question?

- George reports that his supervisor requires employees to work overtime off the clock.
  - You often forget to clock in to work, isn't that right?
  - When was the last time your supervisor asked you to work off the clock?
  - I've heard you avoid overtime at all costs, is that true?
  - So if I understand you correctly, you believe you've worked 40-50 hours per week for the past four weeks, is that correct?

# Drawing Conclusions

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# Drawing conclusions

## Credibility Determinations per the EEOC

- Plausibility:
  - Is the version of facts believable?
  - Does it make sense?
  - Are there inconsistencies?
  - Do the witnesses' chronologies line up?
- Demeanor: Does the person seem to be telling the truth or lying?

# Drawing conclusions

- Motive to falsify:
  - Motive to lie?
  - Motive to get co-worker in trouble?
  - Motive to retaliate?
- Corroboration:
  - Other witness testimony
  - Documents
  - Physical evidence
- Past record: Has the accused engaged in similar conduct before?

# Making Conclusions

- Did the alleged conduct occur?
  - Yes; No; In part
- Did the conduct established violate company policy?
- Do not draw legal conclusions, such as “discrimination,” “harassment,” “retaliation.”
- Describe conduct as, for example, violating policy, unprofessional, inappropriate, *etc.*



# Documentation

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# Documenting Investigation

- Take notes of meetings, interviews, phone conversations, etc.
- Begin notes of each meeting or conversation on a new sheet of paper
- Note who was present during meetings and interviews
- Note if respondent declines union representation
- Sign and date your notes
- Consider converting notes to interview summaries

# Unsigned or Undated Documents

*I interviewed Jack Walker today. He told me that he raised his voice with Sally during the discipline meeting but denied using profanity or pounding the table.*



# Inaccuracy

Watercooler conversation  
between Randy and Harry:

Randy: I've heard a rumor that Sue is spending a lot of work time surfing the internet. I haven't seen it myself, but other people have told me that she's on Facebook and buying stuff off of eBay and Craigslist when she's supposed to be working.

Harry: I'll make a note of that

Note to file:  
August 1, 2018

Randy told me that he saw Sue on computer surfing Facebook, but he wasn't sure if she was on a break or not.

Harry

# Unsupported Conclusions

## Bad

- Joe was drunk.
- Joe was defensive and belligerent.

## Good

- I smelled alcohol on Joe's breath, and he was stumbling and had slurred speech.
- Joe denied that he committed the misconduct, and raised his voice during the meeting. He called his co-worker a "snitch," and threw the documents I showed him on the floor.

# Incomplete sentences and disjointed sequences

- Bob and Steve inappropriate hand gestures. Joe laugh.
- Bob wants promotion. Thinks Sue not qualified.
- Steve - Joe is know it all.

# Investigation Report

- Consider this Exhibit A in legal proceedings
  - Grammar is important – making a first impression
- Review it – make sure it conveys your intended conclusions
- Be thorough - even if it means going back to re-interview some witnesses
  - Report should stand on its own
- Ensure report includes copies of supporting documentation
  - What would investigator need to explain findings to an arbitrator/judge/jury?



# Closing the Investigation

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# Follow-up with Complainant

- Advise complainant of conclusion
  - Substantiated or could not substantiate
- Complaint is not entitled to know how other employees were disciplined
  - “appropriate corrective action was taken”
- Stress prohibition on retaliation again
  - Provide avenue for complaints
  - Consider providing written close-out letter addressing these issues
- Depending on circumstances, may want to affirmatively monitor work area

# Follow-up with Respondent

- Advise respondent of conclusion
  - If substantiated – follow-up may be discipline meeting
  - If not substantiated, may still be a good opportunity for coaching
- Stress prohibition on retaliation again (put it in writing)

# Takeaways

## Do's

- Plan
- Be focused in interviews
- Dig down into the facts
- Take good notes
- Consider credibility
- Close out with the complainant and accused
- Remind all participants about prohibition on retaliation
- Follow-up
- Recognize “scope creep”

## Don'ts

- Ignore complaints
- Delay
- Ignore witnesses, documents, or data
- Lose objectivity or pre-judge
- Ignore respondent's side of the story
- Be sloppy about confidentiality
- Make legal conclusions

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