The Nuts & Bolts of Performing Workplace Investigations

A Webinar for LexVid

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Program Outline

I. What and When to Investigate
II. Avoiding Bias in Investigations
III. Choosing an Investigator
IV. Steps in Conducting the Investigation
V. Weighing Evidence
VI. Making Credibility Determinations
VII. Writing Findings
VIII. Post-Investigation Steps

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But First…
Why do an investigation?

Title VII:

- Requires employers to take "all steps necessary" to prevent harassment from occurring. 29 CFR Section 1604.11(f)
  - EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) available at: www.eeoc.gov/policy/docs/currentissues

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Workplace Morale

- Impact to employees if harassment is not addressed
- Impact to employers if harassment is not addressed



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I. What and When to Investigate

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First ask …

- Are there disputed facts?
- Would a finding that any of the disputed facts occurred lead to a conclusion that laws, policies, or significant workplace expectations were violated?
- Should the employer investigate allegations that would not violate the law but would violate policies and expectations, such as bullying?

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Law/Scope/Findings

Law/Scope/Findings all work together

The investigator should be framing the investigation to find information that would prove or disprove the elements of the legal violation or policy violation.

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When to Investigate Timeliness

- The hallmark of an effective investigation includes it being timely.
- BUT …
  - What does timeliness mean?
  - And what if someone is on leave?

Timeliness

EEOC v. Mgmt. Hospitality of Racine, Inc., 666 F.3d 422, 436 (7th Cir. 2012)

Court stated two-month delay in initiating investigation was not the type of response "reasonably likely to prevent harassment from recurring."

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II. Avoiding Bias

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Impartiality

The investigator should be impartial and objective.

- EEOC Guidance; *Nazir v. United Airlines*, 178 Cal. App. 4th 243 (2009)

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A biased/unfair investigation can make things worse.

- *Mendoza v. Western Medical Center of Santa Ana* (Cal App. 4th 2014)
  - Judgment for plaintiff upheld in part due to testimony by plaintiff's expert witness who testified to numerous shortcoming in the investigation conducted by defendants following plaintiff's complaint. An inadequate investigation is evidence of pretext.

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Decision Making and Biases

- Whoever does the investigation will need to look at and understand their own biases.
- If you know you are going to be impacted by biases in a given situation – avoid it.
- If you are an appropriate person to conduct the investigation and there is no particular reason for you to be biased – go forward – BUT EVERY INVESTIGATOR SHOULD UNDERSTAND HOW BIAS AND DECISION MAKING WORK!

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Confirmation Bias

"I will look at any additional evidence to confirm the opinion to which I have already come."

-- Lord Molson, British politician (1903 – 1991)

- Tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence
- Done unconsciously
- Impacts how we interpret information

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Confirmation Bias Study

- Participants were asked to form a hypothesis of guilt before reviewing all the evidence in a case.
- Doing so caused them to look for reasons to find this person guilty, even when evidence tending to exonerate the individual was introduced.
- Some participants were then asked to explain **why the initial hypothesis might be wrong.**
- Others were asked to generate additional suspects.
- Those who named a suspect and considered why he might be innocent showed less confirmation bias than those asked to name two additional suspects.

Reducing Confirmation Bias

- Thus, those who were asked early in the case to name a suspect and state why he might be guilty showed a greater tendency to confirm that hypothesis.
- However, this was counteracted by explaining why this might be wrong.

O'Brien, Barbara, Prime Suspect: *An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations*, Psychology, Public Policy, and Law (2009).

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Investigator Biases

- Bias in favor of my employer
- Bias against delivering bad news
- Bias against repeat complainers or whiners
- Bias against employees with performance issues
- Bias towards the easy answer/quick case closure
- Bias towards majority rule
- Bias towards people you like or sympathize with
- Bias towards people with power

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III. Ethical and Practical Considerations in Choosing an Investigator

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Licensure Requirements: California (Most States Have Similar Statutes)

- Business & Professions Code section 7520
  - Licensed Private Investigator
  - Or come under exemption in Section 7522(e)
- Exemptions
  - Attorney “performing his or her duties as an attorney at law”
    - Limited Scope retention agreements
    - Ethical duties apply (no ex parte contact with represented party)
  - In house employee of the employer

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Consequences of Failure to Comply

- Penalties include either or both of the following:
  - Fine of up to $5000
  - Imprisonment not to exceed one year
- Violators guilty of a misdemeanor offense
- State bar discipline?
- Civil Liability?

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Consequences of Failure to Comply

- Validity of the underlying investigation could be challenged if investigator failed to comply.
  - Remember, your investigation may be scrutinized down the road!
- Also, loss of privilege and work product protection?
- Reputational harm?

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Retention Agreements

- Retaining as an attorney
- Set out who does what
- Attorney/client privilege
  - *City of Petaluma v. Superior Court of Sonoma County*, Cal: Court of Appeal, 1st Appellate Dist., 3rd Div. 2016

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Counsel vs. Investigator: Who Does What?

Counsel

- Interim action
- Confidentiality and other admonitions (at times)
- Scope
- Type of findings
- Notices to parties and witnesses
- Preserving documents
- Advice as to what to do after investigation is complete

Investigator

- Confidentiality and other admonitions (at times)
- Timing and location of interviews
- Who to interview and in what order
- What to cover in interviews
- Obtaining documents
- Findings

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Should You Use an External Investigator?

Pros	Cons
• Appearance of neutrality	• More costly
• Level of experience	• May take longer
• No previous knowledge of situation	• Lack of knowledge of organizational culture
• Comfortable testifying in court	• May not be necessary
• Less internal time expended	

What to Look for in an Outside Investigator

- Experience with investigations
- Knowledge of law
- Experience testifying
- Reputation for independence
- True impartiality
- Good communication skills
- Subject matter expertise
- Right-sizing abilities

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IV. Steps in Conducting the Investigation

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Overview

- Determine scope
- Review relevant foundational documents (but not too much …)
- Interview the complainant
- Gather other documentation
- Determine who else to interview and the order
- Circle back to complainant and others as needed

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Before You Begin, Consider…

- **Where** will the interviews take place?
- Neutrality
- Privacy
- Comfort of the witness and ability to leave the room
  (You don't want that claim of "false imprisonment"!)

- **In what order** will you interview the witnesses?
- Start with the Complainant
- Respondent next or witnesses next?
- Pros and cons

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Possible Evidence

- In determining the evidence to gather, consider:
  - The nature of the allegations;
  - Laws and policies;
  - The probative value of the evidence, weighed against the costs of gathering the evidence, in terms of money, time and potential disruption to the workplace;
  - Whether outside expertise is needed.

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Interview Questions: Open Ended

- Who?
- What?
- Where?
- When?
- How?

- Avoid questions that suggest an answer.

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The Funnel Method

- Start broad and keep narrowing.
- Circle back for details.
- Keep going over looking for consistencies and contradictions.
  - Not as interesting as “Gotcha” but much more successful!
- **The more sensitive the subject, the more carefully you approach it.**

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Documenting the Interview

- Know your client's practice and rules
- Advantages and disadvantages of:
  - Audio recording vs.
  - Handwritten and typed notes vs.
  - Signed statements/ Signed notes

RETAIN ALL DOCUMENTATION!

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V. Weighing Evidence

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Analyzing and Weighing Evidence

Legal standards

- Beyond reasonable doubt
- Clear and convincing
- Preponderance of the evidence – the one used in virtually all workplace investigations.

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Preponderance of the Evidence

- Also called “more likely than not” – investigator finds that it is more likely than not that the conduct alleged did or did not occur
- Standard is not “clear and convincing evidence” or “beyond a reasonable doubt”
- Some people say “Fifty percent plus a feather.”

Analyzing and Weighing Evidence

”He Said/She Said”

- What to do?
- Use preponderance of the evidence
- Use the credibility factors
- Don’t make an “cannot be determined” finding
- One person’s statement is enough for a finding

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Credibility Assessments and Adequacy of Investigations

EEOC Guidance states that the Commission may "make a finding of harassment solely on the credibility of the victim's allegations."

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VI. Making Credibility Determinations

Credibility Assessments and Adequacy of Investigations

According to EEOC Guidance,

> "If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred."

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Findings: Credibility

- Inherent plausibility
- Motive to lie
- Corroboration
- Witness's ability to perceive, recall
- History of honesty/dishonesty
- Habit/consistency
- Inconsistent statements
- Manner of testimony (hesitations, indirect answers)
- Demeanor (use with caution)

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Credibility: Most Popular

- **Inherent Plausibility:** Is the testimony believable on its face? Does it make sense?
- **Motive to Lie or Not:** Is there a strong or weak motive at play?
- **Corroboration/Lack of Corroboration:** Is there witness testimony or physical evidence that corroborates the party's testimony? Did the party contemporaneously document or report the incident?
- **Consistency/Lack of Consistency:** Has the witness been consistent over time and is his/her statements internally consistent?
- **Manner of Testimony:** Does the witness hesitate or obfuscate when answering critical questions?

Credibility: Proceed With Caution

- Reputation
- Attitude
- Demeanor

These are more subjective.

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Common Pitfalls in Determining Credibility

- Over-reliance on witness demeanor
- Unconscious bias
- Confirmation bias
- Making the determination too soon
- Failing to make the determination

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VII. Writing Findings

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Types of Findings

- Sustained: An allegation is sustained when an investigation reveals a preponderance of the evidence supports the allegation

- Not sustained: An allegation is not sustained when an investigation reveals there was not a preponderance of the evidence in support of the allegation

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Findings

- Explain the reasoning for each finding, including evidence considered and credibility findings.
- Show that you considered both sides.
- When unsure, try writing both ways and see which is more persuasive.

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VIII. After Investigation Steps

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You Are Not Done Yet

- **Closing letters and/or meetings**
  - Done with parties, usually not witnesses
  - Told the results not the details
  - Might be given an executive summary
  - Need to protect confidentiality of employment action while also letting the party know the outcome

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Avoid Retaliation

- **Monitor the work environment**
  - Determine who will do this
  - Check back regularly
  - Respond to issues timely
  - Confirm what you learn and what you've done

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Important Cases and Statutes

- *Cotran v. Rollins Hudig Hall* (1998) 17 Cal 4th 93
- *Silva v. Lucky Stores* (1998) 65 Cal App 4th 256
- *Faragher & Ellerth* (1998) 524 U.S. 742 and 775
- *McInnis* (2003) 31 Cal. 4th 1026
- EEOC Guidelines (1999) Notice 915.002
- FEHA – Gov't Code 12940 (j) (1) and (k) – take all reasonable steps to prevent harassment from occurring.
- Title VII – 29 C.F.R. 1604.11 (f)

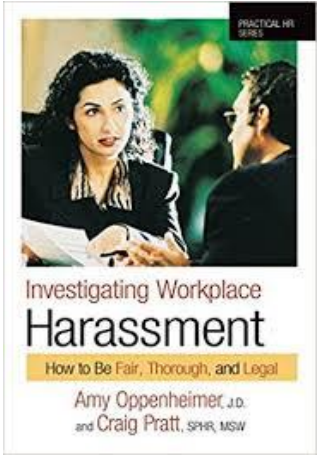
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Resources

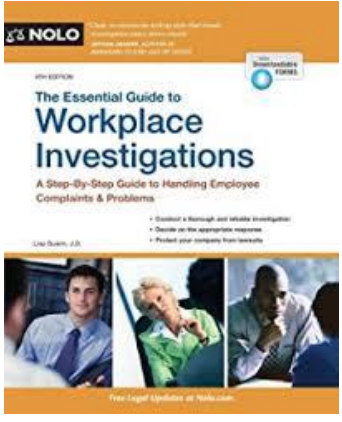
- California Department Of Fair Employment and Housing Workplace Harassment Prevention Guide for California Employers (2017)
- EEOC Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999)
  [Coming soon – new EEOC Guidelines have been proposed]
- Association of Workplace Investigators (AWI) – Guiding Principles for Conducting Workplace Investigations – last revised 2014
- Handbooks by law firms or large employers
- Resources produced by SHRM

How to Books

This one is my favorite - ☺



2003 - 2005



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Thank You for Participating in this Seminar!

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