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SUMMARY KEYWORDS

investigation, investigator, complainant, conduct, evidence, slide, interview, important, case, credibility, allegation, finding, bias, witnesses, workplace, complaint, employees, person, alleged, employers

00:00
Hello,

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and welcome to this webinar on the nuts and bolts of performing workplace investigations. My name is Tina Rowe, Connelly and I am a partner with the Oppenheimer investigations group. And we are a law firm dedicated to conducting school and workplace investigations, as well as mediations trainings and coaching. So if you look at slide two of the PowerPoint, here is the overall outline of the program, what and when to investigate, then we'll discuss avoiding bias and investigations, choosing an investigator steps in conducting the investigation. We'll also talk about weighing the evidence, making credibility determinations, writing findings, and we'll finally finally we'll go over some post investigation steps. So this is a lot of information to cover in an hour. So let's get right to it. First of all, why conducted investigation what why even go there at all? Well, federal law, which is title seven of the Civil Rights Act, requires employers to take all steps necessary to prevent harassment from occurring.

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Simply put,

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the law requires employers to do so. And the EEOC the Equal Employment Opportunity, Equal Employment Opportunity Opportunity Commission is which is the federal agency tasked with

enforcing title seven has its guidelines with respect to addressing harassment in the workplace, and we've provided you with a link to those guidelines

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in the PowerPoint deck.

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However, aside from the legal requirements, it's important to be conscientious of workplace morale. What happens to employees if harassment in the workplace is not addressed? Or even workplace bullying? Do you think that employees want to come to work? Are they productive when they're there? And likewise, what's the impact to employers if employees are not happy? Things like tardiness or high turnover? These are certainly real consequences to any agency and to any business. But at the same time, investigations can be disruptive, they can be time consuming, and they can be costly.

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So

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the first step to consider is, number one,

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what

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do I investigate? And when should I investigate? So when you have a situation on your hands that you think might need an investigation, but you're not certain. Ask yourself, are there disputed facts? is one employee saying something bad happened, but the employee who is alleged to be responsible for the conduct is denying it? And conversely, if there is no dispute, then you probably don't need an investigation at all. And you can jump straight into figuring out what the proper recourses. But also consider what a finding that any of the disputed facts occurred, lead to a conclusion that your laws that that laws or your policies or your workplace, workplace expectations were violated. And some examples of this is someone alleging that a co worker or supervisor touched them in appropriately, or someone alleging that a co worker or supervisor

made an offensive race based comment is someone alleging that a co worker supervisor stole money from the cash register. These are examples of conduct that could potentially violate the law or your policies or your workplace expectations.

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However,

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what if the conduct isn't a violation of the law or policies but still has serious consequences for employee morale and bullying in our case, but the cases that we handle I think bullying or abusive conduct is probably the most common example of this. You know, bullying and abusive conduct aren't necessarily against the law. But but at the same time, this is not the type of conduct that employers want to encourage in their workplaces. You know, and what I mean by bullying or abusive conduct is the supervisor who yells at everyone during meetings, or the co worker who's rude to all of the customers. But and again, this type of conduct doesn't necessarily violate the law. But what impact does this have on workplace morale? Does an employer wants to encourage this type of behavior? And I can tell you from my experience that no most employers want to address this behavior because of the impact that it has on everyone else. So for those following along, I'm on slide seven. The reason you're asking these questions is because you need to determine what the scope of your investigation will be. What exactly is it that I'm investigating, and the law and the scope, and the findings of your investigation all go together. The law and your policies determine what issues you need to identify and address. And once you've identified those, that's what gives you the scope of your investigation. And your findings, your conclusions, will determine the underlying facts that you need in order to take the next step of deciding whether there was a legal or a policy violation. And as for when to investigate, the common tagline for investigations is fair, timely, and thorough. So the investigation has to be timely. But what does that mean, you timeliness is can be pretty relative, especially in circumstances where a party or a key witness to the investigation is on leave. And that certainly happens more than than we'd like it to. So the answer to the question of timeliness, that I'm going to give you, which is deeply unsatisfying, is it depends.

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For most of the clients that our office works with, who are internal investigators, meaning they work in house with an employer, and they're conducting these investigations in house,

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they try to contact the

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complainant or the person who is initiating the complaint within the same business day, or the next business day to set up a time to talk about more details of what the complaint complainant is alleging. And that way, you're showing, we're being responsive, we are taking this seriously. And we're not letting this hang out there for weeks on end. for external investigators, such as myself, after I've been retained by a client, I make it a point to reach out to the complainant almost immediately to schedule an interview with them, you know, the most 24 hours of having the case officially in my hands. And that's kind of what you know, sort of these general parameters of what we mean by timeliness in terms of

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at

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the very least getting an investigation started. Slide nine, we've gotten some guidance from courts on what is not

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timeliness. And the EEOC versus management hospitality of racing case. The court stated that a two months delay in initiating an investigation was not the type of response that was reasonably likely to prevent harassment from recurring. So that seems to be the standard that courts apply reasonably likely to prevent harassment from reoccurring. And to share with you all anecdotally, back in the days when I used to represent clients in litigation and arbitration proceedings, I once lost an arbitration, it was actually an appeal from termination, because because of my clients failure to initiate an investigation for several months, longer than two months, several months. And the arbitrator had some very strong words to say in his decision about my clients failure to act and ultimately he overturned the termination and reinstated the employee. So these so these, so issues of timeliness really do have a real impact on unemployment matters. So another important thing to consider and to keep in mind when conducting investigations, and I'm on slide 10. Now that you've decided that yes, this is a situation where I need to conduct an investigation, something that all investigators need to be aware of before jumping in is bias. And this is a critical component and a staple topic of every investigators training. The law and the guidance provided

by the EEOC says that the investigator should be impartial, and objective. And for those of you who are in California, which is which is where I'm based, the Department of Fair Employment and Housing also known as DFE H. The DFE h guidelines say the same thing. The reason why this is so critical and why it's so important to focus our

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attentions

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on bias and hopefully preventing a bias or keeping our biases in check is that a biased or an unfair investigation can actually make things worse, and the Mendoza versus Western Medical Center of Santa Ana this Mendoza case this is the poster child of the poster child case of a bad and castigation. So in this case, one male employee actually reported sexual harassment against another male employee. And the employer who doesn't designate someone to conduct this investigation and this person interview these two employees together. Not only that the interviews were conducted in a quasi public manner, that is the discussions were in a place that could be seen by all of their co workers sort of like a glass, near those offices with the glass walls and people were walking by like, like they were in a big fishbowl. And the investigation was conducted by someone who was not a trained HR investigator, nor were they otherwise trained to be thorough and investigations. And when the investigation concluded, both employees at the end of the finding was that both employees were implicit in the in the unprofessional behavior. So then the employer decided to fire both of them.

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And, you know, the court noted,

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look, you employers seem more interested in just getting rid of a problem instead of trying to uncover the truth and address it. And ultimately, what the what the court said was an inadequate investigation like this one is evidence of pretext. So when you're making decisions and and trying to keep your biases in check, it's important that that whoever does the investigation is able to exit, look at and understand their own biases. And if you know, you're going to be impacted by your biases in a given situation, then avoid it. That is not doing anyone any favors by bringing your own biases to the table. But if you are the appropriate person to conduct the investigation, then great. But it's still important to understand how bias and decision making work. So for purposes of this webinar, I'm just going to take a quick look at bias with you. But my colleague

vitta Thomas, she has a webinar focusing on bias that I highly recommend, because quite frankly, this is a topic that we could spend hours on. So slide 14, the most common type of bias to look out for when conducting investigations is confirmation bias. And here's a quote that summarizes perfectly what confirmation bias is, I will look at any additional evidence to confirm the opinion to which I have already come. So confirmation bias is a tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence. And oftentimes, it's done unconsciously. So you can see how this can be problematic in an investigation when we're supposed to be considering and weighing all of the evidence that we're collecting. And if you take a look at the next slide, here's an illustration of that, in a confirmation bias study certain so the participants were asked to form a hypothesis of guilt, before reviewing all of the evidence in a criminal type case. So doing so it caused them to look for reasons to find the person that they suspected guilty, even when there was evidence tending to exonerate the individual who was injured that was introduced.

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And then,

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after they were asked to form this hypothesis, and after they were asked to review some evidence, some of the participants were asked to explain why their initial hypothesis might be wrong.

13:47
Okay.

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Others in the study, were asked instead to generate additional suspects. Those who formed the original hypothesis of guilt, and then consider why the person they originally believed did it might be innocent. They showed less confirmation bias than those asked to just name two additional suspects. So slide 16. Thus, those who were asked early in the case, to name a suspect and state why he might be guilty. They showed a greater tendency to confirm that hypothesis, but this was counteracted by explaining why this might be wrong. That makes sense. That's why when I write reports, I approach it with an on one hand, on the other hand analysis,

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on one hand,

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here's the evidence that supports the opposite finding of the one that I'm making. On the other hand, here's the evidence that does support my finding and here's why it outweighs that other evidence. I have had occasions when I did Analysis this way. And I ended up changing my finding, because I realized that the evidence was pointing me in a different direction.

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So,

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slide 17 lists the various biases that investigators need to be conscientious of, and I won't read them all out loud. But again, tune into my colleague vitta Thomas's presentation on biases for a more in depth discussion. And what I can tell you is that many of these biases that, you know, investigators, many of the biases that are listed here are certainly very relatable for all of those who, for all of us who conduct workplace investigations, or school investigations as well. Okay, so what if you realize that you know what, I am bias, I can't conduct this investigation, so I've got to find someone else.

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Who do you choose?

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Let's consider some ethical and practice practical considerations in choosing an investigator. Slide 19, there are licensure requirements, and here are the ones from California, which is where I practice, but most states have something similar to this. The law typically provides that workplace investigations

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have to

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be conducted by a licensed private investigator, unless they fall under an exemption. And attorneys are one example of

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an exemption.

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And also in house employees of a company or an agency can also conduct in house investigations of that company's employees. So make sure that whoever you're working with meets one of these criteria or the criteria provided in your respective, respective jurisdictions. And the reason this is important is there are consequences to not hiring the right investigator, there are financial penalties, there can be criminal penalties, State Bar penalties, and potential civil liability. And none of those things are very fun. But also, I think, most significantly, for purposes of why we even conduct these investigations to begin with, the validity of the underlying investigation could be challenged, which could be highly problematic, if say, you know, the case were to escalate to some sort of informal hearing or litigation. And obviously, very problematic, because it can under it could, it could undermine all of the work that was done and everything that was all of the effort that went into trying to prevent liability or trying to rectify and correct the behavior. So, if you are, you know, you've decided you're biased, or you've decided, you know, for whatever reasons, probably not a good idea to handle this in house, we want someone outside the agency to hire this, to handle this investigation or to handle this matter, if you're going to hire an attorney to do the investigations. So if you're going to hire a law firm, like Oppenheimer investigations group to conduct an investigation for your agency, it's it's really important that the roles of the attorney investigator are clearly

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delineated.

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So I'm on slide 20, to make sure you're spelling out what the attorney investigator will do. And what you as the client will do, for example, who's going to handle scheduling?

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Who's going to

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handle noticing the parties and the witnesses noticing meaning letting them know that this

investigation has been initiated? And that they may be needed to be to be interviewed by the investigator?

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And another question, are

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you going to have the attorney investigator make policy findings? Or are you going to make that determination yourself after the attorney investigator makes factual findings. And also, you know, another thing to consider when retaining attorney investigators is in order to protect the confidentiality of the process and to you know, protect the any work product that comes out of it, specifically the written report, be sure you are forming an attorney client relationship with the attorney investigator you're retaining even though they're providing, quote, neutral services as opposed to the traditional services of an attorney advocate. And you know, in California, I'm citing an example that was a very important case that was decided here in California is the city of Petaluma case, which said that even if you're hiring an attorney to just conduct factual findings to just come to make factual findings and not provide those traditional legal services, this is still considered legal work, if the attorney is using their professional experience to conduct the investigation, and this relationship then is protected or can be protected under the attorney client privilege. Okay, and I have the citation of the city of Petaluma case, available in salt 22

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so

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I just mentioned make sure you set out who does what. And this next slide slide 23 separates out what the role of your agency's attorney should be and what the role of your investigator including your attorney investigator should be your agency's attorney or if you are, if you are the agency attorney, you're the agency's attorney should be advising on interim actions, you know, does this for example, should this person be placed on administrative leave? What type of confidentiality, admonitions or retaliation admonition should be given during the investigation, what the scope of the investigation should be? What types of findings should be made? That is factual findings versus policy findings, preparing the notices that should go to the parties and witnesses and compare that to the role of an investigator who is the one giving the admonitions during the interviews, and the investigator is the one determining the timing and the location of the interviews? And also, also very important, as the investigator should be the one who is

determining who to interview and in what order,

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etc.

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So,

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so backing up just a little bit, but moving forward to slide 24, should you consider hiring an external investigator and you know, here are the pros and cons. And I think these are pretty self explanatory. I would say, you know, obviously, the advantage of hiring an external investigators that there's this appearance of neutrality, and you also the level of experience, you could potentially hire an external investigator who has more experience than anybody that you have internally. Also, external investigators typically have no previous knowledge of the situation. So they're not bringing in their own biases, and they're there. And there's no existing working relationships that could potentially sway their opinion. So I would say, you know that one of the bigger downsides of the bigger cons of hiring an external investigator is the cost and the time, sometimes in most of the time, almost all the time, it's more costly, and most of the time, it could take longer.

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So the biggest

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question to ask is, does this matter rise to a level that's serious enough? Or does it involve a really high level person that we can't that you know that you can't? The agency can't handle internally? And it's it is worth the cost of asking someone outside the organization to handle it. Slide 25. And if you conclude that, yes, an external investigator is necessary here, here's here's some factors you should consider when hiring someone, you know, make sure this person is has the experience with investigations that you're looking for, make sure they have knowledge of the law, typically, in workplace investigations, you know, that no one the investigator is not making legal conclusions. However, it is important to have the background knowledge of what the law says in order to you know, make sure they're looking for relevant evidence, asking the right questions, assisting you in determining the scope, so that you can take the information they're gathering, and the factual

findings are making unable to apply it to the law. So that's why it's still important that this person have the requisite knowledge, the requisite legal knowledge. You know, you'd like to make sure that this outside investigator has some experience testifying, if you think that if you anticipate that this might be an issue in an administrative hearing or in litigation, look for a reputation for independence, there's many law firms, particularly large, larger law firms who provide typical litigation and advice and counsel work. And then they sort of have a division that does independent investigations. And you know, while these Well, you know, I know many of these folks, and they're wonderful and perfectly competent investigators. There are, you know, also consider that there are firms set up exclusive exclusively provide neutral work, you know, firms like ourselves, and then there's so many across the country that deliberately make the decision of we are only going to take on investigations and mediations and trainings, because we really want to emphasize and build a reputation for independence. You'd want an outside investigator who has good communication skills, particularly because they're not one of your internal employees. Someone who has the right subject matter expertise,

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and also the ability and

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this is important to right sides an investigation that is there providing you good value by identifying the appropriate scope of the investigation, and not going into overkill mode.

25:02
Okay,

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so number four steps in conducting the investigation. And I'm on slide 26. So the investigation is now moving forward, here are the steps to follow when conducting the investigation. An overview of here's what you should do to prepare. First try to determine what the scope of the investigation is. And obviously, this is something that can always be revisited later. But it's very important at the outset to sort of have a clear sense of Okay, this is what we need to make factual findings on and that way you're not chasing every rabbit hole that might come up. And what scope can look like some examples. Did john Jones make a race based comment to sue Smith during the holiday party? And if so, what were the circumstances? That's an example of how to frame an issue? Another example is, did Sue Smith treat her employees in an abusive manner by yelling at them ripping up their work product and or requiring them to run personal errands for her? And if so

what were the circumstances, you'd want to also review some foundational documents, and that can be personnel files or charts, if there was a written complaint that was submitted, although we do caution against reading too many foundational documents, though, because you don't want to inadvertently bias yourself for or against any of the parties. And knowing too much can tend to causes bias, especially if you find out information like, you know, this employee brought a complaint, the employee bringing the complaint, the complainant has brought similar complaints on five other occasions, and none of those allegations were sustained. And oh, well, gee, I wonder how this one's going to turn out.

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Right.

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And once you kind of have, and that's why we tend to say, strike that balance, try to strike that balance between getting some information about the complaint and the complainant, but not too much information. And once you kind of have a sense of Okay, this is what I'm investigating, and here's the documents I need to review. Typically, the very next step is to interview the complainant, make sure you get the universe of the complaint. That's is what I say the universe of the complaint. And that way, the complainant has the opportunity to get everything out on the table. And hopefully this will minimize any sort of surprises later. also gather other documentation often and most of the time, I would say this comes directly from the parties or the witnesses themselves. And be sure to follow up with those parties and what the witnesses if they say that they're going to provide you with something, determine who else to interview and the order, and we'll touch on this in just a minute. And of course, circle back to the complainant and into other interviewees on as needed. And some logistics to consider before you meet with anyone or before you meet with the complainant or anyone that you need to interview. Where will the interviews take place? I think the most important consideration in terms of interview location is that the interviews take place somewhere private.

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Obviously, that

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was a case that was an issue in the case I discussed earlier the Mendoza case where they were interviewed in that glass fishbowl. And in this day and age of the covid 19 pandemic, everyone's working from home. And so privacy might be a little bit harder. But what I tried to do to get

ahead of that is to include a note to everyone I'm scheduling with, to try to make sure that they are in a private area at the time of our interview. And I will say 99 times out of 100 This isn't an issue and they're able to follow follow that instruction. Another thing to keep in mind is the comfort of the witness and the ability to leave the room. And obviously this is a little bit more applicable to in person interviews. When I do in person interviews, I try to make sure to give the person I'm interviewing the seat closest to the door so they don't feel like I'm somehow physically trapping them there. And the concern here is of course, any sort of allegations that this is a you know, a false imprisonment, you know, potential false imprisonment claim.

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The order

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of the witnesses obviously start with the complainant.

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And

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after as an external investigator, what I do is I circle back with my client contact after I've had my complainant interview, and I go over my witness list and my respondent list and I asked for their help in sending out the notices and the initial introductions for purposes of scheduling. But in terms of the order, this specific order, I'm not wedded to a particular Order. Some investigators like to save the respondent for last so that they gathered as much information as possible. And they only need to the idea being hopefully they only need to meet with the respondent one time. But other investigators I know, like to interview the respondent first to see if any of the allegations are uncontested. And hopefully, you know, save some time that way. I will say there is no right or wrong way to do it. And for me, personally, my approach is to stay flexible. Slide 29, whatever, what evidence might you gather? Well, emails, memos, letters, obviously all of those can be relevant and extremely helpful, and particularly when it comes to dates and trying to find out the timing of everything. But you've also got to consider the probative value of gathering certain information. How useful is this evidence going to be to you? I once had a case where the allegation was that the employees of a certain race, were being disciplined more than employees of other races. So I asked the HR department that that was my contact for some statistics. You know how many Asian Americans or African Americans were being disciplined this past year compared to other races, and it turned out, they did not have an electronic system that dated as

far back as I needed. So that means they would have had to go through all their files in storage manually to gather this data. So when factoring all of this, and also when considering the other evidence I had, I determined and I just said, you know what the probative value of this of this data did not outweigh the cost to my client of going through the trouble of gathering this information. Okay. And also consider whether you need outside expertise. I had another case and another investigation that I handled recently, the allegation was one of financial misappropriation. And as many of us lawyers joke, I don't do math. That's why I became a lawyer. So the client who retained me also retained an accountant to go through and locate the accounts that were potentially affected by the misappropriation of funds. And also to determine how much was misappropriated that it was my job to take the information from the accountants report, give the respondent an opportunity to review the information and respond to the accountants report. And then I made the final determination as to whether the respondents explanation was reasonable, plausible, and supported by the evidence. And, of course, one of the information one of the evidence, one type of evidence you're gathering are, it will be through the course of witnesses through through your interviews, slide 30. When asking interview questions, keep them open ended. Try not to ask a question so specific, that it suggests an answer. And that's also known as leading, try to stick to these questions. Who, what, where,

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when? How?

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Tell me what happened?

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When did this happen?

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Who else was there? How do you know that information?

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We call this the funnel method. We and I even have a little visual for you the funnel method. Start meeting start broad start broad and circle back, circle back to drill down on the details. Look for contradictions. So you can get clarification. One example. You know, I've often had to ask for clarifying information. Like earlier you said this happened two years ago. But Just now you said

this same incident happened two months ago. So can you clarify this for me.

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And also,

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be careful in how you approach questioning? Obviously, you're starting broad, but as you get narrower and narrower, and as you really start drilling down on the details, be sensitive and how you approach these topics. For myself, I had to get out of my litigating habits when I transitioned into this line of work and not cross examining the people I was interviewing, and that's why we advise, in particular being careful on asking why in a manner that's too judgmental. You know, interestingly asking people why did you do that? can make the interviewee very defensive. So we approach it differently. Instead of asking why we say, Can you clarify that for me? Can you give me some more context? Can you give me some insight on that. And that's what we mean by trying to be careful, try to be sensitive, try not to sound too judgmental. And in terms of approaching, you know, sensitive topics and being sensitive to topics, this also gets into some nuanced issues that I don't have time to cover here. But I do want to mention here because it's very, it is very important to the work that we do. Specifically, I'm referring to being trauma informed. And clearly trauma informed is a topic that's beyond the nuts and bolts of an investigation of the workplace investigations. There are many, many trainings on trauma informed trainings, and I highly encourage you to look into it as you're developing your skill sets as a workplace investigator. Slide 32, documenting the interview, there are many ways you can do this. You can record the interview, you can take notes, either handwritten or typed of the interviews. And you can also have a note taker accompany you to the interview, which is something that which is something our office does and we utilize writers and note takers to to assist us and provide us with invaluable support. The important thing to note here is to maintain consistency. What's your organization's practice when it comes to note taking, and truly there are there aren't right or wrong ways to do it. And many excellent investigators have a difference of opinion in terms of what is a good or what is a good approach. For us, for our firm as external investigators, we actually leave it up to our clients to advise us on whether or not they want us to record interviews, since the practices can vary so widely. And of course, most importantly, retain the documentation. Regardless of how you do it, retain the documentation related to the investigation, make sure you have a robust document retention policy. And this is important because you never know when you'll need to reference this information again, especially if the if the issue escalates to some sort of an administrative grievance or litigation. So slide 33. Now that you've completed your invest interviews, and you've gathered all the evidence, you get to the fun part, this is why you get paid the big bucks. It's your job to weigh and consider the evidence that you've collected. The standard that applies in 99% of workplace investigations is the

preponderance of the evidence standard. I have been asked to use the clear and convincing standard on two occasions, and thankfully the client I work with I've worked with had its own definition in his policies of what that meant. We do not use the beyond a reasonable doubt standard. That is the standard used in criminal court. So what does preponderance of the evidence mean? It's also called the more likely than not standard. So the investigator finds that it is more likely than not that the conduct alleged did or did not occur. Or some others refer to it as 50% plus a feather. It's a lesser standard than the clear and convincing and certainly be and also a lesser standard than the beyond a reasonable doubt standard. Many cases, more than you'd like ended up being the notorious. He said she said cases where you're having to weigh the word of one person against the word of another person. And when you're faced with this kind of a case, use still stick with the preponderance of the evidence standard, you still use that same standard, and you apply credibility factors, which we'll get to in just a minute. But it's important that you make a finding. People are relying on you to make a finding and not just copping out with the can't be determined or inconclusive finding you have sufficient evidence to make a finding one way or the other, even if you're just relying on one person's statement. So slide 37. How do you do that? do you assess credibility? And this is permissible? According to the EEOC, the EEOC guidance states that the Commission may make a finding of harassment solely on the credibility of the victims allegations. So don't get me wrong, you do have to search for corroborating evidence whether direct or indirect. But after you search for it As you've come up them and you've come up empty, then it's time to rely on credibility factors. So slide 38. Here's how you make credibility determinations.

40:16
Here's what

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the EEOC says. 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. On slide 40, I've listed out the credibility factors and they are inherent plausibility motive to lie, corroboration, the witness's ability to perceive or recall history of honesty, dishonesty, habit, consistency, inconsistent statements, manner of testimony, and demeanor. So if you look at the next slide, here are the most common or the most popular credibility factors, inherent plausibility. Is this person's account believable on its face? Does it make sense? I once had a complainant, in one of my cases described to me the manner in which the respondent grabbed her clothing and essentially pulled off her clothing in a manner that wasn't plausible. She alleged that he completely took her off guard and did this very suddenly. And it was implausible that he was able to successfully do what she said he did without some sort of a, you know, physical knee jerk reaction from her.

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So

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based on that credibility factor, and among other evidence, but you know, I did consider that in and whether or not her credibility was diminished mode motive to lie or not to lie. You know, oftentimes, where we see this the most is where someone is about to lose their job for poor job performance or for other reasons. And yet this this is the ones one of the ones that we commonly see. And so we consider that and we weigh that in terms of that complainants credibility. corroboration or lack of corroboration, is there witness testimony or documentary evidence that supports what either the complainant or the respondent are saying? consistency, that's another one. I once had a complainant who escalated the nature of the alleged conduct over time. So initially, when my client first did the intake with this complainant, she you know, she can she's she described the respondents conduct and it was relatively straightforward. And by the time it got to me, by the time I interviewed her, suddenly what this respondent was alleged to have done was significantly escalated and much different from what she originally said, and her lack of consistency did diminish her credibility. manner of testimony, the manner of testimony what we mean by that are things like hesitating before giving you an answer when they didn't hesitate before, or not directly answering the questions despite asking the same question multiple times, you can consider an interviewees manner of credibility. But this is in contrast, next slide to some other credibility factors you have to use with caution. The manner of testimony is different from demeanor, which can be things like didn't make eye contact, spoke softly, sat in a stiff manner. Studies show that one's demeanor is not indicative of whether or not they're telling the truth. And if you think about it, that makes a lot of sense. There's so much that goes into one's demeanor that's beyond truth telling, such as your culture or your upbringing. In fact, in some cultures, it's rude to make eye contact with authority figures. So that's why we say exercise caution, if you're going to reference someone's demeanor, and consider whether that is really helpful to you when assessing someone's credibility. And you also have to be careful with reputation and with attitude. People aren't their best selves when they when you're interviewing them. So you've got to be careful to withhold judgment based on how they're acting that day. And ask for reputation also, this this can this can be relevant, but we always try to be careful not to overstate that just because somebody has reputation for doing something on one or two previous occasions doesn't mean that they're going to do it on every subsequent occasion.

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Some

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common pitfalls when determining credibility, over reliance on witness demeanor, which is what we discussed, we've just discussed why that can be a problem. unconscious bias all of us as investigators bring our biases to the table. Confirmation bias. Obviously, that's something we've discussed earlier, making the determination too soon.

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And this goes back to the study that I discussed when we had this when we went over the slides about confirmation bias. Remember, investigations are supposed to be fair, timely, and thorough emphasis

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on thorough.

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And finally failing to make the determination we also touched on that earlier, you have to make a finding that is what you as the investigator are being asked to do. Alright, so you're done with interviews, you've weighed the evidence. And now it's time to put your findings in writing.

46:11
Slide 45

46:13
Here are the two findings you should be making. Sustained, that is an allegation is sustained when an investigation reveals a preponderance of the evidence supports the allegation, or not sustained an allegation is not sustained when a preponderance of the evidence does not support the allegation. And I will say sometimes you can have a mixed finding. So part of the allegation is sustained, but part of the allegation is not sustained. In my experience, I've found that this often comes up when you know, the underlying action happened. But the alleged motive isn't is the alleged motive there there isn't enough evidence This is to sustain the alleged motive for why bad happened. So for example, somebody got somebody lost their job duties, or somebody got demoted, and they alleged, I lost my job duties, or I was demoted because of my race, or because of my gender. And in reviewing the evidence, okay, it is clear that this person was, you know, lost several job duties or was effectively demoted. Yes, I found that a preponderance of the evidence

supported that. However, in reviewing the evidence there was, there wasn't sufficient information to sustain that gender or race was a motivating factor in the removal of job duties at the demotion. So that's what I mean by a split finding. When writing findings, here are the key steps. This is slide 46. You have to explain the reason for each finding, including the evidence considered, and the credibility factors. I think the biggest mistake of anyone who's just starting to learn how to write findings, is just regurgitating the facts, you know, regurgitating the evidence you've gathered, without explaining how you got to the conclusion you got to. And you're kind of expecting the reader to take your regurgitation of facts and make assumptions on how you took those facts and reached your conclusion. So my approach, especially when I was first learning, and first being trained up on writing findings, when I'm writing my credibility assessment, I pull up that slide, the one I provided to you earlier that lists all of the credibility factors, I dumped those credit, credibility factors into my report. And I start plugging in those factors according to the evidence that I have. And that's also how I how I'm able to show that I've considered both sides. And this is what I was discussing earlier, when I refer to the on one hand, on the other hand analysis, it's important, it's important that you appear balanced. And writing your findings out this way shows it shows your work, it shows that you've considered both sides. And also when you get stuck, and you're not sure how to which way which finding to make. Try writing it both ways, and see which one is more persuasive. And I have done this. I had to make a finding in a case to determine whether the CEO of a company made a race based comment to one of the directors and it was a pretty close call. It was a it was a total she said she said situation no other witnesses. And on one hand, the allegations were too specific to makeup. But on the other hand, the scenario that the complainant described, it seemed inherently implausible to me.

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So I wrote that out.

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I wrote out my findings so that I was sustaining the allegation against the CEO. And then I wrote them out again, where I didn't sustain the allegation. It took some time. But I will tell you, it was an invaluable exercise. And it provided me with the clarity I needed to be more confident about what I was concluding. And ultimately, I did not sustain the allegation.

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So

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you think you're done right? You've come up with your investigation plan. you've interviewed all the witnesses, you got your documentary evidence, you wrote out your findings, that means you're done right? Look not quite not quite slide 47, you do have to remember to take some steps after the investigation has been completed. You are not done yet. Once your report is written, and you've made your findings, for you, internal investigators, make sure that you prepare your closing letters and or closing meetings. And typically this is done done just with the complainant and the respondent, also known as the parties to the investigation, not with the witnesses, share with them the results of the investigation, but not necessarily all the details. And you know, the reason we avoid sharing details in order to prevent a chilling effect on the investigatory process, what if everyone who participated knew that everyone else was going to know that they were involved, and also know the specifics of what they said, that would certainly encourage or discourage people from coming forward or cooperating with the investigatory process in

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the future. And

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while I think that closing letters are a really great way to sort of just sort of document that you've closed the loop with the parties, don't rule out how powerful you know, that personal touch can be with an actual meeting, you know, whether whether it's over zoom, or whether it's in person, but don't rule out how powerful those meetings can be, you know, for one investigation that I that I was actually overseeing this investigation, I wasn't the one who actually conducted it. And, you know, we were kind of just preparing the letters, you know, we're just planning on sending the complainant a letter. But I but you know, my, my supervisor at the time, and I had this conversation about, you know, it seems a little, it seems a little disingenuous to just send a letter, and then that's the end of it. You know, what, what sort of closure is this complainant going to get if we just send off a form letter? So we actually suggested to the department that the complainant was complaining about, she was complaining about one of the high level managers and so we asked, we actually asked the department head, we asked the department head, will you consider taking some time to sit down with this complainant and explain that, look, there wasn't sufficient evidence to make a finding to sustain the allegations you made against this high level manager. But I want you to know that that we hear you we heard your complaint, we understood we understood your complaint. And we we take this very seriously. And if this becomes an issue again, please let us know. And there was such a there was such a, you know, a human aspect of that communication was so powerful, and really assisted this complainant in achieving closure in that matter. So as much as we all want to wrap up our investigation, send out our form letters and move on to the to the other five cases that are that are burning holes on our desks. You know, I think I think one of the biggest complaints I've heard with many of my clients

and the witnesses I interview is, well, they didn't do anything. They didn't do anything to address my concerns. They didn't do anything to address my complaint. And I think the human touch can really go that personal touch can really go a long way to sort of to fight that belief or to fight that, that impression that people can get. Alright, slide 49 you also have to keep your eyes and ears open regarding retaliation. So as you're aware, even if the underlying complaint is found to not have merit, there can still be liability if anyone is retaliating because of the investigation. One of the cases I handled an elected official was involved and was accused of sexual harassment. And the ultimately the complaint of sexual harassment against this elected official was not sustained. It was thrown out completely it was baseless. meritless. However, the complainant then alleged that this elected official retaliated against them for bringing the complaint you know, taking away job duties not Speaking to this person, which potentially affected their career advancement. And unfortunately, there was evidence to sustain the retaliation allegation. And eventually, that led to liability for the agency. Because of this the the actions that this elected official took against the complainant. So the point being, even though the underlying complaint was found not to have merit, that was irrelevant for purposes of the retaliation complaint. And that's why retaliation complaints can be so onerous. So it's important to monitor the work environment, make a determination of who is going to do this, check back regularly with the parties. And if anyone raises retaliation issues with you, be sure to respond promptly respond in a timely manner, just like you would any other complaint for an investigation. And then of course, whatever actions you take, or whatever you do to address the situation, be sure to document that, whether that's, you know, just a memo for your files or something for something more formal, like a like a report or an internal memo.

56:07

So this essentially concludes my presentation. Some things that I wanted to draw your attention to in the slides is slides, 50 5051 and 52. I've been included in order to provide you with some resources to further your breadth of workplace investigation knowledge. So I encourage you to check them out. On slide 50, here are some important cases and statutes. There. Again, a bunch of these are based in California. But there's also some Supreme Court cases and some federal cases that are cited to here. On slide 51, here's some resources that you might find useful. The California DFE h guidelines that were that were prepared in 2017. The EEOC also has similar guidance. And of course, another wonderful. Another wonderful resource, if you're not familiar with it already is the Association of workplace Investigators also known as a WI, eight, I encourage you to seek out membership you know, to research some memberships, see if that's something that interests you. And they also publish guiding principles for conducting workplace investigations. And of course, there's so many resources countless resources regarding from handbooks from large law firms or employers and of course resources produced by Sherm, and on slide 52, a couple of how to books that we wanted to particularly draw your attention to, of course, we have our own bias towards the first towards a book on the left, it was written by our

fearless leader, Amy Oppenheimer, but also the resource to the right the publication on the Essential Guide to workplace investigations printed by Nolo press is also very, very good. So thank you so much for tuning in. My contact information is also included. It's on slide 53. Please feel free to reach out if I can assist you with anything so thank you for joining me and, and yeah, and please enjoy, and I hope that you know, you were able to learn a thing or two from this presentation.