

Internal Investigations: How to Investigate Employee Misconduct With An Eye Towards Litigation

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Importance of Investigations

Why is it important to conduct an investigation?

Provides **a defense** if employer took reasonable care to

(1) prevent and

(2) promptly correct harassment.

Importance of Investigations

“[I]f the employer has an adequate policy and complaint procedure **but an official failed to** carry out his or her responsibility to **conduct an effective investigation** of a harassment complaint, **the employer has not discharged its duty** to exercise reasonable care.”

– EEOC Enforcement Guidance

Good Investigations Save You Money

- Lawsuits have increased by 400% in past 20 years
- More than 40% filed against employers with 15-100 employees
- Almost 24% filed against employers with 500+ employees
- 16% chance award will exceed \$1million
- 67% chance award will exceed \$100 thousand
- Average compensatory award in Federal Court is almost \$500 thousand

...and Money Isn't All You Save

- Staff distraction, stress and effort
- Reduction in employee morale
- Damage to reputation
- Perpetuating bad practices
- Successful lawsuits breed more lawsuits



Goals in Investigation Procedure

- 1. Promptness** – Shows reasonable care to prevent future misconduct
- 2. Confidentiality** – Decreases the fear and likelihood of retaliation
- 3. Thoroughness and Impartiality** – Inspire employee confidence and help prevent lawsuits

Important Considerations

- What triggers an obligation to investigate?
- Timeliness of investigation
- Is the investigation an adverse action?
- Suspensions with or without pay?
 - exempt vs. non-exempt employees
- Effect of employee's request not to investigate
- Who conducts the investigation?
 - When should you get an attorney involved?

When to Investigate?



When any information comes to light – from any source – that relates to potential violations of the law and/or company policies.

- Includes traditional complaints, hotline calls, and even water-cooler gossip (depending on the topic)
- You have an obligation to conduct a thorough investigation and properly document your findings and actions.

Protecting the Parties

- **Protect the Complainant**
 - Consider scheduling changes to reduce contact between accused and complainant.
 - *Remember:* The complainant should not be involuntarily transferred, placed on leave or otherwise burdened because of the complaint or incident.
- **Protect the Accused**
 - Consider putting him on administrative leave.
 - Consider effect on relationships in organization.

Investigation File

- Create a separate file for each investigation.
- **Remember:** Investigation-related documents may be **discoverable**.
 - E-mails, notes, sarcastic comments and drafts could all end up in front of a jury.
 - Always think about the records that you create and retain – they may ultimately make or break the case.
 - Copy attorneys, where appropriate, to increase likelihood of attorney-client privilege protection.

Don't Forget the Big Picture

- How will my actions...
 - reveal the truth?
 - lead to a crisp, defensible, well-documented resolution to the complaint?
- If unclear about the purpose of your actions in an investigation, you're doing it wrong.
- How will investigation summaries and related files be used in the event of future challenges?



Step 1: Be Prepared

- **Begin promptly but be prepared:**
 - Purpose of investigation?
 - What policies are implicated?
 - Who will be interviewed?
 - In what order?
 - When to talk to the accused?
 - What questions will be asked?
 - What documents need to be compiled?
 - Plan/timeline for interviews?



Step 1: Be Prepared – Note Taking

- Date and time
- Identify those present
- Questions/areas of inquiry
- Specific responses – details: who, what, when, where, how
- No legal words/assessments/conclusions – just fact finding
- Avoid personal opinions or judgments
- Use a note-taker?

Step 2: Interview the Complainant/Victim

- **Plan your interrogation:** Preparation pays.
- **Be nimble:** Don't forget to listen and ask follow-up questions.
- **Remember the goal:** Find the truth.
- **Take your time:** Allow the interview to unfold.
- **Remain impartial:** You don't know what happened yet.

Step 2: Interview Complainant – Recommended Questions



- **Basic Fact Finders:**
 - Who, what, when, where, how
 - Who did it? What happened? Who else heard it or saw it? When did it occur? Has it stopped? Where did it happen? How often did it occur?
 - How did it affect you? How did you react? What was your response when it occurred or afterwards?

Step 2: Interview Complainant – Recommended Questions

- **Protecting the company:**
 - Who else knows what happened?
 - Has anyone else had the same or similar experience as you have?
 - Are there any notes, documents or other physical evidence?
 - Has it affected your job performance?
 - How would you like this to be resolved?



Step 2: Interview Complainant – Important Considerations

- Discuss the importance of **confidentiality** and its **limits**.
- Calm any fear of **retaliation**.
- Take **factual** notes (subject to debate).

Check your policies to see if a clock starts upon complaint.

- Certain number of days to get back to complaining employee?
- Certain number of days to complete investigation?
- **Regardless, time is of the essence.**

Step 3: Create a Plan for Investigation

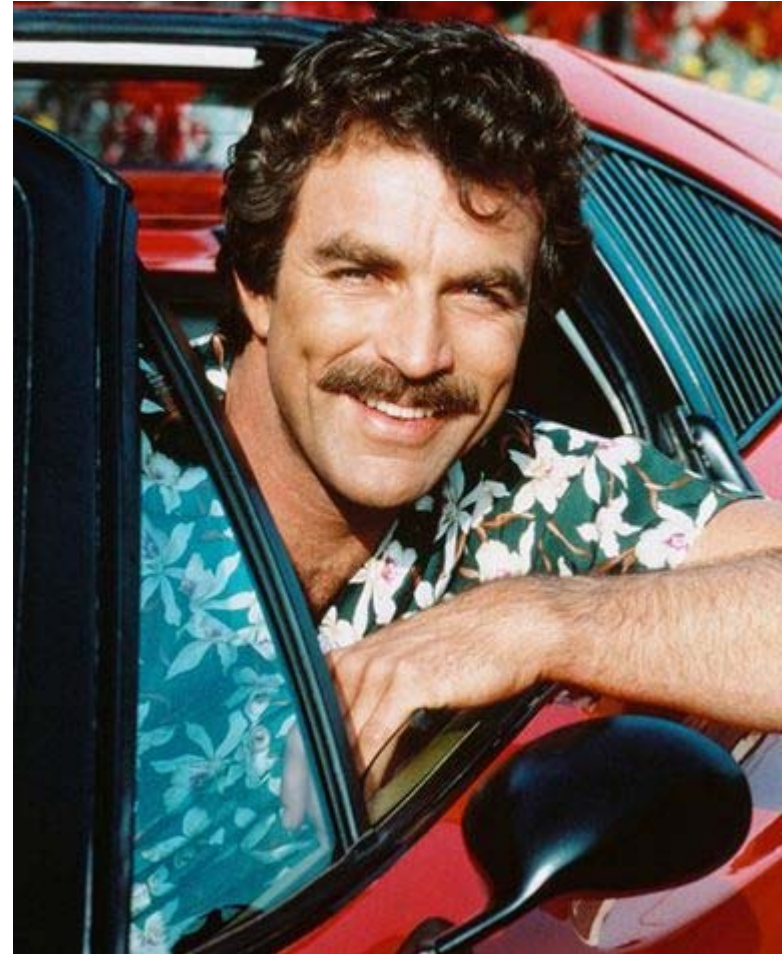
- Nature of the conduct?
- Who should investigate?
- Who should be involved/aware?
- How intrusive?

What Methods Should be Used?

- Involve the union?
- Searches?
- Video or photographic surveillance?
- Record telephone conversations
- Monitor e-mail or other computer records

Step 3: Create a Plan – The Investigator?

- **Who is conducting the investigation?**
 - Must be impartial
 - Must be able to objectively gather and consider the relevant facts
 - Should not be subordinate of accused
 - Accused should not have any control over investigation
 - Attorney?



Step 4: Obtain Documents

Gather documents complaining employee identified in interview:

- Complaining employee's personnel file
- Personnel file of accused employee
- Documents retained by supervisors
- E-mail, texts, photos, tapes, gifts, etc.
- Files related to prior investigations?

Step 5: Take Appropriate Interim Action

- Designed to prevent **retaliation** or further **misconduct**
- May include: Schedule changes, transfers, paid leave
 - For complainant, only if **voluntary**
 - For accused, can be involuntary, but should be characterized as **non-disciplinary**
- **Maintain confidentiality!**
 - The integrity of the investigation demands it.

Step 6: Interview the Accused



Ask appropriate questions:

- Only an investigation
- Consider **how much** info to disclose and **when**...
- Consider the **order** of questions...
- Ask for a general response to the complaint.
- Ask for specific responses to each action or comment.

Step 6: Interview the Accused

The Interview:

- Any possible motives for false accusation?
- Any documents or other physical evidence?
- Any third parties who may have relevant information?
- Document the interview.



Step 6: Interview the Accused



- Discuss the importance of **confidentiality** (and its limits).
- Warn against non-business contact with complainant.
- Take factual notes.
- Warn against **retaliation**.

Step 7: Interview Witnesses

- Advise witness of importance of telling the truth.
- Ask appropriate questions:
 - Open-ended
 - What witness saw or heard
 - What witness was told by accused or complainant
 - Existence of physical evidence?
 - Others with information?
 - Tell her she is not necessarily entitled to be notified of outcome of investigation.
- Discuss the importance of **confidentiality** (and its limits).
- Listen...

Step 8: Circle Back

- Stay in contact with complainant and accused.
- Apprise each of status of investigation as it relates to them.
- Document dates of meetings and topics discussed.

Step 9: Evaluate the Evidence – Determine Credibility

- **Sensibility** – Does the person’s story make sense when considered alone?
- **Demeanor** – Did the person’s body language and tone indicate truth or deception?
- **Supporting evidence** – Does the physical evidence tend to support one interviewee’s account over another’s?
- **Inherent plausibility** – Is the testimony believable? Does it make sense?
- **Motive to lie** – Did the person have a reason to lie?
- **Corroboration** – Anyone else say something similar?
- **Past behavior**– Is there any history of this?

Step 10: Conduct Follow-up Interviews



**KEEP
CALM
AND
BE
THOROUGH**

- Re-interview parties and witnesses about new information, if appropriate.
- Follow same guidelines as with previous interviews.

Step 11: Reach a Conclusion

Possible Findings:

- Alleged conduct **occurred.**
- Alleged conduct **did not** occur.
- Investigation is **inconclusive.**



Step 11: Reach a Conclusion

Remember: Avoid inserting legal conclusions into an investigation summary.

- **Good:** “Creepy Smith was found to have violated the Company’s Anti-Harassment Policy.”
- **Bad:** “Manager Creepy Smith is guilty of sexually harassing hourly employee Whiney Jones.”
- **Bad:** “Manager David Duke created a hostile working environment for Whiney Jones because of her race.”

Step 12: Meet with Complainant

- Inform of results of investigation.
- Advise of substantiated and unsubstantiated allegations.
- Assure her that the company takes such complaints seriously.
- Schedule follow-ups with complainant, as appropriate, to ensure well-being – be proactive.

Step 13: Meet with Accused

- Inform of results of investigation.
- Advise of action to be taken.
 - discipline
 - training
 - new assignment
- Warn against retaliation.
- Schedule follow-ups, as appropriate.

Step 14: Enact Corrective Measures

Where allegations have been substantiated, take appropriate steps to:

- **Stop misconduct** and ensure that it does not recur.
- **Counter** the effects of misconduct on victim's life.

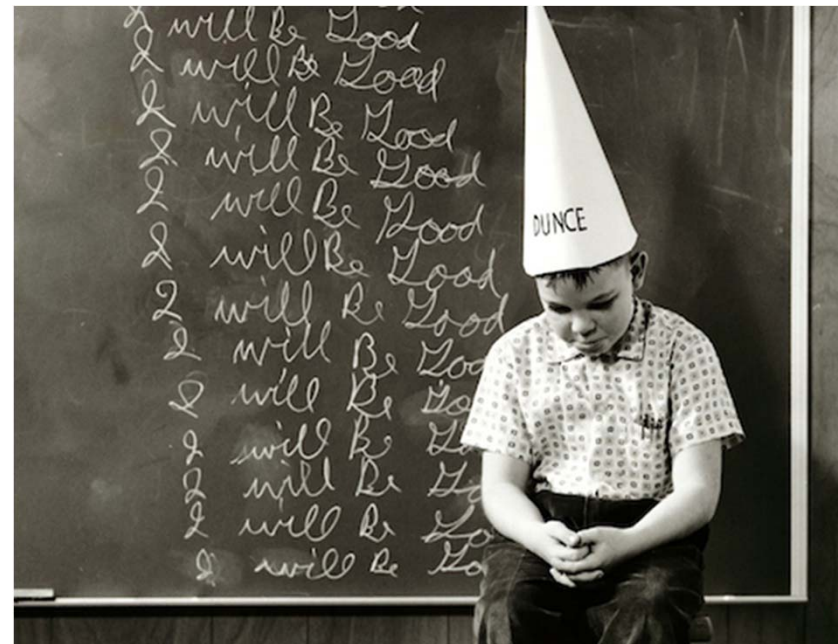


Step 14: Enact Corrective Measures

Discipline should be:

- Consistent.
- A punitive warning **and** an expectation of future conduct.
- Properly documented – even verbal warnings.

*You are the Coach,
not the Momma*



Step 14: Enact Corrective Measures – Checklist

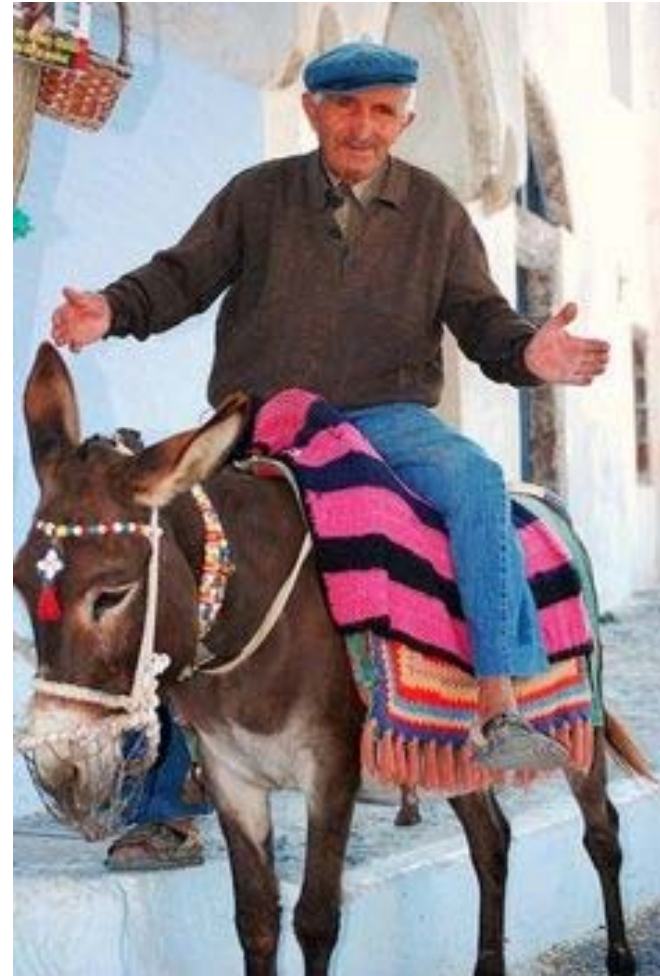
- ✓ Date it (date of occurrence and date of disciplinary action).
- ✓ State the reason – **facts only** – and specific witnesses' testimony.
- ✓ Reference applicable policies.
- ✓ Reference any prior discipline, with specificity.
- ✓ Describe the consequences based on the findings.
- ✓ If departing from a written progressive discipline policy, state why.
- ✓ Clearly outline **future expectations**.
- ✓ Allow employee to respond.
- ✓ Have employee sign the document.
- ✓ Follow up – document whether there was improvement or continuing failure.
- ✓ Maintain a record of discipline in the employee's personnel file.

Caveat – Discipline: Train Your Supervisors to Document

Supervisors must carefully document disciplinary issues...

Why?

- Consequences/progressive discipline policy
- Change in supervisors
- Evidence for EEOC response, at trial, in unemployment benefits hearing
- CYAN



Caveat – Document Everything Carefully; Avoid Self-inflicted Wounds

Question: What is the main cause of unfavorable litigation outcomes in employment cases?

Answer: Lack of documentation

Ask yourself: Can I prove it if she denies it?

If not, do more.

Step 15: Finished! But Preserve Your Record

- Keep records with Legal or Human Resources to establish a record of the company's actions/findings and to ensure confidentiality.
- Restrict access to investigatory records.



Government Investigations

- A federal court in California issued an injunction after an employer interfered with the DOL's investigation into misclassification of cab and limo drivers as independent contractors. Drivers were told not to speak to investigators and to say they were independent contractors (*Perez v. Abbas*)
- EEOC authorized to investigate possible discrimination even if the claimant who filed the EEOC charge had her individual suit dismissed or reached a settlement with the employer. The agency serves not only the individual's interests, but the public's interests, explained the court (*EEOC v. Union Pacific Railroad Co.*)
- The employer was enjoined from terminating, suing, or otherwise retaliating against employees for exercising OSH Act rights; telling employees not to speak to DOL representatives; and otherwise obstructing an ongoing DOL investigation (*Perez v. Lear Corporation Needs and Interiors*)

Questions?

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