

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

Internal HR Investigations: Step Up To The Master Class

Presented By:

M. Kim Vance

Email: kvance@bakerdonelson.com



EXPAND YOUR EXPECTATIONSSM



Agenda

- Understanding when to investigate and why
- Strategic use of the attorney/client and work product privileges
- Responding to the false or malicious complaint
- Resolving the unresolvable conflicts between witness statements
- Simplifying the process of writing the investigations findings, conclusions, and recommendations
- Defending your investigation before the EEOC and in court

Case Study





Do the
circumstances
present potential
legal issues or
just employee
relations' issues?

This Question Impacts

- Who conducts the investigation
- Whether legal counsel is involved
- The timeline for the investigation
- Documentation of the investigation
- Corrective action
- Follow-up

Do you need to
conduct an
investigation or are
there other options
for resolving this
situation?



The Affirmative Defense

- The Employer undertook reasonable care to prevent
- and promptly correct harassment.



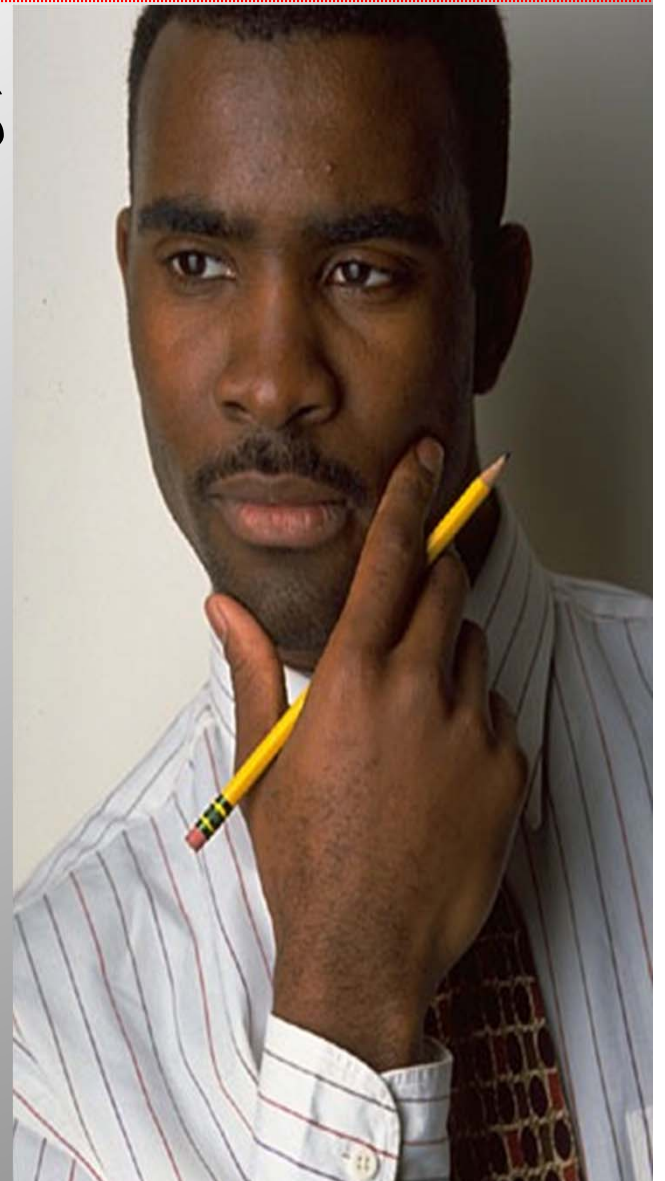
“[I]f the employer has an adequate policy and complaint procedure but an official failed to carry out his or her responsibility to conduct an effective investigation of a harassment complaint, the employer has not discharged its duty to exercise reasonable care.”

***EEOC ENFORCEMENT GUIDANCE:
VICARIOUS EMPLOYER LIABILITY
FOR UNLAWFUL HARASSMENT BY
SUPERVISORS***

“If the harasser is a coworker, then the employer is liable if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action.”

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What are the claims that should be investigated based on Elaine's description of the events?



Initial Claims

- John's personal conduct toward Elaine
- John's management of Elaine
- Elaine's tardiness/absences
- Elaine's performance
- Judgment on the part of a manager





John's Personal Conduct Toward Elaine

- Did it happen?
- Did it happen as Elaine described or is there more to it?
- Did John's conduct violate Company policy?
- If not, did John show poor judgment on the part of a manager?



To Discuss With Legal Counsel

- Is there potential for John's conduct to rise to the level of...



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- What can be done to reduce Company liability?

Elaine's Tardiness/Absences

- Has Elaine's attendance changed since the date she said she got the note from John?
- Has John managed Elaine's absences consistently with any similarly situated employee?
- Did John violate Company policy by not reporting Elaine's tardiness/absences to HR?
- Did John violate Company policy in issuing corrective action for tardiness/absences?
- Did John use poor judgment as a manager?
- What did John know about the reasons for the absences?

To Discuss With Legal Counsel

- Could Elaine's absences have been covered by FMLA?



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- What can be done to reduce Company liability?

Elaine's Performance

- Has Elaine's performance changed since the date she said she got the note from John?
- Has John managed Elaine's performance consistently with any similarly situated employee?
- Did John violate Company policy by not reporting Elaine's performance problems to HR?
- Did John violate Company policy in issuing corrective action for performance?
- Did John use poor judgment as a manager?

To Discuss With Legal Counsel

- Could Elaine's name be



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Judgment As A Manager

- Has John done anything that shows he is using poor judgment as a manager?
- Has he violated company policy?
- Has he failed to partner with HR on key issues?
- Has he engaged in conduct that could increase legal risks for the Company?
- Is he cooperating with HR during the internal investigation.

To Discuss With Legal Counsel

- If you decide to take action on



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- ...and the RISK of
company liability if he does sue?

Who Should Conduct The Investigation?



EEOC Guidance and Case Law

- The investigation must be impartial
- The person who conducts the investigation must be able to objectively gather and consider the relevant facts.
- The investigator should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

EEOC Guidance and Case Law

- The accused should not have supervisory authority over the individual who conducts the investigation.
- The accused should not have any direct or indirect control over the investigation.

Practical Realities

- Can an investigation be neutral if the investigator is at a lower rank in the company than the accused or complainant?
- Can anyone in the company really conduct a neutral investigation of executives?
- Are there situations where using an outside consultant could improve the Company's defense in litigation?
- What about using in-house or outside counsel?

The Attorney As Investigator

- You may use in-house or outside counsel as your investigator.
- Consider the impact on the attorney/client and attorney work product privileges.

The Attorney/Client Privilege

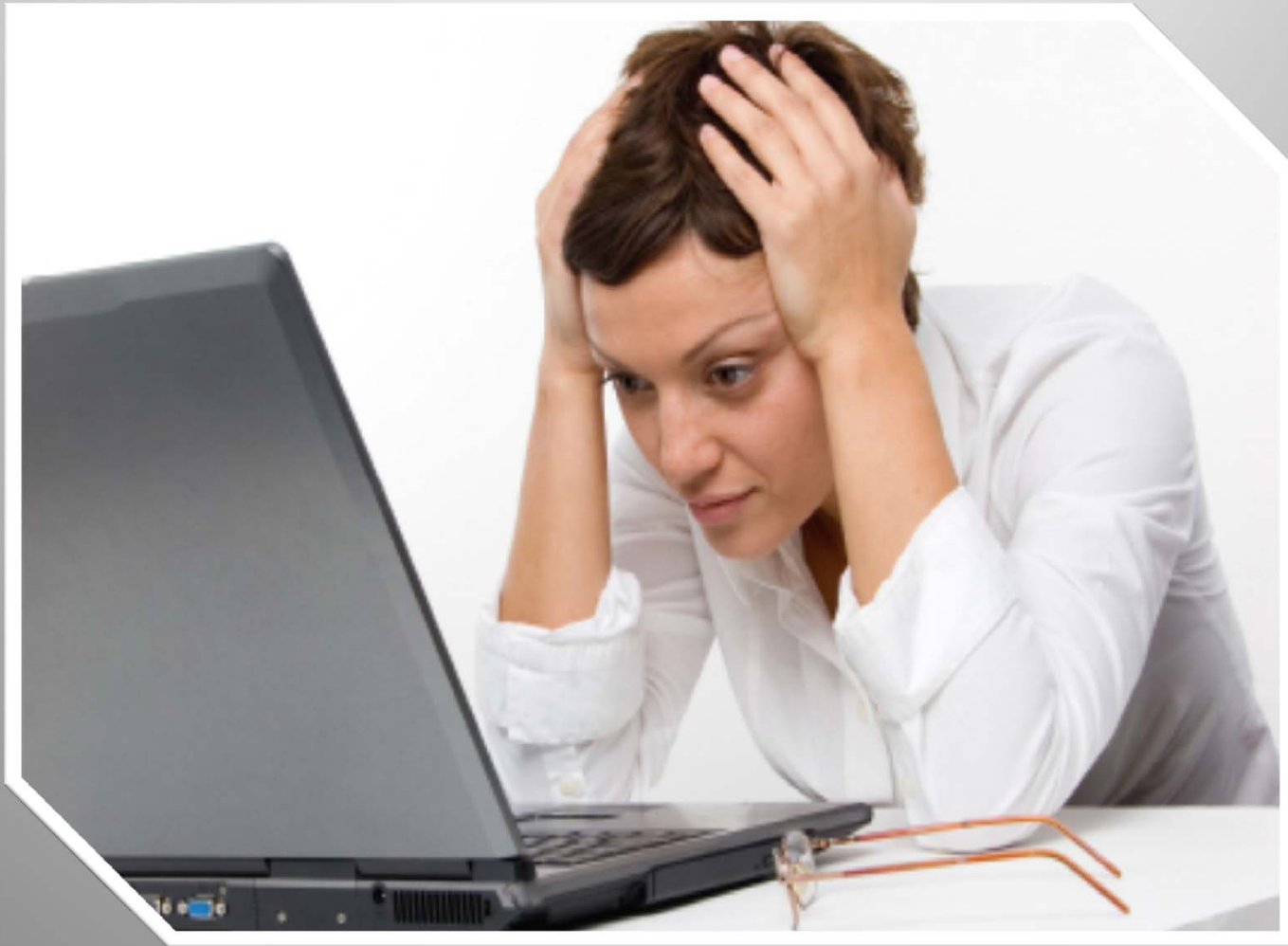
Remember, your investigation process, deliberations, file, conclusions, and corrective action are all highly relevant evidentiary matters.

- You do not want to try and cloak the entire process with the attorney/client privilege in most circumstances.
- You may want some of the process to be confidential, however.

To Protect The Attorney/Client Privilege

- The work of the attorney must constitute legal work and not just business operations.
- To be legal work, the attorney must be evaluating legal risks, preparing for litigation, and/or acting as a legal advisor to management.
- If the attorney is merely acting as one of the decision-makers or is just carrying out HR policies and practices, the attorneys' statements and documents are not privileged.
- All documents desired to be protected from disclosure should be appropriately marked and kept separately from the investigation file.

Divide and Conquer?



Don't Forget: Your Investigator
Will Be A Key Witness Before The
EEOC And In Court!



**CHOOSE
WISELY.**

Do you need to take any
intermediate steps pending
investigation?

Possible Intermediate Steps

- Placing the accused on administrative leave
- Changing reporting relationships
- Making scheduling changes to reduce contact between accused and complainant
- Rule: The complainant should not be involuntarily transferred, placed on leave or otherwise burdened since these measures could constitute unlawful retaliation.

How Long Should It Take?

- The investigation has to be both prompt and thorough according to EEOC guidelines.
- If a fact finding investigation is warranted, it “should be launched immediately.”
- The amount of time that it will take to complete the investigation will depend on the particular circumstances.

Do Not Confuse

"Promptness"

With

"Lack Of Preparation"

What are the steps
that should be
taken to
investigate Elaine's
issues?



Decide in Advance

- When to talk to the accused
- Who will be interviewed
- In what order
- Timelines for interviews
- What documents need to be compiled
- What questions need to be asked

Who To Interview

- The EEOC advises investigators to interview the complainant, accused, and third parties who could reasonably be expected to have relevant information.
- Interview witnesses identified by the parties.
- Interview persons known to be reliable and knowledgeable.

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Recommended Questions

- Who, what, when, where and how: who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?
- How did you react? What response did you make when the incident occurred or afterwards?

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Recommended Questions

- Are there any persons who may know something about these incidents?
- Is your job performance affected?
- Has anyone else had the same experience as you?
- Are there any notes, physical evidence, or other documentation about the incidents?
- How would you like to see the situation resolved?

For The Accused

- Ask for a general response to the complaint
- Ask for specific responses to each action or comment
- Obtain a specific response
- Ask for documents or other physical evidence
- If the accused says the accusations are not true, ask for a motive for the complainant to lie

Can you ask everyone involved to keep the investigation confidential?



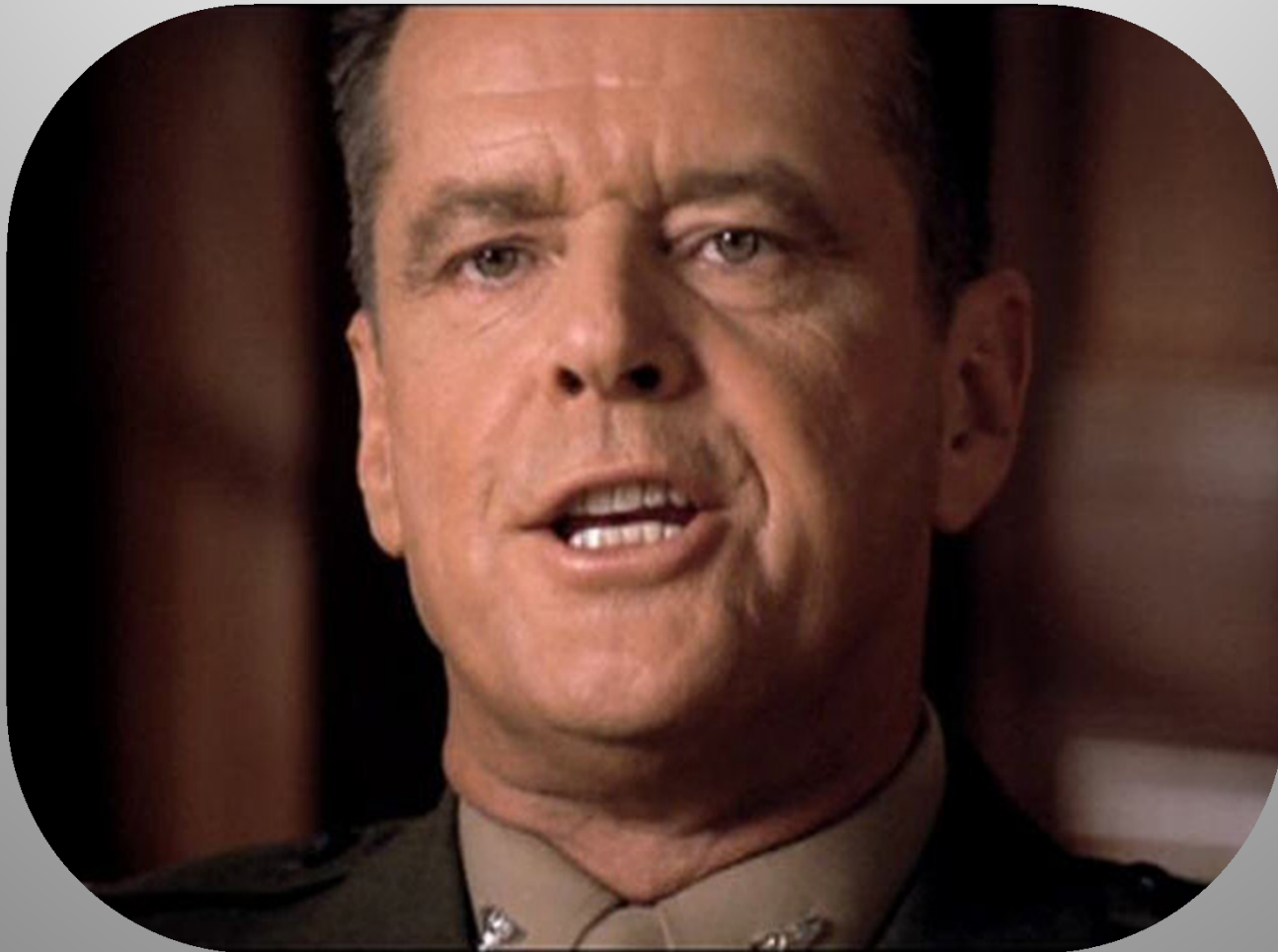
What can you do?

- Ask those involved to respect the Company's need to conduct an impartial investigation.
- Direct those involved not to try and influence the testimony of any witness.
- Direct those involved not to engage in idle gossip about the investigation.
- Direct those involved not to engage in disruptive conduct during the course of the investigation including not taking others attention away from work to discuss the investigation.
- Hold managers to a higher standard.

Taking Notes During Interviews

- Date and time
- Persons present
- Questions/Areas of Inquiry
- Specific responses, details, who, what, when, where,
- No legal words/assessments/conclusions – just fact finding
- No personal opinions judgments
- Use of a note-taker

**Can you handle
the truth?**



“If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility.”

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Factors To Consider Include:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?

Factors To Consider Include:

- **Corroboration:** Is there witness testimony or physical evidence that corroborates the party's version of events.
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

Making The Final Determination: KISS



Your Choices

- Inappropriate conduct did occur and/or Company policy was violated
- Inappropriate conduct did not occur and/or Company policy was not violated
- Investigation Inconclusive

“The parties should
be informed of the
determination.”

“If no determination cannot be made because the evidence is inconclusive, the employer should still undertake further preventative measures such as training and monitoring.”

Making the Tough Calls

- Resolving the false or malicious complaint
- The witness who “lawyers up”
- When the accused will not cooperate
- When evidence is destroyed
- The witness who lies

Update Your Handbook Provisions

- Complaints will be investigated and investigations will be kept as confidential as possible under the circumstances of each situation.
- All employees are expected to cooperate fully in any internal investigation. Full cooperation includes providing truthful responses and documents or other tangible items to assist in the investigation process.

Update Your Handbook Provisions

- Employees who withhold information, do not provide truthful responses, and otherwise fail to cooperate in an internal investigation will be subject to corrective action up to and including immediate termination.
- Employees who interfere with or try to adversely affect internal investigations will be subject to corrective action up to and including immediate termination.

Update Your Handbook Provisions

- Employees who retaliate against anyone participating in an internal investigation will be subject to corrective action up to and including immediate termination.
- Employees who raise good faith complaints or concerns through our internal complaint procedure will not be retaliated against in any way.



Update Your Handbook Provisions

- All employees are expected to respect the internal investigation process and to participate in the process in a professional manner.

Simplifying the Investigation Process

- Conduct regular training on the art of the investigation
- Provide opportunities for those “in training” to sit in on an investigation from start to finish before launching one on their own
- Create a system:
 - Overall investigation checklist
 - Standard receipt of complaint letters
 - Standard notification to accused letters
 - Standard outlines for general questions/opening/closing of interviews
 - Standard closure letters to accused and complainant
 - Standard procedure for who makes recommendations and who has final approval on determinations

Defending Your Investigation

- Testifying about the process – use your overall checklist
- Being able to identify the general questions that were asked as well as the specific responses
- Demonstrating you have investigation training, experience, and skill
- Identifying who made findings, conclusions, recommendations, and final decisions



What Questions Do You Have?

