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Conducting an Effective Workplace Investigation

Presented by Nonnie L. Shivers

Overview

A successful workplace investigation is fair, thorough and effective

- Be well-versed in applicable laws/policies
- Understand the stages of an investigation
- Balance the need to conduct investigations uniformly with the requirement of assessing individual situations
- Work closely with other departments involved in the investigation

Why do Workplace Investigations Matter?

- Business/HR: Resolve conflict early
- Legal:
 - Affirmative defense
 - Failure to take reasonable steps to correct wrongful behavior may lead to additional causes of action

Triggers for Investigations

- Complaint (whether to employer or EEOC)
- Substance abuse
- Threats against others
- Anonymous letters
- Vandalism and other sabotage
- Violation of employer policy
- Safety problems
- Theft
- Suspicion of employee misconduct
- Trade secret/proprietary and/or other intellectual property information
- Fraud and other misconduct that falls under Sarbanes-Oxley Act
- Evidence of discrimination or harassment found in the workplace

An Issue Is Raised

- If **an employee** raises a concern about harassment, discrimination, retaliation, or similar workplace environment concerns, an investigation may be required.
- **“Second-hand complaint”** – if an employee raises a concern for another employee (regardless of subject employee’s consent) that alleges a violation of a work environment policy, an investigation may be required.
- **Personal observations** – if you observe conduct that raises a concern into a violation of policy, an investigation may be required.

Investigation Objectives

The **goals** of an investigation should be:

1. To gather facts about the concern;
2. To determine whether there was a violation of company policy or law;
3. To cause as little disruption as possible to employees, clients, and workplace (preserving as much as confidentiality as feasible);
4. To encourage internal resolution and reporting of issues; and
5. To maintain a fair and respectful workplace.

Confidentiality

- The NLRB has been eroding an employer's ability to keep investigation reports confidential
 - Confidentiality policies—no blanket confidentiality
- Requesting confidentiality of the investigation is permissible only if employer can demonstrate it is necessary in a particular case based on objectively reasonable grounds.
- These rules apply to non-union employers due to the NLRB's concerns over “chilling” protected concerted activity.

Investigative Approach

- Tailor your investigation plan to the facts and circumstances (there is no “One-Size-Fits-All” approach).
- To plan the investigation, consider these questions:
 - Does action need to be taken immediately? Depending on circumstances, consider interim action before investigation.
 - Is there a threat to the employee, the company, or its clients?
 - Who appears to have first-hand knowledge of circumstances? Who has second-hand knowledge of circumstances?
 - What internal policies and procedures apply?
 - Are witness interviews needed? If so, what order should the witnesses be interviewed in?
 - Who should conduct the interviews?

Reviewing Additional Relevant Information

- Gathering relevant information outside of the investigation can add value to the investigation and provide a more comprehensive look at the circumstances
- Relevant information can include, but will not always and is not limited to:
 - Personnel Files
 - Performance Reviews
 - Past documented disciplinary action or complaints, if applicable
 - Policies and Procedures
 - Email records

Best Practice Interviewing Techniques

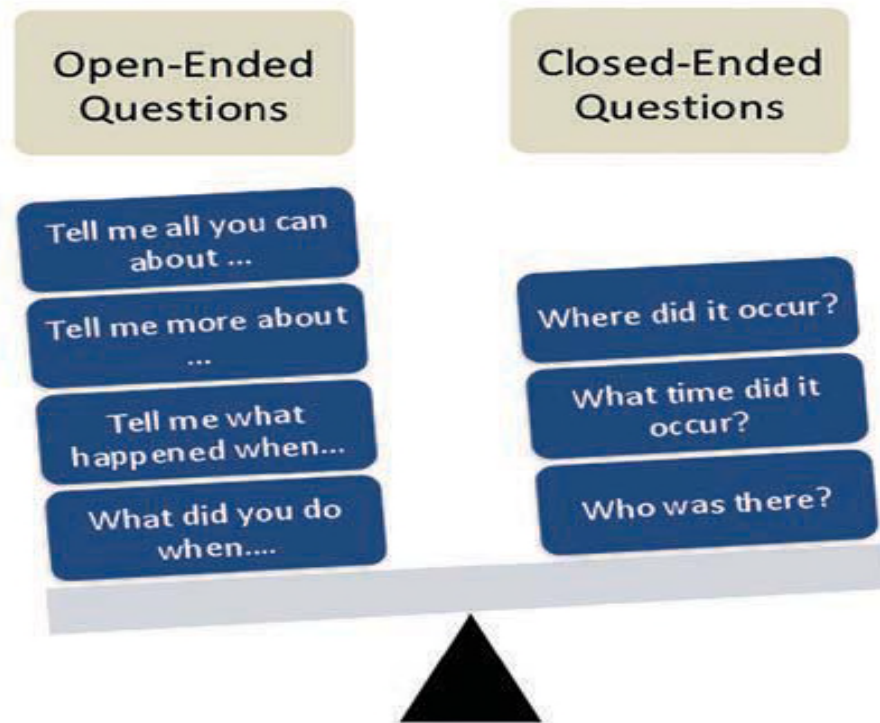
- Start broadly and get narrower
- Think about the circumstances alleged and ask for specifics on the who, what, when, where, and how
- Ask neutral questions (do not express judgment or exhibit bias)
- Do not express opinions during interview, e.g. “as ridiculous as this will sound, I have to ask...”
- Do not ask leading questions
- Provide objective details to the accused about the allegations

Best Practice Interviewing Techniques

- Okay to inquire about motives, especially in “he said/she said” circumstances
 - “Is there a reason he/she would allege this?”
 - “How often do you and him/her interact?”
 - “What is your relationship like?”

- Do Ask:
 - Was anyone else there?
 - Is there anyone else I should speak to?
 - What do you want (to happen)?
 - Is that all or is there anything else you think I should know?

Balance between Open- and Closed-Ended Questions



Note-Taking During Interviews

- At the outset of the investigation, explain that it is your practice to take notes (this is an acknowledgement to promote transparency, not a request for permission)
- Do not feel like you need to transcribe – it is important to strike a balance between note taking and maintaining eye contact
- If there are two interviewers, agree beforehand the role each of you will play (note taker vs primary speaker)
- Consider a naming convention to make it easier to refer to parties in an investigation (initials, etc.)
- Follow a consistent method – e.g. use the body of the page to take notes of what the employee has said, and the margin to note items for future follow up
- Use quotation marks to capture remarks where appropriate

Note-Taking During Interviews (Cont.)

- Do not include conclusions in your interview notes (e.g. “employee lied”, “this cannot be true”, etc.)
- Do not include personal feelings or reactions to interview
 - “Annoyed that employee keeps avoiding question”
- It is fine to include observations but make sure they are neutral
 - Examples of neutral observations include: “employee blushed”, “employee stopped maintaining eye contact”
 - Do **not** include biased observations: “employee acted guilty”
- If you take notes, consult with counsel about how they should be retained (investigative notes are generally not stored in the personnel file)

Credibility

- Central element in most investigations
 - Can be the key factor to reach a conclusion in a case with only circumstantial or conflicting evidence.
 - Comparison of credibility between witnesses.
 - No such thing as a “he said/she said” case – credibility breaks the tie!
- Your client will rely on your credibility determination to decide to settle or fight.
- The ability to judge credibility (whether from life experience or litigation experience) is a key factor in selecting an investigator.

Making a Recommendation

- Review past practices and similar situations to ensure recommendation is consistent and fair
- Differentiate between facts you have found and credibility assessments you have made
- Remedial measures should:
 - Be equal to the wrongdoing (if misconduct is found)
 - Be tailored to avoid recurrence of subject behavior
- Be feasible; recommend action that will work
- Consider all available courses of action.
 - No Action
 - Disciplinary Warning (Verbal or Written)
 - Demotion
 - Compensation Impact
 - Training
 - Process or Policy Changes
 - Transfer
 - Termination

Concluding an Investigation

- Close the loop with the complainant
- Ensure no retaliation
- Written report(s)?
 - Privileged (who said what)
 - Non-privileged (conclusions/recommendations)
- Follow-up

Following Up & Following Through

- Good practice to follow up with relevant parties
- Following up can ensure any recommendations adapted by line managers are effective
- Make sure that no retaliatory conduct has occurred
- Increases confidence in effectiveness of internal procedures & policies



Courts and Plaintiff's Attorneys Like Retaliation Claims

- Courts have construed retaliation claims broadly
- Participation/opposition in workplace investigations may constitute “protected activity”
- “Zone of Interests”
- “Cat’s Paw”
- EEOC Enforcement Guidance on Retaliation and Related Issues
- Nearly 45% of charges include retaliation claim

Top Investigation Mistakes



Failure to Develop and Disseminate Effective Complaint Mechanisms

- How to fix it?
 - Provide multiple complaint avenues
 - Indicate that the information will be kept confidential to the extent possible;
 - State that if misconduct is found, appropriate remedial steps will be taken; and
 - Assure employees that they will not be exposed to retaliation for complaining or participating in a complaint investigation

Ignoring Complaints

- Overzealous vs. taking appropriate action
- Watch out for employees' request for confidentiality
- Listen for buzzwords (i.e., "I feel harassed" or "she is discriminating against me")
- Carefully analyze the decision to allow employees to solve issues on their own
 - Common sense
 - Legal obligations
 - Good business practices

Lack of Objectivity

- Investigator objectivity is a principal component to a fair investigation
- Watch out for personal biases influencing credibility analyses
- DO NOT reach a conclusion before beginning the investigation
 - I.e., a high-level executive is accused of wrongdoing, and the investigator recognizes that drastic steps (such as discharge) would have an immediate, negative impact on the business
- Remember, there is no such thing as a “bad fact” in an investigation – all information you collect will help you reach a fair and reasonable conclusion

Allowing the Investigation to Become a Witch Hunt

- Investigator may become convinced that one party's version of the events are true and steer the investigation in that direction
 - I.e., in a sexual harassment case, the investigator might determine that the allegations are not credible before finishing all of his or her work. As a result, the investigator might begin to focus attention on the complainant's behavior exclusively to see if the complainant's story can be challenged or contradicted
- Don't veer off-track!

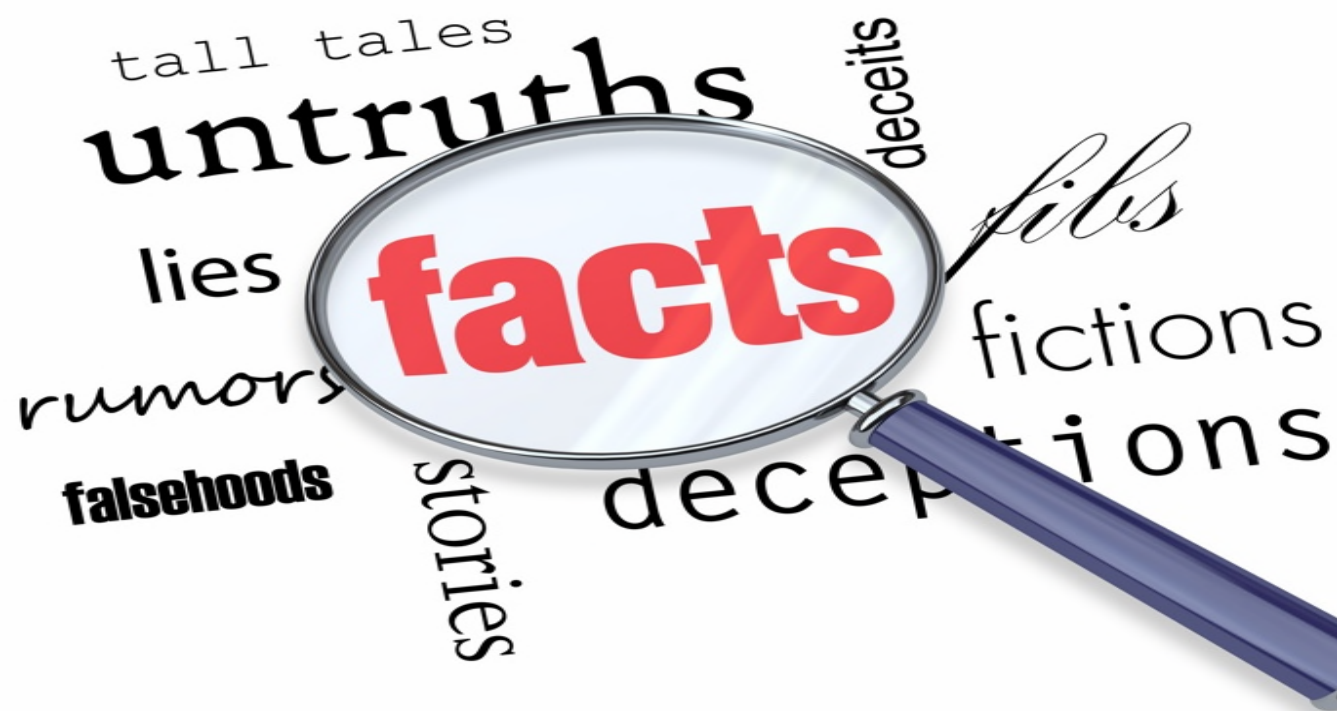
Failure to Reach a Conclusion

- Conflicting accounts do not justify an inability to determine whether allegations have been substantiated
- Most of the time, an investigator should be able to review and analyze all evidence, make credibility determinations, determine parties' motives, and reach finding and conclusions.

Reaching a Legal Conclusion

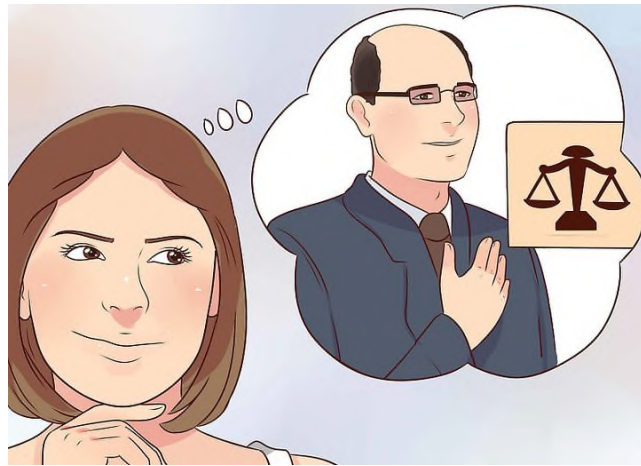
- ONLY REACH FACTUAL CONCLUSIONS!
- Investigator's job is not to determine whether actions are legal or illegal and making such a determination may come back to bite you
- Besides, the goal of workplace investigations is to resolve behavioral issues before they become unlawful

Difficult Investigation Scenarios



Difficult Investigation Scenario

- What do you do when an employee says he or she wants their lawyer to be present during the interview?



Difficult Investigation Scenario

- What do you do when the complaining employee alleges he or she is so distressed that they are unable to come to work and participate in an interview?

Difficult Investigation Scenario

- What if the employee refuses to be interviewed?





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