

HOW TO CONDUCT WORKPLACE INVESTIGATIONS

by Heidi Van Vlaenderen and Brian H. Kleiner

The Employer's Obligation to Investigate

Employers are responsible by federal and state law to provide a workplace free of discrimination and harassment and to provide a safe work environment. Because of these conditions, a complaint by an employee could trigger an investigation. In addition, the employer's investigation obligation is triggered by such warning signs as a supervisor's observations of inappropriate comments or conduct, general office knowledge of harassing, discriminatory or other wrongful behaviour or a request that inappropriate conduct cease. In most cases, an employer has a duty to investigate reported instances of sexual harassment or discrimination, even where the alleged victim does not request or consent the investigation (Laabs, 1995). Thus, there is no such thing as an off the record complaint or comment. Even if the complaining employee insists that he/she was not offended or upset by the alleged conduct, an employer has a duty to investigate.

Steps to Take for Conducting an Investigation

Promptness and thoroughness are mandated; however, the law does not prescribe an internal method of investigating claims (Armstrong, 1997). Even more complex, the investigation can not be the same in each situation. Following is an outline of techniques that an investigator should consider but not necessarily adopt in any given case.

Who is the Appropriate Investigator?

The first step of a proper workplace investigation is to determine who should conduct the workplace investigation. Employers should choose the most appropriate investigator available for a specific case with full knowledge that the investigator may be called later as a witness. There are numerous considerations regarding the potential investigator's attributes that the employer should consider in making this decision. These attributes include; training, skill, believability, objectivity, sensitivity, calm manner, knowledgeable of company policies and procedures and the potential to make a good witness. The following are among the types of investigators typically considered:

- * Human Resources Department
- * Management
- * Human Resources and Management as Joint Investigators
- * Attorneys
- * Member internal audit, ethics or securities department
- * Private investigator or other outside consultant (Connors, 1996)

Human resource managers are considered experienced, well trained, and knowledgeable with regard to the internal structure of the company. Jurors often hold human resources managers to a higher standard. On the other hand, jurors may expect a manager to be involved but managers may be inexperienced in conducting investigations. Combinations of the two could be ideal. Or, the company may decide that an attorney would better serve the needs of the investigation due to its sensitivity. Attorneys are well trained, understand legal issues, and know how to ask questions. Employers often prefer to cover sensitive investigations by the attorney-client privilege. Yet, if litigation ensues, the employer typically will be forced to waive the attorney-client privilege so it can be demonstrated that, upon learning all of the alleged harassment or wrongdoing, the employer properly investigated the allegations, considered the facts and took the appropriate action to prevent reoccurrence.

Should the Investigation be Protected by the Attorney-client/Work Product Privileges?

If the company hires an outside attorney to conduct the investigation, later he/she could be called as a witness. The company would have to hire separate trial counsel to defend the case if the case proceeds to trial. If he/she

were a witness it would be difficult to “shield the lawyer’s notes and other work product based on the attorney-client privilege or attorney work product doctrine (Howard, 1997)”. Therefore, it is not recommended that a company hire an outside attorney to conduct the investigation.

On the other hand, in-house counsels are considered excellent persons to conduct the investigation. An in-house attorney’s “work product is protected under the attorney-client privilege and attorney client work product doctrine (Howard, 1997)”. If the terminated perpetrator challenges his/her discharge, the employer likewise often will find it necessary to waive the privilege to establish good cause or a legitimate nondiscriminatory reason for its decision. Accordingly, the employer may need to disclose the investigation process, notes and report, and possibly the legal advice rendered by counsel even if they constitute or contain privileged communications.

Thus, there are several strategic concerns involved in determining whether to have an attorney involved in the investigation. If the matter is highly sensitive and likely to be settled before trial, it may be more appropriate to have an attorney act as an investigator so that sensitive and confidential information will be protected from disclosure to the other party. The attorney-client privilege can always be waived later on if the case proceeds to trial.

On the other hand, if an attorney is not involved in the investigation from the start, all information gathered by non-attorneys may be subject to discovery and disclosure to the other party before trial. Given these strategic concerns, it is recommended that an employer consult with an attorney to explore these issues at the earliest stages of the investigation so that the attorney-client privilege will be maintained from the start, if necessary.

Determine Purpose and Scope of the Investigation

After the investigator has been selected, it is necessary to identify goals and objectives of the investigation, determine how best to achieve them, and set the timeframe in which to do it. Goals and objectives include fairness, confidentiality, timeliness, accuracy, thoroughness, good-documentation, compliance with company policies and procedures and compliance with the law. At this time, the investigator needs to decide on what evidence he/she already has, what he/she are seeking to find, and how he/she are going to find the information (Howard, 1997). Then, make a list of the witnesses need to be interviewed, any relevant documents, or other items that would assist in the discovery of the alleged incident (Howard, 1997).

Mechanics of the Investigation

The investigator should review all relevant documentation including the personnel files of the parties involved and the work and/or personal relationships between the complainant, the accused and potential witnesses (Connors, 1996). Also, the investigator should have a full understanding of the law, policy or guideline that will be critical in reaching a resolution of the issue when the facts are ascertained. Here the advice of the attorney is extremely helpful. In order to make sure the investigation covers the elements of what is necessary to defeat a claim by an employee, the investigator must know what those elements are. Whether or not the investigation is to be covered by the attorney-client privilege, it is enormously helpful to ask an attorney what types of information must be gathered. The investigator must understand what facts are necessary to reach a conclusion and determine what documents will assist in reaching the conclusion.

The investigator should request a written complaint if the complaint is for alleged sexual harassment. This will accomplish three things. First, it will give you a guide as to what to look for. Second, if you end up getting sued, you may be able to attack the plaintiff’s credibility. And third, if the complainant is willing to put their story in writing, it generally shows that they are serious about it (Laabs, 1995).

The setting should be calm to put witnesses at ease: private, quiet, comfortable surroundings, preferably apart from the witnesses’ work environment. Usually, two people should conduct interviews, one of whom can later serve as a witness, if necessary. One should ask the questions while the other should take detailed notes. Both interviewers should not ask questions at the same time to avoid later accusations that they “ganged up” on the interviewee or subjected the interviewee to unjust coercion.

Interviewing the Parties

Interviewing the Complainant

At the start of the interview, the interviewer should address that the company has taken the complaint seriously (CCH Business Law Editors, 1997). Advise the complainant that the information received during the investiga-

tion will remain confidential unless a person has a "need to know" (CCH Business Law Editors, 1997). Instruct the complainant to maintain confidentiality. Advise the complainant that failure to do so could compromise the investigation (CCH Business Law Editors, 1997). Assure the individual that the company does not permit any retaliation or reprisal for having made a good faith complaint. Advise that should the complainant feel any form of retaliation or continued mistreatment during, or after, the investigation, that they are to report such conduct to you immediately. Explain to the complainant that you will get back to him/her as soon as you have completed the investigation and determined appropriate course of action. Encourage the complainant to keep you informed of any further problems and that his/her continued co-operation in the investigation will be necessary to reach a resolution. Then, move into asking questions of the complainant. The investigator is to prepare a detailed outline of key questions prior to the interview. Begin with open-ended questions (who, what, where, when, why and how), proceeding from the general to the specific. For example, "What happened?", "Who was involved?", "Where did the alleged incidents occur?", "Where?", "Who witnessed the incident, if anyone?", "With whom have you discussed the incident, if anyone?", "Do you have any physical or written evidence?", "Make sure that you get all of the facts (CCH Business Law Editors, 1997).

Interviewing the Accused

Advise the accused that the company is investigating a complaint of inappropriate conduct. If the accused is a union employee, there is a possibility that the accused might have contractual right to request union representation. The interviewer should assure the accused that he/she is committed to fairness and impartiality and that no conclusions have been reached. The accused needs an opportunity to explain his/her side of the story before the interviewer makes his/her decision. Advise the accused that retaliation against participants will not be tolerated. Advise the accused that the information will be kept confidential except to those people who have a legitimate need to know. At the close of the interview, inform the accused that you will get back to him/her when the investigation is completed. If it is necessary to protect one or more parties, for example in a *quid pro quo* sexual harassment allegation, suspend the accused pending the outcome of the investigation. This suspension could be with or without pay depending on the circumstances.

When asking questions of the accused, ask general, open-ended ones to get the accused to tell his/her story before moving to the specific allegations (Flynn, 1995). For example, ask initial questions to determine whether the accused was in a position, or had the opportunity to have committed the alleged misconduct. These questions should address time, place, and presence of other people. This will assist in determining the credibility of the accused and the complainant. This tactic can assist to avoid later defamation claims (Segal, 1993). For example, if the accused could not commit the alleged act, then the specific allegations do not have to be disclosed. Then, move into the more specific questions, in a chronological fashion, regarding the allegation. Ask for all evidence that the accused believes corroborates his/her side of the story. Tell the accused that it is important for him/her to provide you with all facts or information that may help you get to the bottom of the issue. At some point during the interview, the identity of the complainant might have to be disclosed if the accused has not already figured it out.

Interviewing the Witness(es)

The questions should address the incident or matters the witness should be asked about and all details regarding the incident. The interviewer should obtain information the witness is believed to have. The interviewer should prepare questions of other witnesses that could corroborate or refute the complainants testimony. Make sure to pin the witness down to facts and distinguish matters of which the witness has personal knowledge from hearsay.

Again, ask open-ended questions, such as, "Did you see anything unusual going on between Sally and George?", or, "How did Joe behave toward Sally? (Howard, 1997)". Often employees will give specific responses to the general questions. When this happens, the interviewer can move into questions about the specific incidents they report. "Try to avoid 'leading' questions which suggest the answer (Howard, 1997)".

At the commencement of the interview, the interviewer should make appropriate disclosures and perhaps obtain a signed acknowledgement indicating the disclosures that were made. Disclosures are an integral piece to the investigation. The interviewer should state what is being investigated and advise the interviewee what role he/she may play in the investigation. Explain to the interviewee that information obtained during the interview will be reported to those within and possibly outside the company who have a "need to know". Emphasise the seriousness of the investigation, the importance of accurate information and the individual's obligation to provide

truthful, thorough information. Make sure that you caution the interviewee that disclosing confidential information, by discussing it with others, could result in disciplinary action (CCH Business Law Editors, 1997).

What Should you do if the Accused Refuses to Co-operate?

Occasionally, an interviewee might refuse to participate in the interview or answer questions. If this occurs indicate to the accused that the interview is designed to give the individual an opportunity to relate his/her version of the events and to advise management of any information it should consider before the company finalises its investigation. If the accused refuses to participate, management should tell the interviewee that the company will base its decision on the other information gathered during the investigation, the inferences drawn from that evidence and the accused's unwillingness to co-operate in the interview. In some circumstances, refusal to participate is considered insubordination and, therefore, grounds for disciplinary action, including termination. For example, if an employee is suspected of theft of company property, and then refuses to answer whether he/she has the stolen property in his/her possession, there may be two reasons for termination: the first reason being insubordination for failure to respond to a request from a company manager and the second reason being for suspicion of theft of company property. Thus, even in cases where wrongdoing cannot be proved, an employee's insubordination may be adequate grounds for action by the company.

In investigations regarding specific events, cover all events that occurred during the relevant time frame in chronological blocks of time. Do not leave the time block until all details necessary to recreate the scene have been established. For each block of time cover; what, when, where, who, how and why.

Documentation

It is recommended that the investigator document the investigation (Anonymous, 1995). However, there are a few critical details that the investigator needs to understand. This documentation would be discoverable if the case is brought to trial. Therefore, the investigator should avoid making conclusions until the investigation is finished and the investigator must accurately reflect the comments the accused, complainant and witness made. The investigator could make a final report from the drafts, if he/she does, the drafts should be thrown away so that the changes will not be viewed with suspicion. The notes "should be thrown away after receipt of a demand from a plaintiff's attorney or a charge of a discrimination suit (Howard, 1997)".

Reaching a Conclusion

After the interviews have been completed, it is necessary to make a conclusion and decide what, if any, appropriate corrective action is necessary (Connors, 1996). The most important aspect is to link specific facts to specific conclusions. Review the corroborating evidence and make a decision as to whether the evidence supports that the alleged conduct or wrongdoing had occurred. It is helpful to determine the credibility of the parties. Occasionally, an investigator will be unable to conclude. If this occurs, the investigator should confirm that his/her investigation was thorough. The investigator might consider consulting with legal counsel to assist in making a final decision (Connors, 1996).

After a decision has been made, the employer should communicate with the complainant. Generally, the complainant is not informed as to what corrective action the employer has made, however, the complainant is told that the situation has been resolved and that, if appropriate, no retaliation will be permitted by the accuser. Similarly, the accused is informed in regards to retaliation and appropriately disciplined, if found guilty.

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