



HANDLING WORKPLACE INVESTIGATIONS

The Who, What, Why, When and How
to Conducting a Proper Investigation in
the Public Sector

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Why Bother?

- Because a “proper and objective” investigation can help protect the employer from liability or mitigate damages
- James Castelluccio v. IBM
 - Worked at IBM starting in 1968
 - 2005 promoted to V.P. of Integrated Technology
 - Supervised 2500 employees/Excellent performance reviews
 - 2007 his supervisor retires
 - At first meeting with new supervisor, she asks him how old he is and when he plans to retire
 - He was 61 at time, with no plans to retire anytime soon
 - Asked several more times when he plans to retire
 - Castelluccio reports her comments to HR

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- HR conducts age discrimination investigation
 - Announces it will be an “open door” investigation
- Shortly thereafter, Castelluccio gets fired
 - HR investigation exonerates IBM from any wrongdoing
- Castelluccio sues IBM for Age Discrimination
 - Jury finds IBM terminated him because of his age
 - Awards him \$2.5MM in damages, Federal Judge adds another \$1.2MM to award for attorney fees





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But wait – IBM conducted an investigation??!!!

Federal Judge refused to allow HR Investigation Report into evidence:

- Judge found report only “purported” to make objective findings while containing no information favorable to Castelluccio, including his account of the firing and his favorable performance reviews
- Judge wrote: “The purpose of the investigation was more to exonerate IBM than to determine if Mr. Castelluccio was treated fairly.”

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Be Objective



Be Impartial

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Why conduct One?

- Avoid mistakes and/or embarrassment (by disciplining someone for something they did not do)
- Self-monitoring tool (ensures staff are complying with applicable laws and company policies/guidelines)
- Allows employer to gather relevant facts that can lead to proper employment decision
- Prompt investigation may well satisfy an otherwise upset or hostile employee (and possibly avoid a lawsuit)
- Proper and thorough investigation may serve as a defense in any lawsuit related to conduct at issue



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When to conduct – What are the possible Triggering Events:

- Potential violations of Employment Discrimination Law
 - Civil Rights Act of 1964, ADA, ADEA, GINA, State Law (IHRA)
- Health and Safety Law violations
 - OSHA (also includes workplace violence, stalking, etc.)
- Retaliation or Whistleblowing claims
 - Most workplace laws prohibit retaliation against employees who report misconduct or discrimination/harassment
- Sudden change in performance or morale
- Complaint by employee
- Knowledge of supervisor or management



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- Investigation can be used to limit liability of employer under Title VII of Civil Rights Act of 1964
 - Faragher v. City of Boca Raton, 524 U.S. 775 (1998)
 - Burlington Industries v. Ellerth, 524 U.S. 742 (1998)
- U.S. Supreme Court held employers are strictly liable for discrimination/harassment by supervisors, but only vicariously liable for discrimination/harassment by co-workers
- Employer may avoid liability for co-worker's conduct if:
 - 1) it shows exercise of reasonable care to prevent/correct behavior;
 - 2) employee failed to take advantage of corrective opportunities

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“I complained, but the company did nothing”

- In cases where alleged misconduct is minor, many attorneys will focus on employer investigation
- If fail to promptly and properly investigate, the employee will use this to make the employer look bad – as either complicit, inept or indifferent.





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Who should conduct the investigation?

- Knowledgeable about applicable laws, employer policies, and/or collective bargaining agreement
- Experience with investigations, skilled in interviewing and assessing credibility
 - IMPORTANT: Will he/she make a good witness
- Unbiased, no relationships with parties involved, ability to remain impartial
 - IMPORTANT: Must also be perceived as unbiased
- Job Titles/Positions of employees involved in alleged misconduct or wrongdoing



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HR Professionals

- Appropriate in many cases
- Consider position of the employee or target of investigation, may not be appropriate for department heads or elected officials
- Consider working relationship or reporting relationship with those involved in alleged misconduct

Gov't Attorney/State's Atty

- Consider duties/role of atty and issues of the attorney-client privilege
- Consider relationships between gov't attorney and agency employees or department heads, if these are targets of investigation



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Outside Attorney

- Likely to lose attorney – client privilege
 - EEOC v. Spitzer (2008)
 - Employer sanctioned \$300K for not producing attorney notes
- Will become “witness” and disqualified to represent in any litigation
- May appear to be biased as wanting to protect employer/client

Outside Investigator

- Likely to have needed experience
- Need to show that truly unbiased
 - Pay not tied to result achieved
- Consider expense in light of nature of alleged misconduct



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- Formal vs. Informal Investigation
 - Consider nature of complaint, need for action
 - May be that talking to complainant and accused is all that is necessary
- Is Interim Action Needed
 - Is alleged misconduct serious? Involve health or safety in workplace? Risk of violence?
 - At times may be necessary to remove accused employee from workplace
 - Done not for discipline purposes, but to facilitate investigation, minimize complaints of retaliation, avoid further risk of adverse conduct



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MAKE A PLAN FOR THE INVESTIGATION

1. What is being investigated?
2. What employer policies, guidelines or terms of a collective bargaining agreement apply?
3. What type of documentary or other evidence is likely to exist and/or needs to be collected?
4. Who will be interviewed (and in what order)?
5. How has agency/employer handled similar situations in the past (better to be consistent)
6. Is specialized expertise needed to understand the situation, laws or policies at issue?



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PREPARING FOR THE INTERVIEWS

- Don't just go into the interview and plan to wing it
- Gather as much documentary evidence as possible before commencing the interviews
- Consider the order of the witnesses to be questioned
 - Start with the complaining employee
 - Interviewing other identified witnesses next, considering:
 - Likelihood the witness has actual or relevant knowledge;
 - Risk of that employee witness feeding the rumor mill;
 - Bias of the witness
 - Generally prefer to conclude with the accused employee
- Outline and compile the questions you wish to ask each witness



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OTHER CONSIDERATIONS RELATED TO INTERVIEWS:

- What are the rights of the employee in any investigation?
 - Garrity Rights
 - Right of public employee not to be compelled by employer to incriminate themselves – provides “use” immunity in any criminal prosecution
 - Uniform Police Officer Disciplinary Act (UPODA)
 - Illinois statute provides any police officer who is questioned during a formal investigation the right to counsel during questioning as well as the names of the complainants
- Rights specific to union employees:
 - Weingarten Rights [NLRB v. Weingarten (1975)]
 - Gives union employees a right to representation at interview if it could lead to discipline
 - Is an Unfair Labor Practice (ULP) to violate an employees’ Weingarten rights
 - Loudermill Letter/Hearing [Cleveland Bd. of Ed. v. Loudermill]
 - Public sector employee entitled to notice of intent to terminate and pre-termination hearing before discharge – due process rights



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CONDUCTING THE INTERVIEW

- Establish a rapport, put the witness at ease
 - Explain the purpose of interview
 - Assure that no conclusion has been reached
 - Assure that there will be no retaliation or reprisals
 - Will keep discussions confidential to the extent allowable, “request” that employee witness not discuss investigation or interfere in investigation
- Request the employee provide any related documents and identify any other witnesses



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CONDUCTING THE INTERVIEW

- Remain neutral and professional – don't take sides
- Begin with Open-Ended Questions
 - You want witness to tell you what they know, not other way around
 - Ask generally about parties involved, how they get along, management styles, prior disagreements, etc.
 - Explore bias: ask what they think about the complainant and the accused wrong-doer
- Phase into more specific questions
 - Anyone ever complain to you about behavior of parties?
 - Were you present when . . . ?; Who else was present?
 - What did you see? What did you hear?
 - What did you do?
 - What did other people do?



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CONDUCTING THE INTERVIEW

- Take Notes (take a lot of notes)
 - Consider having another person sit in on the interview
 - Particularly for interview of the complainant and the accused
 - One person takes notes while the other questions witness
 - Interviewer should still feel free to take own notes as well
- Assess the Credibility of the Witness [EEOC Factors]
 - Demeanor: Is witness nervous, combative? Appear truthful?
 - Motive: Does the witness have a reason to lie?
 - Plausible: Does the witness' story make sense?
 - Supportable: Are there documents/evidence which support story?
 - Prior Record: What is the disciplinary or performance review history of the witness?



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INTERVIEWING WITNESSES

- If possible, prepare formal statement that summarizes testimony for witness to sign
 - This allows witness to sign-off on accuracy of interview
 - Let the witness make changes if request, may lead to more info
- If not possible to prepare statement, consider having witness review notes and initial them to signify approval
 - Do not include your own thoughts and impressions in notes of testimony
 - Use separate document to summarize thoughts on credibility, consistency, bias, etc. of witness



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INTERVIEWING THE COMPLAINANT

- Assure the employee of impartiality, no pre-judgment
- Inform that you will limit disclosure of info to people who need to know – but cannot guarantee confidentiality
- Tell employee you need his/her cooperation and will follow up from time to time
- Look for consistency or inconsistency in story
- Seek input from employee of how he/she thinks the matter should be resolved
- Tell employee that while their input is important and will be seriously considered, the company will make the final determination as to the best resolution of the issue



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INTERVIEWING THE ACCUSED

- Explain that you want his/her side of the story
- Need as much information as possible about event in order to resolve issue
 - Push for details, including documents and other witnesses
- If he/she refuses to cooperate, may consider directing the employee to answer questions [Garrity Rights]
- tell him/her that your investigation will proceed nonetheless, and that you will consider the lack of cooperation in making a decision
- If accused says the complainant is lying, ask the accused the complainant's reason or motive for lying



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OTHER CONSIDERATIONS IN COURSE OF INVESTIGATION:

- Record the Interviews?
 - May make witness more hesitant to open up
 - Cannot record without consent
 - Violates Illinois Eavesdropping Act to record without consent of all parties, Act makes it a criminal offense in Illinois
- Review of Emails and/or Text Messages
 - Do you go into accused's computer at work and start reviewing?
 - Again must have consent of the parties to do so
 - Can have implied consent based on Employer's computer usage policies – but the policy must be clear that all work emails are monitored and no privacy expectation by employees
 - Run the risk of violating Electronic Communication Privacy Act, Stored Communication Act, and even Illinois Eavesdropping Act



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CAN YOU REQUIRE CONFIDENTIALITY?

I) The NLRB says NO BLANKET CONFIDENTIALITY

- NLRA applies to both union and non-union workplaces
- Section 7 of the NLRA provides employees the right: “to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection.”
 - These rights apply to both union and non-union workforces
- The NLRB considers an employees’ ability to discuss work conditions a protected activity
 - Including potentially discussing workplace incidents or investigation
- As such, NLRB does not allow an employer to impose a policy of confidentiality which would cover all workplace investigations



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CAN YOU REQUIRE CONFIDENTIALITY?

- NLRB does allow an employer to make a case-by-case determination of whether Confidentiality is required:
 - A) If a witness needs protection;
 - B) If there is a danger of evidence being destroyed;
 - C) If there is a danger that testimony will be fabricated; or
 - D) There is a need to prevent a cover up
- 2) EEOC also discourages blanket Confidentiality
 - Issued an opinion that employer policy prohibiting the discussion of alleged discrimination with others was a violation of Title VII of the Civil Rights Act
 - Could be construed as prohibiting a report to the EEOC



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DOUBLE-CHECK FAIRNESS/COMPLETENESS

- Did you objectively attempt to get both sides of story?
- Did you interview all the witnesses identified during investigation?
 - There is a risk that investigation will be held to have been unfair if key witnesses are ignored or overlooked
- Review documents and testimony for consistency
- Decide if any follow-up is needed:
 - Need additional documents?
 - Follow-up interviews with complainant? Accused?
- Determine if need to contact attorney to discuss legal requirements and obligations



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PREPARE THE REPORT

- Recommend it be prepared by interviewer/investigator
- Should Include:
 - Summary of Incident being investigated
 - Identify applicable employer policies and guidelines
 - Dates of relevant steps of investigation
 - Key factual findings and conclusions of the investigator, including credibility of witnesses
 - Identify any factual issues that were not resolved, with a summary of why the issue could not be resolved
 - Identify the person making any decisions on actions to be taken based on the findings within the report



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MAKE CONCLUSIONS AND TAKE ACTION

1. Have a meeting to discuss Report/Make Decision
 - Investigator should present Report to Decision Makers
 - Decision Makers should include HR Director, relevant Managers and/or Department Heads, and even agency or outside attorney if deemed appropriate
 - Answer Question: Were employer policies violated and/or did misconduct occur?
2. Make the Decision as to what action should be taken based on conclusions, facts and information contained in the report, and on the advice of counsel as necessary



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IF HARASSMENT/DISCRIMINATION OCCURRED:

- Employer **MUST** remedy harassment/discrimination
- Remedies as to the accused wrong-doer include (depending on severity and aggravating and mitigating factors):
 - Transfer, demotion, loss of bonus, reduction in pay
 - Counseling
 - Training
 - Discipline (including suspension without pay, written reprimand in file, verbal warning, etc.)
 - Termination of employment



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IF HARASSMENT/DISCRIMINATION OCCURRED:

- May include Remedies for the Complainant/Victim:
 - Offer paid leave
 - Offer paid counseling
 - Payment for losses incurred due to harassment (loss time from work, medical treatment, lost benefits, lost pay, etc.)
 - Offer to transfer the employee
 - BE CAREFUL: Do not force a transfer or any other action that could be viewed as retaliation or an adverse employment action against the complainant



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FOLLOW UP WITH COMPLAINANT AFTER INVESTIGATION

- Prepare a written memo and meet with complainant to inform of the findings/conclusions of the investigation
- Confirm what action, if any, will be taken as a result of the investigation
- Confirm that retaliation against the complainant is prohibited, and request that complainant immediately report any perceived retaliation
- Encourage complainant to discuss any concerns or disappointment with results and/or action taken



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FOLLOW UP WITH ACCUSED WRONG-DOER

- Prepare memo and meet with the Accused and Union Rep, if applicable, to advise of conclusions and findings of the investigation and any action to be taken
- Remind accused of prohibition against retaliation and consequences of same
- Inform accused that he may discuss any concerns or disappointment with results and/or action taken (unless the decision is to terminate, then do not engage in discussion/argument during termination)
- If terminating, advise accused to put concerns in writing to the company for appropriate response



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COMMON MISTAKES/FAILURES TO AVOID:

1. Failing to Plan
2. Ignoring complaints/problems
3. Delaying investigation/taking too long to investigate
4. Taking sides with either complainant or accused
5. Being too aggressive in interviews
6. Not conducting thorough investigation
7. Promising confidentiality to parties and witnesses
8. Failing to properly document investigation
9. Failure to reach a conclusion and take action
10. Failure to follow up with complainant and accused