

Conducting Internal Investigations: How to Investigate Employee Misconduct and Prevent Future Problems

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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 \$1M
- 67% chance award will exceed \$100k
- Average compensatory award in Federal Court is almost \$500,000

...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

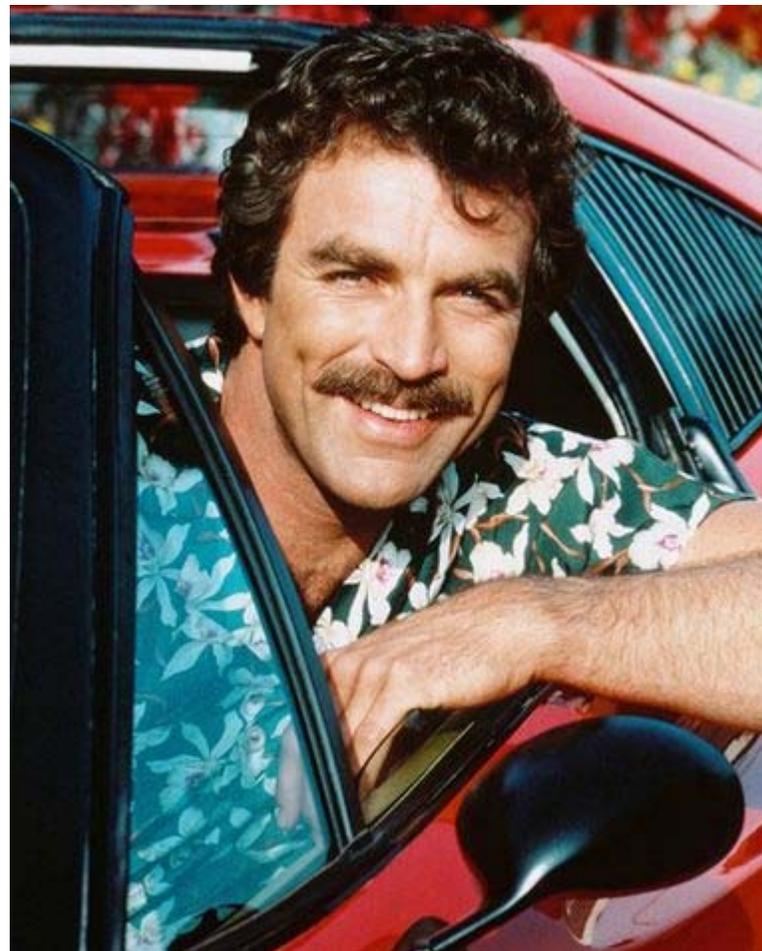
- Nature of the conduct?
- Who should investigate?
- Who should be involved/aware?
- How intrusive?

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
- Emails, 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.

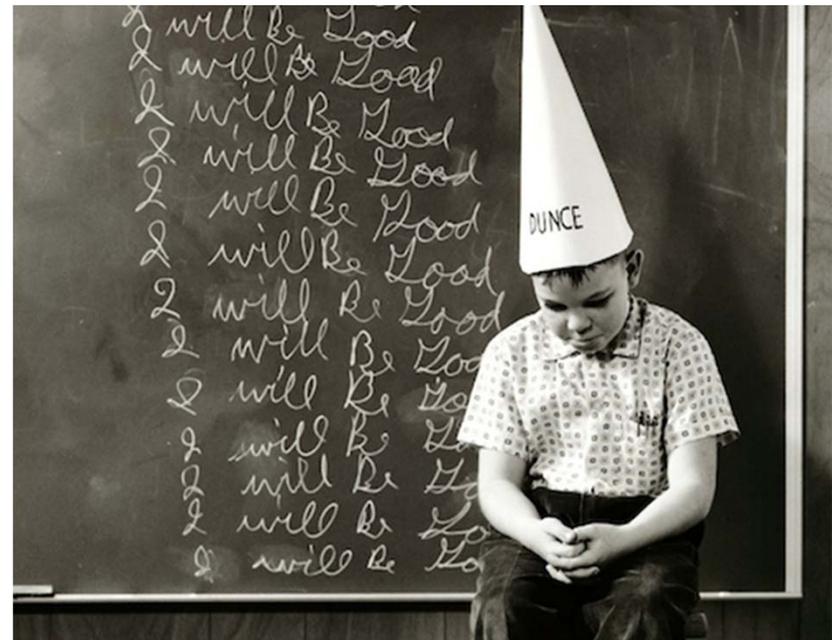


Step 14: Enact Corrective Measures

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

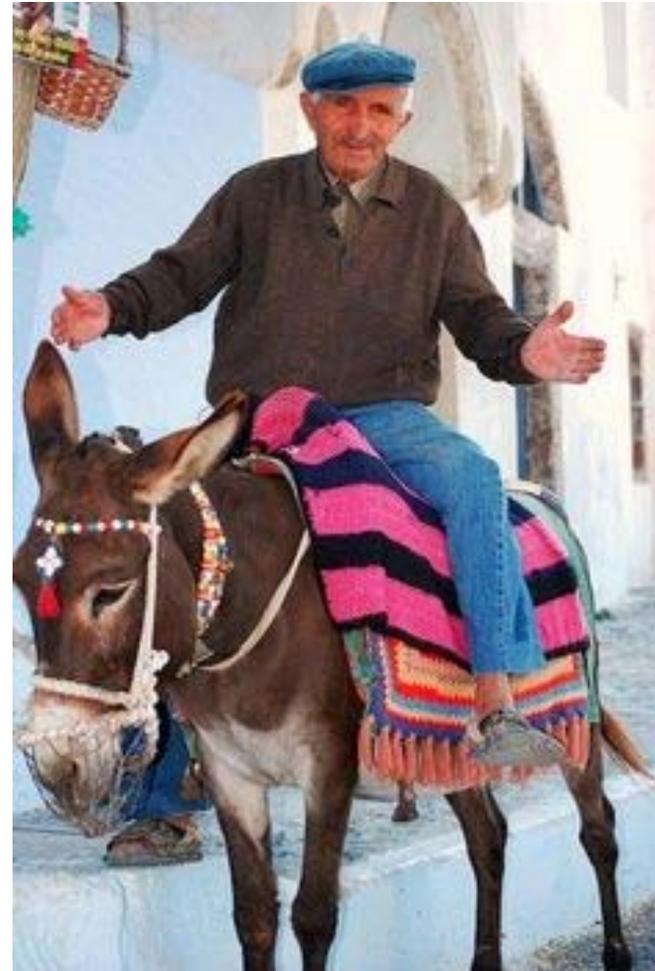
- ✓ Date it (date of occurrence & date of disciplinary action).
- ✓ State the reason – **facts only** – and specific witnesses' testimony.
- ✓ Reference applicable policies.
- ✓ Reference any prior discipline, with specificity.
- ✓ Describe the consequences based on the findings.
- ✓ If departing from 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
- CYA



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.



Questions?

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