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# **Best Practices in Conducting Internal Workplace Investigations of Discrimination and Harassment Complaints**

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*This article offers general and practical advice about the investigative process overall, discussing the hallmarks of an effective investigation. It then addresses investigative protocols typical to discrimination/harassment investigations. The article also highlights interesting legal issues that may arise during the investigation.*

Workplace investigations are not new, nor are the myriad reasons for such investigations. These typically run the gamut from discrimination and harassment claims, to whistleblower claims, to claims of corporate fraud or other misdeeds. The #metoo and #timesup movements, generated as they were by serious and often salacious allegations of sexual harassment against high-profile individuals, have garnered significant media attention and renewed employer focus on the importance of prompt, thorough and effective workplace investigations (and the concomitant risk of not investigating).

When properly done, investigations can protect the company's interests and those of its investors and shareholders. They can identify misconduct, ensure corporate compliance with applicable laws and regulations, minimize business risks, protect a company's image, and even provide a defense to legal claims. Significantly, the benefits often extend beyond the immediate resolution of a complaint. Well run investigations convey to the workforce that the employer is committed to handling complaints in a professional, lawful, and effective manner and to maintaining a safe and discrimination-free work environment. This in turn ensures that employees will raise concerns at the outset when they are more easily

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handled and it decreases the chances that individuals will engage in misconduct, resulting in a more harmonious and respectful workplace.

What constitutes an effective workplace investigation, however, is not set in stone and will vary based on the seriousness and scope of the charges and the level of responsibility of the alleged harasser. This article offers general and practical advice about the investigative process overall, discussing the hallmarks of an effective investigation. It then addresses investigative protocols typical to discrimination/harassment investigations. Since each investigation must be tailored to the specific conduct and actions at issue, the suggested protocol discusses the various choices the company must make as it proceeds through the process. The topics discussed within the investigative protocol section include choosing the investigator; effectively interviewing witnesses; ensuring the collection and review of appropriate documentation; reaching a conclusion and preparing the report. The article also highlights interesting legal issues that may arise during the investigation.

Every company will at some point need to conduct a workplace investigation. How it engages in this process will often determine its success in court or in the court of public opinion. Following the protocol set out in this article will help ensure that a company not only conducts an investigation, but completes one that is legal, professional and effective.

## **BASIC PRINCIPLES OF INVESTIGATING**

A company needs to conduct an investigation when there is a credible report of some kind of misconduct. A credible report is not limited to a personal complaint, but includes an anonymous tip on a hotline, the observations of a manager/supervisor, or even an outsider's report of an issue to the company.

Whatever the reason for an investigation or the level of individuals involved, the ultimate goal is to conduct an *effective* investigation. What makes an investigation effective is its ability to uncover wrongdoing, if any, while at the same time minimizing business risk and identifying any areas that need correction from a legal or practical prospective. By adopting a thoughtful and principled approach to workplace investigations, a company can avoid ad hoc and inconsistent decisions that exacerbate rather than alleviate the underlying problems. Following a basic investigatory protocol will ensure the greatest likelihood of a thorough, thoughtful and effective investigation.

### ***Planning and Professionalism***

The need for an investigation often arises suddenly and without warning, but an employer must resist the temptation to rush to judgement. The employer's decision to investigate and the investigative process

undertaken must be thoughtful and well-planned. This avoids/reduces mistakes, ensures the adoption of best practices with regard to the particular investigation at issue, and persuades any post-investigation reviewers that the employer made a sincere effort to identify and resolve a problem. Pre-investigation planning should include:

- Assess the actual purpose and objectives of the investigation;
- Review relevant law and employer policies and procedures;
- Careful selection of an appropriate investigator or investigation team;
- Establish the preliminary order and timeline for interviews;
- Prepare an outline of topics or subjects to be covered in the interviews; and
- Document the preliminary investigative plan.

Moreover, the entire process must be handled professionally, from the initial preparation of the plan through the final presentation of the report. Professionalism encourages confidence in the individual or group that is charged with uncovering and resolving legal and factual issues and reinforces the perception that the company takes the allegations seriously. The professional investigator is one who treats everyone with respect, who means what he/she says, and who does what is promised. An investigator always remains calm and controlled, never intentionally misleads, does his/her utmost to foster a full and frank disclosure of all relevant matters, and reaches a reasoned and thoughtful conclusion.

### ***Confidentiality***

An investigator should strive to maintain confidentiality as to every aspect of the investigation in order to protect the rights of the accuser and the accused, make witnesses more comfortable and to protect the investigation's integrity. The key word here is "strive." A failure to ensure confidentiality can have serious repercussions, including damaging someone's reputation; undermining the success of the investigation; offering the subject of the investigation an opportunity to cover up misconduct; creating negative publicity for the company; compromising the company's ability to defend against any legal action associated with the investigation; and possibly instigating a retaliatory action based on the disclosure.

However, although the matter should be handled with discretion, the investigator can never promise absolute confidentiality since any

investigation will require some level of disclosure. Investigators should make disclosures on a need-to-know basis only. Moreover, the National Labor Relations Board (NLRB) has placed limits on an employer's ability to keep investigations confidential (i.e., instructing non-supervisory employees to refrain from discussing an investigation while it is pending). Specifically, in *Banner Health Systems*,<sup>1</sup> the NLRB ruled that an employer violated the National Labor Relations Act merely by asking an employee, who was the subject of an internal investigation, to refrain from discussing it while the investigation was pending. The Board held that the need for confidentiality must be assessed on a case-by-case basis. Before an employer requests confidentiality, it must determine whether:

- witnesses need protection;
- evidence is in danger of destruction;
- testimony is in danger of being fabricated; and
- there is a need to prevent a cover-up.

Whether the Board continues to follow *Banner Health* remains to be seen. The new NLRB General Counsel Peter Robb issued a memo on December 1, 2017, listing the *Banner Health* decision as one of the cases the Board may seek to overturn.

### ***Timeliness***

Investigations need to be conducted as promptly as possible, given the complexity of the matter under investigation. Acting expeditiously clears innocent people as soon as possible, stops any misconduct quickly, and allows the imposition of corrective action. It also communicates to wrong-doers that the company takes misconduct seriously. Swift action is particularly important when allegations of harassment are raised, as delay connotes indifference and allows the potential for continued harassment. This portends significant liability if there is subsequent litigation.

The importance of a timely investigation cannot be overstated. Illustrative of an investigation deemed timely, and one that allowed the Company to secure summary judgement in a harassment suit, was the investigation undertaken in *EEOC v. AutoZone, Inc.*,<sup>2</sup> a case involving harassment allegations by LaKindal Smith, parts sales manager, against Gustavus Townsel, the store manager. According to Smith, Townsel began making lewd and obscene sexual comments to her in August 2012 and progressed to inappropriate grabbing and touching in September 2012. Smith reported the harassment at the end of October 2012 to AutoZone's Regional Manager and he, in turn, informed the Regional HR manager, Melody Deener, on Friday, November 2, 2012. The next

business day, Monday, November 5, 2012, Deener spoke to Smith by phone and also requested a letter outlining the allegations. On Tuesday, November 6, 2012, Deener went to the store to interview witnesses and the accused. A week later, the Company transferred Townsel to another store to ensure that he never worked alone with Smith. His employment was terminated on December 6, 2012. The entire process took approximately five weeks.

The U.S. Court of Appeals for the Sixth Circuit affirmed summary judgment for the Company finding that AutoZone's policy of non-harassment and its timely investigation proved that the Company exercised reasonable care to prevent and promptly correct sexually harassing behavior, and as such it established an affirmative defense to liability under Title VII.<sup>3</sup>

### ***Thoroughness***

The hallmark of an effective investigation is one that is thorough, meaning that the employer has taken those steps necessary to determine what actually happened. Just what those steps are will vary based on the nature and complexity of the allegations. The thoroughness of the investigation is one factor examined by the courts in determining whether the employer's investigation was adequate and will be allowed to serve as a defense to any harassment charge.<sup>4</sup>

Of course, some recent cases highlight an investigative process that is anything but thorough. The Massachusetts Supreme Court's opinion in *Gyulakian v. Lexus of Watertown*<sup>5</sup> illustrates what not to do. Plaintiff Emma Gyulakian worked as a finance manager at a Lexus dealership, reporting to Emmanuel Ferreira. At the meeting with the dealership's general manager and general sales manager to terminate her employment (because her "relationship with her coworkers had deteriorated"), she informed these individuals that she had been sexually harassed for the past 18 months by Ferreira. She had not complained to them or to the dealership's human resources manager before the termination meeting. Gyulakian, however, had informed the assistant general sales manager, who was Ferreira's supervisor, on multiple occasions about the sexually offensive incidents – comments about her anatomy, trying to throw coins down her blouse, asking to sleep with her. After the termination meeting, Lexus purportedly investigated and found the claims unsubstantiated. Gyulakian filed suit claiming sexual harassment under Massachusetts law, the matter went to trial and the jury awarded her \$40,000 in compensatory damages and \$500,000 in punitive damages. The state Supreme Court affirmed the punitive award almost exclusively based on the "sham" investigation.

The failures of the investigation were legion and provide a lesson for anyone tasked with a duty to investigate. The assistant general manager learned of the sexually offensive behavior but did not investigate. When the company actually investigated after the termination meeting, this

“investigation” was wholly inadequate. The general manager admitted that even before he began to investigate he did not believe Gyulakian. He failed to interview anyone in the finance department other than the accused “because he did not want to undermine Ferreira.” He kept no notes of any interview. The HR manager did her own investigation, but she had no notes either. No one contacted Gyulakian during the course of the investigation. The investigation found no corroboration, but at trial, a number of co-workers who were not interviewed confirmed many of Gyulakian’s complaints.<sup>6</sup>

### ***Objectivity, Independence, and Tenacity***

Any investigator must maintain objectivity and independence, both actual and perceived, during the course of the investigation. All information must be reviewed and analyzed using the same standards, and the findings should be based on actual facts disclosed during the investigation. Although all individuals bring their own value system to any situation, an investigator must recognize and be sensitive to his/her own biases so as not to taint the objectivity of the process. There must be no actual or perceived conflict of interest.

Tenacity and perseverance are additional criteria of effective investigators. An investigator must recognize that those interviewed – whether a complaining party, subject of the complaint or third party witness – may not be completely honest when interviewed. Thus, an investigator should not blindly rely on uncorroborated statements. An investigator must persevere to develop the evidentiary detail, explain any anomalies, and fully understand the facts. To achieve this result, the investigator should be tenacious but always business-like during the investigative process. No investigator should ever be underhanded or insulting, as there is a qualitative difference between tenacity and obnoxious or demeaning behavior.

## **INVESTIGATION PROTOCOL**

Although any investigation must be tailored to the unique facts and circumstances of the underlying matter investigated, a basic protocol should always be followed. Internal investigations aim to uncover the truth about alleged misconduct within the organization. A good internal investigation must accomplish this objective without compromising the relationship with innocent employees or unnecessarily damaging the reputation of involved parties or the company. That requires careful planning, consistent execution, strong analytical skills, and a solid grasp of the legalities involved. Having a process in place guarantees that thought will be given to the process and any deviation from the protocol will only be undertaken after thoughtful consideration.

## ***Selecting an Investigator***

Perhaps the most critical element of any workplace investigation is deciding who will conduct the investigation. There is no one-size-fits-all approach. An investigator's charge is to develop the factual record through interviews and document review, and to do so thoroughly, efficiently, and professionally, all while understanding the practical and legal ramifications of his/her actions. What this means, at a minimum, is that a company should strive to select an investigator that is competent, professional, and has familiarity with the legal standards applicable to the underlying conduct.

### ***Key Qualities***

Objectivity is of paramount importance in selecting an effective investigator. The goal in any investigation should not be to exonerate the employer or any of its principals, but rather to uncover the truth in a fair and impartial manner. Particularly where sensitive matters are likely to be discussed, consideration should also be given to the interpersonal skills and overall demeanor of the potential investigator. The investigator should be a good listener and sensitive to the situation and persons involved. Instead of feeling intimidated, employees should feel comfortable (to the extent possible) when being asked to disclose what will often be very embarrassing facts. Finally, employers should bear in mind that the chosen investigator's testimony and investigatory report may ultimately be required in the event of subsequent litigation. Effective verbal and written communication skills are, therefore, highly desirable.

### ***Potential Candidates***

Employers have different options when selecting an investigator. The most frequent choices are human resources managers, attorneys (in-house or outside), and third party independent investigators—with each option having its own pros and cons. An experienced human resources professional is often a good choice when confronted with relatively straightforward complaints of harassment or discrimination. HR professionals typically have strong interpersonal skills, may have had experience conducting investigations, and are generally familiar with applicable employment laws. Such internal resources have the added benefit of pre-existing knowledge of the employer's workplace policies and culture and may also be familiar with some of the relevant players in the workplace drama. Although this familiarity may be considered a positive in some cases, it can also lead to an appearance of bias depending on the people involved and the company's

reporting structure, particularly if the alleged wrongdoer outranks the investigator.

Outside investigators, including human resources consultants, who have no skin in the outcome of the investigation, may present a greater appearance of objectivity. Additionally, employees might feel more comfortable disclosing sensitive and potentially embarrassing information with outside investigators, knowing that they will not be seeing or working with them on a regular basis after the conclusion of the investigation. Of course, with these added benefits come the costs of retaining the outside investigator's services, which will be money well spent if the investigator is successful in conducting a fair and thorough investigation.

Attorneys, both inside and outside counsel, bring legal expertise and are often a good choice if an objective of the investigation is to assess litigation risk or to preserve confidentiality. Because in-house counsel may be subject to the same appearance of bias as other internal resources, employers often look to outside counsel to conduct workplace investigations. If there is a concern that counsel has represented the company in the past, and therefore may act to preserve its relationship with a key client, the company can retain outside counsel with whom it has not had a prior relationship. Not only are attorneys inherently knowledgeable about the applicable laws and burdens of proof, but they are likewise trained in interviewing witnesses, collecting evidence, and assessing credibility. Before engaging an attorney as the investigator, however, employers should give careful consideration to the potential ramifications. For example, if litigation ultimately ensues, outside counsel may become a witness in the litigation and will be conflicted out of representing the employer in the lawsuit. Employers should also consider the applicability of and desire to maintain the attorney-client privilege and work-product protection.

Employers often choose outside counsel to conduct the investigation because they desire to keep the investigative report privileged and confidential. However, neither the attorney-client privilege nor the work-product doctrine will always shield the discovery of information when an attorney acts as an investigator. This is particularly true in the context of sexual harassment claims where employers often use the reasonableness of their investigation as a defense.

The attorney-client privilege protects the functioning of the attorney/client relationship and requires:

- an attorney;
- a client;
- a relationship established for the purpose of providing legal advice;

- a communication between them; and
- an intent that the communication be confidential.

Where the parties wish to preserve the privilege in the context of an investigation, it is critical that the report be labelled confidential and privileged and that it contain “advice” rather than just facts. The work-product privilege, which is qualified rather than absolute, protects from discovery the mental impressions, conclusions, opinion, and legal theories of an attorney, created in anticipation of litigation.

Complex privilege issues result when an attorney is hired for a “dual purpose” in a workplace investigation. Some courts have concluded that the attorney-client privilege is not applicable if the purpose of the investigation is to enforce the employer’s anti-harassment policy or comply with a legal duty to investigate and remedy wrongdoing, reasoning that attorneys involved in the investigation are not providing “legal advice,” but are simply giving “business advice.”<sup>7</sup>

Similarly, protection under the attorney work-product doctrine is often rejected where it is determined that the investigatory materials were prepared in the “ordinary course of business” and not in “anticipation of litigation.”<sup>8</sup> Courts have not generally been persuaded by the argument that any internal complaint has the potential to balloon into litigation. However, they do often recognize a shift in the employer’s investigation from a simple internal investigation for remedial purposes to one for the purpose of mounting a legal defense. Determining precisely when that shift occurs is not easy, but the dividing line is usually contact from the complaining employee’s attorney or receiving a charge of discrimination.<sup>9</sup>

Even in cases where the court finds applicability of a privilege, employers routinely waive these privileges when they rely upon the investigation as an affirmative defense to a claim of harassment. In *Faragher v. City of Boca Raton*<sup>10</sup> and *Burlington Industries v. Ellerth*,<sup>11</sup> the U.S. Supreme Court held that absent a tangible employment action, an employer may defend against liability in a sexual harassment case if it can prove that (a) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior and (b) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm.

Courts routinely hold that employers waive any privilege that may attach to investigation-related documents when they raise the adequacy of their investigation and/or corrective action as a defense in litigation.<sup>12</sup> While courts vary in how broadly they apply the waiver, they emphasize that equity requires a plaintiff to be able to explore the parameters of an employer’s investigation to rebut its defenses.

Therefore, when an employer’s investigation is expected to be Exhibit A in its defense, the investigation should be designed with the likelihood of future disclosure in mind. One option is to bifurcate the investigation

process by designating one person or group of people (which may include in-house or outside counsel) to conduct the factual portion of the investigation and prepare related reports while simultaneously using separate counsel to focus on any required legal analysis. Separately documenting an attorney's legal recommendations and specifically identifying them as privileged will certainly aid in maintaining confidentiality.

### ***Scope of the Investigation***

The scope of an investigation should be limited to discovering those facts which prove or disprove the issues underlying the investigative goals. There is no need to use a "scorched earth" approach if one more narrow and tailored will undercover all of the relevant facts. As with all parts of an investigation protocol, the company must be flexible and willing to adjust the process based on the information disclosed at each step. Sometimes a narrow complaint is only the "tip of the iceberg" and what is assumed to be a straight-forward, focused investigation becomes more wide-ranging. A company must remain sensitive to the true nature of the underlying problem and what is actually required to develop the factual record.

### ***Witness Interviews***

The most revealing information frequently comes from employees. If they cooperate, they are an invaluable source of information. Not only can employees provide detailed accounts of what occurred, but they can put the matter in context, providing the subtleties of personality and motivation behind the actions.

### ***Identify Interviewees***

At the outset, investigators should identify every person who has possible knowledge of relevant facts. These individuals generally include the complaining employee, the subject of the complaint, any person the complainant or subject suggested has knowledge, any person believed to be a direct witness, and the supervisors of the complainant and subject. After completing the initial list, the investigator should consider whether to interview everyone on the list. While the investigator must generate a complete factual record, not everyone who knows/heard/saw something needs to be interviewed. Those with first-hand knowledge are important but the investigator should resist the temptation to over-interview. The decision of whom to interview is a delicate balance. It is important to get the best information possible, while keeping the matter as confidential and contained as possible.

### *Order of Interviews*

The next issue is the order in which to conduct the interviews. Generally speaking, witnesses should be interviewed from the least to most likely to have engaged in any wrongdoing. Interviewing in this order will allow the investigator to complete the most critical fact-finding before confronting those most culpable.

Interviewing normally begins with the complaining party. At this stage, however, the interviewer knows the least about the factual record and as a result, the complainant may need to be re-interviewed at a later date to confirm or rebut newly discovered facts. Next up are the neutral third-party witnesses. These interviews usually focus on what the witness saw or heard and the basis of the witness' knowledge, that is first- or second-hand. The scope of the interview should not be limited to the incidents described by the complainant. Preferably, interviewers should also explore whether the witness participated, how the witness has been affected by the participation/observation, and what, if anything he/she has done about it.

The investigator should next consider interviewing anyone suspected of being complicit in the alleged incident. If the allegation raises criminal concerns, law enforcement and/or legal authorities may need to be included in the process.

Investigations are often best served if the subject of the complaint is interviewed last. In this way, the interviewer better understands the underlying incident(s), has developed a more complete factual record, and has assessed the harm occasioned by the alleged conduct, all of which leads to a more productive confrontation. Special considerations come into play when interviewing the subject of the complaint. When initiating the interview, the investigator should: (1) acknowledge the potential conflict between the subject and the interests of the organization; (2) explain the purpose of the investigation; and (3) emphasize the prohibitions against retaliation. Then, the investigator should give the subject full information about the report against him or her to afford the subject an opportunity to fully explain or defend against the allegations.

In certain circumstances, it may be advantageous to conduct surprise interviews without advance warning. These are appropriate if there is a legitimate concern that the subject or a witness will try to cover up misconduct by altering or destroying evidence.

### *Interview Location*

Careful thought should be given to the interview location. Any place that ensures a full and frank discussion, and which allows for witness privacy, confidentiality, and comfort is appropriate. Thus, the investigator should choose a neutral location with no distractions, where a witness will feel free to leave at any time.

Investigators should try to avoid telephone interviews. Witnesses communicate through both words and body language; thus, an interviewer will have a better chance of gaining information and assessing credibility in a face-to-face setting. Additionally, phone interviews present a greater chance that, unknown to the investigator, the interviewee will have someone else present to assist with or monitor the conversation.

### *Interview with Care*

Employee interviews are critical. Not only are witnesses providing information to the interviewer, but conversely, the interviewer is sharing information with them as to the underlying allegations and the investigation itself. Preparation is key. The interviewer should come prepared with standard instructions and a list of topics. These are guidelines only, not a script, since the interviewer needs to be flexible to follow-up any line of inquiry or to clarify points.

#### *1) Begin with instructions*

Anyone involved with an investigation knows that witnesses are anxious no matter whether they are charged with misconduct. Beginning an interview with an explanation of the process and expectations for the meeting will help put the witness at ease and facilitate the dialogue.

As an initial matter, the investigator should explain the reason for the investigation, both what is being investigated and why the witness is being questioned. The investigator should also describe his/her role. The investigator has been retained by the company to investigate the matter and the witness' help is needed to determine what happened. The employee should be informed of several items: (1) that the company takes the matter seriously and has a commitment or obligation to investigate the claim; (2) that confidentiality is important and that information provided by the employee will be kept as confidential as possible, and disclosed on a need-to-know basis only; and (3) that the company has a policy prohibiting retaliation.

Investigators should also consider whether to request that the interviewee keep the matter confidential.<sup>13</sup>

#### *2) Ask good questions, listen attentively, and observe demeanor*

The purpose of workplace interviews is to elicit information, not cross-examine a witness. Thus, an investigator should phrase and organize questions to facilitate fact-finding, and most significantly, an investigator needs to actively listen. This means that the investigator must think

about what the witness said, whether it was logical, and whether it fit with the balance of information already possessed by the investigator. The following is a suggested interviewing protocol:

- Plan the order of the questions, question comprehensively, but retain the flexibility to follow-up for more detailed responses and for any new issues raised.
- Follow a chronological or other systematic order. This allows the witness to understand the questions and be responsive. Random questioning may confuse the witness.
- Be reasonable in your expectations. No investigator is Perry Mason securing speedy admissions of wrong-doing.
- Use open-ended questions. The “who, what, where, when, and how” questions are always a good place to start. Start broad and then narrow the focus.
- Use straight-forward and simple questions. Avoid trying to trick the witness as it makes the investigator appear dishonest and unprofessional.
- Ask the tough questions even if the situation is uncomfortable for the interviewer or interviewee. Save unfriendly or embarrassing questions until the end, however.
- Return to key issues several times in different ways. This will help refresh recollection, develop detail and help to assess the witness’ credibility.
- Allow silence. Witnesses often speak more to fill the void.
- Always determine the basis for the witness’ knowledge. Ask whether the information provided was based on personal knowledge or hearsay.
- If the witness provides information contradicted by a document, by another witness’ statement, or by the witness’ own earlier statement, ask for an explanation at the appropriate time.
- Observe body language. An interviewer must assess credibility. In addition to the logic of the facts presented, an investigator must watch for the manner in which a witness answers to assess if the answer is evasive, dishonest or intentionally incomplete.

- An interviewer should never share his/her personal opinion or characterize the company's position. Nor should an interviewer act in any way to influence a witness' answers.
- Always ask if there are others with relevant information or others that should be interviewed in connection with the complaint.
- Before the conclusion of the interview, the interviewer should always ask whether there is anything else that the witness wants to add, and whether there are any other documents to review.
- Interviews should always be concluded with instructions regarding confidentiality, nonretaliation and thanks for time and cooperation.

### *3) Difficult initial issues*

A witness should never be forced to submit to an interview and employees must be free to leave at any time. However, an employer has the right to require an employee's cooperation as a condition of employment. If an employee chooses not to cooperate that is his/her right, but employment termination may be the consequence of that choice.

Employees often ask if they are in trouble, or if they will be disciplined or discharged. Truth is the best answer. The investigator is the fact-finder and at that point, the company is only gathering facts. Although discipline and/or discharge can follow from misconduct, the company is not up to that point in the process.

Similarly, a witness may ask whether they need to consult an attorney, or whether they may bring a lawyer to the interview. An investigator should not offer an opinion on whether counsel should be consulted, and employers need not and generally should not allow interview subjects to bring a lawyer to an internal investigatory interview. A lawyer is difficult to control, may intimidate the questioner, and may use his/her attendance as a vehicle to scrutinize and find fault with the questions.

A witness may also ask to have a co-worker present during the interview. Barring a situation where the company is obligated to allow another person's attendance (a unionized setting where the witness faces the imposition of discipline as a result of the investigation) participation of a co-worker should be discouraged. Although the company can more easily control an employee than an outsider, there remains the problem of maintaining confidentiality and privacy rights. Even if a third party is allowed, however, the role must be limited to that of observer. The third party cannot disrupt the interview, answer questions for the witness, or pose questions designed to elicit a certain response.

Finally the company should not allow any outsider at the meeting. It is contrary to company interest to disclose sensitive, private, and confidential information to those that cannot be controlled. It also establishes a poor precedent for future investigations.

### ***Collection and Review of Documents***

Documents are important in an investigation. They may implicate or exonerate certain parties, detail misconduct, suggest other avenues of investigation, and refresh a witness's recollection. An investigator should be cautious in handling both paper and electronic documents procured through an investigation, and all underlying documents and data relied upon during the investigation should be secured against loss. Along this same line, the investigator should take steps to preserve relevant information in both paper and electronic format, including issuing written notice to employees with potentially relevant information outlining their duty to preserve information. The company should also consider suspending the normal document retention/destruction procedures for the files of key witnesses.

Original documents are those documents provided directly to the investigator and they should never be altered. If an investigator wants to make notes directly on a document, a copy should be made and originals maintained in an unaltered state. If authenticity might become an issue, such as when tampering is suspected, an investigator should collect the same documents from several sources. An investigator should also take care to mark the source of each version of the document.

### ***Reach a Conclusion***

The purpose of an investigation is to make objective and supportable findings. The investigation allows the company to reasonably rely upon these findings in order to implement both appropriate remedial action and any improvements and changes to business operations. It also proves to stakeholders that the company acted promptly and in good faith to resolve the workplace issue. The investigator must reach a conclusion as to what happened, when it happened, who was involved/responsible, and what standards applied, and these conclusions need to be based on the objective and supportable findings from detailed witness interviews and document/data review. Once completed, the investigative file should be maintained in a secure area.

## **REPORTING RESULTS**

The results of the investigation need to be reported back to the company to allow for review, discussion and any follow-up. As interviews are

completed interview memos should be prepared, and at the conclusion of the investigation, a final report should be drafted and submitted.

### ***Interview Memos***

Accurately recalling the details of a witness' interview is critical to a successful investigation. Immediately at the conclusion of each interview, an investigator should draft a memorandum stating the date and time of the interview, and describing everything that was said or done.

To make an accurate record, the investigator should consider using direct quotes as often as possible. If the witness makes an admission, the investigator should record it, as well as noting any other significant events that occurred. There should be a record of the documents that were used or mentioned during the interview, and to the extent there were contradictions between the interviewee's recollection, the documents and the recollections of others, these facts should be noted as well.

The investigator should not, however, include inflammatory or judgmental words, personal opinions or legal conclusions. Opinions can be easily challenged, objectively verifiable facts cannot. The goal is to draft a complete memorandum that accurately captures the totality of the interview.

### ***The Final Report***

The Final Report is created at the conclusion of the investigation. It includes a summary of the facts gathered and any conclusions or recommendations. Reports are invaluable management tools because they enable a company to act on the findings, that is, to implement disciplinary measures as warranted, and to develop operational controls to avoid other incidents of misconduct. One decision will be whether the report is oral or written, or some combination of the two.

A written report provides the company with critical facts found from the witnesses interviewed and the documents reviewed, and it allows the investigators to make recommendations, if warranted, as to how the company can respond to their findings. The writing is also proof that the investigation was prompt, thorough and credible. This is particularly helpful if used in litigation. However, written reports can also permanently preserve damaging information about the company. Oral reports can control who receives the findings of the investigation, and fortify the applicability of privilege. However, a serious drawback is the appearance that the company is trying to conceal wrongdoing. One option to consider is a limited written report with an extensive oral report. These various options should be discussed and considered before the investigation is concluded.

The Final Report should be limited to the scope of the investigation, which should be clearly set forth in the beginning of the report. The report should also include:

- A description of when and how the initial complaint was made and brought to the company's attention;
- The dates that the investigation began and when it was completed;
- Identification of all people interviewed, the dates of those interviews and a summary of information obtained;
- A discussion of any credibility assessments reached;
- Identification of documents/data reviewed;
- A summary of the facts gathered throughout the investigation;
- A decision as to whether the allegations were substantiated;
- A recitation of specific conclusions;
- A discussion about how the investigation implicated company guidelines or policies; and
- A description of how the company responded to the report.

Whether the Final Report includes recommendations is an area that merits consideration. Some reports should not include recommendations about the imposition of discipline or similar remedies, as these activities are outside the investigation's scope. However, oftentimes in more far-ranging harassment investigations, a company will want an investigative report to include recommendations regarding drafting/revision of policies and procedures, or suggestions as to how to change the culture, ensure that complaints are handled appropriately, and ensure that company leaders stress the importance of a respectful workplace. The investigator should consider these issues before completing the report.

## **CONCLUSION**

With increasing frequency, companies need to conduct investigations into discrimination and harassment at work. An effective investigation helps satisfy an employer's responsibility to prevent and correct employee misconduct and it conveys to employees that the company is

serious about ensuring a safe and harmonious work environment. It furthers corporate compliance with applicable laws and regulations, identifies potential weaknesses in internal processes and controls, minimizes business risks and helps with the company's public image. An investigation can also generate the documentation necessary to defend against legal claims. By following a thoughtful and principled approach to situations involving misconduct, the company can ensure the advantages that an effective investigation offers.

## NOTES

1. 362 NLRB No. 137 (6/26/2015).
2. 692 Fed.Appx. 280 (6th Cir. 2017).
3. *Id.* at 284-85. *See also* Jones v. Allstate Ins. Co., 707 Fed. Appx. 641 (11th Cir. 2017). (Affirming summary judgment for Allstate in sex harassment case where Company investigated and terminated alleged harasser within two weeks of the complaint.)
4. *See, e.g.*, Fox v. Yates Services, LLC, 232 F.Supp. 3d 971 (M.D. Tenn. 2017) (Plaintiff repeatedly complained of harassment by coworkers, and after each complaint, HR manager investigated, interviewing all witnesses identified by Fox and sometimes the entire work-group. When appropriate, disciplinary action was taken. Granting summary judgment to employer in part because employer undertook prompt and thorough investigation.), *aff'd*, 2017 WL 5466657 (6th Cir. 10/31/2017).
5. 475 Mass. 290, 56 N.E.3d 785 (2016).
6. *See also* Pizarro-Correa v. Puerto Rico Internal Revenue Dept., 267 F.Supp. 3d 369 (D.P.R. 2017) (denying company motion to dismiss in Title VII discrimination case. Company failed to investigate plaintiff's sex harassment complaint against co-worker, choosing instead to investigate co-worker complaint against her.).
7. *See, e.g.*, Payton v. N.J. Turnpike Auth., 148 N.J. 524, 551 (1997) (holding that an attorney who conducts a workplace investigation before a threat of litigation is not providing legal advice for purposes of the attorney-client privilege); Koumoulis v. Indep. Fin. Marketing Group, 295 F.R.D. 28, 45 (E.D.N.Y November 1, 2013) (concluding that communications between outside counsel and human resources personnel were not protected by the attorney-client privilege because "their predominant purpose was to provide human resources and thus business advice, not legal advice"). *But see* Keith v. Clatskanie People's Utility Dist., 2014 WL 2803452, at \*3 (D.Ore. June 18, 2014) (holding that, although outside attorney investigator hired by employer only gathered factual evidence and did not offer any legal advice, since the investigation was conducted in connection with another attorney's provision of legal services, the report fell within the scope of attorney-client privilege).
8. *See, e.g.*, Banneker Ventures, LLC v. Graham, 253 F.Supp.3d 64, 73 (D.D.C. 2017) (holding that the defendant-employer was required to produce 51 interview memos prepared by an outside law firm and marked as attorney work-product, concluding that the documents were created in the normal course of business and not in anticipation of litigation where two years had passed between any threat of litigation and the ensuing investigation).

9. *See, e.g.*, Robinson v. Vineyard Vines, LLC, 2016 WL 845283 (S.D.N.Y. March 4, 2016), at \*3 (distinguishing between work product prepared following the plaintiff's internal complaint and investigation materials prepared after the plaintiff sent the defendant an email indicating that she had filed a police report and would be filing a charge of discrimination).
10. 524 U.S. 775, 807-808 (1998).
11. 524 U.S. 742, 765 (1998).
12. *See, e.g.*, Koss v. Palmer Water Dep't, 877 F.Supp.2d 28, 29 (D. Mass. 2013) (holding that the defendants could not raise the *Faragher-Ellerth* defense to sexual harassment liability and then assert the attorney-client privilege and work-product doctrine to shield documents relating to the employer's investigation).
13. *See supra*, addressing concerns raised by the NLRB.