

Conducting Workplace Investigations

APMA 2022 Annual Forum

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DISCLAIMER

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ISSUES THAT MAY LEAD TO A WORKPLACE INVESTIGATION

Drug/substance abuse

Theft

Harassment/discrimination complaints

Workplace threats/violence

Vandalism

Safety problems

Potential disciplinary action



INVESTIGATION OF THEFT OR CRIMINAL ACTIVITY

No legal requirement, but recommended. But it is a crime in CA to threaten criminal action to obtain a civil settlement.



California Law (FEHA)

- Employers are required to investigate discrimination/harassment complaints under FEHA. FEHA requires employers to: “take all reasonable steps to prevent discrimination and harassment from occurring.” Gov’t Code §12940



California Law (FEHA)



- Per DFEH: “anytime you are made aware of behavior that is serious enough to conduct a formal investigation.” And “if there are allegations of conduct that, if true, would violate your rules or expectations, you will need to investigate...”



California Law (Cal. Sup. Ct.)

Cotran v. Rollins Hudig Hall Int.

An employer will not be liable for wrongful termination if after conducting a reasonable good faith and thorough investigation had a good faith belief that inappropriate conduct had occurred.



WHY CONDUCT WORKPLACE INVESTIGATIONS?

FEHA, at Govt. Code §12940(h), makes it an unlawful employment practice to discipline an employee because they opposed unlawful harassment or discrimination or because they “have filed a complaint, testified or assisted in a proceeding under this part.”



EMPLOYEE CAN'T BRING FEHA CLAIM FOR LYING IN INVESTIGATION



McGrory v. Applied Signal Tech., Inc., (2013) 212 Cal App. 4th 1510



Employee can't bring FEHA claim after being fired for lying or withholding information during employer's investigation.



FEDERAL LAW (EEOC)

- “When an employee complains to management about alleged harassment, the employer is obligated to investigate...”

EEOC Enforcement Guidelines



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FEDERAL LAW (U.S.S.C.)

The Ellerth/Faragher defense: Employer has affirmative defense to harassment lawsuit if:

- + It exercised reasonable care to prevent and remediate harassment; AND
- + Employee unreasonably failed to take advantage of preventative opportunities



EEOC

- Title VII requires:
- “take all steps necessary to prevent harassment from occurring.”
- 29 C.F.R. § 1604.11 (F)



COURTS

“Employer’s investigation of a sexual harassment complaint is not a gratuitous or optional undertaking but required by law.”



Malik v. Carrier Corp.

COURTS



An employer has at least two obligations when there is a harassment complaint:

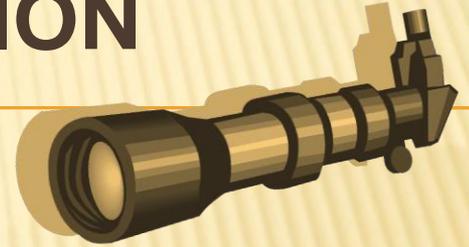
1. Take interim steps to stop any alleged ongoing harassment in order to give the employer time to conduct an investigation.
2. Conduct the investigation, and if there is a determination of wrongdoing, take steps to remedy and stop the harassment.

INTERIM STEPS



- ✘ 1. Administrative leave pending investigation?
- ✘ 2. Changing an employee's shift. (Not the complainant's shift.)
- ✘ 3. Changing reporting relationships.
- ✘ 4. Other steps to limit interaction between complainant and alleged harasser.

CONDUCTING THE INVESTIGATION



Determine the scope of the Investigation.



What is the purpose of the investigation?

WHO SHOULD CONDUCT THE INVESTIGATION?

1

The investigator must be someone with background and experience, and able and have time to perform a thorough investigation.

2

The investigator can come from either inside or outside the company. If inside, cannot be a witness.

3

The investigator must be nonbiased, impartial and objective.



WHO SHOULD CONDUCT THE INVESTIGATION?



Actual or perceived impartiality.

California Private Investigator Act (“CPIA”) states that only licensed investigators can conduct most workplace investigations.

Persons employed “exclusively and regularly” by the employer.

Attorney exemption (attorney performing “his or her duties as an attorney at law”)

ELEMENTS FOR A SUCCESSFUL INVESTIGATION



Review documents first:



1. Personnel files.



2. Company policies, (Code of Conduct, no harassment policy, wage policies, etc.).



3. Emails, phone records, voicemails, mobile phone logs, computer history, security logs.



4. Documentation that shows the interaction between the accused and accuser.

ELEMENTS FOR A SUCCESSFUL INVESTIGATION



Review policies for privacy considerations.



Work with IT to do a key word search of emails.



Check mobile phone contracts – who owns the phones / plan?



Establish an employer contact/liason. This will be contact person for investigator and witnesses.



ELEMENTS FOR A SUCCESSFUL INVESTIGATION



Prepare a witness list and go over what topics will be covered.



Check witness work schedules for availability.



Prepare advisements for employee witnesses. Consider impact on union agreement.

UNION EMPLOYEES



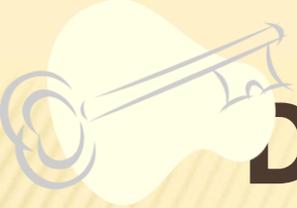
Union Employees

Union employees have the right to have another person (usually a union representative or shop steward) present at the interview, *if there is the specter of disciplinary action.*

If employee wants a union representative present, the employer can grant the request or terminate the interview.

Not entitled to representation for witness interview.





DEVELOP INTERVIEW SCHEDULE

- **1. Complainant is generally first interview in harassment case.**
 - Need a framework and understanding of the facts and helps identify other witnesses who need to be interviewed.
- **2. Don't try to bring all parties together, at least at the beginning of the investigation.**
- **3. What if complainant has already retained an attorney?**
 - Outside investigator/attorney can't speak to complainant outside presence of counsel unless authorized.

CONFIDENTIALITY/PRIVACY CONSIDERATIONS

The investigator should safeguard the confidentiality of the investigation. The investigator cannot guarantee anonymity or complete confidentiality.



CONFIDENTIALITY OF INVESTIGATION

- ✘ Apogee Retail LLC d/b/a Unique Thrift Store
NLRB (2019)
- ✘ “*Mutual aid or protection*” guarantee of NLRA section 7. Applies to non-union and union employees.
- ✘ Rules requiring employees to maintain confidentiality and prohibiting unauthorized discussions of workplace investigations into illegal or unethical conduct are lawful.
- ✘ Overruled Banner case.
- ✘ Must limit confidentiality during duration of the investigation.



GETTING STARTED- THE ADVISEMENT

Explain The reason for the investigation.

Explain Company policy on the subject.

Explain The investigation process and your role.



GETTING STARTED- THE ADVISEMENT

1. We take reports of wrongdoing seriously and will investigate thoroughly.
2. Retaliation for making a report of misconduct or harassment is forbidden by the Company.
3. You must immediately advise us of any possible retaliation or of further incidents of misconduct or harassment.



GETTING STARTED – THE ADVISEMENT

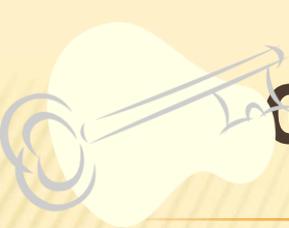
1. Address confidentiality.
2. Stress policy against retaliation for good faith participation in the interview.
3. Stress importance of honesty and forthrightness.
4. Stress that no determination has been made.



GATHERING EVIDENCE, ASKING QUESTIONS

1. Ask the witness for details / knowledge regarding each of the individual allegations.
2. Get specific words and actions.
3. Don't ask leading questions.
4. The “five w’s”





GATHERING EVIDENCE, ASKING QUESTIONS

- Ask the complainant to provide specifics of the incidents and disclose all relevant witnesses and/or documentation.
- Ask charged party to respond to each allegation.
- Assess witness credibility.
- Tell witnesses they can take breaks and leave the room (avoid a false imprisonment claim).
- Try to interview critical witnesses in person.



GATHERING EVIDENCE, ASKING QUESTIONS

1. Do not accuse, do not judge.
2. Stress anti-retaliation policy.
3. Give witness contact # if they have anything to add.
4. Let them know there may be follow up questions.



WRAPPING UP THE INVESTIGATION

1. Reiterate the interview is confidential.
2. Do not discuss during the pendency of the investigation.



WRAPPING UP THE INVESTIGATION

1. Stress anti-retaliation policy.
2. Give witness contact # if they have anything to add.
3. Let them know there may be follow up questions.





INVESTIGATION NOTES

- Can be typed or written or recorded, whatever maximizes the chances of obtaining reliable information. Method should be consistent.
- If written or typed notes, do not add personal or subjective notes – limit to facts only.



INVESTIGATION NOTES

- Use quotes whenever possible and when directly quoting a witness.
- Document difficulties, recalcitrant witnesses.

REACHING A CONCLUSION, MAKING FINDINGS

The findings should be consistent with the scope or intent of the investigation.

Weighing the evidence. Is it more likely than not that the allegation occurred?

DRAFTING THE REPORT

1. Should you prepare a report?
2. In most cases, the Company will want a full written report outlining the evidence with factually based conclusions.

DRAFTING THE REPORT

- State the scope and the issues as identified by the employer;
- Detail the investigation process, witnesses that were interviewed and documents reviewed;
- Identify relevant company policies;
- Recite relevant contact info, such as parties' jobs, work locations, etc. ;
- Provide an outline of the allegations made;
- Provide an outline of the charged party's response to the allegations;
- Summarize witness testimony (if any); and
- Prepare a statement of the investigator's findings and conclusions.

POST REPORT CORRECTIVE ACTION

If allegations are substantiated, the corrective action must consist of discipline designed to “and reasonably calculated to end the harassment.”

OPTIONS FOR CORRECTIVE ACTION

1. Warning – could be oral or written;
2. Training / Monitoring;
3. Transfer / Separation;
4. Demotion / Pay cut;
5. Suspension (with or without pay);
6. Termination.

COMMUNICATING THE RESULTS

If the investigation involved workplace harassment, and there is a determination there was harassment, the victim should be notified of the steps that have been taken to stop the harassment. Depending on the circumstances, the employer may want to disclose the disciplinary measures taken against the harasser.

COMMUNICATING THE RESULTS

If the investigation involved workplace harassment and the investigation revealed there was no harassment, the complainant should be informed there were no violations of company policy or actionable harassment.

COMMUNICATING THE RESULTS

Get the Company back on track!

- Disclose limited facts to witnesses, either individually or as a group.
- Inform upper management about the conclusions, but without disclosing too many facts.
- Conduct additional training.

Thank You!

Jim Gumberg
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January 20, 2022

