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**Certificate in Conducting Lawful Workplace
Investigations Seminar**

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Instructor:

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By:

Institute For Applied Management & Law, Inc.

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Diversity
Wage and Hour

Labor Relations
Drug Testing and Anti-Doping
Affirmative Action
OSHA Matters

Biography:

Mr. Appleby advises and represents employers in a broad course of employment law matters. His focus ranges from defending single plaintiff and class action employment cases to advising on and litigating wage and hour matters and handling OSHA issues. He also has significant experience in union avoidance, defending union campaigns, handling arbitrations and mediations, and conducting investigations. Mr. Appleby provides employers with consulting on human resource practices, including establishing ADR processes, developing systems for providing better and more effective advice to managers, and instituting programs aimed at early resolution of employment problems. Mr. Appleby is nationally known for his employment law and diversity training, as well for developing legally defensible diversity programs. He also is an expert on OFCCP matters, investigations, Title IX compliance and NCAA rules compliance. He has been named in Best Lawyers in America, Employment & Labor-Management, Atlanta every year since 2010.

Education:

J.D., University of Virginia School of Law, 1979

B.A., West Virginia Wesleyan College, 1976

Publications:

Mr. Appleby has published articles on employment and labor law issues ranging from union avoidance to dealing with problem employees, co-authoring a published textbook on pre-employment testing, and assisting numerous companies in creating effective pre-employment drug and paper-and-pencil testing. In 2007, Mr. Appleby published the book *Harassment, Discrimination and Other Workplace Landmines* through Entrepreneur Press. As a member of the professional tennis Anti-Doping Review Board, Mr. Appleby co-authored professional tennis' anti-doping rules and successfully defended the ATP Tour and International Tennis Federation in international drug hearings.

Lectures and Presentations:

Renowned as an exemplary employment law trainer, Mr. Appleby has created numerous training programs and trained thousands of human resource professionals and operations managers across the country. Among his achievements are creating an entirely interactive course in risk assessment for human resource professionals. Mr. Appleby has been consistently rated among IAML's top four instructors for more than 25 years. He presents IAML's Certificate in Conducting Lawful Workplace Investigations, Certificate in Employee Relations Law Seminar, webinars and has taught dozens of in-house programs to our clients.

Activities:

- Member - Georgia State Bar
- Member - American Bar Association Committee on the Development of the Law under the National Labor Relations Act, and the ABA Committee regarding FMLA and Wage-Hour Laws
- Member - International Tennis Federation, ATP Tour and WTA Tour Anti-Doping Review Boards

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CONDUCTING LAWFUL INVESTIGATIONS

I. THE INCREASING IMPORTANCE OF EMPLOYMENT INVESTIGATIONS

The failure to properly investigate claims of harassment or other employee misconduct has always been one of the most dangerous aspects of employment litigation.

A. Costs of Litigation

- Litigation in federal court through trial routinely costs in excess of \$150,000.
- Litigation through summary judgment often exceeds \$50,000 in even simple cases.
- Litigation also costs work hours. Numerous people are often required to spend a great deal of non-productive time on litigation related matters.

B. Risks of Judgment

- Awards in discrimination and related cases can cost up to \$400,000, sometimes more. In one well-known case, a national law firm was forced to pay \$6 million dollars in damages and fees for sexual harassment based largely on allegations that the employer had failed to follow up on earlier reports of harassment. *Weeks v. Baker McKenzie*, 63 Cal. App.4th 1128 (1998).
- Class action cases are often in the millions of dollars.
- Managers and supervisors can be sued individually for related tort claims.
- The United States Supreme Court held in two landmark cases that an employer implementation of its policy against sexual harassment can be a defense against liability in some kinds of sexual harassment cases. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Under the *Faragher/ Ellerth* analysis, in cases involving hostile environment harassment caused by a supervisor, employers have an affirmative defense to liability if they can show that: (1) they used reasonable care to prevent and correct any harassment (e.g., having an anti-harassment policy in place), and (2) the employee unreasonably failed to make a complaint pursuant to the policy or to otherwise avoid harm.

C. When is an Investigation Necessary

1. Receipt of a complaint by the complaining employee.
2. Inappropriate behavior is viewed or reported by a third party.

II. WORKPLACE HARASSMENT INVESTIGATIONS

A. The Best Practices in Employment Investigations

There is no perfect recipe for performing an employment investigation; the investigator's actions will depend largely on the facts and circumstances of each case. When developing a course of action, employers should consider the issues most likely to be challenged in litigation:

1. *Is the investigator properly trained?* It is increasingly common for plaintiffs in employment litigation to challenge the education and training of the persons performing the investigation. Proper training not only helps to avoid missteps, but also prepares the investigator to meet questions during litigation about her qualifications to perform the task.
2. *Was the investigation biased?* Ideally, investigators should have nothing at stake in the result of the investigation. Investigators must be free to reach conclusions appropriate to the facts.
3. *Was the investigation appropriate under the circumstances?* Few investigations can uncover every conceivable fact that might pertain to an alleged misconduct. Nevertheless, an investigator who fails to uncover a fact that might have been discovered before litigation was commenced may be called upon to explain why this fact was not considered earlier. For this reason, it is critical for the investigator to plan at the outset the resources to be employed. Who will be interviewed? What records should be obtained and interviewed? What other steps should be considered? These decisions will be reviewed continuously until the final conclusions are recorded.
4. *Was the employee under investigation given all reasonable opportunities to be heard?* The investigator must employ procedures which afford a fair opportunity for an applicant to present his position.
5. *Has the investigator reached a reasonable conclusion concerning the facts?* The investigator must do more than simply collect facts. There is an obligation to evaluate them and come to a reasonable factual conclusion. A defective investigation includes the failure to differentiate between attributed hearsay and "mere gossip and rumor" and failure to evaluate the credibility of persons interviewed.
6. *Has the investigator properly documented the investigation?* One of the central goals of an employment investigation is to develop a clear and complete documentary record. All documents in an investigation should be prepared with the expectation that the document will be at issue in subsequent litigation. Every effort must be made to avoid inflammatory, incorrect, or other inappropriate comments that may detract from the serious professional purpose of the investigation.
7. *Was the investigator prepared to recommend prompt, effective action to remedy misconduct?* Although it may not be possible to determine in every detail what occurred, the investigation must evaluate the evidence, and, if appropriate, recommend "prompt remedial action" for past misconduct and

ensure that no misconduct or retaliation occurs in the future.

B. The Investigatory Process

1. The Proper Role for the Workplace Investigator

- Gather and document facts about alleged workplace misconduct by interviews or other means.
- Evaluate and reach conclusions about any competing versions of the facts. Note, investigators should rarely, if ever, make conclusions concerning whether the law has been violated.
- Document the investigation and management's response.

2. Preparing for the Investigation

- Review any relevant facts and outline questions to be asked prior to interviewing witnesses.
- Interview the reporting supervisor and obtain any documentation.
- Review the personnel files of the complaining employee and the alleged harasser.
- Review all relevant rules, policies and procedures, prior investigation notes, records of other complaints against alleged harasser and other complaints by the complainant.
- Collect any relevant business records (tapes, calendars) or physical evidence (samples).
- If appropriate under the circumstances, pull and review e-mails and internet history of the complainant and the accused. Ensure that the employee handbook contains a disclosure and acknowledgement of the Company's right to view an employee's e-mails and internet usage.
- Consider having two people on the investigatory team.

3. Preserving Evidence

- Usually the evidence will be in the form of documents that need to be identified and reviewed in a timely fashion.
- Retain all reports, investigative summaries, written statements, and any other evidence relating to the investigation. Once any document has been discovered and reviewed, its retention and control becomes critical.
- An investigative file should be kept in a secure place to maintain confidentiality.
- Do not forget to consider nontraditional forms of documents such as computer disks and e-mail.
- Investigation files should be kept separate from general personnel files.

The one exception to this is any disciplinary memorandum that is issued at the conclusion of the investigation.

- Be keenly aware that the documentary evidence created and maintained in the investigation file will presumably be disclosed and analyzed in any litigation concerning the investigation. Accordingly, every comment or document in the file should be carefully considered.

4. Interviewing Witnesses

Most investigations require interviews. In rare situations where documents supply most of the information, interviews may not be necessary. You should decide early in the planning process whether interviewing will be part of the investigation process. If so, consider the following:

List the individuals you want to interview

- a. *The Complaining Employee.* When a workplace investigation is the result of an employee complaint about treatment he or she received at the company, the first person to be interviewed will normally be the complaining employee. You will want to get complete details from the employee, along with names of witnesses or others who may have information.
- b. *The Potential Victim.* If the potential victim is not also the complaining employee, interview him or her next. Discuss the information you received in the complaint and seek verification of the facts and additional details.
- c. *The Accused/Wrongdoer.* The investigator must in almost every instance interview the accused/wrongdoer as part of the investigation to obtain his/her side of the story. Courts require that the “accused” be given a “reasonable opportunity to respond” to the charges against him/her. The timing of the interview will depend upon the nature of the particular investigation. If you are investigating charges of theft you may want to wait until you have solid evidence and the investigation is close to completion before you interview the accused. When you interview the accused, get complete details from him/her as well as the names of others who may have information about the charges.
- d. *Collateral Witnesses.* Interview all individuals whom you suspect have knowledge or information about the subject incident(s). Do not limit your investigation to interviewing only those whom the complainant or accused have identified. Also, think about the order in which these interviews should be conducted. Do not rush ahead when it is necessary to wait to talk to an important witness.

General Interview Procedures

- Make appropriate disclosures at the beginning of an interview and retain a written record indicating they were made.
- State what is being investigated, i.e., why the interview is taking place.
- Advise what role the interviewee may play in the specific incident.
- Explain how the information received may be used (to evaluate the complaint, to access what actions may be taken, as a record if litigation

arises).

- Explain that, while absolute confidentiality is not possible, information obtained during the interview will be reported to those within and possibly outside the Company on a "need to know" basis only.
- Explain that the Company is taking the investigation very seriously and that the employee should too.
- Explain the importance of accurate information and the individual's obligation to provide truthful, thorough information.
- If appropriate, caution that discipline and possibly criminal prosecution (if applicable) could result from refusing to cooperate or providing untruthful or incomplete answers.
- If the interviewee refuses to participate in the interview or answer questions, explain the consequences.
- Advise the interviewee that there will be no retaliation for participating in the investigation.
- Take detailed and thorough notes. The notes should indicate the name of the person interviewed, date, time and location of the interview, who was present, the length of the interview, and the identity of the interviewer.
- Typically start with open-ended questions and eventually move to narrower, more focused questions.
- End with, "Is there anything else, no matter how remote, that you would like to share with me" to provide witnesses with an opportunity to share any information that was not addressed during the course of the interview.
- Generally, do not use a tape recorder. Recordings often scare witnesses and are vulnerable to attack in court. Instead, take notes by hand or with a laptop.
- Stress that the interview and investigation are confidential, except among those who need to know about the issues.

Interviewing the Complaining Employee

- Conduct the interview as soon as possible after receipt of the complaint.
- Learn as much as possible about the alleged act of discrimination or harassment: when did it occur, where did it occur, who was involved, whether similar incidents have occurred in the past, who else may have witnessed the incident, others who may have mentioned similar treatment, etc.
- If the complaining employee is not too distraught or emotional, request that the employee put the complaint in writing.
- If the complaining employee is emotional, document what you perceive the complaint to be and have the complaining employee review it the next day to verify that the document adequately reflects the complaint. In doing so, try to avoid making assumptions, conclusions or interpretations.
- Request that the employee sign the complaint. If the employee declines to sign, note that the signature was requested and refused.
- Assure the complainant that the Company will conduct an immediate and thorough investigation, while maintaining confidentiality as appropriate.
- Inform the employee that if it is determined that any employee engaged in inappropriate conduct, the Company will take appropriate corrective action.

- Advise the employee that there will be no retaliation for coming forward with the complaint.
- Advise the employee to immediately report any perceived retaliation or difficulties with the alleged harasser.
- Stress confidentiality and the need for the employee to refrain from discussing the incident or the investigation in the workplace.

Interviewing Collateral Witnesses

- Interview such person(s) who raised the issue(s), persons identified by person(s) who raised the issue(s), persons identified by person(s) being investigated, supervisors of persons involved, observers of the incident(s), others with relevant information, authors of relevant documents, co-workers of persons involved, and, if appropriate, other persons who reportedly have been subjected to similar activity.
- Interview witnesses thoroughly, following the general interview procedures described in the next section.
- Stress that all witnesses should keep the investigation and any discussions involved confidential.

Interviewing the Alleged Harasser

- If the employee is a member of a union, he or she has the right to have a union representative present at any meeting from which disciplinary action may result, if requested.
- Learn as much as you can from the alleged harasser about the events as he or she views them (i.e., their version of the facts, what possible motive the complainant would have to fabricate, etc.).
- Explain the Company's policy against harassment. Find out whether the alleged harasser knew about and understood the policy at the time of the alleged incident. Provide an additional copy of the policy to the alleged harasser.
- Remind the alleged harasser that no conclusions have been reached as to whether he or she is guilty of the conduct charged.
- Remind the alleged harasser that it is unlawful to take any retaliatory action against the complaining employee or any witnesses.
- Prepare a written account of the alleged harasser's statement. Ask the alleged harasser to review, correct, and sign the statement. If the alleged harasser declines to sign, note the refusal on the statement.
- Collect any documentation or evidence that may be in the alleged harasser's possession.

Interview Pointers:

- Conduct interviews in private so no one can overhear.
- Begin with general questions, such as “How long have you worked for the Company?”, “How long have you known...?”, “Who do you report to?”, “Tell

me a little about the general environment of your department”.

- If possible, have another person present to be a witness and to take notes. You can explain the other investigator’s presence is to assist you and to take notes so you can concentrate on the interview. However, normally only one investigator should conduct the actual interview. You do not want the witness to feel “ganged up on.”
- Do not prevent the witness from leaving. Do not lock the door of the room where the interview is conducted or prevent the witness from leaving the room. If a witness wants to leave, explain that it is important for you to get all the facts so that you can make the best decision possible. However, if the witness still wants to leave, let him or her go immediately.
- If a witness is unwilling to talk to you, ask why.
- Do not tell the witness what other witnesses have said, unless you need to clarify a discrepancy or in some cases refresh the memory of a witness.
- Find out who else may have information that could shed light on the investigation.
- Listen objectively and do not pre-judge the witness’s story.
- Interview each person the suspected wrongdoer names. The wrongdoer must have the opportunity to exonerate himself.

C. Evaluating the Complaint

1. Factors to Consider in Evaluating a Complaint

- In some investigations, the investigator may need to resolve conflicts in information by making determinations about the credibility of witnesses. Factors such as evasiveness, contradictions in statements, blushing, other facial expressions, potential signs of anxiety such as shaking or perspiration, defensiveness and other demeanor at specific points in the interview may be important. However, record observations, not conclusions about observations.

2. Determine the Outcome

- Management of the Company, not a neutral investigator, should determine the most appropriate action to be taken in light of the facts available. If harassment has been alleged, the Company must take action that is reasonably calculated to end the harassment. Among the options to be considered are:
 - Discharge of the accused, if the investigation reveals that the activity in question occurred and violated federal or state law or

company policy, and there are no mitigating circumstances.

- A strong written warning to the accused, making clear that bad judgment was used and any recurrence will not be tolerated.
 - A written memo to the accused stating that the Company has not been able to determine whether any unlawful or policy-prohibited action occurred, but reiterating the company's policy against whatever action was alleged, and making clear that any such activity in the future, if proven, will not be tolerated.
 - Transferring one or both of the persons involved to a different job or facility in order to prevent any recurrence. Given the legal consequences of this decision, legal counsel often should give advice before this decision is made.
- Factors to consider when determining appropriate level of discipline for the alleged harasser:
 - whether the alleged harasser knew the conduct was prohibited;
 - whether the alleged harasser is a supervisory employee;
 - whether the conduct was one incident or was recurrent;
 - whether there have been any prior warnings or disciplinary action for similar conduct against the alleged harasser;
 - the seriousness of the behavior, i.e., a joke versus physical conduct or extremely foul language versus commonplace language; and
 - what harm or liability the alleged harasser can cause to the Company now or in the future by such conduct.
 - If the results of the investigation are inconclusive, the Company should not indicate that it concludes that no harassment occurred because that is tantamount to accusing the complainant of lying (unless such dishonesty has been established by clear and convincing evidence).
 - Advise other employees (witnesses, supervisors) of the outcome only to the extent they need to know to bring closure to the investigation.
 - It is typically advisable to have a designated representative contact an alleged harassee periodically for at least three months after the investigation to ensure the absence of continued harassment and/or retaliation.
3. Be Discreet
- Do not discuss the complaint, incident or investigation with persons other

than those who have a direct interest in the investigation or those in management positions who need to know the status of the matter.

- Do not promise the complainant, the alleged harasser or any witness complete confidentiality, but do assure each of them that the Company will do its best to assure that the privacy of all employees is respected. Furthermore, ask all witnesses to keep the investigation confidential.

III. SEXUAL HARASSMENT INVESTIGATIONS

A. General

- In sexual harassment investigations, consider the desirability of a female investigator for a female alleged victim because disclosure of information about sexual matters may be embarrassing.
- Consider asking the complainant/victim to write down, either before or at the start of the interview, all incidents of improper conduct and all facts and witnesses that establish that they occurred. (A handwritten statement by the complainant/victim is desirable at this early stage before she/he has counsel who may recast the events in a more negative light.)
- Follow the same general rules set forth in Section II.

B. Conducting the Investigation

1. Interview the complainant

- Carefully define each offensive act or statement.
- Establish a chronology of events pre- and post-dating the alleged conduct, including the victim's reaction to the alleged harassment.
- Discuss the victim's understanding of the Company's sexual harassment policy and what steps the victim took to use the policy.
- Confirm the identities of all eyewitnesses or persons with knowledge for potential interviews and secure an explanation of the scope of their knowledge.
- Obtain copies of all notes, memoranda, e-mails, diary entries, recordings, photographs or other physical evidence relating to the alleged conduct.
- Determine whether the complainant has missed work or incurred any unreimbursed medical or other expenses as the result of the alleged harassment.
- Avoid giving the employee the impression that you either believe or disbelieve her/him at this stage.
- Review the points contained in your notes with the complainant at the conclusion of the interview to confirm their accuracy and completeness.

2. Memorialize complainant's fact statement

- Shortly after the interview, prepare a statement that chronologically documents the complainant's allegations and include references to the identities of witnesses, physical evidence, and claims of damages.
 - Ask the complainant to review the statement, make any changes necessary to ensure accuracy and completeness, and to sign and return the statement to the Company for use in the investigation. If possible, have the complainant review and sign without taking the statement out of the vicinity of your office.
3. Interview the alleged offender
- Inform the accused that a harassment complaint has been filed under the Company's sexual harassment policy. Explain the sexual harassment policy. Provide the accused with a copy of the complainant's statement. Permit sufficient time to study and respond. There is no right to counsel during an internal investigation, although there may be a right to a union representative, as noted above.
 - Inform the accused that the Company has not formed an opinion regarding the truthfulness or accuracy of the allegations and that the investigation is being conducted in a fair and unbiased manner.
 - Ask the accused to respond to each factual allegation in the complainant's statement by way of admission, denial or explanation.
 - Request the identities of witnesses who will support the accused's version of events.
 - If the accused denies the truthfulness of the complaint, seek alternative explanations for the allegations.
 - Instruct the accused not to contact the complainant or her witnesses concerning the complaint because such conduct could be viewed as unlawful retaliation. Also instruct the accused not to discuss the complaint in the workplace or with coworkers.
 - Investigate other complaints against the accused or a possible reputation lending credence to the allegations. Investigate other instances of sexual harassment by the accused.
 - If the accused is a supervisor, it is appropriate to hold that person to a higher standard of conduct, especially if the person directly supervised the complainant.
4. Give the accused the opportunity to submit a written statement summarizing his position with respect to the individualized allegations made by complainant and identifying all persons who would corroborate his version of the events. Inform the accused that you may share this statement with the complainant.
5. Review the statements of both the complainant and the accused to identify points of agreement and disagreement. Separately list facts in dispute for

continuing investigation.

6. Re-interview the complainant to discuss the accused's version of the events and to highlight the facts in dispute.
7. Interview witnesses offered by the complainant and the accused.
 - Each witness should be informed about the general nature of the investigation.
 - Witnesses should also be informed that the investigation is confidential and any disclosures will result in severe disciplinary action up to and including discharge.
 - When interviewing fact witnesses, begin with open-ended questions and narrow to more specific issues.
 - Identify the complainant or accused, if necessary, and state those facts that the complainant or accused has indicated are within the witness's knowledge.
 - At the close of the interview, review the witness' statement with him or her. Ask the witness to sign your notes and to make whatever additions or deletions are appropriate to ensure that the statement accurately reflects his/her understanding of the events.
8. Meet with management to review the results of the investigation, to determine if further investigation is required, and if not, how to conclude the investigation.
 - Prepare a written, dated, and signed investigation report summarizing allegations, findings, credibility determinations, conclusions, and recommendations.
9. If the investigation reveals that harassment occurred in violation of the Company's policy, determine what disciplinary action should be imposed.
 - Review human resource case histories to determine what discipline has been accorded in the past for similar infractions. Strong preference should be shown toward electing the same disciplinary action in the case at hand, if the circumstances are similar.
 - If there is a lack of historical precedent, determine the seriousness of the offense in light of the facts and circumstances. Serious repeat offenders should be severely disciplined, particularly if there has been a prior warning. In any event, the Company is required to take action reasonably calculated to end the harassment.
 - Transfer of the offender is an acceptable remedy. Transfer of the complainant is not, unless the complainant seeks that remedy.
10. Communicate the results of the investigation to the parties and to management personnel involved in the parties' chain of command.

- Generally, it is advisable to have a script prepared for conclusory interviews with the complainant and the accused summarizing the nature of the charge, the scope of the investigation, the findings reached and the reasons. Written communications should be reviewed with counsel prior to delivery to ensure that all statements are factually supportable and that no admissions are made which could injure the Company's legal position.
- If the investigation results in a finding that harassment did not occur, do not belittle the complainant or accuse her/him of providing false testimony regarding the accused (unless definitively established and cleared with counsel). Encourage the complainant to bring a complaint of sexual harassment at any time she/he feels it is warranted.
- In the event harassment is found, you should meet with the offender to communicate the finding, to request any rebuttal information which she/he seeks to have addressed, and to communicate the disciplinary action which the Company has elected to impose. The offender is entitled to have a representative present at this interview. Stress that the offender must avoid any conduct that could be perceived as retaliatory.
- The Company is not required to inform the complainant what disciplinary action has been taken in the event that harassment is found to have occurred, but often it is preferable to do so.
- The results of the investigation should also be communicated to key managers and officials in human resources and in the parties' chain of command. The communication is probably best made in a confidential management meeting.
- Follow up with both the complainant and the alleged harasser on a 30-60-90-120 day basis to ensure no further harassment or retaliation occurs.

IV. DISCRIMINATION INVESTIGATIONS

A. General

- Follow the same rules for conducting interviews as with harassment investigations.
- Be prepared to take appropriate action, if warranted.

B. Conducting the Investigation

1. Interview the complainant.
 2. Identify all instances of alleged discrimination.
 3. Identify and interview all involved in the decision at issue.
- Ask about the basis for similar employment decisions.
 - Ask what facts lead to the decision at issue.

- Ask if the decision-maker has had any previous experiences (positive or negative) with the complainant.
- Ask the decisionmaker to identify any similar instances.
- Identify comparable employees, both in and outside the same protected class as the complainant.

C. File and Job Description Review

1. Review all relevant job descriptions.
2. Review relevant disciplinary records of the complainant and any comparables.
3. Review resumes of all applicants/comparables.
4. Review relevant rules, policies, and evaluations.

D. Follow-Up

1. Discuss your findings with upper management to identify areas of concern.
2. Provide interview skills training, if applicable.
3. Identify tasks or duties the employee can take on to increase the chances of being hired or promoted, if appropriate.
4. Set performance goals, if appropriate.
5. Identify reasons for actions including supporting basis for the decision.
6. If appropriate, conduct supervisory training on hiring, interviewing and the imposition of discipline.
7. If warranted, discuss appropriate discipline for the decision-maker with upper management.
8. Inform the complainant of the outcome of the investigation.

V. DRUG USE INVESTIGATIONS

A. Document Observations

- Create a file, separate from the personnel file.
- What occurred? Describe the incident or event in detail in writing.
- Record observations of the employee by you or a supervisor. For example, you may want to include:
 - Ability to Walk (e.g. falling, holding on, staggering, stumbling, swaying, unsteady, unable to walk)
 - Ability to Stand (e.g. feet wide apart, rigid, swaying, sagging at knees, staggering, unable to stand)
 - Speech (e.g. mute, incoherent, rambling, shouting, silent, slobbering, slow, slurred, whispering)
 - Demeanor (e.g. calm, cooperative, crying, fighting, polite, sarcastic, silent, sleepy, talkative, excited)
 - Actions (e.g. calm, drowsy, erratic, hostile, fighting, hyperactive,

- profanity, resisting communications, threatening)
 - Face (e.g. flushed, pale, sweaty)
 - Eyes (e.g. bloodshot, closed, dilated, droopy, glassy, watery)
 - Appearance/Clothing (e.g. unusual stains on clothing, unruly, having odor, messy, neat, dirty, partially dressed)
 - Breath (e.g. alcoholic/marijuana odor, faint alcoholic/marijuana odor, no alcoholic/marijuana odor)
 - Movements (e.g. fumbling, hyperactive, jerky, nervous, normal, slow)
 - Eating/Chewing Gum (e.g. candy, gum, mints, nothing)
 - Direct Evidence, (e.g. drug paraphernalia, alcohol bottles, reliable reports from others)
 - Job Performance, (e.g. increased tardiness and absences, frequent breaks, missed deadlines, poor judgment)
 - Safety (e.g. increased accidents, minor injuries on or off the job)
- When did you observe the employee? Include time and date.
 - Who else was present to observe the behavior? Include any assistant managers or other management or supervisory personnel who seconded your opinion.
 - Did any injuries or damage occur? If so, list the persons or property injured and follow normal procedures for responding to a workplace injury.
 - What did the employee do in response? List the employee's actions in detail,
 - Has the employee had a history of warnings or been through an EAP?
 - Retain records/evidence if possible, but do not take anything from the employee.
- B. Consider referring employee to an employee assistance program.
- C. Provide documentation supporting a determination that the employee may be in violation of the substance abuse policy.
- D. Review all behavior and observations and determine if a substance abuse test is necessary and appropriate under the terms of your drug testing policy.
- Review with counsel whether your state requires any additional procedures.
 - Meet with employee in private. Inform employee that a decision has been made to refer him or her for a drug and/or alcohol test.
 - Have a second person present at this discussion. Do not accuse the associate of substance abuse. Instead, review observations and detail the basis for your conclusion.
- E. Constructive confrontation with employee if results are positive.
- Review results of test. (Note: Some states require a written notice of the results.)
 - Do not get side-tracked by excuses, etc.

- Review substance abuse policy and explain consequences.

VI. WORKPLACE VIOLENCE INVESTIGATIONS

A. Four Primary Types of Early Warning Signs:

- Ominous threats
- Threatening actions
- Bizarre thoughts or behavior
- Obsession

B. Preventative Strategies

- Develop a written violence prevention plan.
- Designate individuals responsible for creating a safe work place, including a human resources, legal counsel and senior management.
- Establish relationships in advance with local law enforcement officials.
- Establish employee hotline for reporting threats of violence.
- Require complete applications from all prospective employees.
- Conduct thorough background checks, to the extent allowed by law.
- Consider implementation of a drug testing policy.
- Control access to work facilities.
- Evaluate work facilities for safety issues on regular basis.
- Provide escorts to parking lots after dark.
- Notify security personnel of potential threats.
- Respond thoroughly and promptly to all threats.

C. Investigating the Incident

- Call in the local police if appropriate.
- Interview all parties and all witnesses immediately after the incident.
- Caution that discipline and possibly criminal prosecution (if applicable) could result.
- Indicate whether the employee must, may or is encouraged to have his or her own attorney present.
- Document each interview thoroughly and question the interviewee about gaps in his or her version of the incident.
- Request that each interviewee sign the notes documenting their version.

D. Damage Control

- Assign spokesperson to address media, if appropriate. Instruct all other employees not to speak to the media and to direct inquiries to the designated spokesperson.
- Make employee assistance program or other mental health experts available for employees.
- Prepare company-wide communication discussing incident.

VII. WORKPLACE THEFT INVESTIGATIONS

A. General

- Investigate every theft or inventory shortage that takes place, no matter how small. Even if an investigation does not reveal who is responsible, employees receive the message that the Company is serious about theft and pilferage.
- Work with Loss Prevention.
- In the case of incidents that involve insurance, do not rely solely on the insurance investigator's report. Remember: The insurance company's objective is to limit claims, not necessarily to uncover the responsible party.

B. Investigation of the Theft or Shortage Depends on the Nature and Size of Loss

- If the theft is a one-time incident involving a minor loss, limit the investigation to simply interviewing employees who work in the immediate area and reviewing recent shift reports and the visitor log.
- If one or more employees are likely involved in the organized theft of inventory or equipment, hire an undercover investigator to collect the documentation necessary for termination, prosecution, and recovery of the stolen goods.
- If one or more employees are likely involved in the embezzlement of funds, contact the accounting department head and external audit specialists to collect the documentation necessary for termination, prosecution, and recovery of the embezzled property.
- If an outside individual is responsible for a theft, report it to the local police immediately and let them handle the investigation. Offer any assistance if requested.

C. Incident Reports

- Make sure security personnel complete incident reports in addition to their standard shift reports whenever a theft or suspicion of theft occurs. Depending on the severity of the incident, alert a security supervisor or a member of senior management immediately. Distribute copies of the incident report through the necessary channels. To handle incidents that occur after normal operating hours, make sure security personnel have an on-call schedule, a list of security supervisors, and the phone number of a specific member of management.

D. Other Follow-Up

- Issue security alerts to all employees after a theft has occurred to enlist them to serve as the Company's eyes and ears. Remind employees that theft of

Company property affects the Company's bottom line -- and them.

VIII. QUESTIONS YOU MAYBE ASKED DURING THE INVESTIGATION

A. By the Complainant or a Witness

- **Can I lose my job for reporting this complaint?** Answer: The Company absolutely prohibits retaliation for coming forward with a discrimination or harassment complaint. If you feel that you have been retaliated against, please tell me or your supervisor.
- **Will everyone find out what I've told you?** Answer: We limit knowledge of your complaint and the investigation to those with a need to know. Keep in mind, however, that to complete a thorough investigation we will have to discuss your complaint with the person you accuse and any witnesses.
- **What if I decide not to participate in the investigation?** Answer: Once we learn of an allegation of harassment or discrimination, we are under a legal duty to investigate, whether you cooperate or not. I encourage you to fully cooperate so that we can resolve this situation quickly and effectively. [For witnesses: If the situation becomes serious enough, you may be subject to discipline for refusing to cooperate.]
- **Do I have to reveal information if I promised someone else I would keep it a secret?** Answer: I understand your dilemma but the Company's first priority is resolving complaints of harassment or discrimination. Again, you will suffer no retaliation for participating in this investigation. There also may be disciplinary consequences for refusing to cooperate in an investigation.
- **Can I have a lawyer/co-worker/family member present during our interview?** Answer: Due to confidentiality concerns, I will have to conduct the interview with you alone.
- **What if someone gets fired based on what I tell you?** Answer: Our first concern should be resolving discrimination and harassment issues. If there is any fall-out, we will handle it. Remember, you will not be retaliated against for talking to us.
- **Will you tell me what happens after you complete the investigation?** Answer: [Complainant] We will tell you how we have resolved the issue. [Witness] Due to confidentiality concerns, we cannot tell you the results of the investigation.

B. By the Accused

- **Can I have a lawyer/co-worker/family member present during our interview?** Answer: [If accused is a union member] You are entitled to have your union representative attend the interviews. [If accused is not a union member] Due to confidentiality concerns, I will conduct this interview with you alone.
- **Could I be sued individually?** Answer: In some cases, yes. If that happened, we would determine the best course of action for your representation. (If

- applicable, review indemnification policy).
- **Can I sue the complainant?** Answer: That is a decision to be made purely between you and a lawyer.
- **Can I discipline or coach this employee now that he/she has brought a complaint against me? I don't think I can work with someone who has leveled these accusations against me.** Answer: We do not intend to hinder you in doing your job, but we must tread carefully in this situation. It will be a good idea for you to run decisions that may adversely affect the complainant by HR ahead of time. If possible, we may try to change supervisory authority so that you can limit your interaction with the complainant. Please remember to avoid doing anything that could be perceived as retaliatory.
- **If I am absolved of these accusations, will you fire the complainant?** Answer: It is certainly too soon to tell how this will all be resolved. One thing you should be aware of is that the prohibition against retaliation applies even when we cannot conclusively decide whether the discrimination or harassment occurred, as long as the plaintiff had a good faith belief that it did.
- **Will I find out what the other witnesses said when you interviewed them?** Answer: In the end, we will tell you what conclusions we have drawn and why, but confidentiality issues do not allow us to tell you the exact substance of the interviews. Please remember that you should not discuss the allegations or the investigation with the complainant or any witness, to avoid the inference of retaliation.
- **How could you believe her over me?** Answer: This investigation is not about believing one person over another. If we hear of an allegation of harassment or discrimination, under the law, we have an absolute duty to investigate.

IX. CONDUCTING "LONG DISTANCE" INVESTIGATIONS

A. Use of the Telephone

- If possible, appear in person or by video-conference so you can observe the witness's demeanor. Ask for a written account of events, if possible.
- Provide the complainant with a way to reach you during the investigation.
- Designate an "on-site" point person and have that person sit in on all meetings and interviews conducted telephonically.
- Inform the complainant that there is a person "on-site" to address immediate concerns and to deal with any alleged retaliation.
- Inform the complainant that even though you are not physically present, a thorough investigation will be conducted.
- If video-conferencing is not available, talk about the witness' demeanor with your point person following each interview.

B. Use of E-Mail

- Have all written reports and notes sent to you for review to prepare for the

investigation.

- Set a schedule with the point person via e-mail for conducting interviews, receiving and reviewing documents and for assessment.
- If appropriate, send relevant policies to the complainant, witnesses, and alleged harasser.

C. Follow-Up

- Be sure to get back to the complainant following the interview with the point person to tell them about the investigation and your results.
- If possible, have the final meeting by video-conference.
- Provide the complainant with a telephone number to reach you directly with questions and concerns following the investigation.

X. CUSTOMER AND VENDOR PROBLEMS

A. Employee Harassment

1. Customer Harassment of Employees

- Liability exists as if customer were a co-worker.
- Investigate like any harassment claim.
- Observe the customer, if possible.
- Discuss appropriate action with management, if a problem exists.

2. Employee Harassment of Customers

- Liability exists under public accommodation statutes.
- Investigate by talking to customer, employee and witnesses.
- Do not assume the customer is correct.

B. Service Issues

1. Claims that service was withheld.

- Talk to customer to identify dates and times of problems. If possible, identify the employees at work or involved.
- Interview employees and supervisors on the shift at issue.
- Consider other claims.
- If appropriate, provide coaching and/or training.
- Get back to the customer with the results of your investigation.

XI. REACHING A CONCLUSION/ PRESENTING YOUR FINDINGS

When you have completed the interviews and reviewed all relevant documents and information, you will need to conduct a **thorough evaluation** of everything you have gathered. As you evaluate the evidence, consider the following:

- Was the witness credible?
- What motivation might the witness have to be less than truthful?
- Did the accused demonstrate a pattern of misconduct? Does the alleged victim have a history of making complaints?
- Did the accused deny the charges or admit that he/she made a mistake?
- Was the complaint timely or untimely? How does this relate to the event, if at all?
- Were there eyewitnesses with direct knowledge of the incident(s), or only circumstantial evidence?

Once you have evaluated the evidence, carefully prepare your findings. Do not use terms that are legal conclusions; i.e., “Based on the evidence, the manager committed sexual harassment” Generally, the conclusion will either be that the complaint was unfounded and the misconduct did not occur, or the complaint was truthful and at least some misconduct occurred. Sometimes at the conclusion of an investigation, although the facts in the complaint may have been true, there may also be mitigating circumstances. To assist you in determining the appropriate conclusion for a workplace investigation, consider several factors such as the following:

- Does the Company have a policy against the behavior?
- Did the accused/wrongdoer know about the policy?
- Does the accused/wrongdoer admit or deny the misconduct?
- Was any law violated?
- How strong is the evidence? Is it more likely than not the misconduct occurred?
- Has the investigation been thorough? Are there any gaps that need to be investigated before a decision is reached? Have you made any assumptions that need to be verified?
- Has the accused/wrongdoer committed violations in the past?
- How long has the employee been employed?

XII. COMMUNICATING THE RESULTS

Once the investigation is complete and a conclusion has been reached, the company must communicate the results.

A. To the Accused/Wrongdoer

You will always communicate the results to the accused employee. Give the employee the specific factual basis for the determination and, where necessary, impose discipline. In determining the appropriate discipline, consider:

- The seriousness of the misconduct
- The employee's position (supervisors and managers can be held to a higher standard of conduct)
- The employee's employment history and length of service
- Whether the employee has been disciplined for similar behavior before
- How the company has treated other employees who have committed similar offenses

HINT #1: It is best to avoid using legal terms to describe the employee's misconduct. For example, be careful before you state that the employee committed "theft." The legal standard for finding someone guilty of theft is "beyond a reasonable doubt," which only a jury or court can do. Therefore, it is always better to describe the behavior as "a violation of company policy" and specify the policy.

HINT #2: Doing a good job of communicating to the employee why the decision to discipline or terminate him/her was made, including the evidence that was considered in doing so, might convince the employee not to bring a claim against the company. If he/she sees that the evidence you have is solid, he/she may feel it is better to just accept the decision.

B. To the Complaining Employee

The nature of the complaint or misconduct, along with local laws and company policy, will dictate what and how much you tell the complaining employee. At a minimum you should let the complaining employee know that his/her complaint was not ignored. Human Resources personnel or your legal department should drive this level of communication. *You must be careful not to give too much information to the complaining employee.* The accused/wrongdoer, as well as the witnesses in the investigation, have certain privacy rights. It is sufficient that if you are required to or decide to report information to the complaining employee to let him or her know the ultimate result only. The complaining employee does not need the details.

C. To Government Agencies

Depending on the offense, the company may want to (or may be required to) report its findings and results to a government agency. In addition, if the company decides to seek prosecution for the misconduct because it is illegal and considered a crime, the information from the investigation should be given to the appropriate authorities.

XIII. IMPOSITION OF DISCIPLINE

A. Decide what discipline to suggest or if discipline is necessary.

1. Review disciplinary action awarded in past situations involving similar conduct. If it was effective to end prior instances of harassment, strong

preference should be given to using the same method.

2. If no historical precedent exists, or if prior precedent was not effective, determine the seriousness of the action to establish discipline

3. Possible disciplinary action:

- Warning and reaffirmation of policy.
- Transfer of harasser.
- Verbal/Written warning.
- Termination.

B. Communicate disciplinary action to accused if imposed.

C. Follow up to ensure no retaliation.

- Rule of 1-3-5-3

FORMS

* GENERAL INTERVIEW FORM

Individual(s) originating allegations:

Individual(s) against whom allegations initiated:

Name, title and department of person being interviewed:

Open Ended Questions:

- "How long have you worked for the Company?"
- "Who do you report to?"
- "Tell me a little about the general environment of your department".

To whom were the allegations first reported and when and how?

Nature of allegations:

Dates and locations of alleged incidents:

What if anything has been done to date?

Did you witness the alleged incident?

Where were you?

Where did the incident take place?

Who else was present?

When (date and time) was the incident?

What happened?

What did you see?

What (word for word, if possible) did you hear?

Did anyone else do or say anything during the incident?

Is there anything else that you recall about the incident?

[Repeat and use wherever appropriate]

Is there anything else you would like to add about this incident?

Let me give you this information so that you can respond. [Information].

[Repeat and use wherever appropriate]

Do you have any theories as to the reason or motive for the incident?

Have you had any conversation(s) with anyone about the incident?

Have you had any conversation(s) with anyone about anything related to the incident?

Do you know whether anyone else has, or claims to have, any information about the incident?

Have you heard whether anyone else may have information about the incident?

Have you heard any rumors?

Who should we speak with concerning the claim(s)?

Are you aware of any documents (writings of any kind) that relate in any way to the incident?

Are you aware of any physical evidence that may relate in any way to the incident?

Are you aware of any electronic evidence that relates in any way to the incident?

Are you aware of any similar incidents?

[If so, repeat process]

Are you aware of any related incidents?

[If so, repeat process]

Are you aware of any similar claims?

Are you aware of any related claims?

Is there anyone else that you think I should talk to?

Are there any other files, records, or objects that you think I should examine?

Are there any documents, files, records, or other objects that might refresh your memory?

Is there anything else, no matter how remote, that I should know about?

Is there any other evidence or fact that you believe would help us resolve this?

Here are my card and pager number. If you think of anything else, no matter how trivial, or if anything at all comes up, please call me.

Name of Investigator: _____

Investigator's Signature: _____

Date: _____

* **COMPLAINANT INTERVIEW FORM**

Name: _____

Date: _____

Position: _____

Supervisor: _____

Name & position of the accused: _____

INITIAL QUESTIONS

Open Ended Questions:

- “How long have you worked for the Company?”
- “Who do you report to?”
- “Tell me a little about the general environment of your department.”

Tell me about your work environment in general/describe what happened: _____

Was this a single incident – Yes or No? _____

If Yes, what were the date and time of harassment? _____

For each incident, ascertain and document what occurred. Try to get as many details as possible, even though this may be uncomfortable for the complainant. Use additional pages if necessary. Ask open ended, non-judgmental questions, such as:

Did the accused touch the Complainant?

If so, where was the Complainant touched?

Was the Complainant touched more than once?

Did the accused threaten the Complainant in any way?

If so, what was the threat or threats?

How long was the incident? For example, a few seconds or five minutes?

Where did the incidents of harassment take place?

Were there any witnesses to the incidents of harassment? If so, who were the witnesses?

Does the Complainant know of any others subjected to the same behavior?

Does the Complainant know a motive for the harassment?

How did the Complainant respond to the harassment? Did he or she make any effort to bring it to a halt?

Did the Complainant tell anyone else about the incidents of harassment: superiors, co-workers, family, friends, government representatives, attorneys? If so, get details concerning who, what, when, where and the response, if any.

Does the Complainant have any tangible evidence or records of harassment: notes, letters or memos to or from harasser, witnesses; calendar or diary entries, memos, letters, etc. by Complainant; tape recordings, surreptitious or otherwise; formal complaint forms to any agencies?

How did the Complainant feel about the harassment at the time it occurred?

Does the Complainant feel the same way now? If not, what is different about how the Complainant now feels, and what brought about the difference?

Does the accused have control over the compensation, working conditions or future employment of the Complainant?

Has the accused made or carried out any threats or promises in connection with the alleged sexual harassment?

Does the Complainant know or suspect there are other victims of harassment by the same person? If so, who are they?

To what extent were others in control made aware of the situation?

What action would the Complainant like to have taken?

Is there anyone else we should talk to that would shed light on this situation?

Is there anything else?

Interviewer: _____

Date: _____

Witness, if any: _____

Date: _____

* **ACCUSED PRE-INTERVIEW CONSIDERATIONS**

- Prepare for the investigation meeting with the accused. This meeting should take place in private, although as the investigator, you may arrange to have a witness present as appropriate. The investigator should outline the allegations in advance to ensure that all subjects are discussed.
- Provide the accused with a copy of the harassment policy, emphasizing the Organization's commitment to enforcing the policy. This step should be followed even if it is suspected that the allegations are not true.
- Answer the accused's pre-interview concerns and suspicions about the investigation.
- Advise the accused generally about the investigation and strict policies of confidentiality and avoidance of retaliation.
- Ask direct and detailed questions based on information provided by all witnesses, such as those on the following interview form.

* **ACCUSED INTERVIEW FORM**

Name: _____

Date: _____

Position: _____

Supervisor: _____

Open Ended Questions:

- "Let's talk about why we are here today."
- "Tell me about your working relationship; with _____."

Were you and the Complainant working together on the date(s) Complainant says harassment occurred?

Do you recall any interaction with Complainant on those dates?
If so, what was the context of the interaction?

Were there any witnesses present?

What was the substance of any conversation between you and the Complainant?

Expect an adamant denial. For each denial, request that the harasser identify corroborating witnesses or evidence, and detail any "alibi."

If the accused acknowledges any conduct, ascertain and document what occurred. Try to get as many details as possible, even though this may be uncomfortable for the accused. Use additional pages if necessary. Ask open ended, non-judgmental questions, such as:

Did the accused touch the Complainant?

If so, where was the Complainant touched?

Was the Complainant touched more than once?

Was the touching done at the direction of the Complainant or the accused?

Did the accused threaten the Complainant in any way?

If so, what was the threat or threats?

How long was the incident? For example, a few seconds or five minutes?

Where did the incident take place?

Were there any witnesses to the incident? If so, who were the witnesses?

How did the Complainant respond to the incident?
Did he or she make any effort to bring it to a halt?

How did the accused feel about the incident at the time it occurred?

Did the accused do or say anything that could have been misunderstood or could be
intentionally misrepresented?

Ask the accused about his/her beliefs or suspicions as to why the reports or complaints have been made (*i.e.*,
ulterior motives, prior consensual relationships, retaliation by the complaining employee, attempts at job
security in the face of poor performance evaluations, etc.).

Did the Complainant engage in any conduct which the accused felt was inappropriate or
made the accused feel uncomfortable?

Has the Complainant ever said or done anything that would lead the accused or others to believe that the complained-of conduct was not “unwelcome?”

What is the level of supervision between the accused and the Complainant?

How frequently do the accused and the Complainant work together?

Has the accused previously been accused of harassment?

If so, what were the circumstances?

Advise that if the evidence establishes harassment, the Company will take appropriate disciplinary action against the accused and the complainant will be fully informed that the investigation has been completed, and whether the allegations were substantiated, The complainant, however, is not provided with any information about the specifics of any disciplinary actions, but should be informed that the Company is addressing the issue appropriately.

Other:

Interviewer: _____

Date: _____

Witness, if any: _____

Date: _____

* **CO-EMPLOYEE INTERVIEW FORM**

Name: _____

Date: _____

Position: _____

Supervisor: _____

Start with Open Ended questions:

- “How long have you worked for the Company?”
- “Who do you report to?”
- “Tell me a little about the general environment of your department”.

Reassure that this co-employee is not the subject of the investigation

Did the co-worker see any alleged harassing incident?

If so, what occurred?

Try to get as many details as possible (use additional pages if necessary), asking open ended, non-judgmental questions such as:

What happened?

What was said by the accused?

Did the accused touch the Complainant in any way?

When did all of this happen?

Who else was present?

What (if anything) did the Complainant say or do in response to the accused's conduct?

Did anyone else say or do anything during the incident?

Did the co-employee later tell anyone about the incident and if so whom did he/she tell and what was their response?

Did the co-employee see more than one alleged harassing incident between the accused and the Complainant? If so, ask questions such as those on the preceding list for each incident.

Did the Complainant ever discuss the issue of alleged harassment with the co-employee?

How did the Complainant respond to the harassment?

Did he or she make any effort to bring it to a halt?

Did the co-worker notice any appreciable change in the Complainant's behavior?

Did the Complainant become more or less emotional, upset, or moody at work, specifically with or near the accused? Please specify.

Has the co-employee personally seen or heard of sexual harassment by the accused against any other Company employees besides the Complainant? If so, try to get as many details about what occurred as possible, asking open ended, non-judgmental questions such as those listed above.

Has the co-employee heard another co-employee speak or complain about sexual harassment by the accused that the co-employee did not personally witness?

If so, who told the co-employee about the alleged harassment?

Who was allegedly harassed?

What was the form of the alleged harassment?

What happened?

When did it happen?

Who else was present?

What did anyone else say or do during the incident?

Whom did the co-employee later tell about the incident and what was the response?

Is there any reason the co-employee can think of why the accused would have thought that the conduct in question was welcomed?

Does the co-employee know any reason why the Complainant would misrepresent allegations? Any reason why the harasser more-likely-than not committed the misconduct?

Who does the co-employee believe? (in cases where harasser denies allegations outright) Why?

Is the co-employee aware of any other incidents of harassment by any other of the Company's employees?

If so, describe the incident.

Who was involved?

Identify all witnesses.

When did it occur?

Was management advised about the incident promptly
and what was the response?

If management was not made aware of the incident promptly, why not?

Other:

Interviewer: _____

Date: _____

Witness, if any: _____

Date: _____

Investigations Training

Model For Investigation Report

- A. Introduction - describe the setting, location and any other appropriate identification information
- B. Describe the Issue - note it as simply and straightforwardly as you can
- C. Comment on how the issue arose – was it a concern, a complaint, an ethics line issue, etc.
- D. Note the names of the Complainant, any alleged wrongdoer and other witnesses who were interviewed (be cautious with whistleblower issues as some situations require that the Complainant be allowed to be anonymous)
- E. Provide a summary of the facts
 - 1. This should be an objective summary
 - 2. Where discrepancies exist, note that as appropriate
 - 3. If some facts aren't clear, that is ok – but state that instead of inferring it
- F. Provide a determination of the facts, including determinations made related to any factual conflicts and discrepancies
 - 1. If the determination involved uncertain facts, note that
 - 2. Note as well why any specific conclusions were made related to uncertain facts
 - 3. If any meaningful credibility determinations were made, note that and state why the determination was what it was
- G. Prepare a conclusion that summarizes the key factual determinations, but do not use legal conclusions (such as “this behavior constitutes sexual harassment”) - the focus should be on the facts rather than the application of the law or company policy to the facts
- H. If appropriate or requested, offer suggested recommendations as to next steps, such as remedial measures, but remember that the investigator is not normally a decision-maker related to discipline
- I. The investigative report is not a disciplinary document and it should not be written as such. Any discipline taken should be in the form of a separate disciplinary document.
- J. The investigative report should not be given to the involved employees and it should not be included in a personnel file - it should go into an investigatory file in HR (note – there may be exceptions to this in a limited number of states, such as Massachusetts)
- K. If you are using attorney-client privilege, mark the document as such, but delete that marking on the final version – the final version of the report should not be privileged
- L. Other documents kept with the report should include witness statements, exhibits and any plan created regarding doing the investigation

Investigations Training

Assessing Credibility

An investigation must be reasonably thorough, unbiased and conducted in good faith. Within that context, an investigator is free to make determinations as to what the facts are so long as those determinations are based upon an unbiased and reasonable perspective. Among other things, an investigator is permitted to make credibility determinations.

Assessing credibility is an important and unavoidable part of investigating. There are occasions when a “he said/she said” truly exists and that situation cannot be fairly resolved. However, in many cases involving a factual disagreement, there exists a basis upon which to make a legitimate credibility determination.

When analyzing the credibility issues underlying an investigation, consider the questions and suggestions below.

Some questions to consider:

- Does the witness have any reason to be less than truthful?
- Is the witness’s description of the facts different than the otherwise consistent description of one or more witnesses who have no apparent reason to lie?
- Is the witness’s description of the facts different from what the witness has said to you or others in the past?
- Are there facts that are not in dispute that undercut the story being told by the witness?
- Is there anything unusual about the witness’s demeanor that would suggest that he or she might be lying?
- Does the witness seem to be hiding information?
- Is the witness using broad terms or is he or she talking in specifics? If broad terms are being used and the witness is not offering specifics, there may be reasons to push harder and see if factual details are purposely being held back.
- What is the witness’s response to the question “why should I believe you are telling me the truth?” Note – that is not a question to be asked in every interview, but it could help in appropriate circumstances.
- If it is appropriate to state to a complaining employee or an alleged wrongdoer that his or her story is different from the other’s story, it might also help to ask “do you have any specific information as to why the other person might be less than truthful?”

Some suggestions to consider:

- Totally fabricated stories are somewhat unusual, but exaggeration is not. Consider whether the statement being made to you sounds exaggerated and, if so, to what degree.

- Consider the relationships among the witnesses to a situation. People can take sides and they can modify their view of the facts to consciously or subconsciously help a friend.
- If a witness keeps asking you about facts, he or she may be seeking information that would enable him or her to lie more effectively.
- Evaluate every witness in a context of common sense and reasonableness.
- If you are unfamiliar with some of the witnesses, ask their managers about those witnesses' tendency to be truthful.
- Where needed, talk to a witness more than once and gauge his or her consistency as part of assessing credibility.
- The descriptiveness of a witness's statement may or may not be a gauge of truthfulness. A person whose memory is somewhat vague may be telling the truth, but they may not be particularly descriptive.
- Focus on possible witness bias or interest in the outcome of a situation. Many credibility determinations are influenced by the witness's circumstances.

If, at the end of the investigation, you cannot make a fair credibility determination, that is ok. However, don't give up and call it a "tie" without first analyzing questions and considerations like those set forth above.

How to Avoid Mistakes and Oversights When Conducting Investigations

Why this Stuff Is So Important

- Getting it right is your goal
- Fairness and the perception of fairness
- Agency issues and arbitrators – they expect a good investigation
- Litigation – it's better to win than lose
- You'd prefer to keep your job

Here's My Top Ten Areas for Mistakes



1. Preparation

- Obtaining records (especially emails – get IT help if you can)
- Sketching out the plan
- To suspend or not to suspend (and paid or unpaid)?

2. Interviewing flaws

- Direct but tactful is usually better than tactful but direct
- Don't think you're The Closer, but don't be afraid to push either
- The art of pushing without going over the top

2. Interviewing flaws – continued

- Open-ended questions versus cross-examination
- Using and hiding information
- Make sure you ask if the witness has relevant documents, photos, voice mails

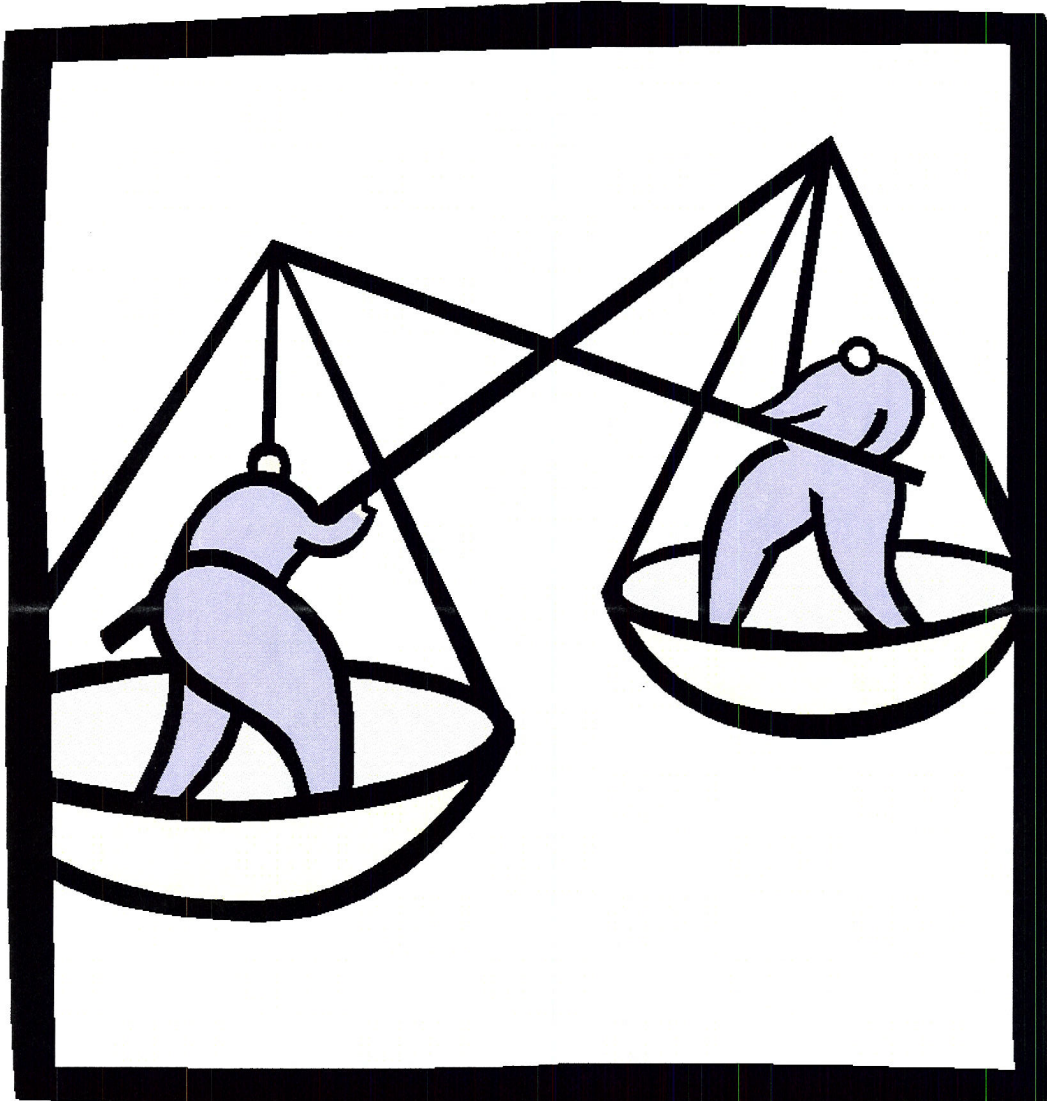
3. Getting around the 11th commandment

- Seek out the names of witnesses from the key parties
- Interview them, but be realistic about their perspective
- Time and facilitation skills count
- So does interest-based methodology
- Don't give up too easily

4. Other skipped steps

- Not talking to the alleged Wrongdoer
- Skipping witnesses
- Not confirming accuracy – witness statements vs. reviewing notes?
- The need for re-interviews

5. The art of making credibility decisions



6. Documentation

- What to create
- What to keep
- What to throw away
- Drafts – they're not finals – dump them when they're not needed any more

7. The beauty of attorney-client privilege and how to use it

- How to use your lawyer to your benefit

8. Opportunities lost – the failure to create self-serving evidence

- You're not writing for you, your boss, or the complainant
- You're writing for the judge and the jury
- Keep it simple
- Be fair in your analysis, but support what you're doing
- Don't editorialize except under privilege

9. The need for an unbiased investigator - the proper role of HR

- Who investigates?
- Who gives advice about what to do with the results and the decision?
- Who's the decision-maker
- Handling the usual situation versus the difficult case

- 10. Watching the clock
- The length of the investigation matters
- So does the response time
- Consider the perspective of those involved
- How long is too long?

A Few Words about the Remedy and the After-Effects

- It doesn't end with the remedy
- Be realistic about the after-effects
- The 1-3-5-3 rule
- Building bridges

A Helpful Summary of the Well-Conducted Investigation

1. *Was the investigator properly trained?*
2. *Was the investigation biased?*
3. *Was the investigation appropriate under the circumstances?*
4. *Was the employee under investigation given all reasonable opportunities to be heard?*

A Helpful Summary of the Well-Conducted Investigation

5. *Has the investigator reached a reasonable conclusion concerning the facts?*
6. *Has the investigator properly documented the investigation?*
7. *Was the investigator prepared to recommend prompt, effective action to remedy misconduct?*

DO NOT REACH LEGAL CONCLUSIONS

It is considered a recommended practice for investigators to reach factual conclusions, *not* legal conclusions. Sometimes, internal investigators will also reach a conclusion regarding whether behavior did or did not violate a company policy. Note that violating a workplace policy is a different standard than violating the law, which is one reason that investigators should not make legal findings. This means that even if the allegation includes concerns about, for example, unwanted touching, an investigator should only reach findings about the facts and should not reach a conclusion about whether there was unlawful (or lawful) conduct.

Conclusions should state, for example:

Mr. Jones says his boss (Mr. Foster) made numerous sexually explicit jokes during meetings, which Mr. Foster denied. Witness interviews confirm Mr. Jones's allegations. Three witnesses recall hearing the jokes at meetings on several occasions. Therefore, a preponderance of the evidence supports a conclusion that Mr. Foster did tell sexually explicit jokes at meetings.

Some investigators (typically internal investigators) are also expected to decide whether a policy was violated. External investigators are usually not asked to make this determination since the employer is often in a better position to interpret its own rules. In the above example, if the investigator were to make a policy violation determination the findings would also include:

It is further found that Mr. Foster violated the company's anti-harassment policy which prohibits telling sexually-explicit jokes in the workplace.

In the event the investigation does not uncover evidence to support the allegations, the conclusion should state that fact, such as:

Mr. Jones's allegations against Mr. Foster are not supported by a preponderance of the evidence. This is because no witness recalls hearing the jokes described by Mr. Jones, even though they were present for the meetings in question. These witnesses appeared credible. They provided consistent information and appeared to have no bias for or against either party.

DOCUMENTATION

Investigators should carefully and objectively document witness interviews, the findings made and the steps taken to investigate the matter. Investigators have different methods of documenting interviews, including taking notes (handwritten or on a computer), drafting statements for witnesses to sign, obtaining witness statements (written by the witness), or audio recording. There are pros and cons to each method and any can be acceptable so long as the information gathered is reliable and thoroughly documented and the documentation is not altered. It is also advisable to be consistent in the way you decide to document your interviews (unless there is a good reason to change your usual practice). It is considered a recommended

practice to retain all documentation. Some investigators type up handwritten notes so they are legible. However, the handwritten notes should also be retained.

SPECIAL ISSUES

What to do if the target of harassment asks the employer not to do anything.

It is rarely appropriate for an employer to fail to take steps to look into a complaint simply because an employee asks the employer to keep the complaint confidential or says that he/she will “solve the problem” with no involvement by the company. Indeed, this is one of the primary reasons why employers should not promise “complete” confidentiality. If the complaint involves relatively minor allegations and the complainant wants to handle the situation him/herself, the complainant can be coached as to how to do so, however the employer should follow up and assure this has occurred and the harassment has stopped. If the allegations are more serious the employer will need to know if they occurred so that appropriate action can be taken. In those cases it is not acceptable to have the complainant handle the matter alone.

Investigating Anonymous Complaints

Anonymous complaints should be investigated in the same manner as those with a complainant who identifies him/herself. The method will depend on the details provided in the anonymous complaint. If the complaint is sufficiently detailed the investigation may be able to proceed in the same manner as any other complaint. If the information is more general, the employer may need to do an environmental assessment* or survey to try to determine where there may be issues. However, the fact that the complaint is anonymous is not a reason to ignore the complaint.

* An environmental assessment is a process of finding out what is taking place in the workplace without focusing on a specific complaint or individual. For example, it might mean interviewing all the employees in a work group about how they interact, if they have experienced or witnessed any behavior that has made them uncomfortable, etc.

Retaliation

Complainants and/or those who cooperate in an investigation must be protected from retaliation. Employers should tell complainants and witnesses that retaliation violates the law and their policies, should counsel all parties and witnesses not to retaliate, and should be alert to signs of retaliation. Retaliation can take many forms. In addition to the obvious, such as terminations or demotions, retaliation could take the form of changes in assignments, failing to communicate, being ostracized or the subject of gossip, etc.

Retaliation can occur at any time, not only right after an incident is reported or an investigation is started. It is good practice to check back with a complainant after an investigation is completed to ensure that the employee is not experiencing retaliation, no matter whether the allegations were determined to be correct.

IMPLEMENTING EFFECTIVE REMEDIAL MEASURES

The FEHC regulations make it clear that an employer must take appropriate remedial steps when there is proof of *misconduct* – the behavior does not need to rise to the level of a policy violation or the law to warrant a remedy. Remember, an employer's legal obligation is to take reasonable steps to **prevent and correct** unlawful behavior. In order to meet this obligation, an employer should:

- Stop behavior before it rises to the level of unlawful conduct, which is why steps should be taken even when the behavior is not yet serious enough to violate the law;
- Impose remedial action commensurate with the level of misconduct and that discourages or eliminates recurrence; and
- Look at what the company has done in the past in similar situations, to avoid claims of unfair (possibly discriminatory) remedial measures.

Remedial measures can include training, verbal counseling, one-on-one counseling/executive training, "last chance" agreements, demotions, salary reductions, rescinding of a bonus, terminations, or anything else that will put a stop to wrongful behavior.

SCENARIOS

Investigations Training

Discrimination Matters

Assume for a minute that you are an operations manager – your name is Mark Morgan. You're 47 and white. Over the course of the last ten years, you have risen to a reasonably decent level of management. You're now in charge of a good-sized department here at Common Times Financial. Recently, life has been better than normal: (1) you just had a vacation in St Lucia, (2) profits are up, and (3) your employees seem generally happy for a change.

The only thing bothering you right now is that John McIntosh, who has long managed the financial statistics function in your department, is retiring in ten days. And you put off finding a replacement until after your vacation. It's now Monday morning and you just learned from HR that this opening has to be posted for ten days. As the HR manager leaves the office, you mutter, "Nuts, I won't have someone until after John retires. Darn these HR rules." Jill, the HR manager, either hears you or, more likely, she is both clairvoyant and has superpowers. She turns and says, "I'll bet you're sorry that you waited so long to post this opening, but you have to understand that there are EEO reasons why we go through the posting process."

Fortunately, good people have applied for the job

Ok, fast forward three weeks. The applications are in, John is gone, and you're already tired of filling in for him and essentially doing double duty. However, Jill has good news – seven people have applied for the job and three seem well qualified. Together you and Jill look over the list and agree there is no use looking at anyone other than the three clearly qualified candidates. Here's who they are and a summary of their qualifications:

Rob Washington – You're delighted and a little surprised that Rob applied. He's a very good guy. He's been with Common Times for almost as long as you have, i.e., nine years. For the last two years, he has been on special assignment related to a system build-out that needed someone who had solid financial experience. Before that he worked in Common Times' financial statistics area and had briefly managed a smaller financial library group. Prior to joining Common Times, Rob spent 26 years with a small investment firm. For the record, Rob is 54 and white.

You and Rob are pretty good buddies. Occasionally you play golf together and you're in the same fantasy football league. You're more than comfortable with Rob's way of doing things. In fact, the only downside to Rob is that while he is hard working and a really nice guy, he has always been more comfortable with "doing" than with "managing." He once told you that in confidence following a few drinks one night after work, specifically stating that telling people what to do "doesn't do very much for me." However, in your opinion, he should be able to manage people – he certainly has the financial knowledge, including statistical knowledge, and he is a good guy with a nice personality. Further, he said a month or so ago that he wanted to give managing another shot.

LaTonya Murray – LaTonya is clearly the best worker in the financial statistics area. She is aggressive, incredibly bright and a really hard charger. She too has limited management experience, largely due to having changed from a career teaching statistics at a local college to a finance position seven years ago. For the record, LaTonya is 42 and African-American.

Jill's response to seeing LaTonya's application was extremely positive. Apparently she's had her eye on LaTonya for awhile as someone who should be moving into management. However, you're not so sure. In your opinion, LaTonya has a lot of ability but her aggressiveness can create issues. She sometimes rubs people the wrong way and her expectations of her co-workers are often higher than they should be. That said, a number of people look up to

her for her abilities and her sheer brainpower. She knows statistics like a cat knows naps.

Fernando Castillo – Now, what to make of Fernando. He's just 30. However, he has natural leadership tendencies oozing from his pores. Nevertheless, his college degree was in languages, not business, and he's only been in the financial world for five years. That said, he's obviously smart but his statistical background is somewhat limited. Still, Fernando has already informally lead two non-managerial teams involved in creating new statistical programs, and both teams produced positive results. For the record, Fernando is from Colombia and, as noted above, is 30 years old. He went to college in the U.S. and his English is very good.

Fernando is also a pretty funny guy who is nice to have around. You have asked him on several occasions to join the fantasy football league, but he has always just smiled and said, "No problem, as soon as you make the league about real futbol instead of about a bunch of hormones running into each other fighting for a funny shaped object." Fernando largely hangs out with the younger crowd at work, but you've noticed that he communicates with senior managers with ease and confidence.

So whom do you choose?

Assume that Rob, LaTonya and Fernando all meet the minimum requirements for the job. Prior management experience is “definitely desired but not required” for the job. Also needed are “solid statistical knowledge, a general knowledge of finance, and the ability to lead others effectively.”

The manager position reports to you. As a result, you’re the decision-maker here. So who are you going to choose and why?

For each candidate, carefully detail a legitimate, non-discriminatory business reason for your decision. You may be deposed.

Also, be prepared to describe the process you used to come to your decision.

Rob Washington

LaTonya Murray

Fernando Castillo

Investigations Training

Sexual Harassment

Jenny White is an hourly operations employee at the Tampa manufacturing plant of Florida Igloo, the nation's largest manufacturer of water coolers. Jenny, 26 years old, is an attractive brunette who once was a Florida State cheerleader. She joined Florida Igloo just last year, after deciding that a career in bodybuilding wasn't for her.

The Tampa plant of Florida Igloo is one of the Company's smaller operations, specializing as it is in mobile water coolers. Only 57 employees work at the plant on one shift. One consequence of this size is that everyone knows each other pretty well. The plant is a friendly place where the employees often party together after work and play softball on two different company teams, one of which is coed.

The manager of the Tampa facility is Ed Green, who is relatively new himself. He spent 10 years with another company before joining Florida Igloo 14 months ago. There are only three other managers on site, including Barney Gray, the Operations Manager, to whom Jenny reports. The Tampa facility has no on-site HR professional, but Mandy Black, who is located in Orlando, provides support to the facility.

There is a fair amount of sexual camaraderie at the Tampa facility. Several employees are now dating or have dated each other in the past. Sexual jokes and sexually-oriented e-mails occasionally make the rounds. Plant Manager Ed Green is aware of the dating and the periodic jokes but, having heard no complaints, he hasn't tried to address those issues. Of the managers, only Barney Gray, a divorcee who is 35 years old, regularly gets involved in the joking. The Company has a sexual harassment policy posted on a bulletin board

and some training has been done on that subject. The policy advises concerned persons “to contact HR, their manager or any other appropriate person.”

Jenny has shared several sexual jokes and had some involvement in sexual banter, but not at the plant. Her participation is typically with the relatively close-knit members of the coed softball team, of which she is a member. The team typically goes to the Pepper Pot, a laid back Tampa bar, after each game to down a few pitchers of beer. Sometimes the joking gets a little strong at the bar, but the legitimate closeness of the team members has never created a meaningful level of discomfort for anyone, including Jenny.

This particular summer, the coed softball team is having a good season, largely because of the recruitment and hiring several months ago of Boomer Yoplanski and LaShawna Sweeney, both of whom were excellent college athletes. By early August, the team has won its first regular season championship and is entering the end of season tournament as the top seed. As a result, attendance at the games is up and Ed Green has put up a poster naming the opening game of the tournament “Igloo Ice Age Night.” By e-mail, he is encouraging everyone to attend the game to support the team. He also announces that he will pick up the tab of everyone who goes to the Pepper Pot after the game.

The Igloo Ice Age rolls over the Gulf Shores Rampaging Ducks that night 14-7 in front of a large number of spectators. About 35 employees head to the Pepper Pot in celebration. There the beers roll fast and hard, and the jokes and fun begin. Barney Gray does not play on the softball team and this is the first night he has been to the Pepper Pot. He shares in a number of jokes and sexual innuendo. More problematically, after drinking two beers too many, he pulls Jenny aside and, to her surprise, plants a big, unwelcome kiss on her. Jenny politely smiles and tells Barney that the kiss was “a drunken mistake.” He responds by saying that “theresh nuthin’ wrong with a li’l actshun” between friends. He then tries to plant a second kiss on Jenny when Boomer Yoplanski

takes notice and pulls Jenny out of the way. Shortly thereafter, at Boomer's unequivocal suggestion, Barney calls it a night and takes a cab home.

The next day, Barney purposely stays away from Jenny. However, word is out in a big way about Barney's effort to put the moves on Jenny. That and the game itself are the only two things that people are talking about.

When Jenny finally sees Barney just before lunch, she says hello but he walks away. Near the end of the day, however, Barney calls Jenny into his office. The following conversation takes place:

Barney: You've totally embarrassed me by telling everyone what happened.

Jenny: Embarrassed you? How do you think I felt last night?

Barney: Ok. I was a drunk and an idiot, but now everyone is talking about me like I'm a sick pervert.

Jenny: Look, I didn't say anything and I didn't tell anyone to talk. Enough people saw it for themselves. I didn't ask for this. Just let it die down and it will go away. I know you were just a stupid drunk.

Barney: Well I was drunk but I'm not entirely stupid. How about going out with me tomorrow night? If I'm getting blamed for this stuff, I might as well try to make something of it.

Jenny: I don't believe this. Now you are an idiot - I'm not the least bit interested in you.

Barney: Ok, but you're making a mistake.

Jenny: Fine, I'm making a mistake. Now let's go back to work.

Barney: You don't know how big a mistake [said as Jenny is walking out the door].

Several co-workers saw Jenny go into Barney's office and leave looking upset. One co-worker, Regi Brown, asks what happened and Jenny says "he doesn't get it and I think he's going to fire me if I don't date him." Regi says, "you need to talk with Ed Green or call HR." Jenny responds by saying, "I can't do that. I just want this to go away." Regi says, "if you don't tell HR, I will." Jenny responds "ok, but don't tell them who I am – just say that Barney is a sexist jerk."

The next morning, Regi calls Mandy Black, the HR professional in Orlando and says that she needs to report a sexual harassment situation involving Barney. When asked if the sexual harassment was directed against her personally, Regi says "no, it involves a friend of mine who works in this facility." Mandy then asks for the identity of that individual so that she "can do a proper investigation." Regi tells Mandy that she doesn't have approval to say who is complaining but she does describe in general terms what happened.

Investigations Training

Medical Matters

Marisa Orlowski is a sales support assistant. She has been with the Company for about 6 years. She lives and works in California. Her manager is Ricardo Herrera, the Administrative Director for Sales Support. Marisa is 41 and Caucasian.

Marisa recently returned from a medical leave related to both back surgery and stress. She has been back for three weeks and, unknown to HR, has been receiving criticism from her boss, Ricardo Herrera. At least in Marisa's view, the criticism is harassment based upon her medical situation. Ricardo has told her on more than one occasion that her absence left the team in a difficult position, particularly since Marisa had been a key player on a cross-functional group that was supposed to complete a major project shortly after her six week leave began. Ricardo has told Marisa that she could have postponed the surgery for two weeks but instead she left her team in the lurch. It is true that the surgery did not have to be done on an emergency basis.

Marisa also is upset because, upon her return, she asked Ricardo to make her hours "somewhat flexible" for three months so she could more comfortably recover from the surgery, and added that she wanted a new chair that would better support her back. Apparently Ricardo has been ignoring both requests. When Ricardo had asked what "flexible hours" meant, Marisa unequivocally requested to come in "when she felt able to do so" and leave early if her back acted up, even if that meant missing a couple of hours per day.

Marisa is a decent employee when she works, but she has always missed too much time. That said, she has not been disciplined except for informal coachings. Her performance appraisals for the last three years are all graded as Meets Expectations.

Marisa is concerned that Ricardo will retaliate against her if she complains to HR about his criticism of her leave and his failure to accommodate her. As a result, she has complained to no one other than a co-worker, Wendy Fong. Wendy offered to talk to HR for Marisa, but Marisa said no. Despite that, Wendy feels personally obligated to go to Lee Anderson in HR to discuss the situation.

The Company has a policy against unlawful harassment as well as a broad "Respect Others" policy. Both policies prohibit retaliation.

Your name is Lee Anderson – you are an HR professional responsible for the sales area. When Wendy shows up in HR, she comes to you. Your job is now to receive her concern and conduct an investigation. **Remember, despite the above information, you have no idea who the complainant actually is when you interview Wendy. You'll have to get that information out of her.**

Assuming you eventually get Marisa's name from Wendy, you would have had a chance to review the records related to Marisa's employment and her recent leave. You would have found the performance appraisals discussed above and a note about informal coachings on attendance. You also would have found that she had used no FMLA leave until two days prior to her surgery, and that she had, in fact, missed six weeks due to the surgery.

Additional Data for Witnesses (this data not available to the audience)

1. Some additional facts:
 - a. Marisa left an anonymous complaint on the Ethics Hotline stating that the Company is not treating employees who take medical leave fairly. Marisa told Wendy about that complaint, but Wendy has not seen that document and she does not have a copy. Marisa is upset that her anonymous complaint did not lead to any action. The complaint did not mention Ricardo by name.
 - b. Marisa very clearly told Wendy that she doesn't feel comfortable going to HR. She doesn't want to create a problem and she is worried that Ricardo will retaliate against her if she "turns him in to HR."
 - c. When Wendy decides to go to HR, she doesn't intend to bring up Marisa's name, but she is willing to describe the circumstances as she understands them. If handled in a way that makes her feel comfortable, she will identify Ricardo as the problem. If pushed to the point where she feels safe in doing so, she will eventually provide Marisa's name, but that is going to take some work. At one point, Wendy says: "I'll give you her name if you tell me that this will be kept completely confidential and no one else will find out that I've talked with you."
 - d. When Lee Anderson in HR meets with Marisa (after finally getting her name from Wendy and asking Marisa for a meeting), she needs to find out what happened. She starts the interview. Marisa, however, wants to know almost immediately if the meeting can be delayed so she can bring her lawyer.
 - e. Note – make the audience get it out of Marisa that she filed the anonymous complaint and that she has emails (Ricardo made a few dumb comments in two emails). However, Marisa is not going to give those emails up until someone specifically asks if she has any documents or other materials that she wants to share.
 - f. When Marisa finally feels comfortable, she is willing to discuss the facts. As stated above, Marisa recently returned from a medical leave related to

both back surgery and stress. She has been back for three weeks and, unknown to HR, has been receiving criticism from her boss, Ricardo Herrera. At least in Marisa's view, the criticism is harassment based upon her medical situation. Ricardo has told her on more than one occasion that her absence left the team in a difficult position, particularly since Marisa had been a key player on a cross-functional group that was supposed to complete a major project shortly after her six week leave began. Ricardo has told Marisa that she could have postponed the surgery for two weeks but instead she left her team in the lurch. It is true that the surgery did not have to be done on an emergency basis. Marisa also is upset because, upon her return, she asked Ricardo to make her hours "somewhat flexible" for three months so she could more comfortably recover from the surgery, and added that she wanted a new chair that would better support her back. Apparently Ricardo has been ignoring both requests. When Ricardo asked what "flexible hours" meant, Marisa unequivocally requested to come in "when she felt able to do so" and leave early if her back acted up, even if that meant missing a couple of hours per day.

- g. Marisa is willing to admit that the back surgery could have been put off for two weeks or so, but that she "really wanted to get it over with rather than worry about it."
 - h. If asked what Marisa wants to have happen as a result of the investigation, she first says "I just want you to fix everything." Shortly thereafter, however, she says that Ricardo should be fired.
- 2. Ricardo, when finally interviewed, offers his own view of what is going on here. These are his thoughts:
 - a. Marisa is not a great employee and she has been coached for poor attendance.
 - b. Marisa informed Ricardo that her back surgery had to be done, but that timing was "a little flexible." Nonetheless, when Ricardo asked her if she could delay the leave for two weeks until the end of the project, she said no.
 - c. Ricardo thinks that Marisa is taking advantage of the situation.
 - d. Ricardo passionately cares about his team and he feels they got the short end of the stick when Marisa would not delay the surgery. He tells you that the team is really frustrated that Marisa wants to take time off now whenever she feels the need to do so or when she needs physical therapy.
- 3. **Ricardo will absolutely deny harassing Marisa and he should maintain that stance no matter what. If asked, he also should say that Marisa missing**

How is this situation investigated, and is this really an investigation, an audit or something else? Is this different from a regular investigation? If so, what do those differences mean with respect to the investigation?

Part 3 of the Scenario: Due to the above investigation, the Company gives Wendy a raise that puts her into a more appropriate comparison with Sam. Upon being informed of that raise, Wendy returns to HR as happy as a lark. While there, however, she says she has told four other female managers about what happened, she gives you their names and says they'll likely be contacting you, then says that she will fill them in on the great news about her raise.

Do you now have an additional investigation to do? If not, what should you do? If so, what happens next? As an aside, can you demand that Wendy keep the information about the raise confidential?

Investigations Training

Ethics Investigation

Roles:

Context (as explained by the Narrator): Jose Manuel, a procurement coordinator at Sacred Cow Hospital is high school friends with Selena Rodriguez, a sales representative at Acme Baby Love. Acme sells powdered baby food to retailers and hospitals. Jose purchases all of Sacred Cows powdered baby food through Acme, as did his predecessor. He is happy to do so because the quality of the product is good, and even happier because he can provide sales orders to his friend Selena. All is good in Jose's world. Recently, however, a rumor circulates around the maternity ward that Jose was seen selling cans of baby food at the Santa Ana swap meet. One of the employees reports the rumor via the 800 hotline number, and states that he believes that Jose gets the baby food from the supply he purchases for Sacred Cow. You are asked to investigate this call.

Part 1 of Scenario: The initial challenge is to determine how to evaluate the allegation that was made anonymously. The participants need to figure out (1) how to connect with the anonymous caller, (2) when to connect with Jose, (3) how to determine whether the hospital is missing baby food, (4) if all is ok given that no baby food seems to be missing [Fact not for the participants at first blush – the baby food inventory looks correct because Selena provides Jose with a 10% surplus of baby food and increases the price per container by 10% as well. Jose then takes the extra 10% of inventory and sells it at the swap meet. He pockets ½ the money from those sales and sends the rest to Selena. The inventory looks intact under this scheme as does the profit margin for Acme. The records also look legitimate because Jose and Selena make sure they don't show the extra 10% of inventory.], and (5) where else to drive the investigation.

Part 2 of the Scenario: At some point, the anonymous caller agrees to a phone interview. She is quite hesitant to identify herself, and quite hesitant to provide information. It turns out that she is a co-worker of Jose, she can't stand him because she thinks he is sleazy, but she doesn't know much beyond the fact that he is selling baby food at the swap meet. She claims he has to be stealing the baby food "given the low prices he is charging at the swap meet."

Part 3 of the Scenario: We should discuss whether (1) the investigator should go to the swap meet, (2) involve the police, (3) purchase the product at the swap meet with the hope of identifying it versus Sacred Cow's inventory, and (4) involve someone in security at Acme.

Part 4 of the Scenario: The investigator eventually will interview Jose. Fortunately, for Jose, he has carefully done the records to make everything look normal. However, it does seem like the Hospital is overpaying for baby food. Jose claims that his successor agreed to the price, which he claims hasn't changed for several years.

Part 5 of the Scenario: It turns out that the investigator really needs to interview Selena, who the investigator figures out must have some complicity here. Beyond interviewing her, the investigator has to figure out whether and how to involve a third party (Acme) in the investigation and the specific interview.

Part 6 of the Scenario: It turns out that Acme wants to investigate as well. Acme's investigator wants to interview both Jose and the co-worker who reported this situation in the first place. The participants will need to evaluate whether/how such interviews should be accomplished.

Part 7 of the Scenario: At some point, Jose demands a lawyer and seeks to "take the 5th" amendment, i.e., refuses to incriminate himself. Now what?

Investigations Training

Risk Analysis

Green Industries produces various home and garden tools and yard devices, ranging from tillers to bird baths to high-class flamingo statues for the front yard. The company started many years ago by just making garden tools, but product growth has been in the yard décor area. As a result, the manufacturing plan for the company expanded over time but, because the décor products were so different from the garden products, the company eventually found itself having seven different manufacturing facilities in Ocala, Florida. In addition, there is a separate headquarters building and a separate sales office.

To make things easier for employees who have to go from one Ocala facility to another, the company runs three shuttle vans. Two of those shuttles operate on a bus-type schedule while the other does special trips for higher-level managers. Ben Roberts is one of six employees whose job it is to drive the vans. He has been doing that job now for about two years, without any serious performance issues.

You're the Director for one good-sized segment of Green Industries. Your responsibility includes the facilities workers, of which Ben is one. At about 2:00 this afternoon, you receive a call from Kwanzi White, the general manager of one of the company's manufacturing facilities. Kwanzi typically calls only when a serious problem occurs so you quickly ask what's going on. She responds that she isn't sure what's happening. She says she just heard third-hand that Ben Roberts was seen today at lunch drinking a beer at The Brown Cow Tavern. Kwanzi isn't even sure who it was that allegedly saw Ben at the tavern but knowing that Ben's shift started at 2:00 p.m., Kwanzi felt that she should call you and give you the news. Kwanzi also tells you that her administrative assistant, Lee Simms, might have more specific information since she got the original call.

Let's assume that chasing the above rumor got you nowhere. However, several weeks later, Ben has a fairly inconsequential accident while driving the van. The only damage is to the right-back side of the vehicle, which got dented and scrapped when Ben took a turn too sharply and hit a concrete barrier. This is Ben's first accident driving the van. There was only one passenger in the van at that time. According to the corporate safety report, the passenger stated that Ben was driving "a bit fast" but that he wasn't out of control. The report also states that Ben, when asked about the accident, apologized and said that he was behind in his route because he had been asked to wait about ten minutes for a senior executive, who he had just dropped off and when the accident happened, he was trying to "make up the time."

Three weeks go by when you get your third call about Ben. It's from his boss, Amanda Lee. According to Amanda, she received an anonymous voice message telling her that Ben often drinks at lunch before starting his shift. Apparently the message, left by a feminine voice, came in at 1:30 this afternoon. Ben started work at 2:00. It is now 2:20. The voice mail concluded with the following statement: "Ben's got a serious alcohol problem and he's pretty drunk right now. Check it out and do something. He covers up the scent with mint gum so don't let him fool you. And who am I? Just a concerned person."

The day after the above incident, Amanda meets with you to discuss the overall situation. She is very concerned about the possibility of having a van driver with a drinking problem. She also tells you that she has spoken to corporate security about the issue. They have told her to do two things: (1) employ a surveillance team to follow Ben around lunch time for several days and (2) if there is any doubt, send him to EAP for a required assessment of his fitness for duty. Amanda tells you that she is a little uncomfortable with the surveillance idea but she likes the fitness for duty assessment, primarily because she has reviewed the EAP brochure on substance abuse, and, according to her, it looks like a very

good program. However, she wants your opinion as to these options before she does anything.

Let's assume that whatever action we took, it didn't lead anywhere. However, three weeks later, Amanda calls back. She tells you that two hourly employees are in her office. It is now 2:45. The hourly employees say that they observed Ben drinking at the Brown Cow Tavern at lunch. The employees say that they were at the Tavern, although (they quickly added) "just for the food." Ben was at the bar, with two empty beer bottles and a full one in front of him. Ben didn't see them but they felt they had to tell Amanda about the situation. Both employees sound credible and neither has any apparent reason to be out to get Ben – the three employees don't work together and the two hourly workers who spoke up really don't even know Ben that well. When asked, they say that they'd even be willing to take a polygraph test.

Assume that Ben is fired due to the above circumstances. Six weeks later, you get a call from Brian Jaffe, the head of HR for Vans Unlimited, a company in Orlando that provides vans and limos for social events, ranging from weddings to bachelor parties to proms. Brian tells you that he is close to hiring Ben for an opening. He also tells you that he has done a background check and that everything seems fine. However, "he always checks the last two employers 'just in case.'" Brian then asks, "so what can you tell me about Ben?"

Green Industries has a longstanding and carefully upheld practice of not responding to reference inquiries regarding prior employees. However, that practice does permit you to verify dates of employment and rate of pay.

Investigations Training

Structuring the Methodology and Plan

For purposes of this analysis, you are an operations manager. As you are walking to a meeting in the front offices, you hear the sound of something unusual going on near one of the machines. You pause, considering the possibility that the diversion could make you late for the meeting. However, you decide to check out the noise.

As you turn the corner, you come upon the remnants of what was once an altercation, or near altercation, between two employees. One, Bob, is still holding onto the shirt of the other employee, Roger. It appears that Roger is trying to push Bob away. Both look disheveled and Bob was red-faced. However, you can't immediately tell if you missed a full-fledged fight, a shouting match, or just a serious disagreement.

After parting the employees, you decide to interview them separately. Roger agrees to wait quietly while you talk with Bob. You and Bob find an office, and you ask him what happened. He replies that Roger has been picking a fight with him for some time, and that Roger created the altercation. When asked to explain, Bob states that Roger keeps calling him "little faggot" and harasses him by picking on him, by telling him he's a wimp, and by making comments about him being the Company's "golden boy." Bob acknowledges that things got out of hand tonight, that he overreacted and tried (unsuccessfully) to punch Roger, that Roger (also unsuccessfully) then tried to punch Bob, then they started grabbing and pushing just before you arrived.

Bob says he's not gay, and that he doesn't understand why Roger makes the comments that he makes. Bob, who has always been a model employee, is obviously frustrated and upset. He says he can't work with Roger anymore. Bob

asks for your help. You tell him that you need to talk to Roger and, since it is the end of the shift, you tell Bob just to get out of here and go home until tomorrow.

Then, you talk with Roger. He tells a completely different story. He says that Bob is always smarting off about management hating Roger and liking Bob. Roger denies calling Bob names and also denies harassing Bob. He adds that Bob is, instead, harassing Roger.

When asked how the fight started, Roger says that when Bob told Roger tonight that management thinks “you suck, Roger,” Roger responded with “you’re a damn brown-noser, aren’t you?” Roger says that Bob then swung at him and missed. Roger denies swinging back, but agrees that they pushed and shoved for a minute or two. You then go ahead and send Roger home.

For the record, Bob is one of your best workers. He has been with the company for nearly 15 years. There is no discipline in his current file. Roger, who has been with the company for somewhat less than two years, is an occasionally troublesome employee who has two write-ups in his file for getting into “heated verbal altercations” with co-workers. On both occasions, he was told that he must avoid further altercations in the future.

Also for the record, Bob is Caucasian, age 48. Roger is African-American, age 33.

PROCESS

Before making a decision, what steps would you go through in connection with the above situation? Consider as well what we're dealing with – what type of investigation is this and over what issues.

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
9. Make a decision

DECISION

Here are your four options:

1. Fire both Bob and Roger (on what basis?)
2. Don't fire either Bob or Roger (what would you do instead?)
3. Fire Bob and do something other than discharge for Roger (why?)
4. Fire Roger and do something other than discharge for Bob (why?)

If you keep both workers, what else should you do to proactively deal with this issue?

Investigations Training

Dealing with Difficult Witnesses

Immediately upon arriving at your office on this beautiful Tuesday morning, your assistant tells you that you'd better check your voice mail. Apparently the folks over at Amarillo have been calling since 7:00 a.m. to get your help. Welcome to another interesting day. And, of course, it had to be Amarillo, where several of your favorite problem children reside.

You are the Regional HR Manager for the Longhorn Bushwhacker Wire Installation Company. Much of your region is North Texas and Oklahoma. The Company installs bushwhacker wires that provide remote computer information regarding the locations of various herds of cattle.

The hourly workers at Amarillo are a difficult group. Beyond being a challenge to manage, they have threatened to bring in a union on two different occasions. The informal leader of the gang is Chick Spencer, whose name doesn't appear anywhere on your favorite people list. Chick is an old school, argumentative guy who perceives that his role is to challenge management, meaning that he'll tell other employees to lie rather than cooperate with a management investigation. Chick's theory is the less that management knows, the better, and unfortunately that strategy has paid off on a number of occasions, including in investigating problems.

When you call the Amarillo facility, half the management team is sitting in a conference room waiting to hear from you. The word is that things got out of hand last night among one of the field crews. Apparently several white workers and several Latino workers got into a heated exchange late in the day over some broken equipment. The word is that no one would take responsibility for the equipment being broken and some name-calling and implied threats were exchanged. As of now, there is no suggestion of actual violence. The managers

in Amarillo are hearing, however, that one or more white employees were calling the Latinos names like “idiot Mexicans” and “dumb ass illegals.” Further, at least one Latino had apparently countered with “gringos estupidos” and the same or perhaps a different Latino, in perfect Spanglish, called one white worker “a crap-head guero.” However, no one is really sure what happened because the word is that Chick Spencer may already have told everyone to “hunker down and stop talking.”

The managers are looking for you to solve the problem and it’s normally your role to investigate harassment issues that arise in the Amarillo area. However, you’re in Dallas with several critical meetings to attend in the next three days.

[Ok, let’s start. Where do we go from here?]

Let's assume that your discussions with the managers lead you no further than the rumors and general information described above. Let's also assume that you can reschedule parts of your life so you can spend a day or so in Amarillo. When you get there, it's easy enough to figure out who were the three white and three Latino employees on the crew in question. However, Susanna Carillo, the manager over that crew, tells you that she is sure that Chick Spencer has already gotten to all six workers and that you're not likely to get much data.

[Knowing that Chick has told the employees to keep their mouths shut, how would you approach this situation differently than you might a normal investigation, or would you approach it differently?]

Once you get to the field, four of the six workers tell you nothing. However, things break loose a little with the last two workers you interview. A Latino worker, Carlos Rojas, who has been with the company for over ten years, tells you that the crew has meaningful problems. Apparently the crux of the problem is the poor relationship between Jeb Montgomery and Victor Jiminez. Carlos implies that the name calling is their mutual fault and that he is worried about a potential fist fight if things don't get better.

Jonathan Smythe, one of the whites on the crew, tells you enough to support Carlos' concerns. He says that this issue has been brewing for some time and that Susanna Carillo knows of the tension but she isn't strong enough to make the problem go away. Jonathan also tells you: "you didn't get this from me and, if asked, I'll deny it, but the names you heard were said, and they were said by Jeb and Victor."

[Revisit the conversation with Jonathan – role play conversation. Then, when finished, and now armed with this additional data, let's discuss where we go from here. Who do we talk with now and what do we ask?]

The next morning, Agent Sheila Spade comes to your office. She is accompanied by a member of the local police department, Jed Green. Charles and Dee Amos are also in the meeting. Sheila gives you details of the allegations she received. Dee tells her you were given similar information.

Sheila proceeds to ask for information about Mohammed, his job duties, and what kinds of things or areas he might have access too. She also asks that you give her any information about his friends or family members that might be contained in his files. Things like his listed beneficiaries, emergency contacts, and references. In addition, she wants access to any medical and/or EAP records to help determine if Mohammed has any “mental” issues. When you hesitate, she comments, “Normally, you probably wouldn’t give out confidential information on your employees. But then, it is unlikely you’ve experienced this type of situation in the past. And don’t forget, we live in a very different world than we did pre-9/11.”

Address the following:

1. Will you give Sheila the information she requests? Why or why not?

2. What risks did you identify/consider regarding Sheila’s request?

February: "Otto Cuban Jew muther fucker not forget about you your time is coming we will get YOU death to the Jews [swastika]." Chrysler's incident report documented that a police officer who came to the plant to collect the note said that a security camera should be installed to record future harassment. The rest of 2003 followed a similar pattern.

- April: graffiti (2 incidents)
- May: graffiti (2 incidents)
- June: graffiti (3 incidents), a death-threat note, the tire of the bike May used to get around the plant was slashed, and the changing mat outside his locker was vandalized
- July: graffiti (6 incidents)
- August: graffiti (5 incidents)
- September: graffiti (5 incidents)
- October: graffiti (2 incidents, hateful as ever: "Hang the Cuban Jew")
- November: graffiti (2 incidents) and a death-threat note
- December graffiti (1 incident)

Sometime in 2003, Chrysler implemented a protocol for handling incidents involving May. According to McPherson (the head of HR at the plant), the person who found the graffiti or note was to notify HR and security, and a picture would be taken. After the incident was documented, someone from HR or security would talk to whoever found the graffiti or the note to establish when it was found. If the incident involved graffiti, the area would be cleaned. Pictures of the incident and details about when and where it happened (including when the area was last seen without graffiti) were collected by Kim Kuborn, who kept a detailed but not quite complete record of May's harassment in a large binder. As already mentioned, Kuborn was also responsible for reviewing gate-ring records to determine who was recorded as being at the plant when she believed a particular incident may have occurred.

In May 2003, Chrysler's lawyers retained Jack Calvert, a forensic document examiner. Chrysler initially gave Calvert pictures (or copies of pictures) of graffiti. Soon Chrysler provided Calvert with an original note from June 2003, which Kim Kuborn collected quickly after its discovery, before the police arrived on the scene to take it themselves, and he went to the police to view more originals. Chrysler also gave him logbooks containing daily entries from many employees on different shifts. After reviewing this material, Calvert told Chrysler's counsel that he thought only one person was responsible for the graffiti and notes, but that he couldn't identify who. Based on what he had seen from the logbooks, he wanted additional "exemplars" (samples of handwriting) from approximately sixty employees. Chrysler responded with a variety of documents, including old job applications. (To jump ahead a bit, Calvert continued to collect exemplars throughout 2004 and into 2005. He ultimately issued his report in July 2007. It was inconclusive. More on this soon.)

The incidents continued through 2004 and ended in 2005:

- January, 2004: graffiti (5 incidents)
- February: death-threat note in May's toolbox
- March: graffiti (2 incidents)
- October: graffiti (2 incidents), May struck in the back with a flying object, submission of swastika in "Team Belvedere Logo Contest," and May found a dead bird dressed as Ku Klux Klansman in a vise
- February, 2005: May's car vandalized, graffiti (3 incidents), and a death-threat note ("Otto you muther fucker bastard your family is not safe Cuban Jew fuck scum Jew kike nigger lover kikes are varmints spics are roaches niggers are parasites Exterminate all kill them all We hate fucken Jews niggers spics [swastika]")
- June: graffiti and death-threat note on May's toolbox
- December: graffiti on May's toolbox

Chrysler's outward response to May's harassment involved McPherson's September 2002 group meetings, Huller's January 2003 interviews with May, ongoing documentation of the incidents, and (usually) prompt cleaning of graffiti. Behind the scenes, Kim Kuborn reviewed gate records to see who may have been around the plant when incidents occurred and Calvert was given more handwriting samples to analyze. Chrysler also wanted the jury to know that the employees at the Belvedere plant valued May as a colleague and cared about him as a person. For example, Kim Kuborn testified that "this behavior was completely unacceptable in our eyes, and we wanted to stop it and find out who was responsible for it. We certainly didn't want this kind of activity going on in the plant and making one of our team members as uncomfortable as it clearly was."

Beyond cataloguing the actions it took in response to May's harassment, and somewhat at odds with the empathy expressed by some employees for May's predicament, Chrysler's defense had another (rather unsettling) theme: May *did it all to himself*. Chrysler kept this defense in the background and at times seemed to deny it was part of its defense at all. For example, when confronted about whether Chrysler really believed May was the culprit, Kim Kuborn said, "I have no evidence that he did this himself." Chrysler left it primarily to Jack Calvert, the forensic document examiner, and Rosalind Griffin, a psychiatrist hired by Chrysler to analyze May, to make the case *against May*, to argue that May was not being victimized by death threats and suffering because of Chrysler's inaction, but that, more likely, *Chrysler* was actually the victim of May's lies.

We have already summarized the mechanics of Jack Calvert's operation. He was given samples of graffiti and notes and known exemplars (handwriting samples from plant employees), and carefully compared the two. After his initial look at the materials, there were approximately sixty employees he could not rule out, and he requested more samples of their writing. He was given more samples and, during 2004 and 2005, whittled his list down to three. He was never able to

reach a conclusion about who did it, but he could only say that there was more evidence "that [this person] did author the material than that he did not" about one employee—Otto May, Jr. Calvert's testimony was challenged, of course. The jury heard that Calvert's list of possible authors was reduced not just by his own professional opinion but also by Chrysler informing him that twenty-six employees could be removed from consideration because they were not at the plant at the time of one of the incidents. The jury heard that those removed included Eldon Kline, John Myers, and Dave Kuborn. The jury also heard testimony that May was not eliminated as a possible perpetrator even though he, too, was not present when some of the incidents occurred. Chrysler never gave that information about May to Calvert. Chrysler did, however, give Calvert a large number of samples of May's writing, including May's notes documenting the harassment where, according to May's testimony, he tried to copy graffiti exactly as printed.

Griffin, the psychiatrist hired by Chrysler, also had a tough assessment of May's role in the harassment. According to Griffin, May has a number of personality disorders. She testified that he is histrionic, narcissistic, paranoid, and, less technically, deceptive. As she put it, he is the kind of person who will "scream louder and louder wolf, wolf, wolf, until they have your attention until you can see that they are very important" and who assumes "people are out to get you and that they're also doing things to persecute you and that they are planning your demise, and there's a conspiracy to bring about your downfall." In Griffin's opinion, May did not suffer from depression and had no post traumatic stress disorder. "[T]he injuries that he alleges was (sic) caused by his employer were his own demons within himself." May's psychotherapist, Dana Kiley, who May had been seeing for eight years, told a different story about May. In her opinion, May had been seriously depressed, and she did not think he had any of the personality disorders Griffin did – not histrionic, narcissistic, or paranoid. She did not she did not think he had any of the personality disorders Griffin did—not histrionic, narcissistic, or paranoid. She did not think May was deceptive or that the harassment was a hoax.

After a seven-day trial, the jury also rejected Chrysler's implication. And beyond that, the jury decided that Chrysler's efforts to stop the harassment were inadequate, and substantially so, and accordingly returned a large verdict for May. As explained in our opening summary, the jury awarded May \$709,000 in compensatory damages and \$3.5 million in punitive damages. The compensatory damage award was remitted to \$300,000 and the district court granted Chrysler's Rule 50(b) motion for judgment as a matter of law on punitive damages. Both parties appeal.

II. Discussion

We review *de novo* a district court's grant or denial of a Rule 50(b) motion for judgment as a matter of law. *Ekstrand v. Sch. Dist. of Somerset*, 683 F.3d 826, 828 (7th Cir. 2012); *Kahn v. Bland*, 630 F.3d 519, 523 (7th Cir. 2010). Thus, like the district court, we decide whether the jury had "a legally sufficient evidentiary basis" for its verdict.

Justia > U.S. Law > Case Law > Federal Courts > District Courts > Missouri > Western District Court of Missouri > 1999) Keefer v. Universal Forest Products, Inc.

Keefer v. Universal Forest Products, Inc.,

73 F. Supp. 2d 1053 (W.D. Mo. 1999)

U.S. District Court for the Western District of Missouri - 73 F. Supp. 2d 1053 (W.D. Mo. 1999)

August 25, 1999

73 F. Supp. 2d 1053 (1999)

Jessica KEEFER, Plaintiff,

v.

UNIVERSAL FOREST PRODUCTS, INC., Defendant.

No. 98-0432-CV-W-8-5-3.

United States District Court, W.D. Missouri, Western Division.

August 25, 1999.

***1054** Lynne J. Bratcher, Marie L. Gockel, Bratcher & Gockel, L.C., Kansas City, MO, for Jessica Keefer, plaintiff.

Ann Mesle, Melody L. Nashan, Lathrop & Gage, Gail A. Goeke, Lathrop & Gage, L.C., Kansas City, MO, for Universal Forest Products, Inc., a foreign corporation, defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

SMITH, District Judge.

The Court has reviewed the parties' arguments and the portions of the record

accompanying them, and concludes there are disputed issues of material fact that preclude entry of summary judgment. Accordingly, Defendant's Motion for Summary Judgment (Doc. # 66) is denied.

When denying a motion for summary judgment the Court ordinarily does not engage in an exhaustive discussion of the facts because it is unnecessary to do so. The Court's view of the facts is ultimately supplanted by the jury's view of the facts, and the Court's view of the facts is therefore of benefit to no one. However, further discussion is required when resolution of the issues requires the resolution of legal issues, and in this case Defendant's Motion presents three legal issues that require discussion.

The first issue is whether this case should be treated as one of co-worker or supervisor harassment. Defendant contends that Darrell Foley was not a supervisor over anyone (including Plaintiff) because he did not have the authority to hire, fire, discipline, or promote. However, there are facts in the record that suggest Foley did have some supervisory power. For instance, a document entitled "Mike Weems 2nd Half '97 Goals" indicates that one of his goals is to "[p]rovide direction to Darrell and Mark to help them run their departments." The fact that Foley has a "department" is evidence that he was a supervisor.

More importantly, as a legal matter it is not necessary that Foley actually hold the title of "supervisor." Vicarious liability exists for the employer under the principles set forth in section 219(2) (d) of the Restatement of Agency, which discusses "vicarious liability for intentional torts committed by an employee when the employee uses apparent authority (the apparent ***1055** authority standard), or when the employee was aided in accomplishing the tort by the existence of the agency relation (the aided in the agency relation standard.)." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2268, 141 L.Ed.2d 633 (1998) (quotation omitted). It is true that generally "a supervisor's harassment involves misuse of actual power, not the false impression of its existence. Apparent authority analysis therefore is inappropriate in this context." *Id.* However, this is true only in the usual case; in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim's mistaken conclusion must be a reasonable one." *Id.*

Here, Plaintiff testified that she reported to Foley on a daily basis for work assignments, provided Foley with medical documentation for her sick leave, and called him to advise when she was absent from work. Keefer Depo. at 36; 191. She spoke to Foley about her desire to learn how to operate a forklift, and he began

training her. Keefer Depo. at 63-64. Foley discussed Plaintiffs performance deficiencies with her, Keefer Depo. at 82, and told Plaintiff that he would talk with Mike Weems about her raise. Keefer Depo. at 83-84. In her affidavit, Plaintiff also declared that Weems introduced Foley to her as a supervisor and told her to see Foley if she had any questions. She also averred that Foley approved her requests for leave. Keefer Affidavit, 118. Whether Weems or any other of Defendants supervisors did anything to encourage Plaintiff in her belief that Foley was a supervisor is not clear on the record. There are facts on both sides demonstrating that (1) Foley was (or was not) a supervisor and (2) even if he was not a supervisor, he was (or was not) performing some of the functions of a supervisor with (or without) Defendant's approval. The ultimate decision on this matter will have to be made by the jury.

The second contested legal issue is whether this is a "single event" instance of harassment. The significance of this issue is diminished by evidence that (1) male employees brought, displayed, and discussed sexually explicit magazines, and (2) Plaintiff complained about this conduct without result.^[11] There is also evidence that Foley put his arms around Plaintiffs shoulder and slapped her legs and there is evidence that Plaintiff was not offended by this conduct until after the incident in the shed, meaning it will be the jury's task to evaluate the import of this testimony.

In any event, the Court concludes that under proper circumstances a single incident of harassment can be actionable. In *Ellerth* and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) both of which were issued on the same day the Supreme Court promulgated an affirmative defense available in cases where a supervisor engaged in sexual harassment but no tangible employment action (e.g., firing or demoting) occurs. "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 118 S.Ct. at 2270; see also *Faragher*, 118 S.Ct. at 2293.^[21] The Eighth Circuit has observed that the existence of this defense may preclude liability in single event cases, but at the same time observed that the defense ***1056** may provide no protection in a case where "the employer learns that the harassment has occurred and fails to take proper remedial action." *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999). Indeed, the first component of the defense does not merely require an investigation and a response; it requires a *reasonable* investigation and a *reasonable* response. Thus, for instance, if an employer were to investigate and determine that harassment occurred

and as a solution fired the complainant, the *Ellerth/Faragher* defense would not be proved. Similarly, if the company investigated the complaint but failed to interview known eyewitnesses, a jury might conclude that the matter was not investigated in a reasonable manner.

When the facts are viewed in the light most favorable to Plaintiff, a jury could conclude that Defendant did not conduct a reasonable investigation or respond in a reasonable manner.

During the investigation, Plaintiff and Foley provided two completely different versions of the events that transpired in the shed. Plaintiff essentially described a two-hour encounter during which Foley begged Plaintiff to have sex with him and claimed to have thoughts of suicide. Foley contended that the discussion was held at Plaintiff's insistence because she wanted to discuss "boyfriend" problems with Foley. Defendant ultimately concluded that it did not know who to believe and so chose to do nothing. However, there is evidence that, if believed by the jury, would support a finding that Defendant did not act reasonably. Plaintiff told Defendant's representatives that Foley's wife called her and said that Foley had admitted what happened in the shed and that she wanted Plaintiff's version of events. Plaintiff also related a series of phone calls Foley made the night of and the day following the incident; some of the calls were taken by Plaintiff's fiancée. It does not appear that Defendant contacted either Foley's wife or Plaintiff's fiancée; the information these two witnesses could have provided would have gone a long way toward helping Defendant determine whether Foley or Plaintiff accurately described the shed incident.^{P1}

Other information known to Defendant also bore on Foley's credibility, but appears to not have been considered. Foley initially indicated he could not provide any information because he had blacked out for 45-50 minutes and could not recall whether or not he asked Plaintiff to have sex with him. Upon being advised that the company might have to credit Plaintiff's version of events, causing him to lose his job, Foley "remembered" that Plaintiff instigated the discussion because she was having problems with her boyfriend and a co-worker and that he had not asked Plaintiff to have sex with him. In an attempt to discredit Plaintiff, Foley also stated that he and the office manager had arranged for Plaintiff to get psychiatric help at a hospital, but this information was discovered to be false. Approximately one week later, Foley called to inform company officials that Plaintiff was the real problem because she frequently exposed her breasts at truck drivers and performed oral sex on male employees. Defendant did not credit these claims, but it also does not

Thus, this Court finds that the facts plead provide a reasonable basis upon which the alleged discriminatory behavior may be imputed to Federal Express.

For all of these reasons, this Court finds that Plaintiff EEOC's sexual harassment claims are viable and survive Defendant's Motion for Summary Judgment.

4. Viability of Plaintiff Zerehi-Carter's Tort Claims

Finally, Defendant asserts that there is no basis upon which Federal Express may be held liable for the tortious conduct of its agents, and that Plaintiff cannot establish proper claims of negligent supervision and retention or negligent infliction of emotional distress.

At the outset, this Court must consider whether there is a proper basis to hold Federal Express liable for the tortious conduct of its agents. As a general rule, liability of a principal for the torts of his agent may arise in three situations: when the agent's act is expressly authorized by the principal; when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or when the agent's act is ratified by the principal. *Mullis v. Mechanics & Farmer's Bank*, 994 F.Supp. 680, 689-90 (M.D.N.C.1997); *Hogan v. Forsyth Country Club Co.*, 79 N.C.App. 483, 491, 340 S.E.2d 116, 121-122 (1986). It is the third situation, ratification by the principal, upon which Plaintiff Zerehi-Carter bases her claims.

The Courts of North Carolina have not applied a strict test for an employer's ratification of an employee's conduct. "The jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts." *Carolina Equipment Co. v. Anders*, 265 N.C. 393, 144 S.E.2d 252 (1965). "Such course of conduct may involve an omission to act." *Brown v. Burlington Industries*, 93 N.C.App. 431, 437, 378 S.E.2d 232, 236 (1989).

*611 Here, Plaintiff Zerehi-Carter has alleged facts sufficient to raise a triable issue as to the inadequacy and untimeliness of Defendant's response to her complaints. Both its actions and its several alleged omissions would provide a jury with a reasonable basis upon which to conclude that Defendant ratified its employees' unauthorized acts.

To establish a proper claim for negligent supervision and retention, Plaintiff must further show that the employees committed a tortious act resulting in injury to her and that prior to the act, the employer knew or had reason to know of the employees' conduct. *Pleasants v. Barnes*, 221 N.C. 173, 19 S.E.2d 627 (1942). In *Brown*, a North Carolina court examining a similar case of sexual harassment found that a supervisor's "omission of action was a course of conduct which a jury could conclude reasonably tends to show ratification of [the harassing employee's] acts." 93 N.C.App. at 437, 378 S.E.2d at 236.

As discussed at length above, Plaintiff Zerehi-Carter has alleged facts which, when viewed in a light most favorable to her, are sufficient to establish (1) the existence of tortious conduct; (2) Defendant's knowledge of this conduct; and (3) that Defendant's actions or omissions served to ratify this conduct. Accordingly, Plaintiff Zerehi-Carter's claim for negligent retention and supervision survives summary judgment.

To establish a viable claim for negligent infliction of emotional distress in North Carolina, a plaintiff must show: (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause severe emotional distress, and (3) the conduct did, in fact, cause severe emotional distress. See *Johnson v. Ruark Obstetrics and Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85 (1990).

With regard to the first element, this Court's analysis in Section 3 above demonstrates that Plaintiff Zerehi-Carter has alleged facts sufficient to support a conclusion that Defendant's reaction to her complaints of sexual harassment was untimely, ineffective, and failed to meet the requirements of its own policy. Should the trier of fact find Plaintiffs allegations to be truthful, they would support a finding that Federal Express acted negligently in response to her complaints. With regard to the second element, this Court further finds that failure to respond promptly and effectively to allegations of sexual harassment renders the effects of such harassment reasonably foreseeable. Plaintiff Zerehi-Carter alleges that her numerous complaints went unheeded, that she was repeatedly assigned to work with her harassers, and that no effective action was taken to protect her. These allegations, if true, would establish that any emotional distress resulting from further harassment was reasonably foreseeable.

The third and final element of the *Ruark* test is a much closer call. While Plaintiff alleges that her fear and anxiety resulted from her co-workers' behavior, and claims

that her therapist and physician advised her not to work with her alleged harassers, Plaintiff has produced no corroborating medical records or depositions. While such material would be helpful to this Court's determination of the cause and extent of Plaintiffs emotional distress, it is not necessary. The Supreme Court of North Carolina has found that "sparse" or "limited" allegations of severe emotional distress are sufficient to state a claim of negligent infliction of emotional distress. See *McAllister v. Ha*, 347 N.C. 638, 646, 496 S.E.2d 577, 583 (1998).

Here, this Court finds that Plaintiff Zerehi-Carter has alleged facts which, when viewed in the light most favorable to her, *612 are sufficient to raise a triable issue as to the cause and severity of her emotional distress. Thus, she has met the *Ruark* test and has stated a proper claim for negligent infliction of emotional distress under North Carolina law.

Thus, Plaintiff has alleged facts sufficient to establish viable claims for negligent supervision and retention and negligent infliction of emotional distress. Accordingly, Defendant will not be granted summary judgment as to those claims.

CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment is DENIED. SO ORDERED.

NOTES

[1] In presenting the facts, this Court accepts all well-pleaded allegations in the Plaintiffs' complaint as true and draws all reasonable inferences from those facts in her favor.

[2] This Court notes that several of the alleged incidents of explicit sexual harassment occurred just prior to the 180-day cutoff. This Court further notes that Plaintiff Zerehi-Carter took two medical leaves during the 180-day period so that she could obtain medical and psychological treatment, and that she suffered from anxiety and panic attacks during this time. While the above analysis demonstrates that equitable tolling is not needed to preserve her claims, it is possible that such relief would be available if Plaintiff Zerehi-Carter could sufficiently prove that the delay was caused by mental illness. See *Boos v. Runyon*, 201 F.3d 178 (2nd Cir.2000).

[3] The Fourth Circuit has recently noted that this is the proper set of guidelines. *Smith v. First Union Nat. Bank*, 202 F.3d 234 (4th Cir.2000).

Investigations Training

Investigations Test

1. List 6 things (other than verbal information) that you should ask a witness if he or she possesses.
 - a.
 - b.
 - c.
 - d.
 - e.
 - f.
2. T or F If a document or a conversation is privileged using the attorney-client privilege, it does not have to be given to a plaintiff in discovery or discussed in a deposition.
3. T or F A failure to investigate a claim of whistleblowing or sexual harassment in and of itself is a violation of law.
4. What law does NOT contains a prohibition against retaliation?
 - a. Sarbanes Oxley
 - b. The National Labor Relations Act
 - c. Title VII of the Civil Rights Act
 - d. The Americans with Disabilities Act
5. What should you NOT do in a NORMAL investigation?
 - a. Lock the witness in a room until she confesses
 - b. Use a polygraph test

- c. Tape record the witness's interview
 - d. Tell the witness you know where he lives
 - e. All the above
6. T or F If an employee named Ben is alleged to have been drinking at a bar before coming to work, it would be ok if you went and had lunch at the bar too.
7. What should you do with your rough notes after you use those notes to write up a formal report as to what a witness said?
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8. An investigatory summary should be written in way such that:
- a. Your mother would be proud of you
 - b. Your 10th grade English teacher would be pleased with your grammar
 - c. You explained things in a manner that would help a judge understand that a thorough investigation was conducted
 - d. It sorted out the facts and explained what you reasonably believed occurred in the situation
 - e. All the above
9. T or F If a witness demands to have a lawyer present, the law requires that you agree to that demand
10. T or F Having attended this HotSchedules' course, you can now testify that you have undergone significant training in regard to investigations, and therefore take the wind out of the sails of any plaintiff's lawyer in the country.