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**THE INVESTIGATOR'S ROADMAP:
CONDUCTING FAIR AND EFFECTIVE
WORKPLACE INVESTIGATIONS**

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Overview

- When is an investigation required?
- How to conduct a proper investigation
- Concluding the investigation and taking action



THE FOUNDATION

WHY INVESTIGATE WORKPLACE ISSUES?

A workplace investigation is a fair and transparent procedure that uncovers the facts about an incident at work, involving a review of complaints, witness testimonies, and evidence to decide the right course of action.

- Avoid or minimize legal liability
- Improve factual basis for decisions
- Improve morale
- Demonstrate the company's commitment to enforcing policies
- Detect violations and misbehaviors inside the organization

DIAZ V. TESLA, INC., 697 F. SUPP. 3D 906 (N.D. CAL. 2023)

Claim Type: Racial discrimination

Key Facts:

- Employer ignored reports of racial harassment; failed to interview witnesses or review security footage
- Defendant explicitly instructed two supervisors NOT to investigate
- Failed to fire the “main perpetrator of racist conduct”
- Court found company “turned a blind eye to racism” and “affirmatively chose to not carry out proper responses”

DIAZ V. TESLA, INC., 697 F. SUPP. 3D 906 (N.D. CAL. 2023)

Outcome:

- \$75K compensatory + \$3M punitive
- Court allowed punitive damages beyond the statutory limit due to “repeated failure to properly respond”

Key Lesson: Ignoring or suppressing complaints does not make them go away — it multiplies damages exponentially.

KING V. U.S. BANK NATIONAL ASSN., 53 CAL. APP.5TH 675 (2020)

Claim Type: Two employees alleged gender discrimination and harassment. After HR terminated the supervisor (the accused), he sued for defamation, breach of implied covenant, and wrongful termination.

Key Facts:

- HR generalist relied on sources known to be unreliable or biased against the plaintiff
- Made a “deliberate decision not to investigate facts that could have confirmed the falsity of the allegations”
- Plaintiff (terminated supervisor) was never given an opportunity to address the accusations

KING V. U.S. BANK NATIONAL ASSN., 53 CAL. APP.5TH 675 (2020)

Outcome:

- \$8.69M compensatory + \$8.49M punitive

Key Lesson: A sloppy investigation can expose the company to liability from the accused, not just the complainant.

WHEN SHOULD YOU INVESTIGATE?

- Harassment complaints
- Discrimination allegations
- Retaliation claims
- Workplace violence/threats
- OSHA violations
- Whistleblower reports
- Suspected theft/fraud
- Serious policy violations

WHEN SHOULD YOU INVESTIGATE?

An investigation is required once you have knowledge of a complaint **including informal complaints**



INVESTIGATION STEPS

STEP 1: PLAN THE INVESTIGATION

STEP 1: PLANNING

Who will investigate?

- When selecting an investigator, consider:
 - Potential biases
 - Any actual or perceived conflicts of interest
 - The investigator's experience
 - Whether s/he has the following qualities:
 - Detail oriented
 - The right temperament to conduct interviews
 - Trustworthy



GYULAKIAN V. LEXUS OF WATERTOWN, 475 MASS. 290 (2016)

Claim Type: Hostile work environment

Key Facts:

- Investigation carried out by a manager who admitted to carrying a bias against the plaintiff
- Most likely witnesses not interviewed because of fear of undermining another employee
- Plaintiff was never contacted during the investigation
- Corroborating evidence that should have been uncovered was not

GYULAKIAN V. LEXUS OF WATERTOWN, 475 MASS. 290 (2016)

Outcome:

- \$40K compensatory + \$500K punitive

Key Lesson: An investigator with bias taints the entire investigation.
Choose an internal neutral investigator or use outside counsel.

STEP 1: PLANNING

Consider using an outside investigator in these cases:

- Complaints involving executive level or senior management
- Allegations directed towards a human resources professional
- High-stakes legal risks
- When internal staff lacks the time, training, or neutrality to conduct a thorough, unbiased investigation

DOMINIC V. DEVILBISS AIR POWER CO., 493 F.3D 968 (8TH CIR. 2007)

Claim Type: Sexual harassment and retaliation

Key Facts:

- Used neutral, open-ended questions that were not “suggestive”
- Gave alleged harasser a written warning explicitly listing retaliation examples and termination consequences
- When retaliation later alleged: quickly investigated, limited contact, monitored communications, mandated training
- Hired outside employment law specialists to verify internal investigations were proper and thorough

DOMINIC V. DEVILBISS AIR POWER CO., 493 F.3D 968 (8TH CIR. 2007)

Outcome:

- Jury's **\$250,000 punitive damages REVERSED** because the court found that the company demonstrated good faith efforts to respond.

Key Lesson: Involving outside counsel/specialists in your internal investigation can help demonstrate good faith and potentially limit liability.

STEP 1: PLANNING

- What are the specific allegations?
- Who needs to be interviewed?
- What evidence needs to be collected?
- Does immediate action need to be taken?



STEP 2: INTERVIEW THE COMPLAINANT

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- At the beginning of the interview:
 - Thank the complainant for coming forward
 - Explain confidentiality
 - Never promise absolute confidentiality!
 - Explain rights against retaliation



STEP 2: INTERVIEW THE COMPLAINANT

- Gather as many details as possible
- Ask open-ended questions
- Don't assume anything



STEP 2: SAMPLE QUESTIONS

- What happened? Please be as specific as possible.
- What date and time did this occur?
- Where did this occur?
- Did anyone else see it happen?
 - Who?
 - What did they say and/or do?
- Do you have any physical evidence you can share with us?
- Who else should we talk to?
- Is there anything else you want to share?

STEP 3: INTERVIEW WITNESSES

STEP 3: CORROBORATING OR REFUTING ACCOUNTS

Witnesses can help to corroborate or refute the complainant's account of what happened and shed light on some of the details the complainant may not have been able to furnish



STEP 3: POTENTIAL WITNESSES

- Someone who saw or heard the incident*
- Someone who the complainant discussed the incident with after the fact
- Someone who heard about the incident from other witnesses
- Anyone else the complainant mentions might have extra information about the issue

*most compelling

STEP 3: SAMPLE QUESTIONS

- What did you witness? Please provide as many details as you can.
- Who was involved?
- What did each person do and say?
- Did anyone else see it happen? Who?
- Did you report this to anyone in management? To whom? When? What did they say and/or do?
- Do you have any physical evidence you can share with us?

STEP 3: WITNESS STATEMENTS

- Not required but recommended especially when:
 - There is potential legal risk (e.g., one or more of the parties involved are members of a protected class)
 - The allegations are serious (e.g., sexual harassment, criminal conduct, theft)
 - The potential consequences are serious (e.g., discharge or criminal charges)
 - There is significant disparity between the witnesses' versions of events

STEP 3: WITNESS STATEMENTS

- Drafted by the interviewer
- Rely on your interview notes and keep it factual—don't overstate/understate facts
- Send to the witness for review and signature



EEOC V. NEW BREED LOGISTICS, 783 F.3D 1057 **(6TH CIR. 2015)**

Claim Type: Sexual harassment and retaliation

Key Facts:

- Failed to investigate a compliance hotline call — instead merely asked the alleged perpetrator if charges were true
- Did not interview the hotline caller
- Did not interview the witnesses identified in the compliance call

EEOC V. NEW BREED LOGISTICS, 783 F.3D 1057 (6TH CIR. 2015)

Outcome:

- **Over \$1.5 million** in compensatory and punitive damages for four employees

Key Lesson: Failing to interview identified witnesses renders an investigation meaningless.

FOSTER V. TOWNSHIP OF HILLSIDE, 780 F. SUPP. 1026 (D.N.J. 1992)

Claim Type: Sexual harassment and retaliation

Key Facts:

- Same day as complaint: interviewed both complainant and alleged harasser
- Same day as complaint: met individually with each woman the harasser supervised
- Approximately 20 people interviewed in total

FOSTER V. TOWNSHIP OF HILLSIDE, 780 F. SUPP. 1026 (D.N.J. 1992))

Outcome:

- **DISMISSED**—NO MONETARY DAMAGES AWARDED
- Court found the employer “properly responded” and “adequately and timely investigated”

Key Lesson: Acting promptly and interviewing all witnesses demonstrates an adequate and timely response that can defeat liability.

STEP 4: INTERVIEW THE ACCUSED

STEP 4: INTERVIEW THE ACCUSED

- Objective: Provide a fair opportunity to respond while gathering facts
- The investigator should assure the accused of the following:
 - The investigation will be conducted fairly
 - No conclusions have been reached yet
 - The investigation will be kept as confidential as possible, on a need-to-know basis
- Don't be adversarial or judgmental. Make it easy for the accused to give you relevant information.

STEP 4: INTERVIEW THE ACCUSED

- Start with open-ended questions, but be sure to get a response to each specific allegation
- Always conclude with:
 - Is there anyone else I should talk to?
 - Is there anything else you want to add?
- Avoid leading/accusatory questions
 - Instead of asking “Did you yell at him?”, ask “What was the volume of the conversation?”



**STEP 5: COLLECT
EVIDENCE/DOCUMENTATION**

STEP 5: BUILD THE RECORD

- Emails, text messages, phone logs, attendance records, audio/video recordings, workplace policies
- Document the chain of custody:
 - How was the information obtained?
 - When was it collected?
 - Who has handled it?
 - Where is it being stored and maintained?

STEP 6: INVESTIGATION REPORT

STEP 6: WEIGH THE EVIDENCE

- Preponderance of the evidence = more likely than not

Common mistake

Employers seek proof beyond a reasonable doubt.

This is NOT a criminal trial!

STEP 6: ASSESSING CREDIBILITY

- **Plausibility:** Is the witness's version of the facts believable? Does it make sense?
- **Demeanor:** Does the witness seem to be telling the truth?
- **Motive:** Does the person have a reason to lie?
- **Corroboration:** Are there documents or other witnesses that support the witness's version of events?
- **Past Record:** Does the accused have a past record of inappropriate conduct?

STEP 6: WHAT TO INCLUDE IN THE REPORT

- The scope of the investigation
- A description of the allegation(s)
- Applicable policies
- Summaries of witness interviews, including the complainant and the accused
- Documents/evidence reviewed
- Key factual findings and credibility determinations
- Specific conclusions
- Recommendation of next steps, if requested



STEP 7: REMEDIAL ACTION

STEP 7: TAKE PROMPT REMEDIAL ACTION

- Remedial action refers to appropriate measures taken by the employer to stop and prevent further harassment or misconduct
- Consider how people in similar situations have been treated



STEP 7: REMEDIAL ACTION EXAMPLES

- Disciplinary action: verbal/written warnings, suspension, termination of employment
- Policy and training: conduct anti-harassment training, re-send the policy as a reminder, implement new policies
- Administrative changes: reassignment, restructuring job duties, modifying work schedules



STEP 8: INFORM THE PARTIES OF FINDINGS

STEP 8: INFORM THE PARTIES

- Do not share the investigation report
- Were the allegations substantiated or unsubstantiated?
- If substantiated, tell the complainant that the company is taking appropriate remedial action...

BUT do not reveal the specifics!

STEP 9: FILE THE INVESTIGATION RECORDS

STEP 9: FILE THE RECORDS

- Do not file investigation records in the personnel file
- Maintain a separate investigation file that includes
 - Interview notes
 - Documentation/evidence
 - Investigation report
 - Relevant policies
 - Notice of investigation closure to the parties



STEP 10: FOLLOW UP

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- Follow up with the complainant in 2-3 weeks to ensure conduct is no longer occurring
- Reflect on investigation to determine if more training is needed to avoid similar problems in the future

COMMON PITFALLS

COMMON PITFALLS TO AVOID

- Failing to Plan
- Ignoring Complaints
- Delaying Investigations
- Losing Objectivity
- Failing to Listen and Ask Follow-Up Questions
- Using Overly Aggressive Interview Tactics
- Not Conducting a Thorough Investigation
- Promising Confidentiality

BEST PRACTICES

BEST PRACTICES

- Act Promptly
- Be Thorough
- Maintain Objectivity
- Document Everything
- Use Open-Ended Questions
- Always Communicate “No Retaliation”



HYPOTHETICAL SCENARIOS

SCENARIO 1: THE BREAK ROOM COMPLAINT

- **Setting:** You are the HR Manager at a mid-size company (200 employees)
- **The Complaint:** On Monday morning, an employee named Sarah walks into your office visibly upset
- Sarah tells you: “I can’t take it anymore. Mark in accounting keeps making comments about my body and asking me out. I’ve told him to stop at least three times. Last Friday, he blocked the break room doorway and said I ‘owed him a date.’ Two other people were there — Jamie and Alex.”
- **Additional Context:**
 - Sarah has been with the company for 2 years; Mark for 5 years
 - No prior complaints in either employee’s file
 - Sarah asks you: “Please don’t tell anyone I reported this”
- **Your Task:** What are your immediate next steps?

SCENARIO 1: THE BREAK ROOM COMPLAINT— RESPONSE

- **Step 1:** Thank Sarah for coming forward and explain you take this seriously
- **Step 2:** Explain you cannot promise complete confidentiality, but will limit disclosure to those who need to know
- **Step 3:** Document Sarah's complaint in detail (who, what, when, where, witnesses)
- **Step 4:** Implement interim measures (e.g., adjust seating/schedules to separate Sarah and Mark)
- **Step 5:** Plan your investigation — identify witnesses (Jamie and Alex), gather evidence, outline interview questions
- **Step 6:** Remind both parties of the anti-retaliation policy
- **Why This Matters:** Prompt action protects the complainant, preserves evidence, and demonstrates the company takes complaints seriously — all critical if this matter escalates to litigation

SCENARIO 2: THE ANONYMOUS TIP

- **Setting:** You are the Director of HR at a healthcare organization
- **The Complaint:** You receive an anonymous note in the suggestion box that reads:

Dr. Thompson in the surgical unit has been drinking before his shifts. Last Tuesday he smelled like alcohol during morning rounds. Three nurses have noticed but are afraid to say anything because he's the department head. Someone is going to get hurt.
- **Additional Context:**
 - Dr. Thompson is a 15-year veteran and department head
 - The note is unsigned — you cannot identify the author
 - Patient safety is potentially at risk
 - Your CEO asks: “Can we just ignore this since it’s anonymous?”
- **Your Task:** How do you handle an anonymous complaint involving safety concerns?

SCENARIO 2: THE ANONYMOUS TIP—RESPONSE

- **Step 1:** Do NOT ignore the complaint — anonymous complaints still require assessment, especially where safety is involved
- **Step 2:** Document the anonymous complaint and preserve the original note
- **Step 3:** Assess the severity and consider whether immediate action is needed
- **Step 4:** Investigate— observe the physician, review schedules, and identify potential witnesses (the referenced nurses)
- **Step 5:** Interview the potential witnesses
- **Step 6:** If evidence supports the allegation, take appropriate action (fitness for duty evaluation, EAP referral, duties adjustment)
- **Key Takeaway:** An anonymous complaint does not excuse inaction. Courts have found employers liable for ignoring known or reasonably suspected misconduct regardless of whether the complaint was signed

SCENARIO 3: THE RETALIATION CLAIM

- **Setting:** You are the HR Director at a manufacturing company
- **The Complaint:** Three weeks ago, an employee named Carlos filed a discrimination complaint against his manager, Tom
- Today Carlos returns to your office: “Ever since I filed that complaint, Tom has made my life miserable. He moved me to the worst shift, took away my overtime, gave me a written warning for being 2 minutes late (which he never enforced before), and told the team I’m ‘not a team player.’ I’m being punished for speaking up.”
- **Additional Context:**
 - The original discrimination investigation is still pending
 - Tom claims the shift change and overtime cut are “business decisions”
 - Tom was informed of the complaint two weeks ago
 - The write-up for tardiness was issued without following normal progressive discipline
- **Your Task:** How do you handle a retaliation allegation while the original complaint is still being investigated?

SCENARIO 3: THE RETALIATION CLAIM—RESPONSE

- **Step 1:** Treat the retaliation claim as a separate, urgent investigation — do not fold it into the original complaint
- **Step 2:** Implement immediate protective measures — consider whether Tom should have any supervisory authority over Carlos during both investigations
- **Step 3:** Investigate each alleged adverse action: Was the shift change documented before the complaint? Is the tardiness policy consistently enforced? Who approved the overtime cut?
- **Step 5:** Interview Tom with specific questions about the business justification for each action — vague answers like “business decisions” without documentation are red flags
- **Step 6:** Interview team members about Tom’s “not a team player” comments and any change in treatment they’ve observed
- **Step 7:** Reach a conclusion on retaliation independently of the original complaint
- **Key Warning:** Retaliation can occur even if the underlying complaint is not substantiated, and retaliation claims are the #1 basis for EEOC charges.

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QUESTIONS

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