

Conducting Discrimination and Harassment Investigations

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Agenda

- Planning and Organization
- Conducting the Investigation
- Documenting the Investigation
- Use of the Investigation Report
- Hypothetical

Should you Investigate?

- What's the Issue?
- Is anyone complaining?
 - If it is sexual harassment, failure to investigate can create liability for the employer
 - Responding to government investigation (EEOC)
- Has the issue already been investigated?
- When should the complaint be put in writing?

Planning the Investigation

- Define the purpose, goal, and scope
- Establish who is responsible for the investigation
- Pick the investigator(s)
- Get appropriate authorization; e.g., Board, CEO, CG
 - Use specific retention letter if using outside counsel

Initial Steps

- Define scope of investigation, identify issues to be investigated.
- Instruct employees and others concerning the need for confidentiality.
- Notify D&O and other insurance carriers.
- Prepare public relations responses.
- Notify regulators?

The Question of Confidentiality

- What does it mean to be confidential?
- Confidential does not equal undiscoverable
- Will the investigation be part of a defense?
- If confidential, takes steps to protect (e.g., limit disclosure of report, secure storage, attorney-client privilege)

How will the results be used?

- Internal Use Investigation.
- Public Use Investigation.

Conducting the Investigation

- Develop an Investigation Plan
- Available tools:
 - Witness interviews
 - Witness statements
 - Documents
 - Workplace searches
 - Photographs/video of the scene
 - Review of electronic files
 - Surveillance
 - Background/credit checks

The Witness Interview

- Be prepared
- Conduct interview in private
- Make certain disclosures
 - purpose
 - who you represent
 - no retaliation for participating
- Union representation required?

The Witness Interview (cont.)

- Tell the truth
- Ask good questions
- Ask follow up questions
- Ask: “Is there anything else?”
- Don’t make threats
- Take good notes
- Consider getting written statement

Documenting the Investigation

- Assume that everything will have an exhibit sticker
- Ensure that investigation plan was followed
- Make conclusions
- Write a report
 - Organize evidence and conclusions
 - Ensure that evidence supports the conclusions
 - Identify factual conflicts and whether any conclusions are based on investigator credibility determinations
 - Identify any remedial action to be taken

Use of Investigation Report

- If report identifies a problem or calls for remedial action, ensure follow up
- If report is to stay confidential, limit disclosure and ensure that report is secure
- Keep investigation results in separate file (but beware that contents could be considered part of an employee's personnel file)

How Should Publicity be Handled?

- Be prepared for publicity before, during, and after investigation of complaint
- News cycles are very short
- CEO and Board Chair tend to have greater credibility in communicating message
 - presumed to have power to fix the problem

Hypothetical No. 1

Tim, the VP of sales, confides in you, VP of HR, that the company's new CEO, Cindy, made sexual advances toward Tim during a recent business trip. Tim rebuffed the advances. Cindy is now critical of Tim's performance and is making comments that the company needs to go in a new direction with sales. Tim is worried about his job.

What should you do?

Hypothetical No. 1

- Next fact:
 - During the investigation, Cindy denies making sexual advances toward Tim but admits that the two were flirting during a recent business trip. Cindy admits that she is considering terminating Tim's employment.

Hypothetical No. 1

- Next fact:
 - The company hired Cindy after an exhaustive search and had to offer her a generous compensation package (including an expensive severance payout) in order to get her. The company has experienced financial difficulty in the last few years due in large part to mediocre sales.