

# Conducting Workplace Investigations

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## Goal of Every Workplace Investigation

- That at the end of the investigation the parties involved in it – including the complaining party, the accused and the employer – conclude that the investigator was thorough, objective and fair, even if they disagree with the investigator's conclusions.

## When to Investigate?

- Actual crime committed/illegal behavior – Examples – theft of company property, fight between employees
- Rumor of illegal behavior – drug dealing on the job
- Third party complaint – customer service issues, allegation of employee harassing third party
- Potential employment discrimination claim
  - Sexual harassment allegation
  - Unfair denial of job or promotion
  - Retaliatory actions, including termination

## When to Investigate? (Continued)

- Potential violation of law – Allegation that employees are working off the clock or working while impaired, workplace accidents, potential safety violations
- Receipt of employment discrimination claim filed with Equal Employment Opportunity Commission or similar state agency (Maine Human Rights Commission, Massachusetts Commission Against Discrimination, Connecticut Commission on Human Rights and Opportunities)

## Considerations in Deciding Whether to Investigate

- To determine the facts/what happened
  - Was there misconduct and if so, does it merit discipline?
  - Did management make a mistake?
  - Was there harassment/retaliation/discrimination?

## Considerations in Deciding Whether to Investigate (Continued)

- Compliance/Potential Litigation
  - Obtaining witness statements close in time to the subject event
  - In conjunction with obtaining legal advice/consulting with counsel
  - To be able to use the *Ellerth/Faragher* defense to a situation where a supervisor's harassment culminates in a tangible employment action

## ***Ellerth/Faragher Defense***

- From the Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton*
- Two elements:
  - The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
  - The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer
- A bona fide workplace investigation can help an employer establish the first element of the defense

## Who Will Investigate?

- Internal versus external
  - If external, legally permitted?
  - In Maine, 32 M.R.S. § 8104 limits who can act as a “professional investigator” – a person who conducts private investigations, which would include most workplace investigations
  - Scope and cost of investigation? (Time commitment, complexity)
  - Perception that investigation was “fixed”
- Impartial and unbiased
  - Does internal investigator have history with a witness or involvement in the matter being investigated?
  - Is high-level employee involved?



## Who Will Investigate? (Continued)

- Experience conducting investigations?
- Skill?
  - Good listener
  - Relates to witnesses – drawing them out versus cross-examination
- Good writer?
- Likely to be an effective witness?

## Should an Attorney Investigate?

- Attorney-client privilege issue
- Litigation – actual or threatened?
- Serious criminal behavior involved?
- Investigation involves senior management member?

## Getting Started – Before the Investigation Starts

- Outline investigation's scope
- What question(s) should investigator answer?
- What is applicable standard of proof?
  - Preponderance of evidence: More likely than not, greater than 50%
- Investigator will determine facts, not legal conclusions and generally not consequences resulting from investigation's conclusions
- Employer will determine whether policy violation occurred and generally appropriate response to investigation's conclusions

## Starting the Investigation

- Outline relevant policies, personnel file materials
- Obtain known physical evidence
- Introduce investigator to relevant witnesses, especially complaining party – let them know about cooperating and that there will be no retaliation
- Ensure that electronic evidence is secured, including potentially, investigative hold letter/email
- Interim measures necessary?
  - Suspend investigation's subject?
  - If not, no contact directive?

## Interviews - Generally

- Start with Complainant?
- End with investigation's subject?
- Understand reluctance of Complainant and other witnesses to participate
- Stress no retaliation policy
- Will witness have someone else with them during interview?  
(Lawyer, union rep, counselor)

## Interviews – Generally (Continued)

- How should you memorialize interview? Take notes? Audio or video recording?
  - Can you take notes and listen at the same time?
  - If recording, be aware of consent laws
  - Will recording have a chilling effect upon the interview?
  - Will you/can you provide a copy of the recording to the witness?

## Interviews - Generally (Continued)

- Ask the witness who else they think you should interview
- Ensure you are clear to all witnesses that you cannot guarantee confidentiality
- Provide your contact information to witnesses and let them know that they can follow up with you with additional information and evidence

## Interview Techniques

- Interviews are one-on-one and conducted privately
- Come with a script, but be prepared to go where the evidence leads you
- Ask open ended questions
- At the end of the interview, ensure that you have asked about all allegations and things known by the witness and that you have all relevant evidence – ask close out questions
  - “Have you told me about everything that led you to complain about X harassing you?”
  - “Do I have all the texts/emails/voicemails that are relevant to the complaint you made about X harassing you?”



## Interview Techniques (Continued)

- NOT an interrogation – need to try to build rapport
- Remain neutral
- Let the witness talk – especially at the beginning
- Important that the witness feels that he or she has been heard

## Witness Credibility

- Investigator's job to determine – notwithstanding inevitable conflicting statements and evidence
- Determining credibility
  - Plausibility
  - Corroboration
  - Motive or lack thereof to say what they are saying
  - Demeanor

## Investigative Report

- Will there be one?
- If so, assume that it will not be privileged from discovery
- Helpful in terms of providing focus, but do not be a slave to form
- Ensure that you follow investigation's scope – do not include unrelated facts or evidence
- Use key documents/evidence, including any witness statements provided as evidence
- You will likely have a variety of audiences – employer, affected employees, their lawyers, MHRC investigator, judge/jury

## Investigative Report (continued)

- Assume your audience(s) knows nothing about the subject of the report
- Write plainly – no jargon, no weak passive
- Factual conclusions should be based upon actual facts
- Explain bases for credibility determinations
- Acknowledge and discuss conflicting evidence
- Goal: that through the report the reader concludes that the investigator was thorough, objective and fair and that the report is well reasoned – even if the reader disagrees with the report's conclusions

**Questions?**

Thank you!