Workplace Investigations: Understanding Standard Practice

By Michael A. Robbins and Julie B. Yanow

In ever-increasing numbers, current and former employees are claiming that they have been the victims of harassment, discrimination and retaliation. When these claims are raised, employers are obligated to conduct an investigation.[1] This article will discuss the basic mechanics that comprise the recognized "standard practice" for conducting a workplace investigation of such allegations.[2]

The Investigator

The first step in conducting an investigation is to choose an investigator to look into the allegations. Whether the investigation is conducted by a company employee—such as a human resources professional—or is conducted by an outside investigator,[3] in order to guarantee the best outcome, the investigator must possess certain traits, including neutrality and impartiality.[4] Among other things, this means that the individual chosen to investigate should not be involved in any of the incidents that are the subject of investigation.[5] Additionally, "[t]he alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation."[6] Nor should the investigator be biased in any other way or have any conflict of interest.[7]

As well as being neutral and impartial, the investigator selected should be experienced. Specifically, he or she should be trained and have hands-on practice in conducting workplace investigations.[8] While the determination of "trained" and "experienced" is a subjective one, the investigator should be a person who has been trained to conduct investigations, has conducted investigations of the kind at issue or, preferably, both.

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1 Under Federal Law: Equal Employment Opportunity Commission's ("EEOC") Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050 (Mar. 19, 1999) (hereinafter, "EEOC Guidance"), *available at* http://www.eeoc.gov/policy/docs/currentissues.html; Watson v. Blue Circle, Inc., 324 F.3d 1252 (11th Cir. 2003); Hatley v. Hilton Hotels Corp., 308 F.3d 473 (5th Cir. 2002); Bator v. Hawaii, 39 F.3d 1021 (9th Cir. 1994); Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). *See also* Malik v. Carrier Corp., 202 F.3d 97 (2d Cir. 2000) (employer's investigation of sexual harassment complaint is not a gratuitous or optional undertaking, but required by law); Sarro v. City of Sacramento, 78 F. Supp. 2d 1057 (E.D. Cal. 1999). *Accord*, Nichols v. Azteca Rest., 256 F.3d 864 (9th Cir. 2001); Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995).
Under California Law: Bradley v. Cal. Dep't of Corrections, 158 Cal. App. 4th 1612 (2008); American Airlines, Inc. v. Superior Court, 114 Cal. App. 4th 881 (2003); Alaniz v. Robert M. Peppercorn, M.D, No. 2:05-CV-2576, 2007 U.S. Dist. LEXIS 32694 (E.D. Cal. May 3, 2007). *See also* Mathieu v. Norrell Corp., 115 Cal. App. 4th 1174, 1185 (2004) (applying duty to investigate to harassment and retaliation) (citing Swenson v. Potter, 271 F.3d 1184, 1193 (9th Cir. 2001) ("The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified."); Cellini v. Harcourt Brace & Co., 51 F. Supp. 2d 1028, 1039 (S.D. Cal. 1999) (Under the FEHA, "defendants [had a] clear legal duty to investigate plaintiff's sexual harassment claim.").

2 Of course, there is no way to comprehensively describe standard practices in an article of this size. Instead, this article encompasses only the "basics."

3 Dominic v. DeVilbiss Air Power Co., 493 F.3d 968 (8th Cir. 2007) (approving both external and internal investigations).

4 *See* EEOC Guidance, *supra* note 1; Nazir v. United Airlines, 178 Cal. App. 4th 243 (2009); Bierbower v. FHP, Inc., 70 Cal. App. 4th 1 (1999).

5 *Bierbower*, 70 Ca. App. 4th at 7. *See also* Walker v. Thompson, 214 F. 3d 615, 627–28 (5th Cir. 2000) (improper to use an involved manager), *overruled on other grounds in* DeHart v. Baker Hughes Oilfield Operations, 214 Fed. Appx. 437, 441, 2007 U.S. App. LEXIS 1362 (2007); Silva v. Lucky Stores, Inc., 65 Cal. App. 4th 256, 272 (1998) (finding investigation appropriately conducted by an uninvolved human resources representative).

6 *See* EEOC Guidance, *supra* note 1.

7 *See Nazir*, 178 Cal. App. 4th at 277 (criticizing the investigation because, "inferentially," one of the investigators had an "axe to grind."). During the investigation, "the investigator should refrain from offering his or her opinion." *See* EEOC Guidance, *supra* note 1.

8 EEOC Guidance, *supra* note 1; *Silva*, 65 Cal. App. 4th at 272; *Dominic*, 493 F.3d 968, 974–76.

The Investigation—Prompt, Thorough, Impartial

Prompt

Once the investigator is chosen, he or she should promptly investigate the allegations,[9] which means that the investigation should both start and end without undue delay. As the Seventh Circuit recently stated, "a prompt investigation is the 'hallmark of a reasonable corrective action.' "[10] There is, of course, no "bright line" as to how long an investigation should take; each investigation must be viewed individually. Naturally, a complex series of allegations involving multiple witnesses who are not located at the same facility will take longer to investigate than a simple set of allegations involving a handful of witnesses, all of whom work at the same location. The Equal Employment Opportunity Commission ("EEOC") has recognized that "[t]he amount of time that it will take to complete the investigation will depend on the particular circumstances."[11] Again, what "prompt" means can vary given the particulars of every situation, but an employer should be able to demonstrate that it took reasonable steps to begin and complete an investigation as quickly as practicable after learning of a complaint. Whether this was sufficiently prompt, of course, will be determined by the trier-of-fact.

Scope

One of the investigator's first steps will be to make sure that he or she understands the scope of the investigation. This can be done in several ways. Generally, a conversation with the person requesting the investigation will give the investigator an idea of the matters to be included. Additionally, at the outset of the investigation, the investigator should review any relevant threshold documents. Generally, this can include a written complaint, if there is one, relevant company policies and documents from personnel files, among other things.[12] While a conversation with the person requesting the investigation and receipt of the threshold documents may be sufficient to establish the scope, it is common for other information to surface which, arguably, raises additional issues and/or may be within the scope of the investigation. This can occur as a result of uncovering additional documents[13] or through information obtained in witness interviews. If, for example, new allegations come to light that pertain to a new type of misconduct, the prudent investigator should neither ignore the information[14] nor automatically sweep those allegations into the current investigation. Instead, he or she should present the information to the person requesting the investigation, so that a determination may be made as to whether the new allegations should be investigated.

Appropriate Confidentiality

Following a review of any relevant threshold documents, the investigator should be ready to formulate a plan and to interview witnesses.[15] When the investigator begins interviewing those involved in the matter, the question of confidentiality often is raised. *Appropriate* confidentiality is another hallmark of a proper workplace investigation. Specifically, while "[a]n employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible . . . an employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses. . . . [I]nformation about the allegation of harassment should be shared only with those who need to know about it."[16]

Order and Types of Witness Interviews

Standard practice is to begin the investigation by talking to the person (or persons) who brought forward the concerns that are the subject of the investigation (i.e.,

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9 EEOC Guidance, *supra* note 1; *Silva*, 65 Cal. App. 4th at 272; Casenas v. Fujisawa USA, Inc., 58 Cal. App. 4th 101 (1997); *Fuller*, 47 F.3d at 1528–1529.

10 Porter v. Erie Foods Int'l, Inc., 576 F.3d 629, 636 (7th Cir. 2009) (internal citations omitted).

11 EEOC Guidance, *supra* note 1.

12 Roby v. CWI, Inc., 579 F.3d 779, 782–83, 786 (7th Cir. 2009); *Bradley*, 158 Cal. App. 4th at 1632. In its Guidance, the EEOC suggests looking for "notes, physical evidence, or other documentation regarding the incident(s)." EEOC Guidance, *supra* note 1.

13 The EEOC discusses the importance of reviewing "physical evidence (such as written documentation)." EEOC Guidance, *supra* note 1. Such evidence has become particularly important given the proliferation of e-mails, texting, the Internet, and other electronic means of communication.

14 Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321 (6th Cir. 2008).

15 At the beginning of the investigation, consideration should be given to whether interim measures need to be taken, such as separating the parties. This will depend upon the specific allegations raised. EEOC Guidance, *supra* note 1. If there is no written complaint, the investigator may have no choice but to discover the allegations in his or her initial interview with the complaining party.

16 EEOC Guidance, *supra* note 1.

the complaining party).[17] This is because the best way to obtain all of the details about the allegations is to hear them from the person raising the concerns. In addition to the complaining party, the investigator should interview other witnesses, i.e., individuals "who could reasonably be expected to have relevant information."[18]

A person may be a witness for one or more reasons. For example, an individual may have relevant information because she is alleged to have observed a specific incident or incidents,[19] or because he might be in a position to provide exculpatory evidence.[20] In addition, the complaining party may have talked to an individual at or about the time of a material event. That individual could reasonably be expected to have relevant information and should be interviewed as well.[21] As another example, an individual might reasonably be believed to have relevant information because he was in a position to have seen something, even though no one specifically says that he did.[22] Such a witness might have a desk close to the area in which a particular incident occurred and, although no one knows whether the witness saw or heard anything, he might have been in a position to do so. As part of a "thorough" investigation, such a witness should be interviewed.

Finally, there may be individuals "similarly situated" to the complaining party.[23] For example, if the complaining party is raising allegations that her supervisor made inappropriate comments to her based on her race, other employees of the same race (particularly employees of the same gender and race), who report to the same supervisor, should be interviewed to see whether they have experienced similar conduct.[24]

Thoroughness

A proper workplace investigation is a thorough one.[25] In order to conduct thorough witness interviews, the investigator should ask open-ended, non-leading questions in an attempt to elicit facts, as opposed to opinions or supposition.[26] Importantly, of course, if a witness is alleged to have seen a particular incident, that person should be asked about the incident.[27] However, the investigator should follow up with detailed questions of all of the parties and witnesses and should not be satisfied with general answers to general questions.[28]

Conducting a thorough investigation includes not only interviewing the complaining party and relevant witnesses, but also meeting with the person or persons accused.[29] Consistent with conducting a thorough workplace investigation, the investigator should give the accused party a full opportunity to admit to or deny the allegations, and to provide any other explanation or evidence he or she wishes.[30] Giving the accused party a full opportunity means that the investigator must again ask detailed questions and obtain detailed responses.

Another important aspect of conducting a thorough investigation is that the investigator should take and retain detailed notes of all interviews.[31] Having an accurate record of interviews is important. However, the presence of a tape recorder can create, or be viewed as creating, an adversarial atmosphere, which is not conducive to establishing a productive information-gathering

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17 *See*, e.g., *Casenas*, 58 Cal. App. 4th at 106. There are some exceptions to this rule, for example, where the complaining party refuses to meet with the investigator or if dictated by a critical witness's availability.

18 EEOC Guidance, *supra* note 1.

19 Gorzynski v. JetBlue Airways Corp., 596 F.3d 93 (2d Cir. 2010); *Nazir*, 178 Cal. App. 4th at 258; *Dominic*, 493 F.3d 968 at 971.

20 Taybron v. City and County of San Francisco, 341 F.3d 957 (9th Cir. 2003); *Fuller*, 47 F.3d at 1529; *Nazir*, 178 Cal. App. 4th at 280; Reeves v. Safeway Stores, 121 Cal. App. 4th 95 (2004).

21 EEOC Guidance, *supra* note 1.

22 *Porter*, 576 F.3d at 637; *Dominic*, 493 F.3d 968 at 970–971.

23 EEOC Guidance, *supra* note 1.

24 The investigator should also ask the complaining party, the accused party and the witnesses whether there are other witnesses that the investigator should interview.

25 EEOC Guidance, *supra* note 1; *Dominic*, 493 F.3d 968 at 974; *Watson*, 324 F.3d 1252 at 1260; Casiano v. AT&T Corporation, 213 F.3d 278, 286–287 (5th Cir. 2000) (giving weight to employer's "in-depth" investigation); *Reeves*, 121 Cal. App. 4th at 120–121; Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997).

26 *Dominic*, 493 F.3d 968 at 974; *Silva*, 65 Cal. App. 4th at 272.

27 EEOC Guidance, *supra* note 1.

28 For example, in its Guidance, the EEOC provides examples of specific questions that should be asked. *See id.*

29 *Id.*; *Bradley*, 158 Cal. App. 4th at 1632; EEOC v. Video Only, No. 06-1362-KI, 2008 U.S. Dist. LEXIS 46094 (D. Or. June 11, 2008).

30 EEOC Guidance, *supra* note 1; *Watson*, 324 F.3d 1252 at 1261; Cotran v. Rollins Hudig Hall Int'l, Inc., 17 Cal. 4th 93 (1998); King v. United Parcel Service, Inc., 152 Cal. App. 4th 426 (2007); *Silva*, 65 Cal. App. 4th at 264, 272; *Casenas*, 58 Cal. App. 4th at 107.

31 *Nazir*, 178 Cal. App. 4th at 280–281; *Silva*, 65 Cal. App. 4th at 272.

partnership with a witness.[32] For this reason, workplace investigators generally do not tape-record interviews.

During her interview, the accused party may suggest witnesses with whom she would like the investigator to speak. If relevant, these witnesses should be interviewed as well.[33] Thereafter, the investigator may need to return to the complaining party (or to witnesses) to obtain further information. For example, in a sexual harassment investigation, in response to the complaining party's claims, the accused party might claim that certain conduct was directed to her by the complaining party. If these allegations were not already addressed in the complaining party's interview, the complaining party should be given the full opportunity to admit to or deny the allegations, and to give any other explanation he or she wishes.

Determining Credibility

In most investigations, there will be conflicting versions of material events. For example, the complaining party will claim that certain conduct occurred, while the accused party will claim it did not occur. Determining credibility is crucial to a proper investigation. "If there are conflicting versions of relevant events, the [investigator] will have to weigh each party's credibility."[34] A variety of factors go into such credibility determinations by the investigator. Among them are:

1. Inherent plausibility: Is the testimony believable on its face? Does it make sense?
2. Demeanor: Did the person seem to be telling the truth or lying?
3. Motive to falsify: Did the person have a reason to lie?
4. Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
5. Past record: Did the alleged harasser have a history of similar behavior in the past?[35]

Because determining credibility is so crucial to a proper investigation, and part of determining credibility is observing demeanor, the investigator should be in a position to observe the witnesses' and parties' demeanor. This means that the interviews of any individuals whose credibility is to be determined should, whenever possible, be conducted in person.

Making and Communicating a Determination

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, the investigator should make a factual determination as to what occurred. Thereafter, depending on the scope of the investigation, either the investigator or a management official who receives or reviews the investigator's report may determine whether the conduct at issue was a violation of policy or otherwise inappropriate.[36] The determination made must, of course, be a reasonable one, based on what the investigation has revealed.[37] It is also important that the parties are informed of the determination in a timely manner.[38]

Taking Appropriate Corrective Action

After having conducted a prompt, thorough and impartial investigation, and having reached a reasonable conclusion, the employer will be in a position to take prompt and appropriate remedial or disciplinary action.[39] While such action will depend upon the results of the investigation, disciplinary action could range from a warning and training to termination, depending upon the facts determined by the investigator. Even if there is a finding that no inappropriate activity has occurred, the employer still should conduct training and monitor the workplace,[40] checking in with the complaining party periodically to ensure that no inappropriate or problematic conduct occurs.

In the event of litigation, the wise employer who understands standard practice and follows these steps will be in the position to show both that it did the right thing and that it took "all reasonable steps necessary to

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32 An exception is under the Public Safety Officers Procedural Bill of Rights Act, Cal. Gov't Code § 3300 et seq., and similar legislation.

33 *Nazir*, 178 Cal. App. 4th at 280; *Dominic*, 493 F.3d 968 at 970–971.

34 EEOC Guidance, *supra* note 1.

35 EEOC Guidance, *supra* note 1.

36 *Id.*

37 Sassaman v. Dutchess County, 566 F.3d 307 (2d Cir. 2009); *Cotran*, 17 Cal. 4th at 103, 106, 109; *Silva*, 65 Cal. App. 4th at 261. *See also Casiano*, 213 F.3d 278 at 286 (finding that "conclusions reached by the investigators [were] well-substantiated by the information they were able to ferret out").

38 EEOC Guidance, *supra* note 1.

39 *Id.*

40 *Id.*

prevent harassment, discrimination and retaliation from occurring."[41]

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Mr. Robbins and Ms. Yanow also are founding members of the Society of Independent Workplace Investigators ("SIWI") and gratefully acknowledge the contributions to this article by their SIWI founding member colleagues: Catherine A. Balin, D. Jan Duffy, Katherine J. Edwards, Barbara Yanow Johnson, Christine Masters and Michael L. Wolfram.

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[41] Cal. Gov't Code §§ 12940 (j) & 12940 (k); Alaniz v. Robert M. Peppercorn, M.D, No. 2:05-CV-2576, 2007 U.S. Dist. LEXIS 32694 (E.D. Cal. May 3, 2007). *See also* 29 C.F.R. 1604.11 ("employer should take all steps necessary to prevent sexual harassment from occurring").