

Workplace Investigations: Best practices for getting it right

Moderator: Pamela Wolf

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Wolters Kluwer

What?
Why?
Who?
How?
When?
Where?

Moderator: Pamela Wolf



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Agenda

- Before the investigation
- Picking the right investigator
- Investigation goals
- Three 'real life' scenarios
- About interviews
- Privacy, confidentiality, attorney-client issues
- Stating and sharing the conclusion
- Best practices and pitfalls
- Questions

Before the investigation

What do employers need to consider before the investigation even begins?

- Policies and training on identifying a ‘complaint’ and ensuring proper evaluation
- Formal policy and process for documenting investigations
- Need to take every complaint seriously
- Whether employment counsel should be contacted
- Prophylactic measures, such as separating accuser and accused



Picking the right investigator

Choosing the right investigator: What are the criteria?

- Potential witnesses and biased individuals are disqualified
- Good writing skills
- Solid interviewing skills
- Experience with investigations
- Understands credibility determinations



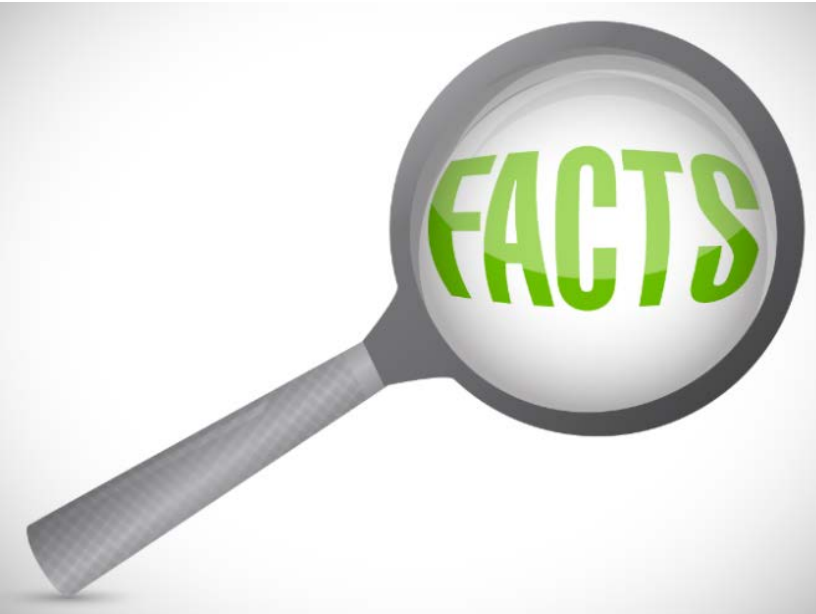
When should an outside investigator be used?

- High-profile cases
- High-risk situations
- Concerns about the appearance of bias
- Employer/HR lacks necessary experience



Investigation goals

Making the goals of the investigation clear:



- Identifying and understanding the accuser's concerns
- Understanding cultural factors that may contribute to the problem
- Thorough investigation appropriate to the scope of the allegations
- Well-reasoned determination on credibility and necessary remedial action
- To end the misconduct

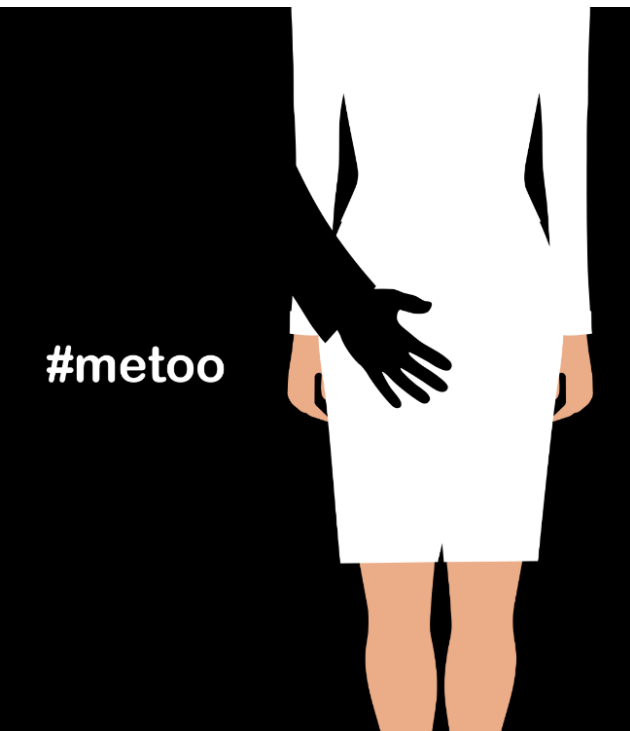
Three 'real life' scenarios

Scenario 1: “Can’t take this racism anymore”

A black employee reports to HR that a family photo in his work station has been vandalized with nooses drawn around the necks of his wife and son. Two weeks ago, he found a stuffed monkey sitting on his desk, which he reported to his supervisor, who just told him to “lighten up.” Two days later, he found a banana on his desk. He says he “can’t take this constant racism anymore.”

Should HR initiate an investigation even though the employee’s complaint is only verbal, and if so how should the investigation proceed?

Scenario 2: Groping executive



The company's male Chief of Operations drank a little too much at a company celebration and squeezed his female assistant's backside in front of several employees and an outside vendor. The assistant did not complain about the incident, but another female employee present at the event did complain to HR, adding that this is not the first time this sort of thing has happened and she's "disgusted by his sexual harassment."

What should HR do and are there any special considerations that should be taken into account?

Scenario 3:

“Go back to where you came from”

A truck driver who works for a third-party vendor was delivering a pallet of auto parts to the warehouse when he overheard two employees calling a third employee a “wetback” and telling him he “should go back to where he came from.” The truck driver was offended but didn’t say anything. He later told his Hispanic boss about it, who was even more offended and called the warehouse manager about it; he even threatened to stop doing business with the company over the “racism.” The manager, who assured the vendor that he would report the misconduct and end it, relays his discussion with the vendor to the head of HR.

*Does it make a difference that a vendor reported the “harassment”?
What should happen next?*

About interviews

Interviewing the accuser, the accused, and the witnesses:



- Collect relevant documents in advance for use in the interview
- Attorney interviewers must clarify who they represent and what that means
- Consider interviewing the accuser first and the accused last
- Encourage interviewees not to discuss the interview with others
- Note that the company will try to maintain confidentiality, but cannot guarantee it
- Discuss recording or memorializing of the interview
- Talk about retaliation and possible follow-up questions

Privacy, confidentiality, attorney-client issues

Dealing with privacy, confidentiality and attorney-client issues

- Investigator cannot guarantee confidentiality to the complainant
- National Labor Relations Board has limited employer's ability to *require* confidentiality
- The accused should be told the accuser's identity
- Attorneys must give *Upjohn* warnings
- Outside investigators may become a witness



Stating and sharing the conclusion

How should the conclusion be stated and with whom should it be shared?

- Keep the conclusion fact-based if possible; avoid legal conclusions
- State allegations and facts and connect them to conclusion
- Identify allegations as corroborated, not corroborated, or inconclusive
- Identify any necessary next steps
- Communication is up to employer; consider 'need to know'



Best practices and pitfalls

What are the best practices and pitfalls when it comes to investigations?

Investigations should be:

- Well-planned, efficient, prompt
- Impartial and conducted by disinterested persons
- Bring closure if possible



Watch out for these pitfalls:

- Barricades to reporting or investigating
- Lack of multiple avenues for reporting
- Refusing to investigate absent written complaint

Thank You – Questions?



You can still submit them and we'll try to get back to you with answers.