

Conducting a workplace investigation.

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What Will We Cover?

- **Botched Investigations**
 - Examples
 - Why they are important
- **Why Are Investigations Important**
- **Common Mistakes**
 - How to Recognize and Avoid Them
 - Can Make a Bad Situation Worse
 - Costs of Botching Investigations
 - Real Life Examples
- **Effective Investigations**
 - **Complaint = Opportunity/Obligation**
 - Solve Problem
 - Avoid Lawsuit



BIAS

BOTCHED

Investigations

Botched Investigations: Real Example

Alexis Berger v. Kargo Global, Inc. (New York, 2017)

- Senior Vice President of Sales for mobile advertising company
- Helped company grow from \$5 million to \$135 million in annual revenue in 3 years
- Employee complained that working for Berger was like “being in an abusive relationship.”
 - Company said they were investigating, had “serious concerns” about her behavior
- Later that month, Berger received \$100k bonus for performance
- Two weeks after that, Berger was “placed on termination track”
 - Personality concerns
 - Unprofessional behavior



Botched Investigations: Real Example

Alexis Berger v. Kargo Global, Inc. (New York, 2017)

- HR refused to give Berger examples of her poor performance
- Internal investigation
 - Did not speak directly to Berger
 - Only interviewed 4 of her 30 direct reports
- Month later, reassigned, \$125k pay cut, no direct reports
- Forfeited \$170k in commissions
- Terminated “for cause,” lost stock incentive plan, required to repay \$100k bonus, and forfeit earned commissions



Botched Investigations: Real Example

Alexis Berger v. Kargo Global, Inc. (New York, 2017)

- Demanded arbitration, asserted claims for gender discrimination, retaliation, equal pay violation, violation of wage law and breach of contract
- Awarded **\$40 MILLION** dollars by arbitrator
 - Violated Federal and State Law
 - Treated/disciplined differently than male managers
 - Evidence that there were numerous similar complaints against male managers and company did not address
- Inconsistencies, inaccuracies, and **poorly handled internal investigations** into Berger's performance



WHY Are Investigations Important?

- **Part of Doing the Right Thing/Obligation to Employees**
- **Promote Professional And Respectful Workplace**
 - Demonstrates Commitment to Policies
 - Deters and Prevents Future Problematic Employee & Management Behavior
 - Enhances Morale
 - Encourages Reporting Issues Before Situation Turns Into a Legal Problem
 - Impact on Lawsuits
 - Avoid Lawsuits Entirely
 - If Not, Help Defend Lawsuits
- **Establishes Culture of Trust.**
- **Establishes A Reasonable, Good Faith Basis For Employment Decisions**

WHY Are Investigations Important?

Lawsuits

- If the investigation does not prevent a lawsuit, judges and juries expect evidence of a good investigation as part of the defense.
- Even if supervisor “guilty” of harassment, investigation might provide complete legal defense under *Faragher/Ellerth*.
 - Responding **promptly** to complaints.
 - Conduct an appropriate and reliable **investigation**.
 - **Take reasonable action** based on the results of the investigation.
- When isolated incidents that are not “extremely serious” come to the attention of management, appropriate corrective action should still be taken so that they do not escalate. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-788 (1998).



WHEN Should You Conduct An Investigation?

- After an accident or workplace injury.
 - Root Cause.
 - 5 Why's.
 - Fishbone.
 - Corrective Actions.
 - Process Improvements.
 - Training Needs.



WHEN Should You Conduct An Investigation?

- Misconduct Observed By Management
 - An employer may be obligated to conduct investigations in the absence of an employee complaint if the employer "knows or should have known" about the conduct. See 29 CFR § 1604.11(d) (2003)
 - Create policy requiring written complaint BUT BEWARE.
 - MUST act promptly.
 - MUST take action to solve problem.
 - Must start ASAP.



WHEN Should You Conduct An Investigation?

- **Misconduct Reported By Employees**

- Encourage complainant to provide a thorough, accurate, legible written report, signed, dated and notarized.
- Create policy requiring written complaint BUT BEWARE.
- MUST act promptly.
- MUST take action to solve problem.



Common Investigation Mistakes



Mistake # 1: Poor Complaint Procedure

- Failure to provide employees with a readily available complaint procedure.
- Failure to offer employees an alternative to making a complaint to supervisor.
- Consequences of poor complaint procedure:
 - Cause a Lawsuit
 - Lose a Lawsuit
 - Lose Valuable Employees
 - Lose the Benefit of Various Defenses in Lawsuits
 - Hurt Company Morale



Avoid Mistake #1: Implement an effective complaint procedure

- Provide multiple avenues for employees to make complaints.
- Advise that information will be kept confidential to the extent possible.
 - **Do NOT promise confidentiality.**
 - **Explain why confidentiality is not guaranteed.**
- Respond by telling complainant that issues raised are important and are being reviewed.



Avoid Mistake #1: Implement an effective complaint procedure

- Strict no retaliation policy.
 - Complainant
 - Participants
- Remedial steps to address conduct.



Mistake # 2: Delaying the Investigation

- Failure to take prompt action in response to complaint exposes Company to liability.
 - Situation may escalate, increasing potential liability.
- Evidence may become compromised if not preserved.
- Ignoring the complaint or the need to investigate.
 - Can happen when employee requests confidentiality.
 - “I don’t want you to do anything about it”.
 - “I can handle it on my own” .
- Investigation can be legally required even if complainant does not want one.
 - Knowledge = Obligation.



AVOID Mistake # 2: Delaying the Investigation

- Act quickly; do not wait for situation to escalate.
 - Ask yourself how you would want it handled if the alleged conduct was happening to you.
 - How would a judge or jury view it?
- Is there a reason for a delay in the investigation?
 - Complaint comes in late on a Friday, or before a holiday.
 - Complainant is unable to meet with you to give specifics.
 - Note that in the investigation.

“Sally came to my office on Thursday, December 23 at 4:45 pm to discuss issues she was having with Max. Investigation continued Monday, December 27 after the Christmas holiday when employees returned to work.”

Mistake # 3: No Investigation Guidelines

- Lessens Quality Of Investigations.
- Produces Inconsistent Investigations.



AVOID Mistake # 3: No Investigation Guidelines.

- **Enact procedure**
 - Already have one? Check if updates are needed
- **Checklist**
 - **Designate**
 - Documents
 - Investigators
 - Witnesses
 - Location of investigation
 - **Logistics**
 - **Timetable**



Mistake # 4: Choosing the Wrong Investigator.

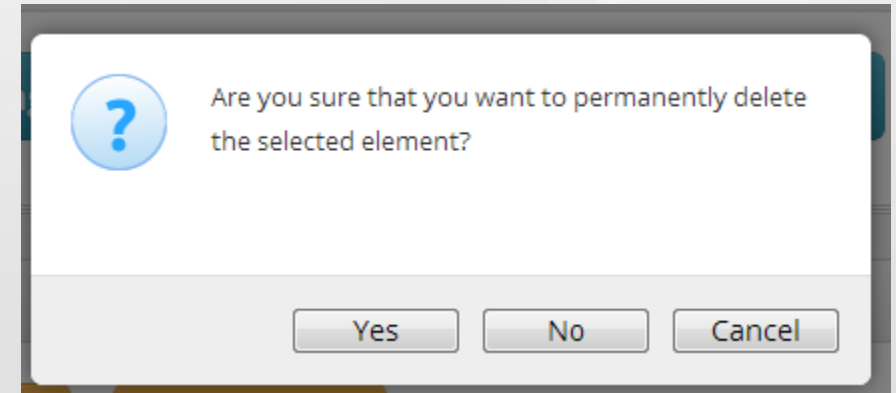
- Investigator is Face of Employer.
- Position of Great Discretion.
- Experience/Judgment.
- Acceptance by Employee.
 - Employee may not be as forthcoming with an investigator they feel is not objective.
- Appearance of Bias.
- Risk of Retaliation.

Avoid Mistake # 4: Choosing the Wrong Investigator.

- Someone from home office or a manager from another department available?
- Investigator trained?
- Perceived as fair and objective to employees?
- Specialized knowledge?
- No good internal options?
 - Consider an outside investigator.

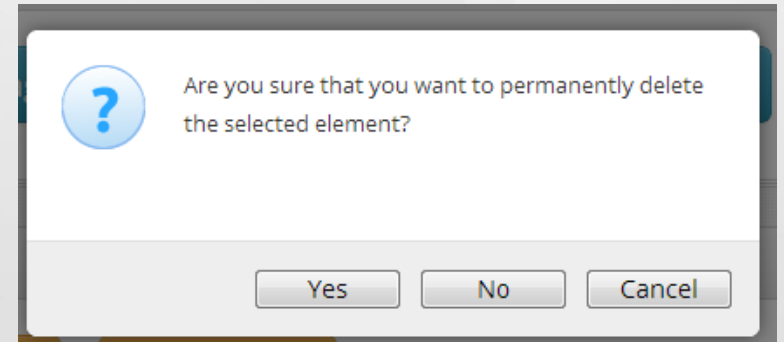
Mistake # 5: Failure to Preserve Evidence.

- Not collecting and preserving evidence can have the appearance that you have something to hide.
- Not preventing alleged harasser or the subject of the complaint from accessing complainant's evidence.
 - Can subject of complaint destroy complainant's company emails or emails with other employees that help support complaint?



AVOID Mistake # 5: Failure to Preserve Evidence.

- Witness statements, text messages, emails, videos.
- Engage IT staff to preserve electronic documents, if necessary.
- Collect and preserve as close to complaint as possible.
 - Contemporaneous documentation supports and adds credibility to oral testimony.
- Ensure that chain of custody is documented.
 - Keep notes of when and how evidence is obtained.



Mistake # 6: Excess Emphasis on Legal Issues.

- Internal investigations are mostly an effort to objectively determine facts, not assess legal issues.
 - Focus on facts – conduct of the employee.
- Do not focus on legal issues – avoid terms that have a legal effect – “Harassment” Or “Hostile Environment”.
 - Example – use “offensive conduct,” not “harassment”.

Mistake # 7: Failure to Reach a Conclusion

Objective is to:

- Reach conclusions regarding facts.
- Develop a plan/recommendation to address issues.
- Do not “Punt” on conclusions because:
 - Conflicting accounts.
 - “He said, she said”.
 - Not enough information to make a determination as to what happened.



AVOID Mistake # 7: Failure to Reach a Conclusion.

- Review and analyze all evidence.
- Make credibility determinations.
- Consider motives.
- Does evidence corroborate or contradict?
- Normally factual not legal conclusions.
- Sometimes, conclusions on SPECIFIC policy violations.



Mistake # 8: Failure to Close out Investigation and Follow Up.

- Failure to get back to complainant.
- Failure to reach documented conclusions.
- Failure to take appropriate actions based on conclusions.
- Failure to follow up with complainant and accused.
- Treating complainant or accused in a cold manner or in a way that can be construed as retaliatory.
- Not explaining reasons for taking or not taking employment action:
 - “Your allegations were unsubstantiated”.
 - Can be interpreted to mean we did not try or we do not believe you.

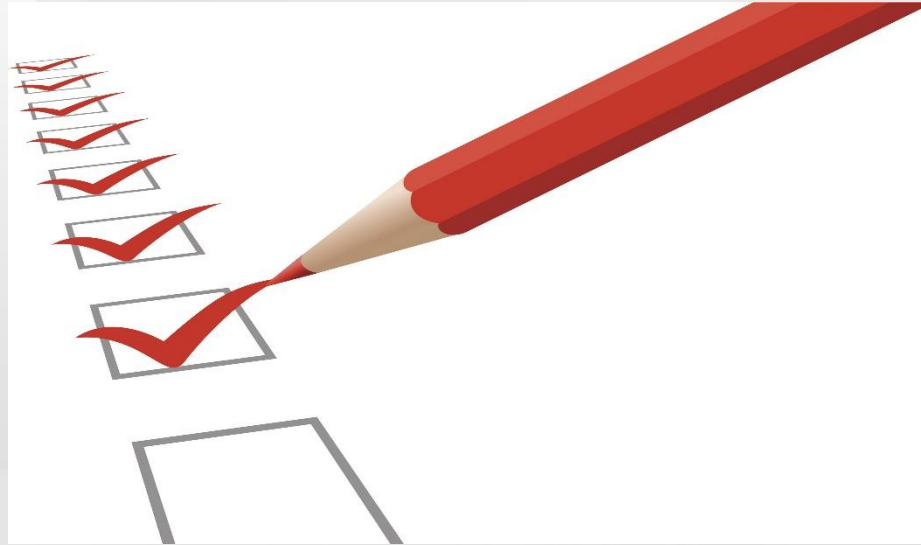
**See
You
Never**

AVOID Mistake # 8: Failure to Close out Investigation and Follow Up

- Create an action plan – and follow it.
- Revised policies or procedures needed?
 - Training.
- Ensure no retaliation.
- Follow up with complainant.

**See
You
Never**

Implement an Investigation Checklist



The Investigation Process



Summary

- Conduct sufficient investigations, appropriate for the circumstances.
- Establish a reasonable, good faith basis for a lawful decision.
- Strive for credibility and impartiality.
- Document thoroughly, carefully, and for user friendliness.
- Follow through to maximize benefit and prevent future problems.



Final Questions?



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