



Lessons from Uber on How to Drive an Effective Investigation



Presented by:

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ON THE FRONT LINES OF WORKPLACE LAWSM

Today's Roadmap:

1. Ride-sharing employment with a harassing manager
2. Drawing the route from internal complaints to employment lawsuits
3. Turn-by-turn instructions for effective workplace investigations



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Example of What NOT to Do:

- Female engineer received advances from department manager on VPN
- After complaining, HR told her it “wouldn’t feel comfortable” giving manager more than a warning, saying she was the common theme in her complaints and that it was “unprofessional to report things via email to HR”
- Pressured to continue working under same manager or leave her department team, with understanding that it could result in poor performance review by her harasser
- Left the company after manager told her she was “on very thin ice” for complaining to HR



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The Fallout:

- February 2017: blog post exposé, “Reflecting On One Very, Very Strange Year at Uber,” by Susan Fowler
- Forbes: “...avalanche of reports by wronged female employees...”
- “Urgent investigation” → 20 employees fired, CEO resigns, dozens more placed in sexual harassment training / counseling as 215 more claims investigated
- Public outcry from Uber Board of Directors, including Ariana Huffington (the only female member)
- Further fueling #DeleteUber campaign



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Why Is This Important?

“Congruence between the image a company portrays externally and the way it operates internally is critical today. People are pulling back the curtains on companies and revealing how well, or not, their internal cultures are aligned with external images. People only want to associate themselves with brands that reflect their personal values...”

- Denise Lee Yohn, *Forbes*



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Drawing the Route from Internal Complaints to Employment Lawsuits

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#MeToo Movement Picks Up Speed

The List Goes On...

- Harvey Weinstein
- Louis C.K.
- Kevin Spacey
- Matt Lauer
- Bill O'Reilly
- Roy Moore
- Al Franken
- Roy Moore
- Fidelity Investments
- Silicon Valley
- California State Legislature



Other Possible Claims Around the Corner

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New California Bills Signal Increase in Employer Risk of Liability

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1. Cost of sexual harassment settlements no longer deductible if they involve a non-disclosure agreement

2. Non-disclosure agreements and confidentiality provisions may soon be prohibited for sexual harassment claims (“STAND” Act)



3. Higher risk of individual liability in a California employment lawsuit

4. Claims for failure to prevent discrimination or harassment may become easier to prove



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Turn-by-Turn Instructions for Effective Workplace Investigations

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Effective Investigations Produce Results

The image shows five vertical colored bars, each with a circular icon at the top and text below. From left to right: 1. Red bar with a book and gavel icon, text: "Avoid or Minimize Legal Liability". 2. Green bar with a man and woman giving thumbs up icon, text: "Improve Morale". 3. Purple bar with a magnifying glass over a word cloud icon, text: "Improve Factual Basis for Decisions". 4. Blue bar with a group of goldfish icon, text: "Set Example". 5. Orange bar with a gold ring icon, text: "Demonstrate Company Commitment to Enforce Policies".

- Avoid or Minimize Legal Liability
- Improve Morale
- Improve Factual Basis for Decisions
- Set Example
- Demonstrate Company Commitment to Enforce Policies

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Other Benefits To A Good Investigation

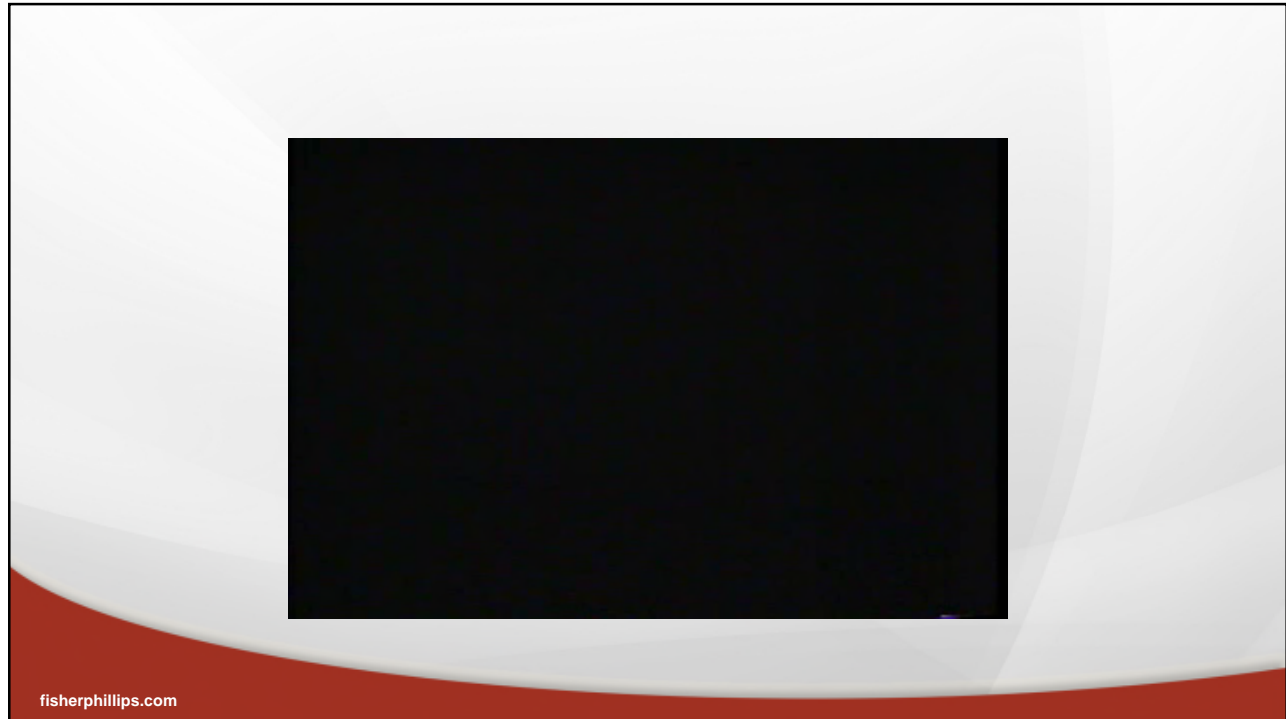
- Respectful and legal workplace
- Attract and retain employees
- Good reputation and profitability



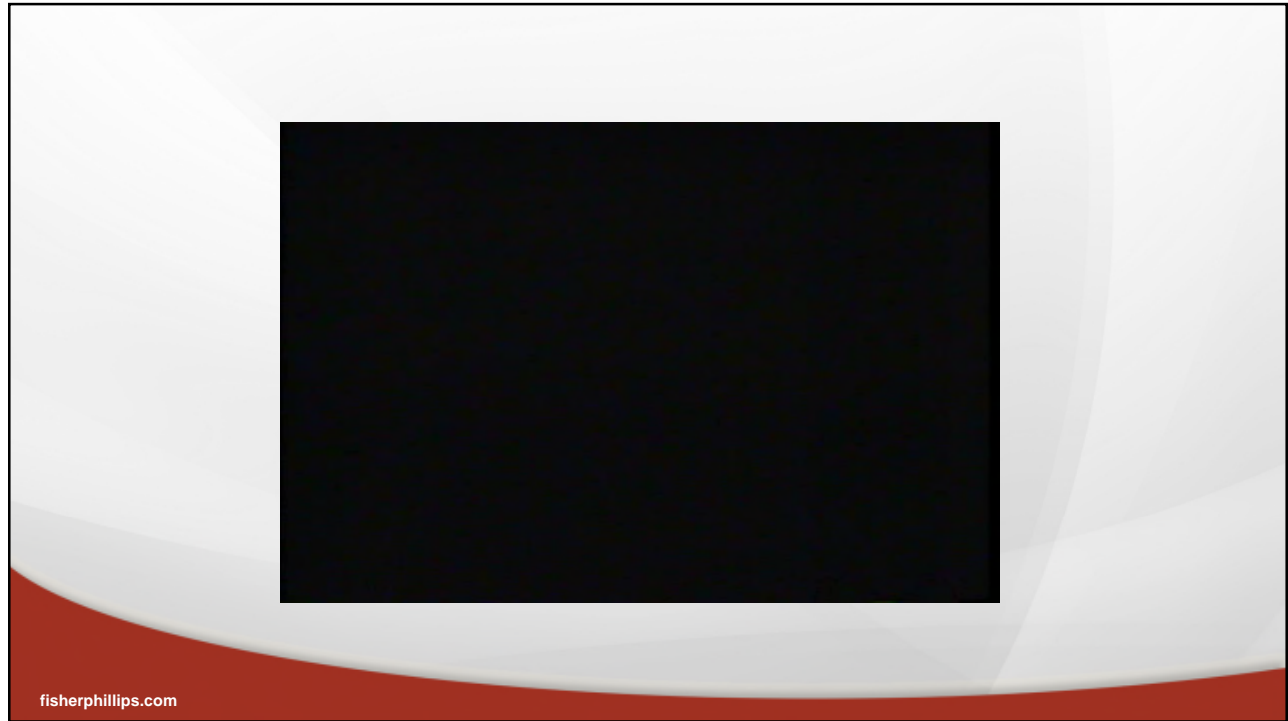
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**What if an employee
comes into your office
and says the
following?**

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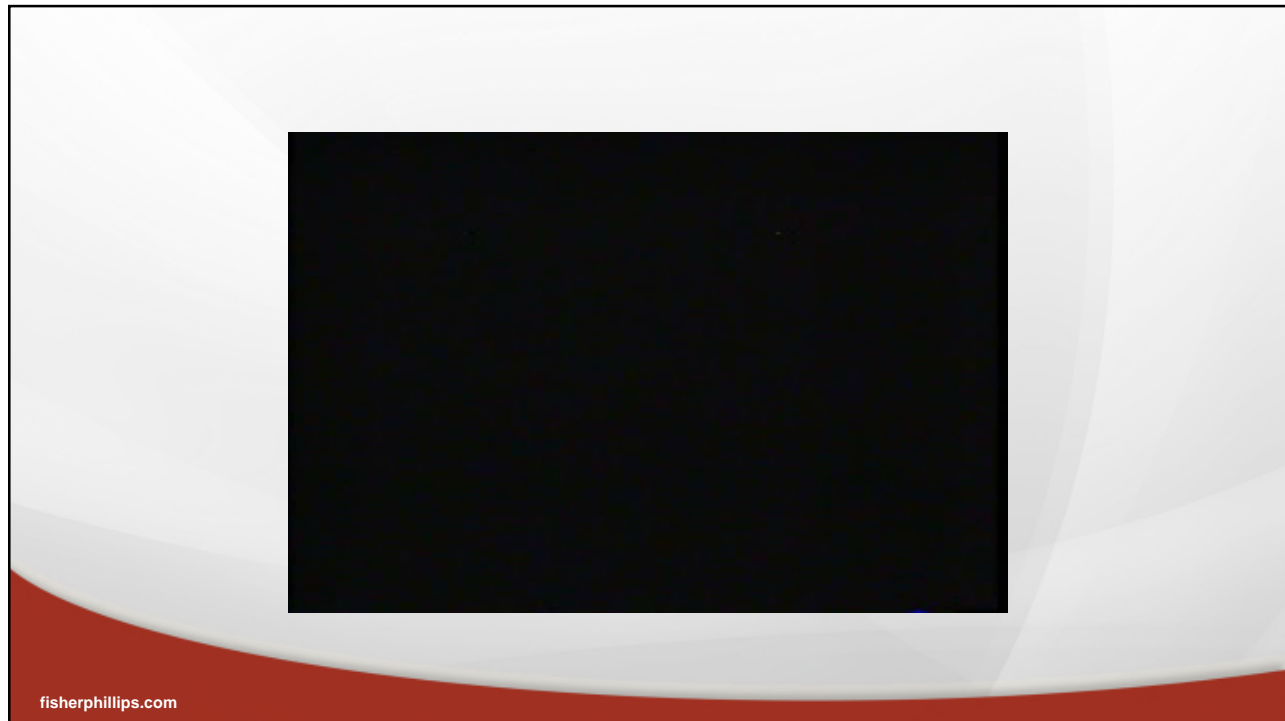


What problems do you see with the following “direct” approach to Jerry’s complaint?



**“Maybe That’s Best
For All Of Us”**

**Does the following
really solve the
problem?**



INVESTIGATION PROCESS

1. Receiving initial complaint
2. Conducting preliminary interview of complainant
3. Taking emergency interim steps, if necessary
4. Deciding to conduct formal investigation
5. Planning the investigation
6. Conducting interviews
7. Reaching a conclusion
8. Creating a written report
9. Making a recommendation to management
10. Implementing investigation results
11. Following up



1. INITIAL COMPLAINT

- What constitutes a complaint?
- Take all complaints seriously
- Methods of complaints
- Supervisory knowledge of alleged violations
- Anonymous complaints

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1. INITIAL COMPLAINT (CONT'D)

- **Employer must respond**, even when employee requests no action
 - “Off the record” reports count!
- **Employer must investigate**, even when there is no “complaint”
 - Witnessing the conduct is enough to require response

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2. INITIAL INTERVIEW OF COMPLAINANT

- **Remember:**
 - Don't try to investigate the complaint yourself.
 - Report the matter to Human Resources immediately.



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2. INITIAL INTERVIEW OF COMPLAINANT (CONT'D)

DO

- **Do** Listen
- **Do** Acknowledge
- **Do** Maintain confidentiality
- **Do** Follow up
- **Do** Monitor the worksite

DO NOT

- **Don't** Agree
- **Don't** Promise confidentiality
- **Don't** Investigate yourself
- **Don't** Promise to fix
- **Don't** Ignore complaint
- **Don't** Treat employee differently
- **Don't** Retaliate

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3. EMERGENCY INTERIM STEPS

- **Imminent danger to health, safety, property, environment or personal dignity**
- **Allegations of violence, threats of violence, certain harassment, retaliation, whistleblowing, criminal acts**
- **Options for immediate actions**

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4. FORMAL INVESTIGATION NECESSARY?

- **Human Resources vs. Outside Investigator**
- **Able to handle internally?**

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5. PLANNING THE INVESTIGATION

- **Who will be involved?**

- Human Resources? Outside consultants/counsel?
- Department manager?
- Company executives?
- Direct supervisor?
- Union?



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5. PLANNING THE INVESTIGATION (CONT'D)

- **Logistics Checklist:**

- Who "owns" the investigation?
- Who should be interviewed?
- Time, date, location, order of interviews?
- Union issues?
- Notification to witnesses?
- Preparing, and anticipating questions

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5. PLANNING THE INVESTIGATION (CONT'D)

- **Develop Strategy for Obtaining Information:**
 - Review personnel files of those involved
 - Collect as much information as you can before interviewing anyone
 - Consider leaves of absence for affected employees
 - Search electronically stored information (e.g., emails)
 - Notify internal team of complaint
 - Decide who will be conducting interviews and when?

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5. PLANNING THE INVESTIGATION (CONT'D)

- **Required Statements for All Interviews:**
 - Limited confidentiality
 - Duty to investigate
 - Role of investigators
 - Investigation process, timing
 - No retaliation
 - Confirm no bias
 - Cooperation
 - Contact information

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6. INTERVIEWING THE COMPLAINING PARTY

- **Stay on Course with These Tips:**
 - Remain OBJECTIVE and set tone for investigation
 - Get written statement or have complainant sign statement you prepare
 - Ask the 6 QUESTIONS (who, what, why, etc....)
 - Determine if incident was isolated or part of a pattern
 - Get SPECIFICS
 - Identify WITNESSES

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6. INTERVIEWING THE COMPLAINING PARTY (CONT'D)

- Discuss confidentiality of process
- Discuss anti-retaliation policy and provide copy of policy if necessary
- Discuss what complainant seeks from investigation, but avoid giving opinions
- Never agree to forego or limit an investigation, even if requested by complainant

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6. INTERVIEWING THE ACCUSED

- Remain OBJECTIVE
- Ask the 6 QUESTIONS
- Provide opportunity for accused to give any potential explanations or alibis
- Obtain written statement

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6. INTERVIEWING WITNESSES

- If current/former employee, review personnel file before interview
- Inform witness that interview is confidential and that breach of confidentiality will result in disciplinary action
- Be alert to privacy rights of both complainant and accused
- Remain OBJECTIVE
- Only provide details that are necessary to obtain relevant information

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6. INTERVIEWING WITNESSES (CONT'D)

- Phrase questions so as not to give unnecessary information
- Do not automatically limit the investigation to witnesses currently employed. Include former employees, friends, relatives, etc., of both complainant and accused, if necessary
- Employer's failure to keep investigation confidential can lead to claims for defamation or invasion of privacy

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6. INTERVIEWING SUGGESTIONS

- **Opening and Closing Statements**
 - "I'm here to look into some allegations that have been made."
 - "I want to understand what you have seen or heard."
 - Participation is voluntary
 - Limited confidentiality
 - Anti-retaliation



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6. INTERVIEWING SUGGESTIONS (CONT'D)

- **Explain Role of Each Investigator**
- **Treat Interviewee with Dignity**
- **Questions**
 - Open-ended and broad
 - Chronological
 - Tough or embarrassing questions
 - Then go to specifics

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6. INTERVIEWING SUGGESTIONS (CONT'D)

- **Issue of leading questions**
- **Allow silence**
- **Special situations**
 - "He said, she said," uncooperative witness, etc.
- **Review notes and documentation issues**
- **Witness statements**
 - Complete, accurate, contemporaneous

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