

# Conducting Effective Workplace Investigations



Presented by:  
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# **WHY** should you even care about a proper investigation in the first place?



Avoid or  
Minimize  
Legal Liability



Improve  
Morale



Improve  
Factual Basis  
for Decisions



Set Example



Demonstrate  
Company  
Commitment to  
Enforce Policies

# Mistake # 1: Poor Complaint Procedure

- Common **Failures**
  - To provide a readily available complaint procedure
  - To recognize a complaint
  - To train on how to respond to a complainant
- **Consequences**
  - Cause A Lawsuit
  - Lose A Lawsuit
  - Lose Valuable Employees
  - Lose the Benefit of Various Defenses in Lawsuits
  - Hurt Company Morale





# How to Implement an Effective Complaint Procedure (and **AVOID** Mistake #1)

- Provide multiple avenues for employees to make complaints
- Recognize complaints can be formal or informal, anonymous or not, by current or former employees, etc.
- **Do NOT require or wait for a complaint to be formalized in writing before taking action**



## AVOIDING Mistake #1 (Cont.)

- Advise employees that information will be kept confidential to the extent possible
  - **Do NOT promise confidentiality**
  - **Explain why confidentiality is not guaranteed**
- Inform complainant that their concern is important, the Company will take it seriously, and the Company will promptly investigate it
- Remind employees of the strict no retaliation policy as it relates to the **Complainant** and **Investigation Participants**



## Mistake # 2: Delaying the Investigation or Conducting No Investigation At All

### ■ Common Mistakes

- Waiting too long to take action
- Considering a complaint too insignificant to require an actual investigation
- Ignoring the need for an investigation because the complainant does not want one
  - “I don’t want you to do anything about it.”
  - “I can handle it on my own.”

### ■ Consequences

- Failure to take *prompt* action exposes Company to liability
  - Situation may escalate, increasing potential liability
  - Investigation can be legally required even if complainant does not want one
    - Knowledge = Obligation



## AVOIDING Mistake # 2

- Investigate everything
  - Shows Company takes all complaints seriously
  - Advise employees that information will be kept confidential to the extent possible
    - Do NOT promise 100% confidentiality
    - Explain why confidentiality is not guaranteed
- Act quickly
  - How would a judge or jury view it?



## AVOIDING Mistake # 2 (Cont.)

- Document any reason for delay
  - Complaint comes in late on a Friday, or before a holiday
  - Complainant is unable to meet with you to give specifics
    - *“Sally came to my office on Thursday, December 23 at 4:45 pm to discuss issues she was having with Max. Specifically, Sally said “...” Investigation continued Monday, December 27 after the Christmas holiday when employees returned to work.”*





## Mistake # 3: Conducting a Bad Investigation

- Common **Pitfalls**
  - Using an untrained or inexperienced investigator
  - Failing to have an effective investigation process or guideline
- **Consequences**
  - Low quality investigation and decision
  - Inconsistent results



# How to Conduct an Effective Investigation Procedure (and **AVOID** Mistake # 3)

- **Enact procedure**
  - Already have one? Check if updates are needed
- **Create Investigation Plan/Checklist**
  - **Designate**
    - Who will conduct investigation?
    - What will be investigated?
    - What documents or other evidence needs to be collected?
      - Collect as much other information as possible (beyond just the initial complaint and interview of the complaining party):
        - Review of personnel files of complaining party, subject of investigation, witnesses, and supervisors
        - Search of e-mails, text messages, or other electronically stored information
  - Who will be interviewed?
    - Have interviewees identified other possible witnesses?
  - Where will the investigation be completed?

# How to Implement an Effective Investigation Procedure (and **AVOID** Mistake # 3)

- **Logistics**

- Notify witnesses and coordinate interviews
  - Consider whether need to strategically order interviews

- **Timetable for completion**

- **Conduct training on how to conduct investigations**

- How to:
  - Interview complainant, subject and witnesses
  - Write an investigation report
  - Analyze facts, assess credibility and reach a conclusion

## **Mistake # 4: Choosing the Wrong Investigator**

- **Common Failures:**

- Using an untrained or inexperienced investigator
- Ignoring any relationships between investigator and participants in the investigation

- **Consequences:**

- Low quality investigation and outcome
- Appearance of bias; lack of confidence in objectivity of investigation and result
- Concern about retaliation





## **Avoid Mistake # 4: Choosing the RIGHT Investigator**

- Someone from home office or a manager from another department available?
- Investigator trained?
- Perceived as fair and objective to employees?
  - Position of great discretion and will be face of Company
- Specialized knowledge?
- No good internal options?
  - Consider an outside investigator



## **Mistake # 5: EXCESS EMPHASIS ON LEGAL ISSUES**

- **Common Failures:**

- Using legal terminology in the investigation report – “Harassment” or “Hostile Environment”
- Assessing legal issues – goal is not to determine if there was a violation of the law

- **Consequences:**

- If a complaint becomes a legal issue, you could be stuck with the legal assessment and conclusion



## AVOID Mistake # 5: Legal Conclusions

- The goal is to resolve misconduct issues *before* they become legal issues
- If Sally tells you, “John grabbed my butt,” do you write:
  - “John grabbed Sally’s butt;” or
  - “John sexually harassed Sally;” or
  - “Sally reported that John sexually harassed her;” or
  - “Sally reported John grabbed her butt”
- ***Whenever possible, avoid any legal conclusions***



## Mistake # 6: Failure to Reach a Conclusion

### Objective is to:

- Reach conclusions regarding facts
- Develop a plan/recommendation to address complaint
- 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 # 6: Failure to Reach a Conclusion**

### How 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 policy violations



# Examples of Conclusions

- ☐ More likely than not that allegation(s) occurred
- ☐ More likely than not that allegation(s) did not occur
- ☐ Some allegations occurred – some did not
- ☐ Some allegations occurred, but the complainant's interpretation of them was incorrect or unreasonable
- ☐ Unsubstantiated



Conclusion

# Mistake # 7: Failure to Close out Investigation and Follow Up

## Common Mistakes:

- 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, we do not believe you

**See  
You  
Never**

## **AVOID Mistake # 7: Failure to Close out Investigation and Follow Up**

- Follow Company's action plan
- Revised policies or procedures needed?
  - Training
- Ensure no retaliation
- Implement investigation results
- Follow up with complainant to ensure corrective action worked

**See  
You  
Never**



# Mistake # 8: Failure to Document Investigation in an Investigation Report

## Common Mistakes:

- 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”
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**See  
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# Mistake # 8: Failure to Document Investigation in an Investigation Report

## The Written Report: The Purpose

- Evidence of a timely and impartial response by Employer
- Accurately document the investigation conducted
- Provide decision-maker with facts, policy, and analysis needed to decide the matter
- Ensure a successful investigation
- Defend the investigation or outcome



**Your investigation is only as good as your written report of it.**

# Basic Organization of the Written Report

- Critical Sections
  - Factual issue
  - Relevant policies/procedures of the Employer
  - Evidence – facts obtained from:
    - Document reviewed
    - Individuals interviewed
  - Analysis
  - Conclusion



# Communicating the Written Report

Letters to individual who complained and the accused.

- Summarize basis for complaint – high-level detail
- Discuss policies in Handbook and that Employer's procedure is to conduct fair and prompt investigations
- Identify witnesses who were interviewed and documents that were reviewed
- To complaining party, indicate generally that "corrective action has been taken"; be more specific with the accused
- Discuss Employer's anti-retaliation, confidentiality, and open door policies





**BOTCHED**

**Investigations**

# Botched Investigations: Real Examples

## ***Barber v. United Parcel Service, Inc.***

- Eight UPS Drivers alleged they were subjected to a racially hostile work environment, discrimination and retaliation
- In 2012, rag-doll dummy in UPS uniform wearing a black mask, attached to twine around neck and hanging from ceiling during UPS meeting
- Company said it was for a safety demonstration; drivers thought otherwise



# Botched Investigations : Real Examples

## *Barber v. United Parcel Service, Inc. (Kentucky, 2016)*

- Drivers had been complaining since 2009 of race discrimination, white employees' use of racial slurs and jokes at the facility
- HR Botched the investigation
  - Only talked to white managers, never checked to see if the facility had earlier race bias and harassment complaints
  - Never interviewed the black drivers



# Botched Investigations: Real Examples

## *Barber v. United Parcel Service, Inc. (Kentucky, 2016)*

- Inadequate investigation referenced throughout trial
- **Verdict:**

**\$5.3 Million**



# Botched Investigations: Real Examples

## ***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 Examples

## *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 Examples

## *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 Title VII and New York Human Rights 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



# Botched Investigations : Real Examples

## ***Donna Adkins v. Kentucky Department of Corrections*** **(Kentucky, 2017)**

- Four female corrections officers sued Department for sexual harassment by a male sergeant
  - Exposing genitals at the workplace
  - Groping female employees
  - Attempted rape of Adkins
- Multiple complaints by several female employees
- Sergeant's wife worked in Department's HR Department

# Botched Investigations : Real Examples

## *Donna Adkins v. Kentucky Department of Corrections* (Kentucky, 2017)

- Only one investigation was conducted
- By HR manager who testified at trial that she had **no training in how to conduct workplace investigations or sexual harassment training**
- Conducted on-site, despite having HQ HR managers at another location who were available



# Botched Investigations : Real Examples

## *Donna Adkins v. Kentucky Department of Corrections (Kentucky, 2017)*

- Plaintiffs' expert testified at trial that department's investigation was so shoddy that it was “**shocking and reprehensible**”
- Jury Awarded Plaintiffs

**\$1.6 Million**





# **Effective Investigations**

# Effective Investigations: Real Examples

## ***Blanton v. Newton Associates, Inc.*** **(5<sup>th</sup> Circuit, Texas, 2015)**

- Pizza Hut employee alleged his female manager was harassing him based on his race and sex
- Employee was well aware of Company's complaint procedure, but did not complain to harasser's supervisor; only low level managers who were subordinate and had no authority over the manager
- Once employee did complain to the correct manager, Company completed an investigation and fired the manager within 4 days



# Effective Investigations: Real Examples

## ***Blanton v. Newton Associates, Inc.*** **(5<sup>th</sup> Circuit, Texas, 2015)**

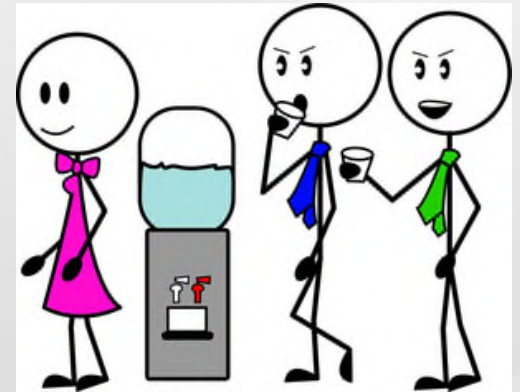
- Jury found that manager had harassed employee
  - Jury also determined that Pizza Hut exercised reasonable care to prevent and promptly correct the harassment and that employee failed to take advantage of the preventative and corrective opportunities offered by the Company
- 
- ***RECALL: the Faragher/Ellerth Defense***



# Effective Investigations: Real Examples

## ***Lee v. Dairyland Power Coop., (W.D. Wisc. 2017)***

- Female employee overheard direct supervisor (male) and two independent contractors discussing her physical attributes
  - Discussion focused on her breasts; comparing her to another female employee
- Female employee left work that afternoon upset, contacted HR
- Employer immediately launched investigation the following day
- Supervisor was put on paid administrative leave
- Investigation found that sexually demeaning talk did occur



# Effective Investigations: Real Examples

## *Lee v. Dairyland Power Coop.*, (W.D. Wisc. 2017)

- Harasser was disciplined, suspended for two weeks and was required to undergo harassment training
  - Apologized to female employee
- Female employee refused to return to work – did not believe company's promise that conduct would stop and feared retaliation
- Female employee subsequently sued for sexual harassment
- Employer moved for summary judgment, showed it took reasonable measures to prevent the harassment, prompt investigation, and disciplining harasser
- Court GRANTED summary judgment, case dismissed





# Final Questions



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# Thank You



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