Workplace Investigations: The Gold Standard

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INTRODUCTION

This article reviews best practices and procedures that employers and investigators should follow before, during, and after conducting any investigation of employees in the workplace. Among other things, it addresses when an employer should undertake an investigation, how to choose an investigator, the need for confidentiality, the need to protect the parties against retaliation, how to conduct interviews and prepare reports, and the importance of taking prompt remedial action.

WHEN SHOULD AN EMPLOYER INVESTIGATE?

Some types of employee complaints must be investigated as a matter of law, *e.g.*, sexual harassment complaints. Although no statutes regulate how investigations must be conducted, the California Fair Employment and Housing Act (FEHA) (Govt C §§12900–12996) requires an employer to take "immediate and appropriate corrective action" when faced with a covered harassment complaint (see Govt C §12940), and the U.S. Equal Employment Opportunity Commission (EEOC) states, "When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly." See EEOC's Policy Guidance on Current Issues of Sexual Harassment dated March 19, 1990, available at www.eeoc.gov/policy/docs/currentissues.html. For myriad business reasons, however, wise employers will investigate all complaints alleging any

form of illegal activity or company policy violations. A prompt, thorough, and fair investigation conducted in good faith can insulate an employer from liability for wrongful termination (see *Cotran v Rollins Hudig Hall Int'l, Inc.* (1998) 17 C4th 93, 69 CR2d 900; *Silva v Lucky Stores, Inc.* (1998) 65 CA4th 256, 76 CR2d 382), improve employee morale, and prevent further harassment or discrimination from occurring.

In deciding whether an employee complaint rises to the level of alleged illegal activity or company policy violations, employers should interpret the incoming complaint very broadly and err on the conservative side by investigating anything that comes remotely close to illegal activity or company policy violations—especially if the allegations are against a supervisor (due to the employer's risk of strict liability). What may seem initially to be an innocuous or petty complaint—which perhaps does not use the magical words "harassment," "discrimination," or "accommodation"—could actually be a hidden landmine that would have been discovered earlier if the company had conducted at least a preliminary investigation. If an employer does not investigate and rule out, based on the facts, potentially illegal conduct early on, *e.g.*, by obtaining admissions from the claimant in an investigative interview, a plaintiff's attorney who surfaces later could create the illusion of some form of illegality retroactively, when a lawsuit is filed.

In addition, investigations should be conducted in cases where no one formally complains yet the employer has learned of a claim of wrongdoing via an anonymous tip, citizen complaint, rumor, hearsay, or third-party employee complaining on behalf of the victim. An employer can be charged with constructive notice of the alleged wrongdoing, even if no one complains of the conduct, when the conduct is so pervasive that the employer should have known of it. An employer should also investigate if a complaint comes in

through the California Department of Fair Employment and Housing (DFEH) or the U.S. Equal Employment Opportunity Commission (EEOC). The investigative report will be included in the employer's response to the complaint.

An internal human resources employee (or another trained employee) can investigate internally the large majority of complaints that an employer receives, and can usually do so within an hour or two by interviewing two or three eyewitnesses. More complex complaints involving multiple theories of liability, whistleblower statutes, and multiple parties will take longer, and may require hiring a qualified outside investigator. Time and cost should not be offered as reasons for a failure to investigate. Failing to investigate for that reason would be penny-wise and pound-foolish. When the management employee who decided not to launch an investigation is asked pointedly by the plaintiff's attorney why he or she did not conduct an investigation and offers expense or lack of time as excuses, the judge or jury may not be sympathetic.

CHOOSE THE RIGHT INVESTIGATOR

Neutrality, Objectivity, Trustworthiness

Someone who has no stake in the outcome should conduct the investigation. The investigator can be someone within the employer's human resources department or an outside neutral investigator (subject to certain statutory limitations discussed below)—whoever is more appropriate in view of the following considerations:

- The alleged wrongdoer should have no supervisory authority over the investigator or any direct or indirect control over the investigation. If an alleged wrongdoer (respondent) outranks the investigator, the investigator may fear retaliation by the higher-ranking respondent. In such a case, the

investigator's ability to fairly investigate or to take appropriate remedial action may be compromised or at least may appear to be compromised.

- Neither the complainant nor the alleged wrongdoer should be a direct subordinate of the investigator. Such an investigator may be more inclined merely to keep the peace, rather than thoroughly investigate the complaint. A supervisor/investigator may not want to face the possibility of losing one of his or her subordinates or to be forced to take other disciplinary action against a favored employee. A supervisor/investigator may be inclined to sweep the problem under the rug to make his or her department appear to be well run, with no employee problems.
- The investigator should not be someone who has had any prior negative experiences with either party, to avoid any actual or apparent bias.
- The investigator should not be someone who has an outside social relationship with any of the parties, to avoid any actual or apparent conflict of interest if a discipline issue arises.

Employers that prefer to use an outside investigator should use either a licensed attorney or a licensed private investigator who understands employment law subject matter. See Bus & P C §7512–7573 (the Private Investigator Act), which allows licensed attorneys (performing duties of an attorney) and private investigators to conduct workplace investigations. Business and Professions Code §7523(a) provides that only licensed private investigators can conduct investigations unless a statutory exemption exists. Business and Professions Code §7522(e) provides an exemption for "[a]n attorney at law in performing his or her duties as an attorney at law." It should be noted that no exemption exists for external human resources consultants to conduct workplace investigations, and a violation of this statute can result in a

misdemeanor conviction, punishable by a fine of $5,000 or imprisonment up to one year (or both). Bus & P C §7523(b). Case law has not yet determined how a violation of this statute could impact the validity of an investigative report prepared by an outside investigator who acted in violation of the Private Investigator Act.

An attorney conducting an investigation should set forth in the retention agreement that he or she will be performing the duties of an attorney utilizing his or her knowledge, skills, and experience in employment law to conduct the investigation as an impartial investigative attorney (to emphasize compliance with Bus & P C §7522(e)), and not as an advocate.

- If the outside investigator is an attorney, the attorney should not be the same one who would represent the company in any future litigation over the same matter, given that the attorney/investigator could be subpoenaed as a witness at trial by opposing counsel.
- The investigator must act in good faith, listen fairly to both sides, and be detail-oriented and trustworthy.
- The person selected to investigate should have adequate time to do the investigation.
- In more serious cases when litigation seems likely, the person selected should be very experienced and articulate and have a good demeanor in case he or she needs to testify one day as a witness in deposition and in front of a jury. The potential investigator (a material witness) must feel comfortable acting in that capacity.

Knowledge of the Law Pertaining to the Subject Matter of the Investigation

The investigator should be trained in the subject matter under investigation, *e.g.,* sexual harassment, discrimination, retaliation, disability

accommodation, whistle-blowing, workplace violence, theft, expense fraud, abuse of public funds, trade secret, defamation, or privacy violations. That knowledge will enable the investigator to better understand the elements of a prima facie case and the shifting burdens of proof. Although the investigator is not bound by trial procedures, burdens of proof, or evidentiary rules, knowledge of these types of legal claims will assist the investigator in making factual findings based on trustworthy, reliable, and credible evidence.

INVESTIGATE PROMPTLY

The investigation should be commenced immediately and completed as soon as reasonable circumstances will allow. *Swenson v Potter* (9th Cir 2001) 271 F3d 1184, 1193 ("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.") Investigations commenced within a day or a few days after a complaint and completed within a two-week period have been routinely upheld as timely. On the other hand, waiting until after the complainant files an administrative charge or a lawsuit will create a rebuttable presumption of inadequacy. The presumption can be rebutted if the employer has a reasonable explanation for the delay. Reasonable explanations might include a situation where legal counsel represents the complainant and counsel files an administrative charge before allowing his or her client to be interviewed. In addition, there are times when the complainant files an administrative charge while out on disability leave and is not available for an interview. In all events, the employer's goal should be to initiate the investigation and ensure that it is completed as soon as reasonable circumstances allow.

DETERMINING THE SCOPE OF THE INVESTIGATION

Ideally, the investigator should not determine the scope of the investigation. The employer should dictate the scope to the investigator, and in complex cases, the employer usually has outside legal counsel advising the employer on what the parameters of the investigation should be. The scope of the investigation should be detailed in the retention letter and in the investigator's written report.

In very complex cases, the employer may want an investigator to investigate only some of the claims, and the employer will address the other claims through alternative means. Either way, the scope of work should be confirmed in the retention agreement if the employer is using an outside investigator. The investigator may want to add a footnote to clarify that certain subject matter is outside the scope of the investigation and that the report will not include references to that outside subject matter.

If a witness wants to delve into issues that are unrelated or outside the scope of the investigation, the investigator should tell the witness politely that he or she has a limited scope of work and advise the witness to pursue the unrelated complaints with the human resources department. If something illegal is alleged, the investigator should advise the employer of the potential problem, but not investigate it unless asked to do so. Any expansion of the scope of work should be documented. If the employer instructs the investigator not to investigate the new issue, the investigator may want to document that fact in a confirming email. If the new issue becomes part of the scope of work, that fact should be confirmed in writing. In investigations handled internally, such formalities are usually not implemented and the scope of work can be determined by simply examining a written complaint or any intake interview notes, applicable company policies, physical evidence, or other documentation

related to the alleged incident(s). See *Bradley v Cal. Department of Corrections* (2008) 158 CA4th 1612, 71 CR3d 222.

PROTECT PARTIES AND WITNESSES FROM RETALIATION DURING THE INVESTIGATION

EEOC guidelines state that an "employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti-harassment policy and complaint procedure will not be effective without such an assurance." U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (EEOC Guidelines), dated June 18, 1999, available at http://www.eeoc.gov/policy/docs/harassment.html. In footnote 59, the EEOC Guidelines cite to the following data about fear of retaliation:

Surveys have shown that a common reason for failure to report harassment to management is fear of retaliation. *See, e.g.,* Louise F. Fitzgerald & Suzanne Swan, "Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment," 51 *Journal of Social Issues* 117, 121-22 (1995) (citing studies). Surveys also have shown that a significant proportion of harassment victims are worse off after complaining. *Id*. at 123-24; *see also* Patricia A. Frazier, "Overview of Sexual Harassment From the Behavioral Science Perspective," paper presented at the American Bar Association National Institute on Sexual Harassment at B-17 (1998) (reviewing studies that show frequency of retaliation after victims confront their harasser or filed formal complaints).

The EEOC Guidelines further recommend that the investigator should remind the complainant, the respondent (the accused wrongdoer), and each

witness about the employer's prohibition against retaliation. The employer's policy should be set forth in the employer's employee handbook. Examples of retaliation should be explained to the accused employee so that there are no misunderstandings. For example, many years ago the author worked on a case in which the accused earnestly confronted his accuser in a hallway at work and asked her why she had taken the route of filing a formal complaint against him instead of trying to work things out with him face to face, which he was willing to do. She promptly told her lawyer of this "confrontation," and a retaliation claim was added to the investigation. Retaliation claims now make up the majority of EEOC claims filed.

NOTE According to statistics released on January 11, 2011, the EEOC received a record-shattering number of charges in 2010. The EEOC reported that for the second year in a row, retaliation claims were the most common type of EEOC discrimination charges (36,948, which was 7.9% more than 2009).

While the investigation is pending, management should scrutinize employment decisions affecting the complainant and witnesses to ensure that those decisions are not based on retaliatory motives. For example, it is advisable for the employer to promptly issue a written admonition to the alleged wrongdoer that, while the investigation is underway, he or she should avoid any direct contact with the complainant (to prevent any new retaliation claims) and should not engage in any retaliatory conduct towards the complainant. An employer may consider rescheduling or temporarily transferring the alleged wrongdoer or the complainant (only if the complainant agrees), placing the alleged wrongdoer on a paid leave of absence (administrative leave), or changing the reporting relationship between the complainant and the accused pending the outcome of the investigation. The

employer should communicate with the complainant about the proposed intermediary measures to ensure the complainant does not deem them to be retaliatory.

Part of the plan to prevent retaliation should be to conduct the investigation in a private area or conference room, preferably away from the witness' regular work area. Any windows to the room should be covered so that other people cannot look inside and see who is being interviewed. Sometimes witnesses are more comfortable meeting off site. For example, in accordance with the preferences of witnesses, the author has conducted interviews in a library conference room, lawyers' offices, at a public park, and at coffee shops. The investigator must be flexible and willing to accommodate reasonable idiosyncrasies of witnesses to gain cooperation and prevent retaliation.

On occasion, a witness may ask for anonymity in a written report. If the employer is agreeable, the witness can remain anonymous. The investigator should summarize only the most relevant testimony, remove all identifying information, and indicate in a footnote the reason for the anonymity. If the witness is anonymous, it will be up to the investigator to assess credibility and decide how much weight to give the witness' statement.

LOGISTICS

The employer should not attempt to exert influence over the investigator's decisions regarding the course of action during the investigation. The employer's involvement (and that of its general counsel) should be limited to: (1) determining the scope of the investigation, (2) assisting the investigator with preservation of evidence, and (3) notifying the complainant, respondent, and witnesses in writing of their obligations of confidentiality, anti-retaliation, and truthfulness. Any attempts by the employer to convey "facts" to the investigator before the investigation begins should be extremely limited.

Information that an investigation is ongoing should be limited to those employees who “need to know”. Generally, the only people who need to know about the investigation (aside from the parties and witnesses) are those who will be involved in determining the remedial action. Some supervisors may need to know, in general, that an investigation is taking place so that a direct report (a witness) may be excused from work duties at an appointed time. However, some employers do not want supervisors to know even that much, and supervisors are simply told that the direct report witness is needed in the human resources department at a certain time. If possible, it is best for the coordinator to determine the witnesses’ availability in advance of the interview date by looking at employee schedules or networked intra-office calendars or by asking their supervisors. Then the witnesses should be notified privately and individually on the morning of the interviews. Keeping the interviews confidential helps to minimize unnecessary worrying and employee gossip about “what’s going on”.

The person who will be coordinating the interviews needs to ensure that privacy protocols are followed. The coordinator should not send out a mass email to all witnesses telling them all when and where to report for their respective investigative interviews. Witnesses should be scheduled far enough apart so that they do not meet in the hallway outside the interview room. Ideally, witnesses should be on call for an estimated start time and come to the interview room when the investigator is ready and the coordinator calls them.

Witnesses should be promptly advised by the coordinator that they are not the focus of the investigation, but have merely been identified as a witness who may have seen or heard something related to a complaint made by another employee. Witnesses should be advised by the coordinator that for confidentiality reasons they are not to discuss the investigation with anyone at

any time, and if they violate that confidentiality admonition, they could be subject to discipline. It is very helpful if employers have a written policy in their employee handbooks explaining that employees have a duty to cooperate in any employment investigation. Occasionally, some employees need to be directed or ordered to participate in the interview process because they are reluctant to get involved. It is therefore helpful if the duty to cooperate is stated expressly in the employee handbook.

It is prudent for the coordinator to place most or all of the information described above in a written letter to each witness to document that the information was actually conveyed to each witness and to emphasize the importance of the information and the formality of the investigation to each witness. At a minimum, the letter should inform each witness of the confidentiality admonition, the "no retaliation" admonition, the duty to cooperate, and the duty to be truthful in the interview.

CONFIDENTIALITY OF INVESTIGATION

Although parties and witnesses are instructed to keep their investigative interview confidential, an investigator should never guarantee confidentiality to any party or witness. The investigator should clarify that the allegations of the complaint and any information learned during interviews will be kept confidential to the extent possible, but that some information may need to be presented to parties and witnesses if necessary to conduct a thorough investigation. According to the EEOC,

[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.

See EEOC's *Policy Guidance on Current Issues of Sexual Harassment*, dated March 19, 1990, available at http://www.eeoc.gov/policy/docs/currentissues.html.

Documents produced by the parties and witnesses should be kept confidential on the same basis. Many witnesses will ask, "Who is going to see your report?" The investigator should advise the witness truthfully that the report will be reviewed initially by the person who retained the investigator and possibly others who need to assist in the decision-making process. Further, if the matter proceeds to a *Skelly* hearing (for California public sector employees, see *Skelly v. State Personnel Board* (1975) 15 C3d 194,124 CR 14) or to court action, the company may be required to disclose the report to the parties. The investigator should advise all witnesses, including the complainant and the alleged wrongdoer, to keep the subject matter of, and the questions and answers presented at, the investigative interview confidential. It is advisable to have all parties and witnesses sign an acknowledgement and agreement that they will keep the interview confidential and that they understand they may be disciplined, up to and including termination, if they violate the agreement.

Other Admonitions or Warnings

In investigations of public sector employees when criminal prosecution could follow (including investigations involving police officers and firefighters), the investigator should give a *Miranda* warning and a *Lybarger* admonishment to the respondent and potentially to witnesses also.

***Miranda* Warning**

Miranda rights should be read to the employee witness *[only during a custodial police interview]* if it is deemed possible that the employee may be charged with a criminal offense. Some police and fire agencies routinely give *Miranda* warnings even if no criminal charges are contemplated, as an exercise of caution. The *Miranda* warning preserves the admissibility of witnesses' statements against them in criminal proceedings. A sample Miranda warning is as follows:

You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to have an attorney present before and during the interrogation.

***Lybarger* Admonishment.**

If the employee is under a direct order to submit to an interrogation, the statement is deemed coerced and *Lybarger* immunity should apply. In *Lybarger v City of Los Angeles* (1985) 40 C3d 822, 221 CR 529, the California Supreme Court held that governmental employers may obtain compelled statements from their employees for administrative purposes, by advising employees that the compelled statement cannot be used against them in a criminal prosecution. Thus, after the *Miranda* warning has been given, a *Lybarger* admonishment is required and the employee must be informed as follows:

1. While you have the right to remain silent with regard to any criminal investigation, you do not have the right to refuse to answer my administrative questions.

2. This is strictly an administrative investigation. I am, therefore, now ordering you to discuss this matter with me.

3. If you refuse to discuss this matter, your silence can be deemed insubordination and result in administrative discipline, up to and including termination.

4. Any statement you make under compulsion of the threat of such discipline cannot be used against you in a later criminal proceeding.

INVESTIGATION MUST BE THOROUGH

Interview the Complainant.

In most cases, the investigator should first obtain the complete story from the complainant. See, *e.g., Casenus v Fujisawa* (1997) 58 CA4th 101, 106, 67 CR2d 827, 830. Exceptions to this rule might occur if the complaining party refuses to meet with the investigator or if a critical witness will be unavailable later. Plenty of time should be set aside for interviewing the complainant because the interview may take several hours in complex cases. Often, the complainant or the complainant's attorney has submitted a summary of the complaint in writing or has had an intake interview with someone in the employer's human resources department.

If an attorney already represents the complainant, an investigator who is an outside attorney will need to request permission from the complainant's attorney to interview his or her client. California Rule of Professional Conduct 2-100 states:

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) [A] "party" includes: (1) An officer, director, or managing agent of a corporation . . . or (2) an. . . employee of a . . .corporation . . . if the subject of

the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

A comment to the corresponding ABA Model Rule 4.2 adds (Comment 7 to ABA Model Rule 4.2):

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Rarely is a request for an interview denied by a party's attorney, but it could happen. In that case, the investigator should request that the attorney provide as much detail about the complaint as possible. The attorney's report should be used as the basis for the claim, together with any written or verbal complaints or statements that the complainant has made to co-workers, supervisors, the human resources department, or others. If possible, before interviewing the accused employee(s) and witness(es), the investigator should obtain the full story from the complainant or from his or her representative if the complainant is unavailable for any reason.

The EEOC has issued guidance on its website regarding the minimum questions that should be asked of the complainant, alleged harassers, and third-party witnesses. See http://www.eeoc.gov/policy/docs/harassment.html#

VC1e. These questions should be asked, if relevant to the facts of the particular investigation, to help ensure thoroughness.

Interview All Relevant Witnesses and the Respondent

The investigator should interview the respondent and all witnesses identified by the complainant and the respondent, unless a witness is clearly irrelevant. If an identified witness is irrelevant, the investigator should document the reason for not interviewing that witness. For example, when asking a party to identify all witnesses whom that party would like to be included in the investigation, the investigator should also ask what facts the party expects the named witnesses to provide. If job performance of a party is not an issue in the investigation, the investigator does not need to interview a named witness whose only testimony would be how great the party's job performance was. That information is simply not relevant, and the investigator should explain that in a footnote.

A person may be a witness for one or more reasons, *e.g.*: (1) he or she is alleged to have observed, or has actually observed, a material incident, or is alleged to have been in close proximity and "might" have observed something; (2) he or she may be able to provide exculpatory evidence on behalf of the accused; (3) he or she may have talked to the complainant contemporaneously with the material event(s) under investigation; or (4) he or she might be "similarly situated" to the complainant. For example, if a female complainant alleges that her supervisor made sexually inappropriate comments to her, other female employees who work with, or near, the same supervisor should be interviewed to determine whether they experienced similar conduct.

If the investigator has reason to believe that the respondent may not dispute some of the claims, it may save time to interview the respondent first in case he or she admits to some or all of the alleged misconduct. However, this is

not the usual situation, so interviewing all of the complainant's witnesses first will help guide the investigator in conducting a more thorough initial interview with the respondent. On the other hand, interviewing the respondent first may give the investigator a more balanced basis on which to begin interviewing all of the witnesses. No hard and fast rule exists in this regard, and the decision should be made on a case-by-case basis.

The respondent should not be shown a copy of the complainant's written complaint in advance of the interview. Doing so would give the respondent too much time to plan a story, weave a web of spin, practice responses, and talk to and coordinate with witnesses. The investigator needs to obtain a pristine statement from the respondent and judge the demeanor and immediate reaction of the respondent to the claims. The investigator should address every allegation with the respondent and give him or her every opportunity to respond to every detail.

The investigator should allow all parties and witnesses the opportunity to call or email the investigator if additional information is recalled after the interview is over. At the end of each interview, all witnesses should be asked if there is anything else they would like to add. Often, as a precautionary measure, the author will also ask witnesses if anyone (including the author) has threatened, coerced, or asked them to testify in a certain way or say something that is not true. If a party or witness has an attorney present, the author typically invites that lawyer to ask questions of his or her own client in case the author has left anything out or has not asked something that the lawyer thinks should have been asked. That lawyer will thus be hard-pressed to later claim that the author was not thorough in conducting the client's interview if the lawyer failed to take the author up on that offer.

At the beginning of each interview, the investigator should start with simple background questions to gain an idea of where the witness fits into the puzzle, put the witness more at ease, and get a sense of the witness' baseline demeanor. The investigator should not offer any opinions or suppositions to any witness; however, the investigator may need to elicit opinions or suppositions from witnesses if the investigator believes it could lead to the discovery of relevant facts. The investigator should be prepared to meet defensive or even angry witnesses and parties and be prepared to handle difficult questions, emotions, and erroneous accusations about the investigative process. An investigator needs to maintain a calm and non-defensive demeanor at all times to defuse these types of situations quickly and to obtain the necessary information from the witness. Witnesses should also be questioned about their respective work and personal relationships with the parties so that the investigator can determine if potential biases exist.

The investigator should document the amount of time spent interviewing each witness and spend a sufficient amount of time with each witness. Spending only 30 minutes with a complainant or the accused on a complex case would most likely appear insufficient on its face. The investigator should avoid this vulnerability to attack by spending the appropriate amount of time to conduct a thorough interview and by documenting the start and stop time for each interview.

The investigator should interview witnesses to whom the complainant may have made contemporaneous statements. The investigator is not bound by evidentiary rules, and in any event, contemporaneous statements are a possible exception to the hearsay rule. If a credibility issue arises, contemporaneous statements should be obtained and documented in the investigation. This information should be considered with the other evidence, and the investigator

can determine how much weight to give it later. Thus, when interviewing the complainant, the investigator should ask if he or she reported the incident contemporaneously to any peers or other third parties, as this may be evidence that the alleged wrongdoing occurred.

Sometimes the witnesses may be former employees, customers, students, or clients. An employer may be reluctant to involve such people in a private company matter. In that case, the investigator should weigh how important the information is against the employer's desire not to involve customers unnecessarily in the employer's private personnel matters. Can the information be obtained from another source without involving one of these individuals? Is the information to be sought duplicative of undisputed information that the investigator already has? If so, those individuals may not need to be involved. Once, the author needed to involve one of her client's business partners in an investigation because the business partner was integrally involved in the claim. The author's client agreed that the author should contact the partner company for an interview. When the author did so, the partner company declined to be interviewed based on advice of counsel, and the author documented this in a footnote. An investigator needs to show that he or she at least made an effort to contact a witness. A failure to do so may open the investigation up to a later claim by plaintiff's counsel that the investigation was a sham.

An investigator may need to circle back and re-interview witnesses or parties to clear up new issues that have arisen with other witnesses. The investigator should inform each witness at the end of the interview that he or she may need to call the witness back later for follow-up questions. Sometimes the investigator may need to ask only one follow-up question, which might be handled quickly in a telephone call. However, if the investigator has a large

number of follow-up questions or a question on a significant issue, a follow-up interview in person is advised.

Obtain Documentation

The investigator should obtain all relevant documentation from all sides. The documentation may include:

- Private records, such as security logs showing when someone entered or exited a room or a building; videotape of areas relevant to the time or place under investigation; applications for employment; records of prior disciplinary actions; supervisor notes that were not transmitted to the formal personnel file; periodic employment evaluations; records of any investigations or grievances involving the alleged victim, witnesses, or respondent; company computer files and hard drives; computer records that show Internet usage and websites visited; computer log-on and log-off records; company emails (provided that the employer has a written policy reflecting that emails are company property and are subject to review by the employer); company telephone records; saved voicemail messages; travel and mileage logs; incident reports or complaints that did not result in an investigation; attendance records; calendars; and company records of any legal actions involving the parties, including wage garnishments, subpoenas for records, and notification of other legal actions. An expert in computer forensics may be required to retrieve deleted emails. At the commencement of the investigation, the investigator should ask the employer to take steps to preserve the materials described above so that they are not inadvertently destroyed.
- The Internet, which includes personal blogs and websites, social media (Facebook, LinkedIn, Twitter, and MySpace, provided that the information is not password-protected and is open to all of the viewing public); Usenet

(a website where users read and post messages called articles or posts, collectively termed news, to one or more categories, known as newsgroups); message boards; and chat rooms.

- Public records, such as records of the Department of Motor Vehicles; state and federal criminal courts (criminal court records may provide information about convictions as well as initial charges leading to an arrest, details of the crime, and the accused's behavior preceding and during the offense; the court reporter's transcript may show how the accused, victims, or witnesses testified); state and federal civil courts (*e.g.*, prior or current restraining orders that might be documented in California's Domestic Violence Restraining Order System (DVROS)), divorce records, and financial, tort, or violence cases); federal bankruptcy courts (showing to whom a party owes money and how much is owed, which may be relevant to the underlying claims and a motive to lie); county recorders' offices (showing debts, liens, property records, birth, death, and marriage records); and military records (DD Form 214, Report of Separation from Military Service).

The federal Fair Credit Reporting Act (15 USC §§1681–1681x) and similar state consumer information laws may impact an investigator's ability to obtain certain types of information. It is important to be aware of the regulations and not violate statutory prohibitions on obtaining confidential information. It may be possible and legal to gather some types of information without specific consent of the party under investigation; however, some statutes may require post-investigation disclosure of certain information to the investigated party. Further, documentation related to comparable employees

should be obtained when the investigator is investigating a FEHA or Title VII disparate treatment claim.

Due to privacy rights of employees, the investigator should not seek medical or genetic diagnosis or prognosis information or documentation from the parties, comparable employees, or witnesses. All parties have privacy rights in their medical records, including, but not limited to, rights protected by GINA (Genetic Information Nondiscrimination Act of 2008 (42 USC §§2000fff–2000fff-11), 42 USC §2000ff-5 and 29 CFR 1635); FMLA (Family and Medical Leave Act (29 USC §§2601–2654); HIPAA (Health Insurance and Portability Act of 1996 (42 USC §§201–300aaa-13), 42 USC §1320d-2); ADA (Title I of the Americans with Disabilities Act of 1990, 42 USC §S12101–12117); and CMIA (California Medical Information Act, CC §56—59); and provisions of the state constitution. If a complainant is raising a disability discrimination claim or a claim of failure to reasonably accommodate a disability claim, the investigator should obtain a written waiver from the complainant before seeking to obtain any medical or workers' compensation documentation.

Finally, it is advisable for the investigator not to review the personnel files of the parties before conducting the investigation, so as not to prejudge the current claim. Although the investigator may request a party's file at the commencement of the investigation, it should be held and not reviewed until after that party's interview is concluded. The file might later become important to a credibility assessment.

Inspect Employer Training and Postings: Duty to Prevent Harassment

Under FEHA, Govt C §§12940(j)(1) and (k), employers are required to take reasonable steps to prevent harassment in the workplace, and it is an

unlawful employment practice when they fail to do so. FEHA also requires 2 hours of mandatory sexual harassment training every 2 years for supervisors if the employer has 50 or more employees, including contractors. Govt C §12950.1(a). An employer's failure to comply with this law will not, in and of itself, result in employer liability, nor will compliance with the law insulate an employer from liability (Govt C §12950.1(d)); however, an investigator make take either of these factors into consideration when reaching a conclusion on the issue of whether harassment occurred. Therefore, an investigator should request the harassment prevention training records and attendance records concerning an employee accused of unlawful harassment.

Under the FEHA, an employer is required to post the Department of Fair Employment and Housing (DFEH) poster on discrimination and sexual harassment (DFEH-162 English and DFEH-162S in Spanish) in a prominent and accessible location in the workplace. Govt C §12950(a). Some employers also issue to all employees a DFEH brochure titled "Sexual Harassment Is Forbidden By Law" (DFEH-185 English and DFEH-185 Spanish) and a DFEH "information sheet on sexual harassment". Govt C §12950(b). The information sheet is required to be delivered in a way that ensures receipt by each employee, *e.g*, including the information sheet with each employee's paycheck. Govt C §12950(c). An investigator should check for these postings and brochures when a complainant alleges that the employer did not take adequate or reasonable measures to prevent harassment.

Note-Taking Methods

Workplace investigators use many different methods to document interviews, *e.g*.: (1) cryptic handwritten notes; (2) copious handwritten notes allowing the witness to read the notes, make corrections, and sign each page; (3) handwritten notes converted into a typed statement, which the witness is

later allowed to revise and sign; (4) notes taken on a laptop; and (5) digital recording with the interviewer summarizing or transcribing the statements. No doubt there are many variations of these methods.

No court or regulatory body has specifically held that any method is preferred over any other. However, the author's preferred, and usual, method of documenting witness statements is to record the interviews digitally, summarize the oral statements in the investigation report, and transcribe the statements if desired by the client. In instances where a company (or its litigation counsel) is opposed to digital recording, the author will switch to the handwritten notes method and have the witnesses review and sign off on each page of the notes. Of course, California law requires permission from the interviewee to record any two-way conversation before recording.

In the author's experience, there are two reasons why some investigators do not use the audio recording method: (1) the purported "chilling effect" on the witnesses; and (2) the fact that the investigator's voice might reflect a negative tone or bias (or something worse) and be played back to a jury, thus casting doubt on the entire investigation. If the investigator is very experienced, *e.g.*, has a work history of deposing hundreds of witnesses in litigation, the benefits of audio recording should far outweigh the negative aspects.

"Chilling Effect" Argument

Long gone are the bulky audiocassette recorders that used to sit in the middle of the interview table. Digital recorders are now as small as 1" x 4", and they tend to disappear from the witness' mind shortly after the interview begins. Before the investigator turns on the recorder, he or she should try to make the witness feel at ease with the process. The witness usually sees the recorder sitting on the table as soon as he or she walks into the room. In the author's experience, only about once in every 150 interviews does anyone ever

say, “Oh, you’re recording?!” Especially with public sector investigations, recording is very common, and most employees seem to expect it. If a witness is not assuaged by an explanation of the circumstances when someone other than the investigator would ever listen to the recording, then the investigator should switch to the handwritten notes method, but also document the reason (in a footnote) why that particular interview was not recorded.

It is common practice to record police officer and firefighter investigations because the California statutes governing these investigations state that the interviews “may” be recorded. See Govt C §§3300-3313, 3250-3262. Usually, the police officer’s or firefighter’s union representative will bring his or her own recorder and will record the interview, whether the investigator records it or not. In addition, some collective bargaining agreements require recording of interviews. For extra assurance, the interviewer can always ask the witness, either in the middle or at the end of the interview, if he or she has, thus far in the interview, felt inhibited in any way by the recorder. If so, the investigator can offer to turn it off for any additional comments or changes to the witness’ prior statements. In the author’s experience, no witness has ever taken the author up on that offer.

Negative or Biased Tone of Voice Argument

To avoid this argument, the investigator should simply not display a negative or biased tone of voice. This takes practice. If the investigator is a lawyer or a retired police officer, he or she may be accustomed to interrogating or deposing witnesses in a setting where the investigator is reasonably free to show whatever emotion or attitude is desired to obtain the results or answers wanted. This manner is not appropriate for a neutral investigator, however. Even if the investigator believes that a witness is lying, the investigator should not divulge his or her thoughts by facial expression or by tone or inflections of

voice. Once an investigator becomes accustomed to doing so and becomes good at it, this argument should not come into play. Moreover, an investigator should ask open-ended questions, so that recording interviews will keep the investigator on his or her toes to ensure questions are properly asked.

Positive Aspects of Recording

If interviews are recorded, investigators shield themselves from typical arguments that can be used against them in litigation. Some of the arguments litigants may make when investigators do not record their investigative interviews include: “She left crucial information out of her report that I told her during my interview”; “She mischaracterized what I said in my interview”; “She misquoted me”; “She cried when she heard my story about how terrible I was treated”; “She spoke to me in a rude, disrespectful, or retaliatory way”; “She threatened me if I did not give testimony the way she wanted”; “I was held captive in the room by the investigator [false imprisonment]”; “I was tired and wanted to take a break and the investigator would not let me leave.” An unscrupulous party may use many different approaches in attempting to discredit the investigator and his or her efforts to be thorough, accurate, honest, and unbiased.

Recording also eliminates the possibility that a witness may see the investigator take note of something in particular that the witness said and then attribute something negative to the fact that the investigator took special note of it. Recording further allows the interviewer to make continuous eye contact with the witness, which aids rapport and also helps the interviewer better observe the demeanor of the witness at all times. Finally, digital recording makes it easier to interview witnesses more efficiently all day long and saves the investigator from writer’s cramp.

The investigator should be mindful of Penal C §632(a), which states:

Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

This statute does not require the investigator to ask, "Is it okay with you if I record?" All an investigator needs to do is to advise the witness that the investigator intends to record the interview. If the witness does not object, the recording can proceed.

In the absence of some unforeseen circumstances, an investigator should follow the same note-taking *or* recording procedure for all witnesses and parties, unless a witness or party objects to recording and expresses discomfort or refuses to proceed with the interview.

WRITING THE REPORT

The employer and the employer's litigation or general counsel will expect a comprehensive written report. Most employers also appreciate receiving an executive summary of the findings at the beginning of the report, followed by an explanation of the methodology used during the course of the investigation, a discussion of the evidence received, a discussion of how credibility issues were resolved, and detailed factual findings. The appropriate burden of proof to apply to the investigator's fact-finding is a "preponderance of evidence," *i.e.,* a feather's weight of evidence on one side--not the criminal standard of "beyond a reasonable doubt" or the fraud standard of "clear and convincing" evidence.

The investigator should avoid too much paraphrasing in the written report because that may be subject to attack if the investigator gets it wrong or does not incorporate enough relevant information into the summary.

Harassment or discrimination claims are rarely established by direct evidence such as witnessed racist statements or videotapes of harassing conduct. The absence of any eyewitness to sexual harassment is the norm, rather than the exception. The conduct generally takes place behind closed doors. Indirect evidence—such as a pattern of mistreatment of a protected class of persons, arbitrary enforcement of rules, similar complaints by others of the wrongdoing, contemporaneous complaints by the complainant to friends or family—may be relied on as evidence of wrongdoing. The personal lives of the parties are not relevant, except in unusual circumstances.

Assessing Credibility of the Witnesses

The investigator should make credibility assessments when there are conflicting versions of events. According to the EEOC Guidelines, credibility factors that the investigator should consider include: the inherent plausibility of one version or another (whether the testimony is believable on its face); the witness' demeanor; any motive to lie; corroborative evidence; and any past record of similar conduct. Although the fact that the alleged harasser has a past record of inappropriate or harassing conduct may be evidence of guilt, it is not a conclusive presumption of guilt. Another factor to consider is any evasive or deceptive response, *e.g*., when a witness avoids a direct answer to a question several times by dancing around the question. Other factors to consider include: a witness providing contradictory information on an important issue, and a witness admitting to something so similar to what has been alleged that a finding can be made that the alleged conduct occurred. No one factor is

determinative regarding credibility, but the investigator must consider all information in light of all the circumstances.

Where there are conflicting versions, and a lack of corroboration, a credibility assessment may form the basis for the investigator's determination. The fact that a complainant was slow to complain is not conclusive evidence of anything. Most employees are reluctant to complain of wrongdoing by their coworkers or supervisors. They are fearful of retaliation or ostracism or fearful that they will not be believed. The California Supreme Court has recognized these as legitimate reasons for a victim not to complain. Investigators should not assume that a claim does not have validity simply because the victim did not complain or took a long time to complain. Face-to-face interviews should be conducted to observe the interviewee's demeanor and to assess credibility unless there is a reasonable and justifiable reason that the investigator is unable to do so.

TAKE APPROPRIATE REMEDIAL ACTION

If it is determined that wrongdoing has occurred, the employer must take immediate and appropriate corrective action designed to: (1) stop the wrongdoing; (2) correct its effects on the complainant; and (3) ensure that the wrongdoing does not recur and does not adversely impact the complainant. If no determination can be made because the evidence is inconclusive, or if the determination is that the complaint cannot be substantiated, the employer should still undertake further preventive measures such as training and monitoring. Both parties should be advised of the results of the investigation and that corrective action, if any, has been taken. This disclosure sends a message to employees that complaints of wrongdoing will be taken seriously and that appropriate remedial action will be taken when wrongdoing has been

found to occur. These disclosures are privileged and constitute a complete defense to any defamation claim.

The employer should monitor the workplace for 6 months to a year after the investigation, to ensure that no further wrongdoing and no retaliation against the complainant or any of the witnesses occurs. The employer should have someone from the human resources department or management check with the complainant on a regular basis to follow up on the resolution of the issues. The employer must ensure that all company policies and procedures regarding complaint procedures and investigations are followed and applied consistently.

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