

# The Do's and Don'ts of Workplace Investigations

- *Kevin Battle*
- *Barbara Moore*
- *Mary Tabin*



The materials and information have been prepared for informational purposes only. This is not legal advice, nor intended to create or constitute a lawyer-client relationship. Before acting on the basis of any information or material, readers who have specific questions or problems should consult their lawyer.

## Today's Topics

- Why a Good Investigation is Important
- The 12-Step Process for Effective Investigations
- The Dos and Don'ts of a Workplace Investigation
- Crack the Case of the Bad Workplace Investigations



## Why A Good Investigation Is Important

## Why Investigate Workplace Issues?

- To get the most complete and accurate facts
- To make good decisions
- To document the good reasons for our good decisions
- So our values, principles and policies aren't just talk: we act on them
- So colleagues trust their leaders' decisions
- To minimize the risk and cost of legal claims



## Why Investigations Are Critical

A sound investigation is critical because:

- For both discipline and harassment cases, *a sound investigation is an essential element of the employer's successful defense. Investigations are required for unlawful harassment/discrimination issues*

And:

- The investigation will be an essential source of the information used to prove (or disprove) the elements of a discipline or harassment case.

## Why Investigations are Critical

- Or, more simply:

Bungle the investigation,  
lose your case.



## The Twelve-Step Process for Effective Investigations

## Step 1: Consider Immediate Temporary Action

- Consider a suspension
  - To remove risk of personal harm in a dangerous situation – e.g., *violence, high medical risk, serious safety risks*
  - To stop the accumulation of workplace problems – e.g., *harassment*
  - To prevent additional loss to the Company – e.g., *financial losses, trade secrets*
  - To protect the integrity of the investigation – e.g., *high ranking employee accused*
- Confirm in writing that:
  - The suspension is *pending investigation*, and a decision will be made after the investigation is complete; and
  - The employee is not to interfere with the investigation or potential witnesses.
- Get contact information!

## Step 1: Act Quickly (Cont.)

- Begin process of investigation within 2-3 business days of receiving complaint.
- Most investigations should be completed within 7-10 business days.
- Allowing complaints to linger and investigations to continue for weeks creates concerns.
  - Confidence in the process
  - Retaliation
  - Confidentiality/gossip
  - Memory

## Step 2: Get the Right People Involved Up Front

- Identify the Decision Maker(s)
  - Who has ultimate control over the scope and manner of the investigation?
  - Who will receive the investigator's report?
  - Who will decide on the actions to be taken based on the investigation?
- Consider whether legal counsel should be involved – e.g., potential for future legal claims against the Company, high-ranking employee, attorney-client privilege protection, culture concerns, sensitive issues, HR workload, etc.
- Consider whether to contact law enforcement – e.g., in cases of suspected or threatened criminal activity

## Step 3: Prepare An Action Plan

- *Prepare a written outline of the investigation plan, documents to be reviewed, and the topics to be covered with each witness. Consider:*
  - What do I need to know about what happened?
  - Are there policies or rules that might apply to this situation?
  - What documents might be relevant? Do I have them?
  - Who else might have relevant documents?
  - Who are the likely witnesses to be interviewed?
  - What do I need to learn from each of them?
  - What is the best order in which to interview them?
  - What if a witness won't answer questions?
  - What record of the interviews will be needed? My own notes? Signed statements? Recordings?



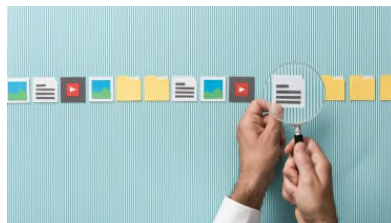
## Step 4: Gather Documents And Other Historical Information

- Gather and review as much as you can before interviewing witnesses or confronting the suspected offender.
  - Existing documentation of the current issue or incident
  - Work records of the employees involved
  - Relevant Company policies
  - Information about previous similar cases



## Step 5: Obtain New Information?

- If the bad acts are still happening, consider steps to obtain new information before interviewing witnesses:
  - Surveillance
  - Investigation of computer files or email activity
  - Audio monitoring or recording



## Step 6: Interview the Complainer

- Take all complaints at face value; do not form any initial conclusions.
- Don't judge the complaint by the complainer.
- Speak with the complainer in person.
- Use a written, prepared, consistent introduction.
- Obtain *specific details*. Do not settle for broad accusations, generalizations, or ambiguous statements.

## Step 6: Interview the Complainer

- Get a *complete* list of allegations.
- A signature from the employee is strongly preferred, but should not be required over the employee's objection.
  - If necessary, confirm with your own memo: "This is to confirm what you told me ..."
- Have the complainer identify any witnesses and other corroborating information.





## Step 6: Interview the Complainant (Cont.)

- Assure the complainant that
  - a prompt and thorough investigation will be conducted
  - he or she will be informed of the results
  - corrective action will be taken as appropriate based on the results of the investigation.
  - No retaliation
- No broad promise of “confidentiality.” Confidentiality will be maintained to the extent that it is possible to do so.

## Step 7: Interview Other Witnesses

- Use the standard introduction to explain the “rules” of the investigation.
- Begin with open-ended questions that invite the witness to tell the story:
  - What do you know about X?
  - What happened?
  - What did you see?
  - Who did what?

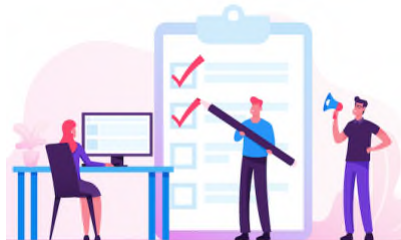


## Step 7: Interview Other Witnesses (Cont.)

- Then use specific questions about specific incidents, behaviors, or events that have been raised.
- Finally:
  - What else do you think I should know?
  - Do you know of any other witnesses I should talk with, or other information that should be considered?
  - (Where confidentiality is required) Do not talk with others about this interview or the investigation.

## Documenting The Interviews

- Three Options
  1. Investigator's notes or memos
  2. Signed witness statements
  3. Recorded statements



## Option 1: Investigator's Notes

- **Record facts:** What did the witness see or hear? What does the witness know? What did the witness say in the interview?
- **Record observations:** “The witness appeared to be very angry; the witness started crying.”
- **Record effects:** “John’s action caused the company to pay him for 4 hours he did not work.”



## Option 1: Investigator's Notes (Cont.)

- Remember that all notes are likely to be “discoverable” if there is a legal claim (exception for attorney conducted investigation).
- The content of notes and reports can be used as evidence to prove discrimination, retaliation, or other claims.
- The content of notes and reports can be used to undermine the Company’s grounds for its decision.

## Option 1: Critical To Avoid

- Therefore, it's critical to avoid:
  - References to protected characteristics (e.g., age, race, sex, disability, medical information);
  - References to protected activities (e.g., FMLA leave, union activity);
  - Except where they are discussed objectively in direct relation to the subject of the investigation (e.g., references to sex in a sexual harassment investigation)



## Option 1: Avoid

- Comments that could be interpreted as hostility toward the *complaint* or the *complainer* (as opposed to the lack of evidence to support the complaint)
- Personal dislike for the claimant or a witness
- Sarcasm, humor



## Option 1: Avoid (Cont.)

- The investigator's conclusions, judgments, inferences, comments on liabilities:
  - "Bob has obviously created a hostile work environment for Mary."
  - "Bob is discriminating against Mary."
  - "Bob has a bad attitude."
  - "The Company has tolerated safety violations in this plant for a long time."



## Option 1: Legal Review

- **Legal review:** Before finalizing memos, consider sending drafts to legal counsel (in a privileged lawyer-client communication) for advice about content, presentation, and process.
- Once the memo is finalized, destroy the drafts that were exchanged with counsel – *UNLESS* a legal claim has already been asserted or threatened, because that would give rise to a duty to preserve the evidence.

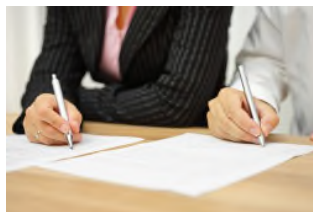
## Option 2: Signed Witness Statements

- Consider obtaining signed statements when:
  - Witnesses disagree about the facts.
  - The allegations or the potential consequences could be serious (for example, theft, sexual harassment, potential discharge, or criminal conduct).
  - There is a chance that the witness might not be around in a few months or a few years.



## Option 2: Consider Obtaining Signed Statements When (Cont.)

- The witness is not a Company employee.
- You have doubts about the witness's trustworthiness.
- The case involves an employee who has other issues or disputes with the Company.
- The case involves a potential legal risk (e.g., where any of the people involved is in a legally "protected class").



## Option 2: Preparing A Witness Statement

- In most cases, the interviewer should draft it.
- Follow all the rules for Investigator's Notes above, including legal review.
- Keep it absolutely factual. Avoid exaggeration, overstatement, and understatement.
- Include all of the important points – pro or con.
- A poor statement can be worse than no statement.
- A poor statement can suggest a biased investigator.

## Option 2: Signed Witness Statements

- Allow the witness to make changes, until s/he's satisfied it's correct.
- Get the signature.



## Option 3: Recorded Statements

- Tape recorder, video recorder, or court reporter, for example
- More confrontational, but people have become less resistant
- Can be highly reliable
  - But beware of equipment issues, clarity of voices and words, etc.
  - Requires the highest degree of preparation



## Step 8: Interview the Accused

- Give the standard introduction.
- Begin with general open-ended questions.
- Allow the accused to tell his or her version of the entire story.
- Where there are specific allegations, get a specific response to each allegation.
- Ask for any corroborating information or other witnesses.



## Step 8: Interview The Accused

- Instruct the accused:
  - No decision will be made until the investigation is complete.
  - Do not discuss this with any other employees or witnesses. That will look like you're interfering with the investigation or pressuring witnesses.
  - Do not communicate with the complainer; any intimidation or retaliation is strictly prohibited.
  - The Company will investigate all relevant information and witnesses you identify for us.

## Step 8: Interview The Accused

- Consider whether the accused should continue to work.
- Consider whether to obtain a signed statement.



## Step 9: Decide What Happened and Prepare A Report

- You have the right to weigh the evidence and decide which facts you believe or do not believe.
- There is no requirement that the decision-maker be perfectly correct.
- Viewed objectively, what does the weight of the evidence reasonably show?
- Involve others in decision if there is potential legal exposure

## Step 9: Decide What Happened (Cont.)

- He said, she said” cases: *MAKE A DECISION.*
  - Maybe one version is more believable than the other.
  - Maybe one person is more believable than another.
  - Maybe there are witnesses that support one side over the other.
  - Maybe there is no way to decide who is telling the truth. Some corrective action might still be required.
  - State the reasons, based on the results of the investigation, for any credibility assessments.
  - Employers have a “good faith defense” as long as the investigation is done correctly

## Step 9: Decide What Happened (Cont.)

- State a specific conclusion for each specific allegation.
- Use concrete facts rather than broad conclusions or generalizations:
  - No good: “Joe has heard Jim discuss inappropriate topics with Sue.”
  - Good: “Joe confirmed that Jim told Sue that he and his work buddies made frequent visits to local strip clubs during the workday.”



## Step 9: Decide What Happened (Cont.)

- Be objective. Avoid subjective remarks like:
  - “the accused employee lacks credibility” or
  - “the comments were only jokes and were not intended to be offensive.”
- Be confident about the statements and findings in the report so that you can testify to them under oath. If you cannot, you probably aren’t finished with your investigation.
- Consider legal review of the draft report, in a privileged lawyer-client communication.

## Step 10: Decide On The Action To Be Taken

- Likely to require higher level review and management participation.
- The action should be consistent with and supported by the facts and conclusions from the investigation.

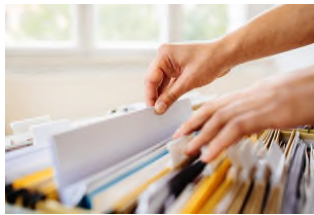


## Step 11: Inform The Complaining Party And The Accused

- Speak with each separately.
- Provide a written “fact and findings” letter to each.
  - We recommend not providing the report to either party
  - Ask each to sign an acknowledgement of receipt.
  - Assume the letter won’t remain private.
- Offer each the opportunity to provide written comments.

## Step 12: Filing and Follow-Up

- File documents in the correct places:
  - *Records of investigations* should be kept in an investigation file separate from the personnel records of the employees involved.
  - Any *disciplinary action* should be documented in the *personnel record* of the employee being disciplined, with an explanation of the reasons for the discipline such as the investigation report, but not the complete investigation record.



## Step 12: Filing and Follow-Up

- *Follow up:* In the following weeks, check back with the people involved to make sure the problem has remained resolved.
- This is high priority in harassment cases.
- Document the follow-up conversation.



# The Dos and Don'ts of a Workplace Investigation

## Do Or Don't?

Someone has reported that they overheard an employee, Troy, talking with Bob about his new hunting rifle and that he would show Bob the gun at lunch. The employee is worried that the gun is in Troy's locker or vehicle.

The Company has a strict policy prohibiting employees from bringing any weapons to work, including recreational weapons.

*Should HR pull Troy off the line and ask him to open up his locker and vehicle for inspection?*

**DO! But...**

## **Be Aware of “Invasion of Privacy” Claims**

- An “Invasion Of Privacy” can occur when:
  - The employer *unreasonably intrudes ...*
  - Into either a *place or information* the employee reasonably expected to be *private ...*
  - Where the employer had *no legitimate business reason* to do so.
  - Some states (like Texas) allow employees to have weapons in their vehicles on company property
- A potential privacy risk includes live or video surveillance, searching lockers, reviewing employees’ work equipment or emails

## How To Avoid “Invasion of Privacy” Claims

- Issue policies informing employees that they have *no right of privacy* in lockers, email, computers, etc.
- Obtain the employee’s consent to a search or inspection, which can be established in advance by a written policy.
- Ensure that searches, surveillance, etc., are conducted for *legitimate business reasons*.
- Use *reasonable, non-offensive methods* to conduct searches or surveillance



## Do or Don't?

You suspect that the Company’s top salesperson is preparing to start their own business and worry that he will steal the Company’s confidential information and recruit others from the sales team. You decide to gather more intelligence before confronting the employee.

*Can you add an audio recording device in the bathroom in order to catch them recruiting other employees?*



## DON'T! Because...

## Secret Audio or Video Recordings

- Recording Phone or In-Person Conversations
  - Federal law prohibits using any device to listen to or record electronic, oral or telephone conversations, unless there is “consent”
  - Generally, secret recording is legal if only one party consents to it – like the employee you’re talking to.
    - But an employer can prohibit secret recording
  - Beware: Some states prohibit recording unless all parties consent.
- Most states prohibit video and audio surveillance in any “private” place.
- Surveillance is generally permitted in areas that are not private.
- So what’s a “private place”?
- Be sure to check the law in your state before using electronic surveillance.



## Do or Don't?

You've completed your interview of the complaining party and other witnesses. You start the next step of interviewing the accused party. You decide to meet in your office for more privacy. During the first five minutes of the meeting, it becomes clear that they are refusing to answer any of your questions.

You are worried about having a complete investigation, so you tell the accused that you have locked the doors and they will stay in the room as long as it takes until they start to cooperate.

*Can you do this?*

## DON'T! Because...

## False Imprisonment Claims

- **Definition:** Restraining or confining another person against his liberty, without the right or authority to do so.
- **Lesson:** Exercise great caution before physically restraining any witness for an interview.
  - The employee who walks out of the interview may be subject to discipline for doing so.
  - Write in your investigation notes that the employee is refusing to answer questions and detail what those questions are and his/her demeanor.

## Do Or Don't?

Alice has accused Frank of stealing sales commissions that belong to the Company. You do not have any evidence yet proving that this happened, but you repeat these allegations to Frank during his interview.

*Is that permissible?*

## DO! But Be Aware Of...

## Defamation

- Definition of Defamation:
  - A false statement of fact about a person
  - That is communicated to someone else
  - That causes damage to the person in his or her personal reputation or line of work.
    - Includes a false accusation of the commission of a crime, or false statements about a person's work.
- Truth is always a defense. But an employee will often dispute the truth of an accusation.
  - Do you want to have to prove it's true?

## Defamation: Qualified Privilege

- “Qualified Privilege:” An employer is not liable for communicating false information, so long as:
  - The false communication was limited to those people who had a legitimate business need to know the information;
  - The employer did not have an obvious reason to know the statement was false; and
  - The communication was made to promote a legitimate business interest.

## Defamation: Qualified Privilege (Cont.)

- Qualified Privilege
  - This privilege *does not protect* statements made to someone who does not have an important business reason to know the information.
  - When coworkers were told of a fired employee’s wrongdoing “as a means of restoring morale among the workforce in general and quieting rumors,” the *privilege did not apply*.
    - So the employer could be held liable for defaming the former employee.



## Do Or Don't?

You've just wrapped up a big investigation, which resulted in the termination of the Director of the local arts museum. You are at a happy hour event with other HR professionals when one of your friends mentions they heard through the grapevine that the Director was fired and incorrectly guesses the reason behind the termination. You decide to set the record straight and clarify the reason why the Director was fired.

*Is that permissible?*

## DON'T! Because...

## Disclosing Disciplinary Information

- Michigan's Bullard-Plawecki Act
  - Prohibits disclosure of "disciplinary information" to individuals outside the employer's organization, except in limited circumstances.
  - *Even if the information disclosed is true, the employer can be liable if the disclosure caused damage to the employee*
- **Lesson:** *Once you've completed your investigation and made a good decision, keep quiet about it.*



## Do Or Don't?

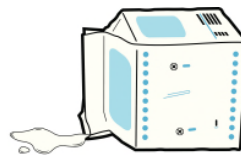
Sheila files a complaint that her supervisor, Rob has been inappropriately touching and texting her. HR launches an investigation and reviews copies of text messages between Sheila and Rob. Although the messages are rude, they do not appear to be discriminatory or harassing. HR moves Rob into a different area of the plant and instructs Rob to not contact Sheila. Three months after conducting the investigation, Sheila quits the Company. On her way out the door, Sheila explains that she felt like had to quit because Rob was continuing to look at her "funny" and that they'd be hearing from her lawyer. However, six months go by and the Company has yet to hear from an attorney.

*Can Human Resources now delete Sheila's inbox and the copies of the text messages?*

## DON'T! Because...

## “Spoliation of Evidence”

- Destroying (or failing to preserve) evidence that may be relevant to potential litigation
  - E.g., failing to preserve physical evidence, failing to remove information from files that are subject to automatic deletion or destruction
- Spoliation can damage the employer’s ability to defend a legal claim.
  - E.g., may limit use of other evidence on the same issue, affects credibility issues





## Case Scenarios



### The Case of the Broken Scale

Two employees complained to you that they've heard other employees using the N-word in the workplace. You immediately launch an investigation and interview all the employees on that shift. Through the investigation, you learned that some employees have used the N-word at work. However, some of the Caucasian employees also complain that their African American colleagues tease them, which hurts their feelings. You decide that everyone involved has been disrespectful and that this was just a typical case of horseplay among employees. You conclude the investigation by asking everyone to be respectful and do not issue any disciplinary action.



## The Case of the Broken Scale (Cont.)

- What went wrong in this case?
- What would you have done differently?

## The Case of the Runaway Train

You are investigating allegations of a hostile work environment. The complaining party has suggested that you interview several witnesses to alleged incidents. In turn, those witnesses also propose that you interview additional employees. Due to key witnesses being absent, you are unable to interview all of the witnesses in the same week. After three weeks, you become antsy about finishing the investigation. You review your notes from the ten interviews, and use those to decide there is insufficient evidence to support the allegations and you close the investigation. A few weeks later, the complaining employee quits and files an EEOC Charge alleging hostile work environment.



## The Case of the Runaway Train (Cont.)

- What went wrong here? What did the investigator forget to do?
- What would you have done differently?



**Kevin Battle**

616.831.1718

battlek@millerjohnson.com



**Barbara Moore**

269.226.2982

mooreb@millerjohnson.com



**Mary Tabin**

616.831.1753

tabinm@millerjohnson.com

**DETROIT**

409 E. Jefferson Ave  
Fifth Floor  
Detroit, MI 48226

**GRAND RAPIDS**

45 Ottawa Ave SW  
Suite 1100  
Grand Rapids, MI 49503

**KALAMAZOO**

100 W Michigan Ave  
Suite 200  
Kalamazoo, MI 49007

[millerjohnson.com](http://millerjohnson.com)