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THE ART AND SCIENCE OF THOUGHTFUL WORKPLACE INVESTIGATIONS: LEGAL PRINCIPLES

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This article describes the legal structures which form the basis for the duty to perform workplace investigations, the professional standards for what constitutes a "reasonable" workplace investigation, and explores specific issues in conducting an "appropriate and reasonable" workplace investigation.

Standards for conducting workplace investigations initially grew out of an employer's legal duties under Equal Employment Opportunity (EEO) laws, specifically Title VII of the Civil Rights Act of 1964 (Title VII). However, these standards have largely migrated into other contexts, including FMLA, ADA, ADEA, Whistleblowing (e.g., under the Sarbanes-Oxley Act), ethics and compliance violations, general claims of misconduct and Title IX of the Education Amendments of 1972 (Title IX).

The fundamental reason to conduct a workplace investigation is to ascertain the facts so that an organization can make a reasonable decision with respect to employee concerns. How that investigation is conducted is crucial. A poorly conducted investigation can lead to its own host of problems, including failing to understand and appropriately address employee concerns along with accusations that the organization conducted a sham investigation to cover up wrongdoing or mask discriminatory or illegal actions.

A. LEGAL STANDARDS FOR CONDUCTING A WORKPLACE HARASSMENT INVESTIGATION - GENERALLY

The foundation of an employer's legal duty to conduct workplace investigations arose out of anti-discrimination and harassment laws. Under Title VII of the Civil Rights Act of 1964, it is an unlawful employment practice:

> "for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC §2000e-2(a)(1).

Unlawful harassment constitutes unlawful discrimination. Meritor Savings Bank FSB v. Vinson, 477 US 57 (1986). In 1998, the Supreme Court provided guidance on how employers should fulfill their duties to prevent and correct sexual harassment by a supervisor under this statute in Faragher v. City of Boca Raton, 524 US 775 (1998) and Burlington Industries v. Ellerth, 524 US 742 (1998).

In these two cases, the Supreme Court delineated between two types of sexual harassment by a supervisor: (1) where an employee is subjected to a tangible adverse employment action (such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, a significant change in benefits, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities); and (2) where the employee is not subjected to a tangible adverse employment action.

In addition, when the harassment is alleged to have been perpetrated by a co-worker or peer, an employer can show it acted "reasonably" by taking prompt and appropriate corrective action. In either case, the employer's investigation is a key component of proving "reasonable" action by the employer.

In its 2024 Enforcement Guidance on Harassment in the Workplace[1], the EEOC explains that liability standards depend on the identity of the harasser:

1) If the harasser is a proxy or alter ego of the employer, such as a high level person or officer of the corporation, the employer is liable for the harasser's conduct. The actions of the harasser are considered the actions of the employer, and there is no affirmative defense.

[1] https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace, vacated in part by Texas, et al. v. EEOC, 2:24-CV-173 (N.D. Tex. May 15, 2025).

2) If the harasser is a supervisor and the hostile work environment includes a tangible employment action against the victim, the employer is liable for the harasser's conduct. There is no affirmative defense.

3) If the hostile work environment does not result in a tangible employment action, whether the harasser is a supervisor, a co-employee or a non-employee, the employer is vicariously liable for the actions of the harasser. The employer, however, may attempt to prove a two-part affirmative defense:

    a. The employer acted reasonably to prevent and promptly correct harassment; and

    b. The complaining employee unreasonably failed to use the employer's complaint procedure or to take other steps to avoid or minimize harm from the harassment.

Realistically, this means having an effective policy and complaint procedure and promptly following up on complaints in a reasonable and appropriate way.

In Burlington, the Supreme Court acknowledged that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." Id., at 764. The Court recognized Congress' intent to promote conciliation in the Title VII context by encouraging the development of grievance procedures which encourage employees to report harassing conduct, pursuant to 29 C.F.R. § 1604.11(f). Pursuant to this intent, an employer generally has a duty to take reasonable care to prevent and promptly correct harassing behavior of which it knows or reasonably should know. The employer's conduct is reviewed for negligence in determining whether it is liable for unlawful harassment. Dawson v. Entek Int'l, 630 F3d 928, 934-35 (9th Cir 2011).

In Swenson v. Potter, 271 F.3d 1184 (9th Cir 2001), the 9th Circuit described a prompt investigation as "[t]he most significant immediate measure an employer can take in response to a sexual harassment complaint." The Court explained:

> "An investigation is a key step in the employer's response, * * * and can itself be a powerful factor in deterring future harassment. By opening a sexual harassment investigation, the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace. An investigation is a warning, not by words but by action. We have held, however, that the "fact of investigation alone" is not enough, * * *. An investigation that is rigged to reach a pre-determined conclusion or otherwise conducted in bad faith will not satisfy the employer's remedial obligation."

Exercise of Reasonable Care to Prevent Harassment

An employer's adoption of an anti-harassment policy followed by dissemination of the policy to employees generally shows that the employer has exercised reasonable care to prevent harassment in the workplace. Kohler v. Inter–Tel Techs., 244 F3d 1167, 1180 (9th Cir 2001).

Employer's duty is Triggered by a Complaint of Harassment or by the Knowledge that Clearly Unwelcome Conduct is Occurring.

The employer's duty to provide a prompt, thorough and impartial investigation is triggered by a complaint of harassment or by the employer's knowledge that clearly unwelcome conduct is occurring.

For example, in Hardage v. CBS Broadcasting, Inc., 427 F3d 1177 (9th Cir 2005), Hardage made what the Court described as a "vague" and "minimal complaint," which nevertheless resulted in an employee from the company's Human Resources Department interviewing him. He refused to provide details and insisted on handling the situation himself. In this situation, the 9th Circuit held that the employer's response fulfilled its duty to investigate as a matter of law, citing McPherson v. City of Waukegan, 379 F3d 430, 441 n. 7 (7th Cir 2004) ("`When ... the only possible source of notice to the employer ... is the employee who is being harassed, she cannot withstand summary judgment without presenting evidence that she gave the employer enough information to make a reasonable employer think there was some probability that she was being sexually harassed."). See also, Williams v. Whitley Memorial Hosp., 3:21-CV-892 JD (ND Ind, 2023) ("the negligence standard does not demand employers retain precognitive human resources investigators to detect future employee harassment" where plaintiff never actually made a complaint but argued a complaint by another party should have led to the discovery of plaintiff's allegations of harassment).

Generally speaking, an employer should conduct an investigation when it learns of a complaint of harassment or when it has a reasonable belief that harassment is occurring in the workplace. For example, in Okonowsky v. Garland, 109 F.4th 1166 (9th Cir 2024), the prison managers appeared to endorse sexually harassing and targeting Instagram posts where they were aware of them but did nothing until a formal complaint was received.

Reasonable Remedial Measures

The employer's actions are generally judged against the standards of whether or not they were reasonably calculated to end the harassment. The EEOC Guidance on Harassment provides that the employer's remedial measures must include an effective investigation process which will provide a prompt, thorough and impartial investigation into alleged harassment.

In Kohler, supra, the 9th Circuit described an "exemplary" response to a complaint of harassment where the employer promptly investigated once it learned of the complaint of harassment, attempted to engage the complainant in its investigation, took remedial measures calculated to end harassment and provided training to the workforce. According to the Court:

> "The undisputed facts of this case establish that Inter-Tel was exemplary in its investigation of Kohler's allegations. The first notice Inter-Tel received of Kohler's sexual harassment allegations was from the EEOC. Inter-Tel responded by promptly hiring a neutral third party to investigate Kohler's allegations. In addition, Inter-Tel immediately wrote to Kohler and extended an offer for her to return to her position at Inter-Tel, with a new supervisor and under the same terms and conditions as her original employment. Finally, Inter-Tel

offered Kohler back pay from the time of her resignation through her reinstatement. Kohler did not respond to Inter-Tel's offers.

"The independent investigator, who was an employment law attorney, repeatedly sought Kohler's participation in the investigation. Kohler never responded to these attempts because she "did not want to participate in the investigation." The investigator interviewed six Inter-Tel employees, including Herrera and all but one of the other Project Coordinators who reported to him. The investigator determined that Herrera had forwarded an offensive Donald Duck voicemail message to a number of employees. Ultimately, however, the investigator did not confirm Kohler's claim that she had been harassed. Inter-Tel wrote a letter to Kohler, informing her of the outcome of the investigation. Kohler never responded.

"After the investigation was complete, Inter-Tel reviewed its antiharassment policy with Herrera on two occasions even though no actionable harassment had been confirmed. In addition, Inter-Tel reprimanded Herrera and threatened to deny his eligibility for a "supervisor" position for sending the offensive voicemail message. Inter-Tel also conducted mandatory sexual harassment training seminars for the entire Emeryville work force on May 1, 1998, and again on May 27 and 28, 1998.

"Inter-Tel could hardly have done more to investigate Kohler's allegations in a prompt and neutral manner. These facts present a paradigm of the "reasonable efforts" the Supreme Court sought to encourage when it established the affirmative defense. Faragher, 524 US at 806. Inter-Tel clearly satisfied the first element of the affirmative defense." Kohler, supra, at 1181 (footnotes omitted).

In addition, in Swenson v. Potter, supra, the Court granted the employer's motion to set aside the jury verdict, finding the Postal Service's investigation to be prompt and entirely appropriate where (1) the investigation was begun three days after management learned of the grabbing incident and on the same day Swenson herself complained; (2) Swenson was asked for a written statement the same day she complained; (3) management scheduled a face-to-face meeting with the respondent to try to resolve her complaint; (4) the investigators spoke to the respondent and relevant witnesses; (5) the investigators interviewed Swenson with the assistance of a sign language interpreter three times; (6) managers met with Swenson throughout the investigation to ascertain the facts and also to ensure she was comfortable; (7) Swenson had the opportunity to present her complaint, articulate her concerns and express her view of preferred outcomes; and (8) the delay in concluding investigation was due to Swenson's own absences from work or the need to schedule a sign language interpreter.

The investigation was appropriate even though it did not sustain Swenson's claim of sexual harassment and a jury later disagreed. The Court held:

"According to Ellerth, the employer cannot be held liable unless it reacts negligently to the harassment complaint [citation omitted]. Conversely, the employer will insulate itself from Title VII liability if it acts reasonably. Obviously, the employer can act reasonably, yet reach a mistaken conclusion as to whether the accused employee actually committed harassment * * *."

Due Process

A basic principle of fairness requires that the respondent be interviewed (if willing) and be apprised of the allegations in enough detail so he or she can reasonably respond to them.

In Swenson, supra, the Court also considered the due process rights of the accused. After conducting an investigation, the Postal Service concluded that it could not support a case of sexual harassment against Feiner. The 9th Circuit explained:

> "The Postal Service could properly take into account that Feiner was covered by a collective bargaining agreement, and so had the right to grieve any discipline imposed on him. Having concluded that it had insufficient evidence to sustain a charge of harassment, the Postal Service had an entirely legitimate reason for declining to discipline Feiner and resorting to other methods of remedying the situation.
>
> "As a matter of policy, it makes no sense to tell employers that they act at their legal peril if they fail to impose discipline even if they do not find what they consider to be sufficient evidence of harassment. * * *. Employees are no better served by a wrongful determination that harassment occurred than by a wrongful determination that no harassment occurred. We should be wary of tempting employers to conduct investigations that are less than fully objective and fair. Title VII "in no way requires an employer to dispense with fair procedures for those accused or to discharge every alleged harasser. * * *."

B. PROFESSIONAL STANDARDS FOR WORKPLACE INVESTIGATIONS

An employer's obligation is to promptly and thoroughly investigate complaints of harassment in an unbiased manner, using a trained and/or experienced investigator. Although there is no law which requires an employer to use a third party neutral, the impartiality, experience and/or training of the investigator could be subject to question or attack if the employer chooses to use an investigator who is neither unbiased nor competent. Ensuring in house investigators are well trained and experienced is imperative. It is also important not to use an investigator who is subordinate to either the complainant or the respondent, as the disparities of power could lead to a less than neutral outcome.

AWI provides Guiding Principles for individuals to use in performing a reasonable workplace investigation.[2] Those principles are (1) whether to conduct an investigation, (2) determining who should conduct an investigation, (3) defining the investigation scope, (4) investigation planning, (5) communication with representatives of the employer, (6) confidentiality and privacy, (7) evidence gathering and retention, (8) witness interviews, (9) documenting the investigation, (10) investigation findings and (11) writing the report.

AWI's Guiding Principles outline workplace investigations best practices. However, employers are generally not held to the high standards of AWI's Guiding Principles. I reference the AWI Guiding

[2] https://www.awi.org/general/custom.asp?page=Guiding_Principles.

Principles to illustrate the professional standards many workplace investigators use in performing a thorough workplace investigation.

Workplace investigations which follow these standards do not have to be "perfect." Rather, workplace investigations must be reasonable or appropriate, even if they contain factual errors. For example, in Dudley v. City of New York, 18 Civ. 10015 (AKH) (S.D. N.Y. Jul 07, 2020), the Court found the employer's investigation was reasonable where it included interviews with the complainant, the respondent (Dudley), neutral eyewitnesses, comparisons of witness interviews to written statements; and thorough written memorandums balancing the evidence and drawing prudent conclusions.

Generally, if an employer can show it acted reasonably, the investigation will be considered sufficient. See, Nixon v. Franciscan Health Sys., CASE NO. C11-5076BHS (WD Wash. Mar 12, 2012) ("Though Nixon may have been dissatisfied with the time the investigation took to conclude, or its results, the Court concludes that Franciscan responded adequately to Nixon's report by immediately initiating a thorough investigation); Swenson, 271 F.3d at 1192 (when the employer promptly begins an investigation, reasonable delays supported by legitimate reasons will not by themselves cause even a lengthy investigation to constitute a failure to take remedial efforts); Holly D. v. California Inst. of Tech., 339 F.3d 1158, 1177 (9th Cir 2003) ("The legal standard for evaluating an employer's efforts to prevent and correct harassment . . . is not whether any additional steps or measures would have been reasonable if employed, but whether the employer's actions as a whole established a reasonable mechanism for prevention and correction.").

C. POLICY, COLLECTIVE BARGAINING AGREEMENTS AND LAWS

If there is a collective bargaining agreement or policy on conducting investigations, this will govern how they are approached. See, e.g., Kramer v. Wasatch County Sheriff's Office (10th Cir 2014) (use of untrained workplace investigator who was not given the County policy governing investigations resulted in the investigation devolving into an examination of plaintiff's sex life and targeting her for unrelated misconduct after she claimed work related rape).

Also be aware that there may be special laws governing investigations. For example, public safety officers have certain rights in investigations pursuant to ORS 236.350 et. seq.

D. PARTICULAR ISSUES IN INVESTIGATIONS

Failure to Investigate may be an Adverse Employment Action in Retaliation Claim

In Longhorn v. Or. Department of Corrections, Civ. 6:21-cv-01267-MC (D. Or. May 23, 2023), Longhorn was hired in 2020 as a Corrections Officer. Within two months, Longhorn was sexually assaulted by a male co-worker, Klimek, who then began to stalk her at work. At first reluctant to file a complaint, Longhorn eventually did, which was investigated by the Oregon State Police.

Once Klimek was arrested, rumors started at the prison and continued for the next year (despite Longhorn's many reports to various people in management) that Longhorn had slept with Klimek to advance her own career, that she was part of a sex ring and that she was having sex with other co-

workers in the parking lot. Longhorn's male co-workers regularly referred to her as a "snake," a "lying bitch" and a "whore," but not always to her face. She learned about some of these rumors and name calling from colleagues who reported it to her. These rumors spread to the adults in custody (AICs), some of whom began to act out towards her by masturbating in front of her, yelling at her and one telling her to "sit on his dick." In addition, a Sergeant told her in front of an AIC that she had "better not be lying" about a report she made.

The Department of Corrections (DOC) had a policy requiring reports of sexual harassment including reports of sexual talk, jokes and teasing to be promptly investigated. However, the DOC never opened an investigation into Longhorn's reports and Longhorn was never interviewed. The DOC claimed it could not investigate the workplace issues because of the ongoing criminal investigation into Klimek and because Longhorn took intermittent leave because of panic attacks and depression.

During the year Longhorn was subject to the rumors and name-calling described above, Human Resources performed multiple interviews at the prison where Longhorn worked because of concerns about treatment of female staff and the culture. No one ever interviewed Longhorn. Ultimately, the District Attorney declined to prosecute Klimek. Fearing Klimek would be returned to work, Longhorn resigned in May 2021.

Longhorn sued the DOC, alleging a hostile work environment, constructive discharge, retaliation, and whistleblower retaliation under Title VII and Oregon law. In denying the DOC's motion for summary judgement on all claims, the Court noted that Longhorn's work environment was objectively hostile and abusive, especially considering the danger to her physical safety posed by her male colleague's failure to support her in the prison context. In addition, the Court found that Longhorn established that there were triable issues of fact about whether she was compelled to resign given the environment and DOC's failure to investigate her complaints.

With respect to Longhorn's retaliation and whistleblowing claims, the Court agreed with Longhorn that the DOC's failure to perform any investigation into her claims could be considered an adverse employment action in retaliation for her protected activity of reporting sexual harassment:

> "Though Plaintiff's claim is unique, the Court can conceive of a situation where an employer deliberately chooses not to investigate reports of harassment in retaliation for an employee engaging in protected activity. The Court therefore will not rule that, as a matter of law, an employer's failure to investigate reports of workplace harassment cannot constitute an adverse employment action. ***." Longhorn., at 12.
>
> "Plaintiff also cites to DOC's policy of promptly investigating all reports of sexual harassment, arguing that there is "no good explanation for why the pending criminal charges against Klimek meant that DOC should not look into [Plaintiff's] reports of workplace harassment by [officers] other than Klimek." ***. There is no disagreement that these other allegations of harassment do not rise or fall with the criminal investigation of Klimek. The criminal prosecution of Klimek may be what fueled the harassment, but that is no reason for

DOC to suggest that its hands were tied when it came to a prompt investigation of Plaintiff's workplace reports.

"The Court finds that DOC's refusal to investigate the harassment Plaintiff experienced at EOCI after she reported Klimek's assault and harassment could reasonably deter an employee from engaging in protected activity. Plaintiff has therefore established a prima facie case of retaliation." Id., at 13.

C.f., Patocs v. Automatic Data Processing Inc., CV-20-01257-PHX-JJT (D Ariz Jul 12, 2022) (for purposes of Patocs' retaliation claim, Court found that an allegedly inadequate investigation did not constitute an adverse employment action where Patocs made only conclusory allegations about the investigation being biased, but also held that a reasonable jury could find an adverse action in Plaintiff's placement on paid leave pending the internal investigation) and Nelson v. Zinke, CV 16-135-M-DWM (D Mont Feb 27, 2018) (delaying employment investigation until criminal investigation was complete was reasonable and did not constitute "inaction" to claim of sexual harassment).

Inadequate or Negligent Investigation

In Okonowsky v. Garland, 109 F.4th 1166 (9th Cir 2024), the 9th Circuit reversed the District Court's grant of summary judgment in part because of an inadequate investigation which it called an "equivocal at best" response to the complaint. In this case, Okonowsky reported a Lieutenant in the prison for having a personal social media account in which he posted sexually offensive content, and that she was a personal target. Over 100 prison employees followed this Instagram Account, "liking" posts, sharing them and commenting on them. When Okonowsky reported this, the Human Resources manager and the investigator assigned to look into the complaint both told her they found nothing wrong with the content or that they found it "funny." After her report, Okonowsky reported that the Lieutenant increased his targeted attacks on her.

The 9th Circuit found that the investigation was "slow walked" by the investigator, Okonowsky's direct supervisor did not concern himself with the investigation at all, three months passed before the conduct ceased, the investigation was never actually completed and there was no evidence that the employer's actions had any effect at all on the Lieutenant's decision to take down his Instagram account.

In another inadequate investigation case, Bradley v. AutoZoners, LLC, 4:20-cv-00337-BLW (D Idaho May 04, 2022), Bradley complained of multiple instances of sexual harassment. AutoZone began its investigations two weeks after the complaint, interviewing the respondent and one witness before interviewing Bradley. The respondent claimed Bradley made up the allegations because he was holding her accountable, which the investigator credited despite respondent only having issued Bradley one reprimand for leaving a safe open two months prior to the interview. The investigator did not attempt to interview any other of Bradley's co-workers, who were witnesses to the conduct. The investigator claimed he reviewed camera footage from the store as part of his investigation, but the store did not have cameras in the locations he described. The investigator finished his

investigation in one afternoon. No written report was ever produced and Bradley was never informed of the results of the investigation.

Pointing to AutoZone's failure to perform any minimal prevention by reminding the respondent it had a sexual harassment policy, the Court found AutoZoner's investigation inadequate, stating that denial of allegations does not constitute an adequate remedy. The Court stated that "[a]t a bare minimum, AutoZone could have "reminded" Hancock of its sexual harassment policy, but there is no evidence that AutoZone even did that. The Court therefore cannot find as a matter of law that AutoZone exercised reasonable care to prevent and correct sexual harassment" especially when respondent's behavior continued.

See also, Sarens U.S., Inc. v. Lowery, Lead Case No. CV 20-47-M-DWM, Member Case No. CV 20-60-M-DWM (D Mont Jan 08, 2021) (company failed to exercise reasonable care where it maintained an outdated sexual harassment policy, failed to provide correct reporting information when a complaint was made, did not formally investigate allegations regarding a repeat offender - dubbed "the sex pest" by co-workers - and failed to implement recommended measures following a finding of harassment) and Crabbe v. American Fidelity Assurance Co., CASE NO. CIV-13-1358-R (WD Okla Apr 30, 2015) ("less than fair" investigation where African American employee was terminated following an investigation into whether employees in a work group were improperly using the company's electronic equipment but only African American employees in the work group had their computers searched and White employee was allowed to review report and refute facts, but African American employee was not).

In Vasquez v. Empress Ambulance Serv., Inc., 835 F.3d 267 (2nd Cir 2016), after Vasquez complained about sexual harassment from her co-worker, Gray, Gray claimed she had sexually harassed him. Gray created a false documentation of what appeared to be sexting from Vasquez but was really from a person with whom he was in a relationship. Empress believed Gray and fired Vasquez without investigation. The Second Circuit held that Gray became Empress' agent under "cat's paw" theory because it allowed Gray's retaliatory intent to infect its decision making process because of its own negligence in failing to conduct an investigation.

In U.S. Equal Emp't Opportunity Comm'n v. Big Lots Stores, Inc., Civil Action No. 2:17-CV-73 (ND WVa Sep 27, 2018), the District Court found a wholly inadequate and negligent investigation where the Human Resources employee tasked with doing the investigation did not even ask the alleged perpetrators if they were mocking and disparaging the complainant based on her hearing impairment and speech, and where the investigator found that she could not substantiate the complaint despite having corroborating evidence of the harassment from multiple co-workers who were witnesses. The Court went on to note that the investigator had no experience or training in conducting investigations, a point that it relied on when refusing to dismiss the EEOC's claim for punitive damages. The Court found that there was a risk of future disability harassment where both the alleged harassers were still working with the complainant and the employee who conducted the "negligent and reckless investigation in this matter" remained employed in the human resources position responsible for conducting investigations.

See also, Galdamez v. Potter, 415 F.3d 1015 (9th Cir. 2005) (when plaintiff Postmaster reported harassment by community members, the Postal Service manager told her that Willamina was a "redneck town" and that she was "tough" enough to deal with the racially hostile treatment and another manager said that postmasters were expected to "grin and bear" racist remarks and harassment, showing that the Postal Service's response to Galdamez's difficulties was limited) and Swinton v. Potomac Corp., 270 F.3d 794 (9th Cir. 2001) (a plaintiff alleging co-worker racial harassment must prove that the employer "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it" where employer had a policy but no mechanism for the employee to effectively use it).

"Sham" Investigation

Typically, the allegation of a "sham investigation" is made when a plaintiff asserts that the employer's legitimate, non-discriminatory reason for its actions is a pretext, pursuant to the burden shifting framework of McDonnell Douglas Corp. v. Green, 411 US 792 (1973). Factors in a sham investigation include that an investigator fails to follow a good faith process to reach reasoned conclusions, or misrepresents evidence to lead to a desired outcome. A sham investigation has weaknesses, implausibilities, inconsistences and contradictions so as to not be "worthy of credence."

In Harden v. Marion Cnty. Sheriff's Department, 799 F.3d 857 (7th Cir. 2015), the 7th Circuit explained that "[i]n a typical sham investigation, persons conducting the investigation fabricate, ignore, or misrepresent evidence, or the investigation is circumscribed so that it leads to the desired outcome (for instance, by deliberately failing to interview certain witnesses)." In Harden, the 7th Circuit found that the investigation was thorough and transparent because the investigators (1) interviewed each and every person involved in the incident (fourteen in all), (2) reviewed surveillance footage and radio traffic, (3) explained their grounds for eliminating suspects other than Harden; (4) offered a legitimate explanation for their conclusion that Harden was the thief, and (5) provided a plausible explanation for why Harden had the motive to commit the theft.

In Menninger v. PPD Dev., 23-2030 (1st Cir 2025), the jury's $24 million award was upheld in part because of evidence that the employer, PPD, engaged in a sham investigation:

> "Specifically, the District Court endorsed Menninger's arguments that the evidence supported findings that PPD (1) sought to coerce Menninger to quit, (2) manufactured false grounds to terminate her, and (3) established new goals and expectations for her role that it knew were impossible, all because of Menninger's disability or in retaliation for disclosing her disability and requesting accommodations. The District Court further adopted Menninger's argument that a reasonable jury could have concluded that PPD perceived a substantial "risk that its actions would violate federal law," as evidenced by its decision to conduct a *sham investigation* of her complaint, as well as its witnesses' contradictory testimony at trial" (emphasis supplied).

In this case, Menninger asked for accommodations and two days before the HR Director St. John was to meet with her, he emailed another person in HR about "delicately working [Menninger] out."

Later, when Menninger made a complaint, the internal HR employee assigned to investigate, Ballweg, found no evidence of wrong doing on PPD's part. However, the evidence at trial was that emails and Ballweg's own testimony indicated that Ballweg was deeply involved in PPD's efforts to "work [Menninger] out." In this case:

> "The evidence supported an inference that Ballweg oversaw the efforts to reduce Menninger's performance rating and document criticisms of Menninger's work, updated higher-ups on the progress of "Menninger's exit" and the efforts to create a record of poor performance, and helped draft communications from Mekerri assigning Menninger new, allegedly impossible goals and identifying supposed performance issues. Thus, the jury could have concluded not only that Ballweg was an inappropriate person to investigate Menninger's complaint, but also that by conducting the investigation herself, Ballweg deliberately sought to conceal any wrongdoing."

In Willis v. Career Educ. Corp., No. 12 C 07662 (ND Ill Jun 19, 2015), Willis was terminated after taking a six week leave for surgery. The Court found the investigation was pretextual because

- The investigation, which began only after Willis already was suspended, had a foregone conclusion, given the decision-maker's prior interest in replacing Willis and Willis' supervisor's statement to the effect that Willis was merely going to be given the opportunity to admit wrongdoing.
- The decision-maker decided to dismiss Willis before the investigation was complete.
- There was no effort to determine whether Willis' assertions that she had not committed the misconduct were true or not.
- There was evidence that others often engaged in some of the behavior Willis was accused of, without consequences.

See also, Smothers v. Solvay Chems., Inc., 740 F.3d 530 (10th Cir., 2014) (Tenth Circuit reversed summary judgement for the employer where it found that a failure to interview the respondent about a complainant's allegations, coupled with different treatment of similarly situation comparators for similar safety violations, supported an inference that the termination was a pretext for disability and FMLA discrimination).

However, the investigation was not a sham even though imperfect in the following cases: Foster v. Credit One Bank, 23-2983 (9th Cir Oct 30, 2024) (argument that investigation was a pretext failed where plaintiff proffered no evidence that anyone involved in the decision to fire her lacked an honest belief about the reason for the termination even if the investigation process was not as thorough as it might have been); Lohmeier v. Gottlieb Memorial Hosp., 24-1470 (7th Cir. Aug 14, 2025) (no sham investigation where investigator spoke to every nurse on the shift about missing drugs); Nelson v. Bank, 75 F.4th 932 (8th Cir. 2023) (failure to interview some witnesses does not automatically create evidence of pretextual investigation).

Admonishments

Witnesses should be admonished that they are protected from retaliation for speaking to the investigator in good faith. The respondent should be admonished that he or she is prohibited from retaliating against others for participating in the investigation. In addition, an admonishment about confidentiality, or at least a request not to share what is discussed with co-workers is a good idea. There are many examples of rumors spreading and leading to retaliation (see, e.g., Longhorn v. Department of Corrections). Nor is such a restriction a violation of the First Amendment in the public employment context. Roberts v. Springfield Util. Bd., 68 F.4th 470 (9th Cir. 2023) ("the communication restriction complained of by Roberts does not violate the First Amendment because it did not limit Roberts' ability to speak about matters of public concern. Rather, it merely barred him personally from discussing his own alleged violation of SUB policies—a matter of private, personal concern—with potential witnesses or fellow SUB employees").

Interviewing Witnesses

At a minimum, the complainant and respondent and any informational and eyewitnesses should be interviewed. Depending on the issues, consider interviewing similarly situated witnesses or reviewing records related to comparators. See, Mastro v. Potomac Elec. Power Co., 447 F.3d 843 (D.C. Cir., 2006) (failure to interview respondent – and the only Caucasian – until the report and investigation were completed was "inexplicably unfair," put Mastro on the defensive and deprived him of the same opportunity the complainant was given).

Timing of the Investigation

In Zisumbo v. Ogden Regional Medical Center, 801 F3rd 1185 (10th Cir 2015), the 10th Circuit denied the employer's motion for judgement as a matter of law, upholding the jury's finding that the investigation and decision to terminate was retaliation against Zisumbo for complaining of race discrimination. In this case, the employer had information from Zisumbo for several months. After he complained about race discrimination on the employer's complaint hotline, the employer reviewed the information it had possessed for several months, determined it was falsified and terminated him. C.f., Vargas v. The Vons Cos., B315167 (Cal App Dec 15, 2022) (four week delay in starting investigation was not "perfect," but perfection is not required, only reasonableness).

Failure to assess credibility

See, EEOC v. Big Lots, supra; also, Mastro v. Potomac Electric Power, supra ("In short, in conducting an investigation that rested entirely on the question of credibility, Duarte eschewed consideration of any indicia of credibility. Viewed generously, Duarte seems to have based his determination on the sheer weight of numbers; but sufficient evidence exists for a jury to conclude, alternatively, that discriminatory treatment may have permeated the investigation itself").

Consider factors such as:

- Inherent plausibility: does what each witness tells you make sense?
- Corroboration: were others aware of the facts at the same time? Were there text messages, emails or notes?

- Material omission: did a witness leave out something which ought to have been communicated?
- Motive to falsify: who has a motive, and is it likely they actually did falsify?
- Past record: have they been warned about this kind of behavior?
- Inconsistent statements: witnesses sometimes do contradict themselves. Be careful about this because it can stem from a fear of retaliation or other reasons that could argue in favor of the witness' credibility.
- Demeanor is a factor that the EEOC has suggested in the past. It can be fraught with concerns about bias.

Bias

Ensuring the investigator has no conflict of interest is crucial to preventing bias, as using an investigator who is trained and competent to weed out issues of bias. Menninger, supra, is a case where the investigator's bias led to a finding of a sham investigation and punitive damages. If an individual does have a conflict or a potential bias, it is a good practice to insulate them from the case. For example, in Lakeside-Scott v. Multnomah County, 556 F.3d 797 (9th Cir 2009), Lakeside-Scott's allegedly biased supervisor did not negatively impact an investigation into the employee's conduct where the supervisor's involvement was negligible. In this case, plaintiff alleged that her supervisor was biased against her because of a BOLI complaint and that this bias impacted an investigation into her conduct. After the BOLI complaint, Lakeside-Scott's supervisor discovered information which she turned over to Human Resources, resulting in an investigation concerning Lakeside-Scott's workplace behavior. Lakeside-Scott was terminated. The Court found:

> "The facts before us here show a workplace in which the initial report of possible employee misconduct came from a presumably biased supervisor, but whose subsequent involvement in the disciplinary process was so minimal as to negate any inference that the investigation and final termination decision were made other than independently and without bias."

Imperfect Investigations Can Still be Reasonable

- Reaching mistaken conclusions does not necessarily make an investigation "unreasonable." Vargas v. The Vons Cos., B315167 (Cal App Dec 15, 2022) ("the fact that Vons's investigation reached an outcome with which plaintiff disagrees does not preclude our finding, as a matter of law, that Vons's investigation was reasonable. As noted above, an employer can both act reasonably and reach a mistaken conclusion as to whether the accused employee committed harassment").
- Employer's inability to identify harasser does not render investigation unreasonable. Doe v. City of Detroit, 3 F.4th 294 (6th Cir. 2021) (City's response to anonymous harassment of transgender employee was reasonable even if it couldn't identify the harasser).

- Campbell v. State, 892 F.3d 1005 (9th Cir. 2018) (the fact that the Department of Education could not substantiate all plaintiff's complaints in its investigation did not render it unreasonable where there was no evidence that the investigation process was inadequate).

Criminal Behavior

When this comes up, common issues are embezzlement, fraud, stalking, intimidation of co-workers and sexual assault. Depending on the nexus to the workplace, some employers will report and some will leave it to the employee to report (if the allegation is intimidation in a harassment investigation, there is a nexus).

Contact law enforcement as necessary/relevant to get as much information as possible if they have already investigated the criminal complaint. Consider whether you should place the employee on leave if they are not in custody. Other issues to consider are:

- Release of information
- Confidentiality
- Whether to delay the investigation to allow law enforcement to investigate

As with all other issues related to investigations, the question is whether the employer acted reasonably based on the specific fats. See, Longhorn, supra (failure to investigate due to criminal allegations unreasonable); and Nelson v. Zinke, CV 16-135-M-DWM (D. Mont. Feb 27, 2018) (delaying employment investigation until criminal investigation was complete was reasonable and did not constitute "inaction").

Also note the requirements of Garrity v. New Jersey, 385 U.S. 493 (1967) in public sector investigations. Garrity warnings are used when the workplace investigator reasonably believes the allegations against a public employee include criminal acts. They are given to compel the public employee to respond truthfully to the questions and at the same time protect the employee from prosecution for truthful answers given so the employee doesn't have to choose among Constitutional rights.

APPENDIX A - RESOURCES

All EEOC (promulgated) Guidance: https://www.eeoc.gov/eeoc-guidance

Enforcement Guidance on Harassment in the Workplace (2024)
https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace

Findings of the EEOC Select Task Force on the Study of Harassment in the Workplace (2016) (links may be outdated) https://www.eeoc.gov/select-task-force-study-harassment-workplace

Association of Workplace Investigators: Guiding Principles for Conducting Workplace Investigations https://cdn.ymaws.com/www.awi.org/resource/resmgr/files/publications/AWI-Guiding-Principles-Broch.pdf

Ashley Lattal, The Hidden World of Unconscious Bias and its Impact on the "Neutral" Workplace Investigator, 24 J. L. & Pol'y (2016): http://brooklynworks.brooklaw.edu/jlp/vol24/iss2/3

Amy Oppenheimer, The Psychology of Bias: Understanding and Eliminating Bias in Investigations: https://pdfs.semanticscholar.org/fb90/f3bfcce1d8a19bd64cd8f3b6498fcecb1dcf.pdf

Jill Goldsmith, Implicit Bias and Mindfulness as an Antidote:
http://www.workplacesolutionsnw.com/wp-content/uploads/2015/07/Implicit-Bias-and-Mindfulness-white-paper_jill-final-edits-4.pdf

Promising Practices for Preventing Harassment: https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment

Tasha Eurich, What Self-Awareness Really Is (and How to Cultivate It), *Harvard Business Review*, January 4, 2018

Lueke, A., & Gibson, B. (2014). Mindfulness Meditation Reduces Implicit Age and Race Bias: The Role of Reduced Automaticity of Responding. *Social Psychological and Personality Science*, *6*(3), 284-291. https://doi.org/10.1177/1948550614559651 (Original work published 2015) (full article available at
https://www.researchgate.net/publication/269700255_Mindfulness_Meditation_Reduces_Implicit_Age_and_Race_Bias)

Ingold, K., & Lueke, A. (2023). A brief mindfulness intervention reduces the tendency to endorse negative Black stereotypes. *Journal of Applied Social Psychology, 53*(2), 112–120. https://doi.org/10.1111/jasp.12931

Richard, L. & Roher, L. (July/August 2011) A Breed Apart? How Personality Characteristics Influence Who Becomes a Lawyer – and How Far They Rise. *The American Lawyer*. Available at:
https://www.lawyerbrain.com/wp-content/uploads/2023/04/hogan_american_lawyer.pdf

Kahneman, D. (2011). *Thinking, fast and slow*. Farrar, Straus and Giroux (use of "Anne Approached the Bank").

APPENDIX B - INTRODUCTIONS

[Introducing the investigator to witnesses, usually via the HR contact]

For complainant

I'm writing to e-introduce you to _____ who has been hired to investigate your concerns. She would like to schedule a time to meet/talk with you as part of her investigation, and we would ask that you make time to meet with her as soon as your schedule permits.

Your interview can be conducted in person or via Zoom or Teams.

We appreciate you bringing forward your concerns, and please know that we value you and all other employees and take the concerns you have raised extremely seriously.

We are doing everything we can to ensure a fair and neutral process that will protect the rights of all people involved and help us determine what next steps are appropriate to help ensure a healthy, productive, and inclusive workplace. We will not tolerate any retaliation against you or anyone else who participates in the process in good faith.

If you have any questions or concerns, please feel free to reach out to me directly.

For respondent:

[this is just for the introduction, not for the full "you are under investigation" communication if a more extensive notice is required]

As you know, a complaint has been filed against you. We have retained _____ to investigate the allegations. She would like to schedule a time to meet/talk with you as part of her investigation, and we would ask that you make time to meet with her as soon as your schedule permits. [The investigator] will go over the allegations with you when you meet with her [or, include specific allegations].

Your interview can be conducted in person or via Zoom or Teams.

Please know that we take the concerns which have raised extremely seriously and that we will also ensure a fair and neutral process that will protect the rights of all people involved. This process is important because it will help us determine what next steps are appropriate to help ensure a healthy, productive, and inclusive workplace. Please remember that we do not tolerate retaliation against anyone who participates in the process in good faith and so it is very important to refrain from actions or behavior which could be construed as retaliatory.

If you have any questions or concerns, please feel free to reach out to me directly.

For witnesses:

I'm writing to e-introduce you to _____ who has been retained to conduct a neutral investigation into concerns which have been raised. You are not the subject of this investigation and we are not aware of any concerns being raised about you – you are just a witness. ____ would like to schedule a time to meet/talk with you as part of her investigation, and we would ask that you make time to meet with her as soon as your schedule permits.

Your interview can be conducted in person or via Zoom or Teams.

Please know that we value you and all other employees and take these concerns extremely seriously.

We are doing everything we can to ensure a fair and neutral process that will protect the rights of all people involved and help us determine what next steps are appropriate to help ensure a healthy, productive, and inclusive workplace. We will not tolerate any retaliation against you or anyone else who participates in the process in good faith.

If you have any questions or concerns, please feel free to reach out to me directly.