

Avoiding Pitfalls during EEO Internal Investigations

Conducting internal EEO investigations may not be as complex as conducting a steroid investigation in Major League Baseball, but the process should be formal and well constructed. Reports drafted by EEO investigators are regularly scrutinized by lawyers in discrimination cases, the courts and outside agencies. Investigative reports must be made to endure such scrutiny.

A thorough investigation can be rendered moot by a report that is not well written. The foundation of the process must be a concise and well written policy that not only describes prohibited conduct but clearly defines the complaint process. Managers and supervisors should be trained periodically in the laws of discrimination, procedures for handling complaints, vicarious liability, and the employer's non-retaliation policy.

The purpose of handling investigations appropriately and developing policies and training is to minimize, if not, eradicate liability. Federal and state laws allow employers to assert a defense even if there was misconduct and harassment. If an employer can show that there were procedures in place to handle complaints, preventative steps such as training were taken and an investigation was done, then there may be no liability if the employee failed to avail himself or herself of such procedures.

Taking Complaints

Company policy should require that EEO complaints be made in writing. Even if a verbal complaint was made, the employee should be directed to reduce it to writing. If a third-party or supervisor reports a complaint he or she received, it should be noted. The investigation may immediately commence, but the employee should be asked to state his or her complaint in writing at the first interview. If a complainant refuses to sign the document, the EEO investigator should document and verify facts and note that the complainant refused to sign it. Once the complaint has been received, a letter should be sent to the complainant stating that the company has received the complaint and will be investigating it expeditiously. The employee should be made aware that the employer has taken immediate action.

Pre-investigation Preparation

A file should be set up for each investigation. Maintaining phone logs, documents, charts, notes, memos, follow-up and draft reports in an organized fashion will be helpful. The investigative file should be maintained separately from the personnel file in a confidential place. Before beginning the investigation, the investigator should consider reviewing the following documents:

- Written complaint and interview notes
- Personnel files of all relevant parties
- Union Collective Bargaining Agreement (if applicable)
- Documentary material offered by complainant
- Individual employment contract (if applicable)
- Files from prior investigations of accused (if applicable) and complaints filed by the complainant against other parties
- Complaints filed against the complainant
- Relevant employer policies
- Time logs
- Organizational Chart

Prior discipline may help identify whether there is a pattern of continuing abusive conduct by the accused. Such a pattern may help you to see if there is a history of animosity between any of the key players or if there are biases or alliances you should know about. Remember, however, that a prior similar act alone is not a conclusive indication that this new incident did or did not occur. It should be a new and neutral investigation.

Interview Technique

The scope of the investigation should be limited to the allegations in the complaint. However, if there are additional or new facts, a supplemental complaint or separate complaint should be completed by the complainant. Notes should be carefully taken. During litigation, notes may become discoverable. Focus on the facts and avoid legal conclusions. Each element of the allegation made by the complainant should be explored. The investigator should periodically restate and summarize what the interviewee has stated.

This technique allows the interviewee to clarify, correct or supplement his or her answer. At the end, repeat all significant points and ask the interviewee to confirm accuracy. This process should be followed until there is agreement that you have accurately summarized the complainant's position and there is no additional information available in connection with these allegations. If there are important quotes, include them as quotes in the summary.

Typically, the complainant should be interviewed first. The "accused" should be interviewed second or last; however there might be situations where the order of who to interview may change based upon the information being developed. The investigator's demeanor should be conducive to establishing a rapport to gain trust and confidence. The investigator should be attentive, not interruptive, and be interested. Body language should be relaxed and attentive. The goal here is to make the interviewee comfortable and relaxed. Avoid prejudging and making assumptions during all interviews. Avoid legalese and terms of art throughout your investigation. Your role is to be an impartial investigator of the facts. For complex matters or when an unbiased investigation may be impossible, it is advisable to hire outside counsel.

Tape-recording or taking a statement is generally unnecessary unless the witness is likely to change his or her testimony or will become difficult to locate. Relevant employer policies and laws should be reviewed for any prohibitions against tape-recording.

Immediate Action

Depending on the circumstances, immediate action may be necessary. Immediate removal or transfer of the complainant or another employee may be required in order to protect someone's safety or for other compelling reasons. Typically, the complainant should not be moved involuntarily because it might later be deemed retaliation. The alleged harasser should be moved where there is doubt.

In the process of interviewing an employee during an investigation of one complaint, the investigator may be notified of another matter that may require investigation. Have that witness complete a signed complaint form.

Drafting Comprehensive Reports

The report should be done in draft form initially. It should include a brief statement of the allegations being investigated; a summary of what was done to facilitate the investigation; a statement of facts and the basis for the inclusion of these items as facts, analysis and conclusions, and recommendations, if appropriate.

Use a standard format. Sometimes, however, modifications of this format may be warranted. For example, if a matter has a complex procedural history or is part of a larger related

investigation the use of new headings such as “Procedural History” or “Background” may be helpful.

The Findings of Fact section should include the procedure used for the investigation, how the complaint came to the attention of the employer, the reliable facts, and the positions taken by the accused and the complainant. The use of a chronology may help to keep this section organized. Where there are assertions made but the facts do not support this position, an indication of this factor should be included in your analysis. Map out what facts would be needed to support complainant’s claim and/or the other person’s position. Map out each fact and whether there is support.

The Analysis section should connect the facts to the conclusions. If there are conflicting versions of the event the employer will have to weigh each party’s credibility. Assessing credibility is tricky. Factors to include are plausibility, demeanor, any reasons to lie, corroboration such as witnesses, whether the victim discussed events with another individual around the time it occurred, or the past record of harasser. The analysis should link the facts to the conclusion. Recognize that there will be overlap between findings of fact, analysis and conclusions.

The Conclusion and Recommendation section includes the final determination and a recommendation for discipline or other action as appropriate. When deciding on the appropriate discipline to recommend, consider the following:

- seriousness of the offense;
- the positions of the involved parties;
- the impact on the complainant;
- actions taken in previous cases;
- the personnel records and employment histories of the involved parties ;
- how a reasonable person in the same circumstances would have responded to the situation; and
- any extenuating circumstances that may be relevant.

Recommendations can range from requesting an apology to termination.

Because the investigation may be subject to discovery in a subsequent legal proceeding, the investigator’s conclusions should be factual. The conclusions should state whether any applicable workplace policies were or were not complied with by the accused.

Each investigation will have a specific set of facts that may require adjustments in the investigation process. However, ensuring that investigations are done thoroughly and consistently could safeguard the employer in litigation. When there is doubt as to the capability of handling matters internally, it may be more prudent to use an outside fact-finder. You may wish to consult Roger Jacobs at 973-226-0499. He has conducted hundreds of workplace investigations as a labor and employment lawyer. For more information visit www.jacobsjustice.com.