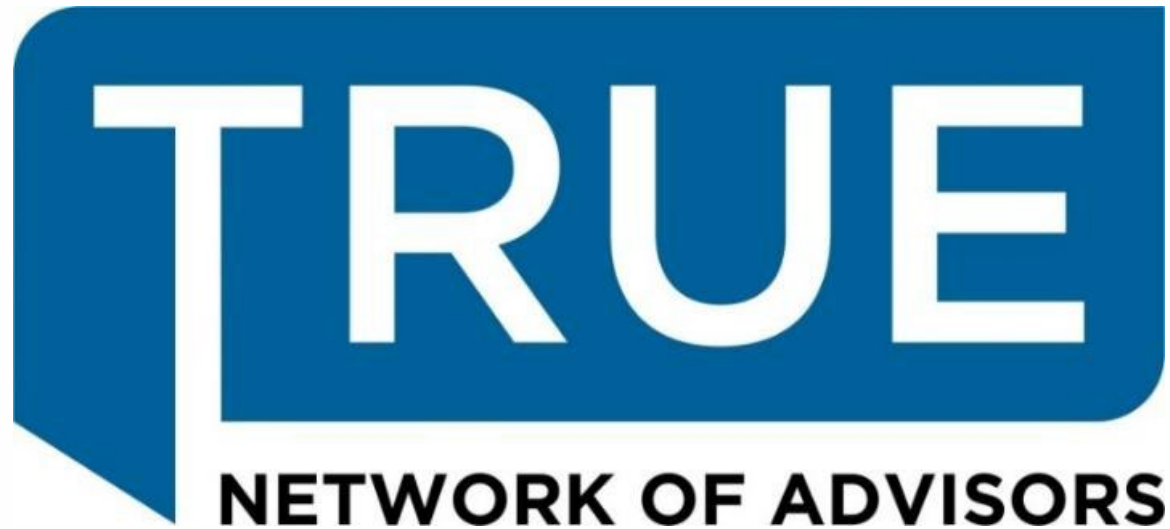


Conducting Effective Workplace Investigations



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Common Investigation Scenarios

- Employee complaints of harassment/hostile work environment
- Employee complaints of discrimination and/or retaliation
- Validity of employee work performance deficiencies
- Valid basis for disciplinary actions or termination decisions



Employee Complaints of Harassment/Hostile Work Environment

➤ The nature of the investigative steps taken (or not taken) by an employer have direct bearing on the *Faragher/Ellerth* affirmative defense analysis of:

(1) whether the employer exercised reasonable care to “correct promptly any harassing behavior,” and

(2) whether the employee “unreasonably failed to take advantage of any preventative or corrective opportunities,” provided by the employer.



Employee Complaints of Discrimination and/or Retaliation

- The nature of the investigative steps taken (or not taken) by an employer can affect the legal analysis of:
 - (1) Whether the employer had a **legitimate non-discriminatory business** reason for the action at issue; and
 - (2) Potential damages based on the **employer's compliance or non-compliance** with anti-discrimination/retaliation laws.

Validity of Alleged Work Performance Deficiencies, and Basis for Disciplinary Actions or Termination Decisions

- Do legitimate, non-discriminatory bases exist to justify the employment actions taken against an employee?
- Potential “Cat’s Paw” legal theory imputing unlawful intent into the decision-making process: was the proposed employment action simply rubber-stamped by upper management or did a separate investigation take place regarding the validity of the basis for the proposed action?

Why Effective Investigations are Important:



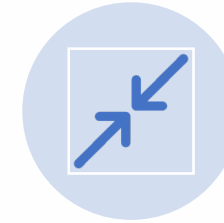
**NECESSARY TO DISCOVER,
ADDRESS AND
PREVENT/CORRECT
WORKPLACE PROBLEMS**



**MAINTAIN AND IMPROVE
EMPLOYEE MORALE**



INCREASE PRODUCTIVITY



REDUCE TURNOVER RATES



**DETERMINE NECESSARY
CHANGES TO INEFFECTIVE
COMPANY POLICIES**



**PROMOTE CONSISTENCY IN
APPLICATION OF COMPANY
POLICIES**



**END INAPPROPRIATE
CONDUCT ON A COMPANY-
WIDE LEVEL**



**AVOID LITIGATION/PREPARE
COMPREHENSIVE DEFENSE**

Effect of Investigation On the Employee:

Correction of hostile environment or unlawful adverse actions

Maintain and improve employee morale—feel of being valued by the employer

Increase productivity—employee can focus on work and not be distracted by ongoing social, emotional, and financial impacts of a hostile environment or discrimination/retaliation

Avoid litigation and public knowledge of the events

Objectives of Every Investigation:

- **Find. The. Truth.** (Even if the truth is not easily accepted or acknowledged by the employer or the employee)
- Stop and **correct** any behavior in the workplace that is unlawful, violative of company policies, or which creates an unproductive workplace with intent to prevent recurrences
- Provide **guidance** to employees on how to move forward
- Maintain as much **confidentiality** as possible
- **Avoid workplace disruptions** or potential workplace violence

Employee Relationships Matter



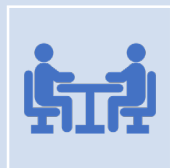
Investigations can affect the relationship between Human Resources, Management, and Employees.

Trust factor – validity of employee’s worth and company’s concern about employees
Perceptions (even if incorrect) of favoritism or “covering up” employee concerns
Responsiveness, to include response time, corrective action, and communications with employees about the investigation and its results



While confidentiality is important, it is critical that Employees understand that it cannot be guaranteed in all situations.

Must protect integrity of investigation.
Must take all steps necessary to examine all sides of an issue.
Must ensure no retaliation.



To further the trust relationship, always ensure that there is adequate follow-up at the conclusion of the investigation.

Discussion of investigation findings.
Corrective action.
Reason(s) for lack of corrective actions, if applicable.

Workplace Investigation 101:

➤ **An employee has complained of potential unlawful activity....now what?**

1. Get a written statement of the complaints and any physical evidence,
2. Obtain witness names,
3. Take steps to insure confidentiality,
4. Advise the employee of the process and when they can expect follow-up, and
5. Take steps to avoid further unlawful acts or retaliation.

**Ask detailed questions
& follow-up; gather all
the facts**

**Distinguish between
“legal” issues and
workplace gripes**

**Are there any
witnesses or others
who have had same
issue?**

**Prior reports? If so, to
who? If not, why not?**

**Any other relevant
documents ,
information or other
evidence?**

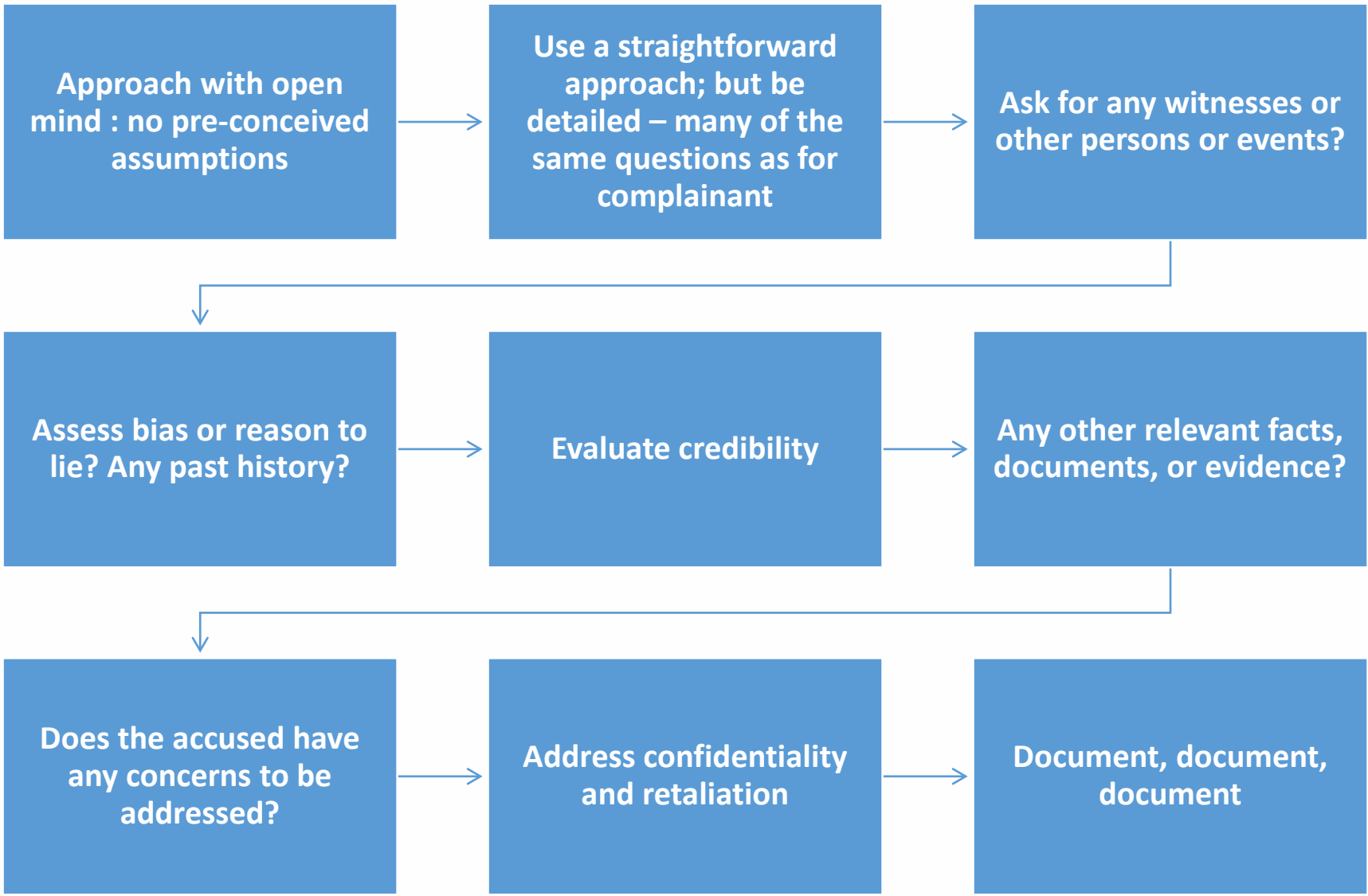
**Request copies of
emails, text messages,
photos, audio
recordings, voicemails,
social media, etc.**

**Any additional
concerns? Suggestions?**

**No
retaliation/obligation
to report retaliation**

Address confidentiality

**Document, document,
document**



Necessary Follow-Up

- Interview other witnesses
- If applicable, interview manager or supervisor in area
- Determine any additional documents needed
- Determine any additional information needed, even if it means re-interviewing a witness already interviewed
- Consider any potential for subsequent legal action
- Have a follow-up conversation with the accuser
- Set any necessary corrective action into motion
- Address confidentiality and retaliation
- Document, document, document

When Is It Discrimination?

- **If the complainant says he/she's being treated differently based on a protected characteristic:**
 - Race, age, gender, military status, disability, pregnancy, national origin, religion, sexual orientation, etc.
- **If there are reports of any direct comments about the complainant's protected status:**
 - "Women shouldn't be assigned to do these jobs."
 - "If you didn't have fibromyalgia/weren't sick all the time, you could really advance in the company."
 - "You do great work when you are here, but the absences are holding you back." (FMLA/ADA)
- **Be alert for concerns that retaliation may have already occurred or could very well occur.**
- **When someone mentions a lawyer (maybe).**

No “Magic Words” Required

- **EEOC Guidelines on What Constitutes Protected Activity Opposing Discrimination:**
 - An individual explicitly or implicitly communicates a belief that the matter complained of is, or could become, harassment or other discrimination.
 - The communication may be informal and employees need not use the words "harassment," "discrimination," or other legal terminology, as long as circumstances show that the individual is conveying opposition or resistance to a perceived unlawful act.
 - Individuals may make broad or ambiguous complaints of unfair treatment.

Witness Legal Rights

➤ Witnesses Have the Right To:

- band together and raise concerns about workplace conditions (aka “protected concerted activity”)
- talk/ complain without threat of retaliation
- record the conversation

➤ Witnesses **DO NOT** Have the Right To:

- lie or be untruthful (although you shouldn’t threaten them)
- interfere with an ongoing investigation
- refuse to participate or cooperate

Who Is Telling the Truth?

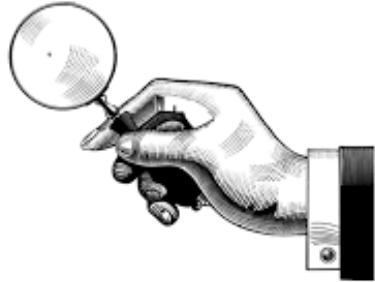
- You Should:
 - Evaluate the witness's demeanor
 - Consider any potential motives or biases that the witness has demonstrated
 - Review any prior history between accused, accuser, and witnesses
 - Ask for help if you need it
- You Should **Not**:
 - Bring preconceived notions into an investigation
 - Appear to automatically side with a supervisor
 - Ignore concerns about a witness's truthfulness
 - Hesitate to re-interview a witness if you believe they have been untruthful



Common Investigation Challenges

- **Failure to conduct investigation in a timely manner—or at all**
- **Failure to interview all “potential” witnesses**
- **Failure to document all interviews and conversations**
- **Failure to recognize and/or address all allegations**
- **Failure to offer the complainant the opportunity to offer more evidence**
- **Failure to inform complainant about the results of the investigation**
- **Failure to enforce confidentiality or anti-retaliation policies**

Avoiding Common Investigation Challenges



THE DEVIL IS
IN THE DETAIL

- Make sure ALL concerns are understood and explored in the initial discussion with the Complainant through open-ended questions:
 - “Is that all?”
 - “Is there anything else you want to address?”
 - “Have you told me everything that you can remember about that incident?”
 - “Is that everyone who was present?”
 - “Can you draw me a picture?”
- Ensure completeness of investigation in follow-up discussions
- Continue to take steps to ensure no retaliation

Practical Tips for Documentation

List all interview participants, time & date

Notes should be made during interview or immediately afterward

Be accurate, clear, detailed, and legible...

Use quotations where appropriate

Document facts, not conclusions, in notes

Legal advice in separate notes marked “Privileged”

A WORD ABOUT NOTES AND SPOILATION OF EVIDENCE

HOW MUCH DETAIL?

- **DO** support conclusions with factual examples (example: “complaints cannot be substantiated” should be accompanied by facts, such as “witnesses [NAMES] did not observe any harassing behavior or touching on [DATE].”)
- **DON'T** gloss over details—some complaints may include derogatory, vulgar, or offensive language, behaviors, etc. These need to be documented accurately and not “sugar coated”

DRAFTING THE INVESTIGATION SUMMARY

- Investigation Reports Should Contain a Description of:
 - The issue/complaint prompting the investigation;
 - The specific policies, guidelines, or performance criteria that are at issue;
 - The witnesses interviewed and a summary of the information learned during each interview;
 - All relevant evidence reviewed and a summary of each piece of evidence; and
 - Any known evidence not reviewed and why it was not reviewed
- State findings of fact and how they relate to the issue being investigated
- Address any abnormalities in investigation (why employees were asked about unrelated topics, why witnesses interviewed out of order, etc.)
- Document conclusion
- Label report as “privileged, work product” if applicable—be aware of *Faragher/Ellerth* waiver or conflict of counsel concerns

DOCUMENTING CONCLUSIONS

- Use facts, not opinions
- Avoid use of first person, when possible
- Rely on the information obtained during the investigation
- Make sure your conclusions are consistent with company policy and past practice and cite the policy or past practice
- Address what is substantiated and what is not
- Save the conclusions for the end. Don't lead with conclusory statements or sprinkle the factual summary with what could be perceived to be conclusions
- Be ready to stand by your conclusions

DEVELOPING THE RESOLUTION

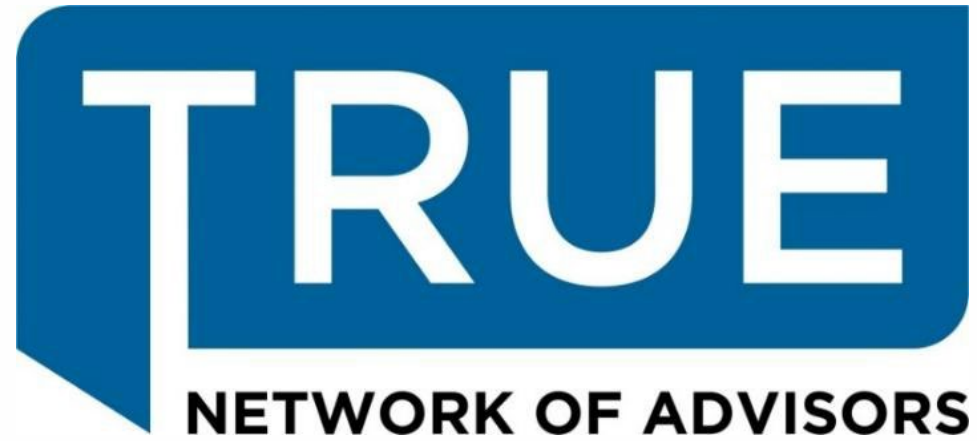
- **What is/are appropriate remedial actions?**
 - No action
 - Corrective action
 - Termination
 - Reassignment/Demotion
 - Training

- **Meet with Complainant (and others where applicable)**
 - Should occur promptly following completion of investigation
 - Show appreciation for reporting concern
 - Advise of outcome
 - Any other evidence?
 - Advise of confidentiality and of anti-retaliation policy.

- **Retain documentation and continue to monitor the situation.**

USE THE “GOLDEN RULE”

- Employees expect and appreciate respect, consistent treatment, and honest, direct communication from management and supervision
- Employees must feel that their concerns are heard; both by their managers and Human Resources, and that they receive a response to their concerns
- Documenting and communicating employee performance and disciplinary issues must be an equal priority—employees need to know if they have areas in which they need to improve and to be given an opportunity to do so



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