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2006 IPMA-HR Western Region Annual Conference

“Conducting an Internal Investigation”

May 3, 2006
8 am – Noon

Presented by:
Scott Tiedemann

Conducting an Internal Investigation

IPMA-HR Western Region Annual Conference – The HR Trek
Presented by Scott Tiedemann

5-3-06

**Conducting an
Internal Investigation**

Presented by:
Scott Tiedemann

WHEN TO INVESTIGATE

When To Investigate

- Reasonable Suspicion of Employee Misconduct
- Suspicion Based on Specific and Articulate Facts, Which, Taken Together with Rational Inferences from Those Facts, Would Cause a Reasonable Person to Believe a Violation Has Occurred

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When To Investigate?

- Factors to Consider
 - Seriousness of Misconduct
 - Available Resources
 - Morale

True, False or Maybe

- A supervisor observes an employee arrive for work 20 minutes late. The supervisor must conduct an internal investigation before counseling the employee.

When To Investigate

- Alleged or suspected harassment must be promptly investigated.

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Hostile Work Environment

PROTECTED STATUS:

- Sexual
- Gender
- Race or Color
- National Origin or Ancestry
- Sexual Orientation
- Religion
- Age
- Disability/Medical Condition
- Marital Status
- Opposition to Harassment

True, False or Maybe

- John tells his supervisor that he has no problems with his co-workers, but thinks that the supervisor should be aware that racial humor is prevalent on his shift. An investigation should be started immediately.

True, False or Maybe

- New crew members have traditionally been subjected to gags by senior members of the crew. The gags are viewed as part of the team building process. Bob, a new crew member, opens his locker and finds gay pornography. He and everybody else have a good laugh. The supervisor hears about it a month later from Bob, who thinks it is funny. No investigation is needed.

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WHO WILL INVESTIGATE

**Preliminary Considerations
Potential Candidates**

- You
- Other Internal Personnel
- Outside Investigator
- Attorney

Who Should Investigate?

- Consider
 - Training
 - Organization
 - Reasoning
 - Demeanor

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True, False or Maybe

- A manager suspects serious misconduct by one of her subordinates. The suspected misconduct is so serious that it will result in termination if substantiated. The manager is the disciplinary authority who would make the final decision regarding discipline. The manager should have someone else conduct the investigation.

Who Should Investigate?

- Using an Outside Investigator/Attorney
 - Specialized Skill or Knowledge is Required
 - Efficiency
 - Surveillance
 - Safety
 - Time
 - Fair Credit Reporting Act

True, False or Maybe

- An employee is suspected of going home to sleep during work hours. The city hires a private investigator to conduct surveillance. The Fair Credit Reporting Act requires that the employee be notified of the investigation.

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Hiring an Attorney to Conduct an Investigation

- The Attorney-Client Privilege May Not Apply if Investigation is Used as a Defense
- Consider Retaining Legal Counsel to Advise Your Investigator
- Pros:
 - Experienced in Conducting Interviews
 - Knowledge of Employment Law
- Cons:
 - Attorney-Client Privilege May Not Apply

True, False or Maybe

- Scott is your favorite employment law attorney. He has successfully defended you against prior harassment claims. You have just received a new harassment claim. You should retain Scott to conduct the investigation since he is likely to handle any related litigation.

BEGINNING YOUR INVESTIGATION

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Principles for Conducting Investigations

- Be Prepared
- Stay Focused on Your Objective
- Stay Organized
- Maintain Confidentiality
- Follow the Rules
 - Personnel Rules
 - Memorandum of Understanding

Preliminary Considerations Interim Steps

- Administrative Leave
- Transfer

True, False or Maybe

- Jack claims that his supervisor, Susan, has harassed him. A sensible first step would be to reassign him to the night shift so that he does not have to be in contact with her.

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True, False or Maybe

- Jim, a police officer, is arrested on misdemeanor charges of public intoxication. Jim may properly be placed on unpaid administrative leave.

Create an Investigation Binder

- Label It CONFIDENTIAL
- Include Sections for:
 - Alleged Violations
 - Rules and Regulations
 - Documentary Evidence
 - Witness List
 - Interview Notes
 - Written Report
 - Findings/Conclusions

GATHER EVIDENCE

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Are there any Documents Relevant to your Investigation?

- Personnel Files
- E-mails, Memos, Disciplinary Documents
- Physical Evidence

Search Employee Work Areas

- Reasonable Expectation of Privacy
- Review Personnel Rules

True, False or Maybe

- Lisa is suspected of accessing pornographic sites from her work computer. Her employer may conduct a forensic examination of her computer to determine if its suspicions are accurate.

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True, False or Maybe

- Mary is suspected of dealing drugs at work. Your policy states that her locker is subject to search at any time. You open her locker and find a duffle bag. You are certain that there is contraband in the bag. You may open the bag.

Identify Potential Witnesses

- The Complainant(s)
- The Accused
- Bystanders
- Persons With Whom the Complainant(s)/Subject Discussed the Case

Establish Order of Witnesses to be Interviewed

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True, False or Maybe

- You interview the suspect employee last. He wants to know what the specific allegations against him are (i.e. dates, times, places, witnesses) before he is interviewed. You must provide him with the information.

Recording the Interview

- Tape Record v. Notes
 - Pros:
 - More accurate
 - Focus on listening
 - Cons:
 - “Chilling Effect” on witness
- Signed Statements

Starting the Interview

- Introduction and Admonitions
- Employee’s Right of Representation
- Confidentiality
- No Retaliation

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True, False or Maybe

- Sammy is one of the witnesses you are interviewing regarding a suspected theft. During the middle of the interview, you begin to suspect Sammy has some culpability. Since Sammy was only designated as a witness he does not have a right to representation.

Principles for Conducting Interviews

- Stick to the Facts - Who, What, When, Where, Why
- Ask Open-Ended Questions
- Try Not to Lead the Witness
- Do not go on and off tape

Interviewing the Accused Employee

- Give Employee Reasonable Notice of Interview
- Afford Employee Right to Representation
- Conduct Interview During Normal Working Hours
- Conduct Interview Only for Reasonable Period of Time

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True, False or Maybe

- You ask a crucial question, and the subject employee asks to take a bathroom break before answering. You may require the employee to answer.

Interviewing the Accused Employee

- Don't Forget the Wrap-Up Questions
 - “Have you told me everything?”
 - “Is there anything else you wish to add?”

Legal Rights of the Accused Employee

- The Right Against Self-Incrimination
 - *Lybarger v. City of Los Angeles*
(May or may not apply in your state)

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True, False or Maybe

- Jerry is suspected of accessing child pornography at work. He refuses to answer your questions and invokes his right to remain silent. You may require him to waive his rights under the Fifth Amendment or give up his employment.

Assess Witness Credibility

- Bias
- Motive
- Evasiveness/Vague Answers
- Defensiveness
- Recollection of Details
- No Eye Contact
- "I Don't Recall"

EVALUATE THE EVIDENCE

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Evaluate the Evidence

- Did the Subject Employee Do or Not Do What He/She is Accused of Doing?
- Did the Employee's Conduct Violate Any Rule, Regulation, or Law?

What is Competent Evidence?

- Documents
 - E-mails, Memos, Timesheets, Documents
- Eyewitness Testimony
 - Personal Knowledge

True, False or Maybe

- A woman accuses your employee of sexually assaulting her. Her statement is clear and consistent with the physical evidence. In contrast, your employee has a very selective memory and gives patently false testimony on some points. Nonetheless, the allegations against your employee cannot be sustained because this is a classic case of "he said, she said."

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What's Not Competent Evidence?

- Rumors, Gossip
- General Statements that Cannot be Supported

The Burden of Proof

- Preponderance of the Evidence
- It is More Likely Than Not that the Alleged Misconduct Occurred

True, False or Maybe

- Your employee is accused of criminal misconduct. The prosecutor declines to file charges for "lack of evidence." The prosecutor's refusal to file charges is binding upon the employer.

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Evaluating the Facts in a Harassment Investigation

- Agency Policy
- Type of Harassment
 - Quid Pro Quo – “This for That”
 - Hostile Work Environment

Was the Complainant a Victim of a Hostile Work Environment?

- Visual, Physical or Verbal Conduct that is Based on Complainant’s Protected Status
- Assess Whether Complainant was Subjectively Offended and Impacted Work Ability
- Assess Whether Reasonable Victim Would be Offended and Impact Work Ability

True, False or Maybe

- A supervisor and subordinate are engaged in a consensual sexual relationship. A second subordinate alleges that the supervisor shows favoritism towards his significant other and claims this has created a hostile work environment. The employer has no liability concerns.

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Did Quid Pro Quo Harassment Occur?

- Unwelcome Sexual Conduct/Request for Sexual Favor
- Close Connection with Discussion of Job Benefits
- Reasonable Person Standard
- Harasser's Intent
- Preponderance of Evidence

True, False or Maybe

- Stan finds his secretary irresistible, but he knows that his employer's policies prohibit supervisors from dating subordinates. He maintains a professional demeanor towards the secretary. At the holiday party though, he consumes some "liquid courage" and asks her out. She says no and complains. Stan is guilty of quid pro quo harassment.

WRITING THE REPORT

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Outline of the Report

- Introduction
- Summary of Investigation
- Allegations
- Chronology
- Findings
- Attachments
- Recommended Disciplinary Action???

Communicating the Findings To Complainant

- Follow Agency Rules
- General Finding
- Appropriate Action Taken
- Appeal Rights, if Any
- Confidentiality
- No Retaliation
- No Report

True, False or Maybe

- Jason complains about harassment by co-workers. An investigation was done and some of the allegations were sustained. Jason has a right to know what specific disciplinary action was taken.

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Communicating the Findings To Subject Employee

- Specific Findings (if sustained)
- Recommended Actions
- Appeal
- Confidentiality
- No Retaliation
- If discipline, notice of intent to discipline, investigative report, supporting data

Communication of Findings Third Parties

- Privacy Rights
- General vs. Specific
- Sending a Message

TAKING ACTION

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Taking Corrective Action

- What Action Taken to Stop Harassment?
- What Action Taken to Ensure that Harassment Not Tolerated?

Discipline (at-will employees)

- Was the conclusion to fire reached honestly after an appropriate investigation and made in good faith?

Property Interest Rights of the Employee

**Can the agency prove
by a preponderance the
evidence that alleged
harassing conduct occurred?**

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Deciding Upon Discipline

- Verbal Counseling
- Written Reprimand
- Transfer
- Demotion
- Suspension
- Termination

Sending a message of intolerance of harassment

Deciding Upon Discipline

- Severity of Conduct
- Prior Discipline
- Training
- Harm to Public Service
- Likelihood Misconduct will be Repeated

Other Positive Actions Ongoing Messages

- No Harassment
- No Retaliation
- Training and Education
- Follow Up
- Being a Good Role Model

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TOP FIVE CROSS
EXAMINATION QUESTIONS:

ARE YOU PREPARED?

- It took you four months between the time my client informed you of her complaint, and the time you started interviewing witnesses? WHY?

- Always conduct the investigation promptly.
- If the delay is unavoidable, inform the complainant in writing about the status of the investigation so complainant is not “left hanging.”
- If there is a delay, document why it occurred: did the Complainant cancel the interview? Did you interview 25 people in order to do a thorough report?

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- Isn't it true that my client told you that Suzie Smith was sitting at her desk when Mr. Harasser touched my client? Yet you chose not to interview Ms. Smith?
- And you believe that is a thorough investigation?

- Be prepared to explain why you left out a witness.
- Interview all witnesses identified by the complainant, even if you don't think they have anything material to add.
- Go beyond the witnesses the complainant identifies: Who sits near the complainant? Who goes to lunch with her? Err on the side of interviewing more rather than fewer witnesses.

- Now Ms. Investigator, I see that you graduated college in 2005.... and now you are conducting sexual harassment investigations?

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• You do not have to be an expert investigator, but you should have some experience in this area. Be prepared to discuss your qualifications, the number of investigations you have either performed or participated in, the training you have received, and your other relevant qualifications.

• Mr. Investigator, I see that you have been doing investigations for the County for ten years. How many sexual harassment investigations have you done? Twenty? Of those twenty, isn't it true that in those twenty investigations, you NEVER ONCE found that the harassment occurred?

• Under liberal rules of discovery, it is possible that the employee's counsel will be able to obtain redacted versions of your previous investigations. Be prepared to explain, in general, the basis for your findings in previous investigations.

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• Ms. Investigator, do you believe that in order to conduct a fair investigation, you must be unbiased? Yes? Good. So would you please explain how you considered yourself unbiased in this investigation given that you and Mr. Harasser go out for drinks every Friday night after work and routinely have lunch together?

• If you have a social relationship with either the accused or complainant, you should not do the investigation.
• If the accused is someone who supervises you, directly or indirectly, you should not do the investigation.
• Consider all other possible ways that you could be labeled as biased. If you have any concern in this regard, do not conduct the investigation.

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CASE STUDY #1

Elliott Chardonay has been a Maintenance Worker I for the City of Real Beach for eight years. In October, he reported to work at his normal starting time, 7:00 a.m. His supervisor, Billy Sunday, observed that Elliott had dilated pupils, slurred speech, spoke in a fast and agitated manner, and moved with strange, jerking motions. Believing Elliott to be under the influence of drugs or alcohol, Billy told Elliott to go home.

Billy reported the incident to the Personnel Director. The Personnel Director, also assuming Elliott to be under the influence of drugs or alcohol, sent a letter to Elliott's home informing him of the following: (1) the City had an Employee Assistance Program for employees with drug or alcohol problems; (2) if an employee wished to participate in a rehabilitation program, such a program is covered by the City's medical insurance; and (3) an employee is granted time off to participate in rehabilitation programs. Elliott never sought the assistance of the EAP program, never enrolled in a rehabilitation program, and never responded to the Personnel Director's correspondence.

On November 15th, Elliott reported to work at 5:45 a.m., an hour and fifteen minutes before his scheduled starting time. He confronted the night time custodian, Guy Noir. Noir reported that Elliott was speaking in a rapid, frenetic and disjointed way. Noir also reported that Elliott continuously jerked his head and shoulders and paced back and forth.

When Billy arrived at work at 6:45 a.m., Noir informed Billy of Elliott's conduct. Billy, again suspecting drug or alcohol use, directed Elliott to accompany him to the Real Beach Medical Clinic for submission to a drug and alcohol test. (The City had a drug and alcohol policy permitting drug testing upon reasonable suspicion.)

The drug and alcohol test was administered by the Real Beach Medical Clinic. The results were analyzed by the Metropolitan Laboratory. The results sent to Personnel by the Lab indicated: "Not consistent with human urine."

Questions:

- 1) Was Billy correct in sending Elliott home?**

- 2) Should you investigate?**

- 3) **What evidence should be obtained?**
- 4) **Which witnesses should be interviewed?**
- 5) **Should you interview Elliott? When?**
- 6) **What, if any, discipline should be imposed?**
- 7) **What should the charges be?**

CASE STUDY #2

Emma Freespender is the purchasing and payroll clerk for the city. She is responsible for payroll and the city's expenditures. When Emma went on vacation, the newly-hired Finance Director went into Emma's office and opened her desk drawers to look for IRS forms. In doing so, the Director found one of Emma's pay stubs and noticed the stub reflected a higher hourly rate than the specified salary. The Director also saw late notices from credit card companies. Becoming concerned, the Director turned on Emma's computer and reviewed the payroll program. To the Director's astonishment he discovered that Emma gave herself a pay raise six months ago. While in the computer system, the Director also discovered that Emma was delinquent in paying the city's taxes, was fined several times by the IRS because of the delinquency and Emma failed to follow proper payroll procedures in documenting city employees' payroll changes, tax deductions, etc.

When Emma returned from vacation, the Director questioned Emma regarding the above. Emma said that the previous Finance Director told her she would get a raise six months ago and therefore; since she is the payroll clerk and processes all pay increases, she adjusted her pay scale. Emma also stated that the reason why the payment of taxes was delinquent is because she didn't have time to do the work. Finally, Emma stated that she was never properly trained into payroll procedures, the former Finance Director was sloppy, disorganized, unprofessional, and did not want to spend money on training her. Emma also told the Director that her privacy was invaded in the search of her office.

Questions:

You are the Director of Human Resources. The Finance Director wants to terminate Emma. Answer the following:

- 1) Do you investigate?**
- 2) Are there any interim steps you should take if the City conducts an investigation?**
- 3) What do you investigate?**

- 4) **Was the search of Emma's desk drawer lawful?**

- 5) **Was the Director's accessing of the computer lawful?**

- 6) **Should Emma be disciplined?**

CASE STUDY #3

You are the personnel director for the City of Townville. The city has approximately 200 employees, and you are responsible for all personnel matters including investigations of harassment complaints. Tommy Tattletale, a meter reader in the Public Works Department, approaches you to "voice a concern." You ask him to step into your office, to have a seat, and to explain to you what his concerns are. Tommy tells you that as a meter reader, he is concerned about a particular resident that has been getting on his nerves recently. You ask him to explain the circumstances behind his belief. He proceeds to tell you that a particular resident on Main Street harasses him every time he attempts to read the water meter at this resident's home. The resident has threatened to contact the police department for trespassing, and threatened him one time with a firearm. Tommy explains that the harassment is so severe that he cannot go to this resident's home any more, and he wants to sue the City for maintaining a hostile work environment.

The City has an anti-harassment policy that prohibits harassment of City employees based on sex, gender, race, national origin or ancestry, sexual orientation, religion, age, disability and marital status. The policy also indicates that all complaints of harassment shall be investigated.

Questions:

- 1) If all the facts are true as alleged, is this unlawful harassment?**

- 2) What additional information do you need to obtain in order to respond to Tommy's complaints?**

CASE STUDY #4

As the Human Resources Officer, you received a complaint that the Director of Transportation told his employee of forty years that she reminded him of his great aunt Tillie. The employee has now complained to you that her supervisor has made this remark. The employee also states that her supervisor is always commenting how slow she works in comparison to the newer employees. During your interview of the supervisor, he admits that he told the employee that she reminded him or his great aunt Tillie because of their similar personalities. He further admits to the comment regarding the newer employees because those newly hired employees were much more skilled working with computers, than the complaining employee. After completing your investigation, you conclude that the Director made these comments.

Questions:

- 1) As the investigator, what are your findings?**

- 2) What are your conclusions as to whether harassment occurred?**

- 3) Is Director's comment about "how slow she works" excused by the difference in computer skills?**

CASE STUDY #5

You are investigating charges of racial harassment by the Director of Public Works towards her subordinate employees. You received a complaint that the Director, Pat Triot, told her subordinate employee of Latino decent, Juan Lopez, that he should go back to the border where he came from. In investigating the charge, the following has occurred:

Questions:

Before you begin your interview of the Director, she refuses to say anything unless she has an attorney present and has threatened to walk out of the interview room.

1) How should you respond to her threat to leave unless she can obtain an attorney?

During your interview of Juan Lopez, he complained that the Director told him that he should go back to the border where he came from. He also told you that another employee, Martha Washington, was present when the comment was made. When you interview Martha, she has no recollection of this incident.

2) How should you proceed in completing the investigation?

After affording the Director an opportunity to obtain an attorney, you resume her interview with her attorney present. During the interview, you ask her directly whether or not she ever made this comment. Before answering, her attorney stands up, objects, points his finger at you and says that you are not entitled to ask this question and he is directing his client not to answer the question.

3) How should you proceed?

CASE STUDY #6

You are the City Manager for the City of Jonesville. The personnel director retained an outside investigator to conduct a harassment investigation of the finance director regarding charges of alleged gender discrimination and racial harassment. Prior to the investigation, you had heard that the finance director was demanding and oftentimes "lost his cool" with his subordinate employees. As most of the employees in the department are women, you were concerned that the finance director might be engaging in gender discrimination. After conducting a thorough investigation, the outside investigator made the following findings of fact:

Fact finding no. 1. Finance director Jane Doe frequently raises her voice at the female subordinate employees. This investigator cannot articulate any specific circumstances, as none of the employees can verify any particular incident. The employees claimed that it happened so often that they cannot recall any specific circumstances. The investigator also finds that the one male employee was never the victim of the director's raised voice.

Fact finding no. 2. The investigator finds that many of the female employees are particularly sensitive to assertive supervisors, as the prior supervisor had a history of being authoritarian and had threatened many of the female employees in the past. Thus, this investigator finds that although it is quite common for supervisors to lose their patience on occasion, in this particular department, it is problematic, as several of the female employees have developed a heightened sensitivity for assertive behavior.

Fact finding no. 3. This investigator finds that the alleged harasser admits to "losing her cool" on occasion, but indicates that the pressure from the City/Manager is too great, and the lack of adequate training and hiring of unqualified employees has led to an under skilled finance department and is causing her to lose her patience.

Questions to Consider:

- 1) Does it matter that the Director is female and the alleged victims are also female?**

- 2) Did the Finance Director commit gender discrimination and/or gender harassment?**

- 3) What additional information is necessary in order for you to make a determination as to whether or not the Finance Director engaged in gender discrimination?**

- 4) Assuming the Finance Director engaged in gender discrimination, what level of discipline is appropriate? Keep in mind that the City has not had a qualified Finance Director for many years, and the City Manager desperately wants to keep her because of the technical skills that she brings to the department. At the same time, you do not want a six figure lawsuit filed by any of the female employees. What do you do?**

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SECTION 1 **INTRODUCTION**

This workbook is directed to those supervisors and mid and upper level managers who are responsible for investigating reported allegations or evidence of employee misconduct, including harassment. The purpose of an investigation is to gather all of the facts relevant to making a determination as to what occurred or did not occur. The workbook is designed to provide a step-by-step guide for conducting an administrative investigation, including interviewing the employee that is the subject of the investigation.

SECTION 2 **WHEN SHOULD AN INVESTIGATION BE CONDUCTED?**

A. WHEN THERE IS A VIOLATION OF A STANDARD OF CONDUCT

In the overwhelming majority of public agencies, discipline can be imposed only if the employee has violated a clearly defined standard of conduct. An administrative investigation into alleged misconduct by an employee should therefore be conducted when there is reasonable suspicion to believe that an employee has violated a rule or regulation. Below is a list of common provisions found in personnel rules and regulations and/or memorandums of understanding (MOUs) that provide for the imposition of discipline:

- Fraud in securing employment or making a false statement on an application for employment.
- Incompetency, i.e., inability to comply with the minimum standards of an employee's position for a significant period of time.
- Outside employment not specifically authorized by the appointing authority or City Manager/CAO.
- Acceptance from any source of a reward, gift, or other form of remuneration in addition to regular compensation to an employee for the performance of his/her official duties.
- The refusal of any officer or employee of the agency to testify under oath before any grand jury having jurisdiction over any then pending cause or inquiry regarding agency operations.
- Inefficiency or inexcusable neglect of duty, i.e., failure to perform duties required of an employee within his/her position.
- Willful disobedience and insubordination, a willful failure to submit to duly appointed and acting supervision or to conform to duly established orders or directions of persons in a supervisory position.
- Dishonesty involving employment.

- Being under the influence of alcohol or dangerous drugs or narcotics while on duty.
- Excessive absenteeism.
- Inexcusable absence without leave.
- Abuse of sick leave, i.e., taking sick leave without a doctor's certification when one is required or misuse of sick leave.
- Discourteous treatment of the public.
- Improper or unauthorized use of agency property.
- Refusal to subscribe to any oath or affirmation which is required by law in connection with agency employment.
- Any willful act of conduct undertaken in bad faith, either during or outside of duty hours, which is of such a nature that does or may cause discredit to the agency, the employee's department, or division.
- Inattention to duty, tardiness, indolence, carelessness or negligence in the care and handling of agency property.
- Willful violation of any of the agency's ordinances, resolutions or rules, regulations or policies.
- Improper political activity. Example: Those campaigning for or espousing the election or rejection of any candidate in national, state, county or municipal elections while on duty and/or during working hours or in an agency uniform on or off duty; or the dissemination of political material of any kind while on duty and/or during working hours or in uniform.
- The conviction of either a misdemeanor or a felony where the conviction has a nexus with the employee's duties.

In addition, the following factors should be considered before conducting an investigation:

- Available time and resources
- Employee morale
- Severity of the alleged misconduct
- Source of the allegations of misconduct
- Frequency of the misconduct

For example, an anonymous letter claiming that a public employee had parked an agency vehicle in a "No Parking" zone would not necessarily justify an investigation of such an allegation. (However, a brief conversation with the affected employee might well be in order). On the other hand, an anonymous letter alleging that an employee of a city treasurer's office has been seen

removing funds from a cash register and putting them in her purse should prompt an investigation.

If alleged misconduct involves harassment, discrimination, retaliation, or other illegal conduct including whistleblower retaliation, the need to investigate and take prompt corrective action is substantial, as stated in the section to follow. Indeed, failure to conduct a prompt, fair, and thorough investigation in such cases could subject your agency to liability under both federal and state law.

B. WHEN THERE IS ALLEGED OR SUSPECTED HARASSMENT

The Equal Employment Opportunity Commission¹ has imposed a duty upon employers to investigate complaints of harassment.² In fact, case law establishes that once an employer knows or should have known of possible harassment, failure to conduct any investigation at all may constitute an independent violation of federal law (Title VII).³

Therefore, anytime a complaint of harassment is received, either formally or informally, the agency must conduct an investigation.⁴ This is true even where the complaint appears to have no merit whatsoever. An investigation may also be triggered by the following:

- When a person, other than the aggrieved person, complains about harassment;
- When someone indicates that inappropriate conduct is occurring, even if the word “harassment” is not used;
- When a supervisor personally observes inappropriate conduct or language, or has general knowledge of a potentially hostile work environment. In this situation, the supervisor must request that any inappropriate conduct cease and that an investigation be conducted.

Important: The investigation should proceed even when the alleged victim or other complainant does not request or consent to an investigation.

1. WHAT IF THE COMPLAINANT DOES NOT WANT AN INVESTIGATION?

Sometimes, complaining parties who report an incident of harassment request that the employer do nothing. Honoring such a request could place other employees at risk for harassment. “Doing nothing” or failing to investigate could place the public agency at risk for liability for failure to investigate and failure to take prompt remedial action. Once on notice of an alleged occurrence of harassment, the employer **must** investigate, despite the complainant’s request to “do nothing” or not to investigate. The employer should therefore advise the complainant that it will investigate the complaint, but it should also elicit and address any specific concerns that the complainant has regarding an investigation.

2. WHEN SHOULD THE INVESTIGATION BEGIN?

The investigation must be conducted PROMPTLY, fairly, and thoroughly.

The investigation should start within a few days of the receipt of the complaint. If an investigation is delayed, witnesses' memories fade, evidence may disappear, and the employer may be accused of failing to take prompt and effective remedial action.

Examples

An employer prevailed in a harassment case where it (1) began the investigation the day after the plaintiff complained, (2) completed a detailed report two weeks later, and (3) took remedial action about five weeks later.⁵

Another employer prevailed in a harassment case where several supervisors and the personnel manager (1) met with the plaintiff the day she complained to tell her they appreciated her bringing the incident to their attention and to reiterate the policy against harassment, (2) completed the investigation within three days, and (3) reprimanded and transferred the alleged harasser, even though there were no corroborating witnesses.⁶

C. BEFORE THE INVESTIGATION BEGINS

1. FOLLOW THE AGENCY'S INVESTIGATION PROCEDURE

Agencies who have established valid and thorough complaint investigation procedures are expected by the courts, the EEOC, and the DFEH to follow those procedures. It is particularly important to abide by all the time lines.

If your agency does not have an established complaint and investigation procedure, we strongly recommend implementation of such a procedure. The absence of such a procedure may result in incomplete investigations and inconsistencies in the way the employer handles harassment complaints. It might also call into question the commitment of your agency to eliminate harassment.

Employers in the process of establishing formal investigative procedures should, in the interim, follow accepted principles of investigative procedure.

2. DOCUMENT THE COMPLAINT

A complaint of harassment can either be made verbally or in writing. When a complaint is made verbally, a written summary of the allegations should be made immediately and signed by the complainant, or the complainant should be asked to place his/her complaint in writing. If the complainant refuses to sign a written statement of the allegations or to submit a written complaint, a written record of the complaint should still be made with a notation of the

complainant's reluctance to place his/her complaint in writing. Having a written record of the complaint will ensure accuracy and clarity of the charges being investigated and will guide the investigator in conducting the investigation.

Also, the investigator should make sure he/she fully understands the allegations and issues presented by the complainant. An effective tool is for the investigator to write down his/her initial analysis of the complaint, including any ambiguities he/she identifies in the complaint.

3. REVIEW THE ALLEGATIONS: WHAT TYPE OF HARASSMENT?

After a complaint of harassment has been received and documented, the allegations must be reviewed to determine what type of harassment is contained in the complaint. Forms of unlawful harassment include hostile work environment or *quid pro quo* sexual harassment. Keep in mind that harassing conduct may violate an agency's policy even though it would not constitute unlawful harassment.

a. Hostile Work Environment

For hostile work environment harassment to be unlawful, the conduct must be based on the alleged victim's **protected status**, such as his/her:

- Race
- National Origin or Ancestry
- Sex (including gender and pregnancy)
- Age (40 years and older)
- Physical or Mental Disability, or Medical Condition
- Religion
- Marital Status
- Sexual Orientation
- Opposition to Unlawful Harassment (i.e., retaliation)

Harassment based on sex includes harassment of a sexual nature, as well as gender harassment, and harassment based on pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.⁷ Harassing conduct of a sexual nature, whether motivated by hostility or by sexual interest, is always based on sex, regardless of the gender of the alleged victim or the sexual orientation of the harasser. Thus, same sex harassment and harassment by a homosexual employee against an employee of the opposite sex are also unlawful.⁸

Retaliation against a person who brings a good faith complaint of harassment or participates in an investigation of harassment, is unlawful and violates most agencies' policies. Even if harassment is not found to have occurred, if the complaint was made in good faith, the employee may not be retaliated against for bring the complaint.⁹

A work environment is hostile as defined by law if:

- The conduct is so offensive that it interferes with an employee’s ability to do his/her work;
- The conduct is so severe or pervasive that it creates an objectively hostile or abusive work environment; and
- The alleged victim subjectively perceives the environment to be abusive.¹⁰

An agency’s policy may be violated even if the conduct complained of does not constitute “unlawful” harassment. Many agencies have policies that prohibit conduct whether or not it would be considered unlawful harassment. In other words, the investigation must determine if the agency’s policy was violated not whether or not the law was violated.

b. Quid Pro Quo Sexual Harassment

Quid pro quo harassment occurs when submission to sexual conduct is explicitly or implicitly made a condition of a job, a job benefit, or the absence of a job detriment.¹¹

**SECTION 3 WHO SHOULD BE ASSIGNED TO CONDUCT THE
ADMINISTRATIVE INVESTIGATION?**

A. SELECTING THE RIGHT PERSON FOR THE JOB

Before an investigation can begin, an investigator must be selected who will be responsible for:

- Conducting the investigation
- Evaluating the facts
- Rendering factual findings
- Writing a report

Conducting an investigation is a major responsibility. This major responsibility is highlighted by the fact that, in discipline cases, challenges are being made to the conduct of the investigation itself. Since the investigation itself may be subject to scrutiny in a hearing or judicial proceeding, it is crucial that the agency choose an appropriate individual that is capable of conducting a PROMPT, FAIR, and THOROUGH investigation.

The investigator could be a supervisor, a human resource or personnel employee, an outside consultant or private investigator, or an in-house or contract attorney. It is important that one individual be in charge of the investigation without interference from others in the organization.

The investigator, to fulfill his/her responsibility for acting promptly and fairly, must be provided the necessary resources, training and access to information and potential witnesses.

1. CREDIBILITY, RANK AND AUTHORITY

In general, it is preferable to have the investigation conducted by an upper management employee who is higher ranking than those to be interviewed and who has established credibility within the agency. That said, a lower ranking investigator can be vested with authority by a supervisor to require employees who are otherwise above him/her in the chain of command to participate in an administrative interview.

2. PERSONALITY, DEMEANOR, AND CHARACTER

Administrative investigations should always be conducted in a professional and courteous manner. Nevertheless, any proceeding which can result in the imposition of discipline may become adversarial and confrontational. The most effective investigator is not viewed as an advocate for the complainant, the alleged wrongdoer, or the agency. Neutrality and objectivity enhance the credibility of the investigator and the investigation. Investigators who demonstrate impartiality and integrity will be more effective in conducting investigations.

The investigator should also be someone who is patient, thorough, and assertive. Many investigations, harassment ones in particular, often involve interviewing people who are reluctant to provide information. The investigator must be willing and capable of aggressively pursuing questions of individuals who may be reluctant or deceptive during an interview. On the other hand, the investigator must be able to develop a positive rapport with interviewees, including the quality of empathy.

3. IMPARTIALITY

Perhaps the most important quality an investigator must possess is impartiality. In order to conduct a fair investigation and to minimize conflict of interest claims, the investigator must not be biased in any manner toward the persons involved in the investigation, including the complainant, the alleged harasser, and the witnesses. Additionally, the investigator must not have any biases toward the nature of the allegations being investigated. If there is any doubt as to the investigator's ability to remain impartial throughout the course of the investigation, another investigator should be designated.

4. SOMEONE WITH INVESTIGATIVE EXPERIENCE

Conducting an administrative investigation is a learned skill. Whenever possible, it is recommended that the person(s) in your agency who has the necessary experience and personality to conduct an investigation be regularly assigned that task. It is also recommended that those individuals in your agency who are responsible for conducting investigations receive proper training on how to conduct an investigation.

5. HARASSMENT INVESTIGATIONS: ACCOUNTABILITY, CONTINUITY, AND EXPERIENCE

Accountability, continuity and experience are particularly important in the case of harassment investigations. For these reasons, one person from within the agency should be responsible for investigating all harassment complaints. There may be some exceptions to using the appointed investigator depending on the given circumstances, but in any event, this responsibility should not be delegated to a different person during the course of an investigation. The investigator should be knowledgeable in the area of harassment, including the agency's policies and procedures that prohibit harassment and the type of conduct being investigated, as well as being experienced investigating these complaints.

B. WHEN TO USE AN OUTSIDE INVESTIGATOR

In certain circumstances, an agency may want to consider using someone from outside the agency to conduct the investigation. An outside investigator should be considered when the alleged harasser is a high level employee or official in the agency. When the accused harasser is someone in such a position, it may be difficult to find someone within the agency that could perform an unbiased and impartial investigation.

An outside investigator should also be considered if the investigation is complex. Investigations can be very time consuming. It may, therefore, be more efficient to have the investigation conducted by someone outside the agency who can devote the time necessary to conduct a prompt and thorough investigation.

C. LEGAL IMPLICATIONS OF USING AN OUTSIDE INVESTIGATOR

Before choosing to retain an outside investigator, you should be aware of three significant legal implications which may impact your decision.

1. FEDERAL FAIR CREDIT REPORTING ACT

The first issue involves the Fair Credit Reporting Act (FCRA).

The FCRA not only regulates consumer credit reporting agencies, but it also establishes limitations for when it is permissible for third parties (such as an employer) to obtain "consumer" information about a person. To ensure these goals, Congress determined that "consumer reports" may only be released by a "consumer reporting agency" to third parties under certain enumerated circumstances.¹² Additionally, "investigative consumer reports," a sub-type of "consumer report," can only be procured or caused to be prepared under similar enumerated circumstances.¹³ Violators of these or other sections of the FCRA can be subject to civil or criminal penalties and may be liable for attorneys' fees.¹⁴

Significantly, liability under the FCRA only exists if the information concerning the consumer constitutes a "consumer report" or "investigative consumer" report. Where consumer

information comes from an entity which qualifies as a “consumer reporting agency,” then an employer must comply with its duties as a “user” of a consumer report under the FCRA.¹⁵ The FCRA defines “consumer reporting agency” as “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers *for the purpose of furnishing consumer reports to third parties*, and which uses any means or facility on interstate commerce for the purpose of preparing or furnishing consumer reports.”¹⁶

The FCRA defines the term “consumer report” as “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living” which is used or expected to be used (1) to establish eligibility for personal or family credit or insurance, (2) for “employment purposes,” or (3) “any other purpose authorized under section 1681b of this title.”¹⁷ Thus, the *purpose* for which the report is generated is important to help determine whether a report qualifies as a “consumer report” or “investigative consumer report” under the FCRA.

Significantly, “consumer report” does *not* include “any report containing information solely as to transactions or experiences between the consumer and the person making the report.”¹⁸ This exclusion is significant because it may preclude reports made by an employer itself (e.g., if an employer itself conducted the video surveillance or prepared the harassment report) from being deemed “consumer reports” under the FCRA.

The FCRA defines the term “investigative consumer report,” a sub-type of “consumer report,” as “a consumer report or portion thereof in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer’s credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.”¹⁹ The major distinction between an ordinary “consumer report” and an “investigative consumer report” is that the latter always requires prior authorization from the consumer.

2. CONGRESS AMENDS FAIR CREDIT REPORTING ACT TO CLARIFY THAT EMPLOYEES NEED NOT BE INFORMED OF INVESTIGATIONS FOR MISCONDUCT

On December 4, 2003, Congress amended the Fair Credit Reporting Act (FCRA). That law generally requires that individuals be notified whenever a communication is generated concerning their character, general reputation, or personal characteristics. Previously, there had been confusion as to whether the law required employers to notify employees of investigations concerning misconduct.

Congress’ amendments now eliminate any question by specifically exempting disclosure of certain communications related to employee investigations. Those communications, however,

must: (1) relate to suspected employee misconduct or be required to comply with federal, state, or local laws and regulations, including any preexisting written policies of the employer; and (2) not be provided to anyone other than the employer or an agent of the employer.

15 U.S.C. § 1681 *et seq.*; Pub.L. No. 108-159 (Dec. 4, 2003) 117 Stat. 1952.

D. INVESTIGATOR DETERMINES THE FACTS

The agency should direct the investigator to gather facts, make credibility determinations, prepare factual findings and issue a report (which will likely be discoverable). The agency attorney can then conduct a legal analysis and develop conclusions about the conduct, potential liability and similar legal issues. This legal report would probably be privileged and not subject to disclosure unless the agency chose to disclose it.

E. USING AN ATTORNEY TO CONDUCT AN INVESTIGATION

Some circumstances may warrant that an attorney conduct the investigation. When an attorney is the investigator, the attorney-client privilege and attorney work-product doctrine may prevent disclosure of the attorney/investigator's notes, reports, and other information gathered during the investigation. Thus, when an investigation involves highly sensitive allegations, having an attorney conduct the investigation may be a consideration. However, it is becoming more difficult to shield investigative reports when an attorney is acting in an investigative capacity.

Eventually, it may be necessary to disclose information gathered during the investigation in order to establish that a fair and thorough investigation was conducted. In fact, if litigation ensues as a result of the investigation, the investigator may be compelled to disclose the details of the investigative process, his/her notes, the report(s), etc. One court has held that the attorney-client privilege does not apply to attorneys conducting investigations where the attorney acted as the investigator and the investigation is used as a defense in a sexual harassment lawsuit.²⁰

An alternative way to benefit from legal advice during an investigation without having to waive the attorney-client privilege, is to appoint a non-attorney to be the investigator who can consult with an attorney should legal advice be necessary as to the direction or strategy during the investigation.

SECTION 4 BEGINNING THE INVESTIGATION

A. PRELIMINARY ISSUES TO CONSIDER PRIOR TO STARTING THE INVESTIGATION

In some circumstances, interim steps may need to be taken before the investigation is completed. In situations involving harassment or discrimination complaints, the employer should assess

whether interim corrective action should be taken so that the risks of continuing harm and liability are minimized. In one case where the employer ultimately fired the employee but delayed the investigation and resolution of the matter, the Tenth Circuit Court of Appeals upheld a verdict against an employer for intentionally inflicting emotional distress.²¹ Failure to take immediate action, especially where such action can be easily taken, may create additional liability.

Interim steps may include temporary transfer, placing the alleged wrongdoer on administrative leave, temporarily changing office locations, assigning an interim supervisor, or other temporary response designed to respond to the offending situation. In deciding which interim measures to adopt, the employer should consider the option that has the least negative impact on the complainant.

In *Swenson v. Potter*²², an employee complained that she was subjected to sexual harassment by a male coworker. During subsequent litigation, the employee claimed that the employer violated Title VII by failing to take appropriate corrective action in response to her complaint. However, the court noted that the employer separated the two employees by moving the complainant to a different position, and initiated an investigation. The court stated that while it is not proper to transfer a complainant to a less desirable location, an employer has broad discretion to choose how to minimize contact between the two employees. The court held that there was no evidence indicating that the position the complainant was moved to was less desirable than the one she occupied at the time of her complaint.

An employer should use caution in moving a complainant or taking any employment action that could be perceived as adverse to the complainant. It may therefore be more appropriate to temporarily transfer the alleged wrongdoer, and not the employee who complained. Asking the complainant for his or her input can also be helpful in achieving a mutually satisfactory interim solution and reducing the potential for on-going or compounding liability.

B. WHEN DO YOU ADVISE THE EMPLOYEE THAT HE/SHE IS THE SUBJECT OF THE INVESTIGATION?

By way of example, let us assume that the investigator has been advised by an informant that employee Doe, a backhoe operator, returns to the city yard on Wednesday evenings between 10:00 p.m. and midnight, and uses a city-furnished key to enter the facility and to remove scrap metal that would otherwise be sold by the city. Should employee Doe be promptly told that he is the subject of an investigation? The answer is an emphatic no!

There is no statutory or case law requirement that an employee be advised *pre-interrogation* that he/she is the subject of an administrative investigation. Using the above example to advise Doe of the ongoing investigation could very well jeopardize the city in securing the necessary *sub rosa* evidence by which to prove Doe's alleged misconduct.

Additionally, it is not unusual for several days or even weeks to pass between the commencement of an investigation and the actual interview of the subject employee. Pre-

interview notification to the subject employee of the pendency of the investigation may cause fellow employees to be more reluctant to come forward or to be open during their interviews (the subject may pressure potential witnesses). Furthermore, the subject employee's morale and job performance may be negatively and unnecessarily impacted, especially in a case where the pre-interview phase of the investigation is indicative of a finding of exoneration or not sustained.

Nevertheless, there are certain instances when it would be advisable to notify the subject employee early on of the pending investigation. These include:

- When your rules require it,
- When there is a risk of retaliation by the subject employee who should be ordered not to retaliate and not to discuss the investigation with co-workers, and
- When the nature of the complaint requires the separation of the complainant and the subject of the investigation.

C. WHAT IF THE SUBJECT MATTER OF THE INVESTIGATION RELATES TO CRIMINAL AS WELL AS ADMINISTRATIVE MISCONDUCT?

In such instances, it is recommended that, immediately upon learning of allegations that could result in criminal charges, you advise the local police chief/sheriff of the pending administrative investigation and make efforts to coordinate the criminal and administrative investigations. Generally, our firm recommends that criminal and administrative investigations be conducted on separate but parallel tracks.

An employee has the right to assert his or her right to be free from self-incrimination under the Fifth Amendment to the United States Constitution during a criminal investigation. If an employee reasonably believes statements he or she may make during the administrative interview will incriminate him or her for criminal wrong-doing, they may assert this right in the administrative investigation.

D. CREATE A BINDER

Before the investigation begins, the investigator should create a binder to use in gathering, organizing and maintaining information throughout the investigation. At this preliminary stage, the binder should include a copy of the agency's relevant policies and procedures, any written complaint or a written summary of the allegations, and any other information the investigator may have that is relevant to the investigation. This binder should be the investigator's primary tool throughout the investigation for maintaining information gathered during the investigation, such as notes of witness interviews and documentary evidence. After the investigation is completed, the investigator's findings and conclusions, written report, and documentation of remedial action taken, if any, should be included in the binder.

A. DOCUMENTS

At the beginning of the investigation, the investigator should gather and review all relevant documents. The investigator should also keep a list of all of the documents he/she reviews. This list should be updated and kept in the binder, along with a copy of the documents. Relevant documents may include:

- Written complaint(s),
- Memoranda or notes of any complaint or alleged incident of harassment,
- Personnel policies and procedures,
- Departmental rules,
- Grievance procedures,
- Employee handbooks,
- Personnel files (if relevant),
- Performance evaluations (if relevant),
- Other relevant policies such as the agency's Anti-Harassment Policy or Workplace Violence Policy,
- Investigation procedure, and
- Any other relevant agency rules.

Personnel Files: Documents in employees' personnel files are another source of information that the investigator may want to review as a part of his/her investigation. Information contained in personnel files, such as performance evaluations and disciplinary records, may assist the investigator in resolving issues of credibility. For example, if an employee has been previously disciplined or counseled regarding an incident reflecting the employee's trustworthiness, his/her credibility in the investigation may be questionable. The investigator should also consider any previous discipline during the remedial phase of the investigation.

It may not be appropriate, however, for the investigator to review personnel files *before* the investigation begins or at the beginning of the investigation. Remember, the investigator should not have any preconceived judgments or opinions about the allegations or persons involved. If the investigator learns about prior complaints made against the alleged wrongdoer, or of prior discipline, it may affect his/her ability to remain impartial. Thus, the investigator should only review personnel files when it becomes necessary, such as in making credibility determinations or recommending the level of disciplinary action, if any, to impose.

Also, do not forget about employee privacy rights! Investigators should not be allowed to peruse entire personnel files at will. Unless the investigator is the custodian of the personnel files, the

investigator should only have access to relevant information in employee personnel files on a need-to-know basis. The investigator needs to be given proper authority to review any personnel file. Also, there are special requirements for accessing police personnel files.

Prior Complaints: In cases where the investigator is investigating a complaint filed by one employee against another employee, the investigator should also review records of prior complaints against the alleged perpetrator, and records of prior complaints by the complainant. Other meritorious complaints against the alleged perpetrator could be used to establish a pattern of misconduct or harassment, whereas, unmeritorious complaints by the complainant may be indicative of his/her credibility. Prior unmeritorious complaints by the complainant may also reflect on the reasonableness of the complainant's perception of the alleged perpetrator's conduct.

Remember: An evolving list of documents and all documents should be kept in the binder!

B. PHYSICAL EVIDENCE

Aside from documentary evidence, there may be physical evidence which could actually be "smoking gun" evidence as to whether misconduct or harassment has occurred. Physical evidence could also be the determining factor in making credibility decisions. Examples of physical evidence include such items as:

- Letters or cards;
- Legally recorded or videotaped evidence ;
- Time cards;
- Computer print-outs;
- Receipts;
- E-mail printouts;
- Cartoons;
- Photocopies and faxes.

Physical evidence can be particularly important in harassment investigations as they may be evidence of the relationship between the parties, consent, pornographic or other inappropriate material, etc.

Remember: Originals and/or copies of all relevant physical evidence should be kept in the binder!

C. CONDUCTING INTERVIEWS

1. GOALS OF THE INTERVIEWS

The purpose of interviewing the complainant, alleged wrongdoer/harasser and witnesses is to gather basic and relevant facts in order to make a decision as to whether misconduct occurred. Therefore, the focus should be upon:

- What happened?
- Who was involved?
- Who were the witnesses?
- How did it happen?
- When did it happen?
- Where did it happen?
- Why did it happen?

Answers to these basic factual questions should lead to the investigator's final decision as to whether misconduct occurred.

2. PREPARATION FOR THE INTERVIEWS

a. Who to Interview and What to Ask

One of the most effective means of gathering facts during an investigation is to interview persons who may have information about the allegations. Before interviews are conducted, however, the investigator must decide:

- Who should be interviewed,
- The order in which the interviews should be conducted, and
- What questions to ask.

One way to make these preliminary determinations is to develop a chart containing:

- The conditions under which misconduct may have occurred,
- What facts would be needed to prove each condition, and
- Possible witnesses concerning each condition.

For example, in a harassment investigation involving an allegation that a supervisor told an employee that her odds of receiving an upcoming promotion were good if she "played ball" and then asked her out to dinner, a chart may look like this:

COMPLAINT: *Quid Pro Quo* Sexual Harassment

Condition No. 1: Is the employee in a protected class?

Needed Facts: No facts are needed because we know the complainant is in a protected class, i.e., woman.

Condition No. 2: Was a sexual favor sought?

Needed Facts: Did the supervisor actually use the term “play ball”? Did the supervisor actually ask the complainant out to dinner? If so, what did the supervisor mean by “play ball”? Did the dinner invitation constitute sexual conduct? Was any other sexual favor sought? Did the supervisor seek sexual favors from any other employees?

Witnesses: Did anyone observe or overhear the conversation between the supervisor and the complainant? Was anyone else at dinner with the supervisor and complainant? Was anyone else harassed by the supervisor? Has the complainant complained about being sexually harassed by any other employees?

Condition No. 3: If there was sexual conduct, was it unwelcome?

Needed Facts: Did the complainant go to dinner with the supervisor? Why? Was she uncomfortable? Did she feel she could refuse the invitation? Did she feel she could leave dinner? Had she ever gone to dinner with the supervisor before?

Witnesses: See Condition No. 2. Did the complainant talk to any co-workers about the alleged conduct of the supervisor?

b. Identifying Witnesses

After identifying the relevant conditions, facts, and witnesses, the investigator will be in a better position to develop a preliminary list of questions and to identify potential witnesses to interview. Possible witnesses may include:

- The complainant,
- The accused,
- Other employees in the department,
- Employees in the human resources department,
- The employee’s physician (Be Careful!),
- Bystanders, and
- Individuals to whom the complainant might have talked to about the alleged conduct.

The investigator should keep a list of witnesses in his/her binder. Witnesses should be added to that list to keep it current so that at the end of the investigation there is a final and complete list of witnesses. We recommend that the binder include a tab for each witness.

c. Developing Questions

The list of questions should include *who, what, why, where, when, how, and anything else* about each alleged incident.

For example, assuming the complainant in the example above went to dinner with her supervisor, the investigator should ask the complainant:

- Who went to dinner? Was anyone else present?
- What happened at dinner?
- What were you each wearing at dinner?
- What was said at dinner?
- Why did you go to dinner?
- Where did you go to dinner?
- When did you go to dinner? How long did it last?
- How did you feel at dinner? Did the supervisor do anything to offend or intimidate you at dinner?
- Whom have you told about the dinner?
- Who paid for dinner?
- Is there anything else that offended or intimidated you at dinner?
- Have you had dinner with your supervisor before? Since?

After drafting the preliminary general question/witness list, the investigator should draft a list of questions for each particular witness. The investigator should also compile any documents he/she may wish to use while interviewing each witness.

Important – Remember to Use Binder! After interviewing a witness, the investigator should place his/her notes of the interview, the draft questions, and any relevant documents presented to or received from the witness in the binder. All of these items can be placed in the binder behind each individual witness' tab. Notes reflecting the dates and times witnesses are scheduled to be interviewed and are actually interviewed may also be included in the binder.

i. What About the Difficult Questions?

The investigator may want to consider saving the more sensitive and potentially embarrassing questions until the end of the interview. If these questions are asked at the beginning of the interview, the witness interviewed may become reluctant to provide information or may become

defensive. The nature of the allegations in complaints often makes people feel uncomfortable and/or embarrassed. An interview must not be concluded, however, without asking the “tough” questions.

ii. Follow-Up Questions

Don't Forget to Ask! Even though a list of questions to ask during the interviews has been prepared beforehand, the investigator must not forget to follow up on answers to these questions with additional questions. The list of questions should only be used as a guide. Witnesses often provide new information that was not anticipated or expected. This information should be pursued with follow-up questions.

The investigator should also always ask each person interviewed to list all individuals he/she believes may have knowledge of any of the alleged incidents. The investigator should also ask what his/her belief is based on, and what knowledge the other person(s) identified is/are believed to have.

The investigator should conclude interviews of all witnesses by asking the witness if he/she has any further relevant information to provide.

iii. Questions for the Complainant

In addition to gathering facts supporting the alleged incidents of misconduct or harassment, the complainant should be asked if he/she ever discussed the allegations with anyone. If so, to whom and when? What did you tell him or her? If not, why not?

The complainant should also be asked if he/she kept notes of what happened. If so, the investigator should obtain a copy of the notes if the complainant still has them.

If the alleged perpetrator is the complainant's supervisor or a co-worker with whom the complainant works, the complainant should be asked if he/she believes he/she can still work with that person. If he/she does not believe he/she can, the investigator should ask if there is anything he/she would like the agency to do to address the situation. If the complainant asks for a transfer pending the outcome of the investigation, the request should be considered and accommodated, if possible. The employer, however, should avoid suggesting that the complainant transfer to another position or department. Transferring the complainant could be perceived as retaliation for complaining about misconduct or harassment and/or a continuation of a hostile work environment.

iv. Questions NOT to Ask

In determining what questions to ask, the investigator should also keep in mind what questions not to ask. An investigator should not ask questions that are wholly irrelevant to the allegations being investigated. Nor should an investigator attempt to elicit information protected by a person's right to privacy unless it is clearly necessary to obtain the private information in order to conduct a full and thorough investigation. As previously discussed, the questions should focus on establishing the conditions under which the alleged inappropriate conduct/misconduct or harassment occurred.

For example, with respect to investigations of alleged sexual harassment, the complainant's sexual activities with individuals other than the alleged perpetrator are irrelevant to the investigation. However, a pre-existing relationship between the complainant and the alleged perpetrator may be relevant, although not conclusive, to the question of whether conduct was welcome.

v. Questions Regarding Complainant's Conduct

A complainant's conduct might be relevant for resolving issues of consent, whether the conduct was welcome and whether a hostile work environment was present. Examples of relevant conduct by the complainant may include provocative attire the complainant may have been wearing or the complainant's frequent use of obscene or sexually-oriented speech.²³ Again, while these factors might be relevant, they are not conclusive.

vi. Questions Regarding Alleged Wrongdoer's Conduct

The investigator may want to inquire into the alleged conduct towards other employees, besides the complainant. This type of information may be relevant to the alleged wrongdoer's motive or intent in his/her conduct toward the complainant. Specifically, it may be used to show that the employer or alleged wrongdoer had a general attitude of disrespect and hostility toward members of the complainant's protected class (i.e., women) and therefore, had a motive to harass the complainant.²⁴

In a harassment investigation, evidence that the alleged harasser harassed people both within and outside of the complainant's protected class should be explored but is most likely irrelevant. For example, where a supervisor was abusive to both men and women, he nevertheless unlawfully sexually harassed his female subordinates because his abuse of them was centered on the fact that they were women. He referred to men simply as "assholes," but he called women "dumb --- --- broads." While he could have simply called the women "dumb," the fact that he instead called them dumb *broad*s showed that his abuse focused on the *gender* of the female employees.²⁵

Even if, however, the abusive supervisor abused male and female employees equally, he could still have sexually harassed the female employees if *a reasonable woman* would have found the conduct offensive and hostile. Moreover, the supervisor's abusive behavior to both men and women could result in viable claims of sexual harassment from *both* male and female employees.²⁶

d. Contacting Witnesses

Contacting the persons to be interviewed is a critical part of the interview process. Agencies should have an established procedure identifying:

- Who is responsible for contacting the person(s) to be interviewed,
- How the persons to be interviewed should be contacted, i.e., either verbally or in writing,

- What information should be provided to the person(s) to be interviewed, and
- What admonitions, if any, should be given to the person(s) to be interviewed.

For example, if an internal investigator is conducting the investigation, it may be appropriate for the investigator to contact the person(s) to be interviewed directly and schedule an interview. However, if an outside investigator is conducting the investigation, it may be more appropriate for someone from within the agency to contact the person(s) to be interviewed and schedule the interviews on behalf of the investigator.

Whether or not the initial contact with the person to be interviewed is verbal or in writing and what information should be provided to the person(s) to be interviewed, depends on who it is that is going to be interviewed. It is often advisable to provide the person(s) to be interviewed with a “pre-interview memorandum” notifying him or her of the general nature of the investigation and setting forth the appropriate admonitions discussed below.

Sample memoranda to witnesses and the alleged harasser are Appendices at the end of this workbook.

3. INTERVIEW PROTOCOL

a. The Interview: Where, When, and for How Long?

Preferably, the interview should take place at the workplace during work hours. However, there may be situations where a neutral site is selected as the interview place. If an interview is conducted outside regularly scheduled working hours, the employee interviewed must be paid overtime (as required by agency rules and regulations, as well as applicable laws) for time spent in the interview. In addition, the interview should only last for a reasonable period of time, taking into consideration the complexity of the allegations being investigated. Reasonable breaks should be taken to allow the employee being interviewed to attend to his/her own personal physical necessities or to consult with counsel or another representative who may be present (but not while a question is pending!).

b. The Interview: Who Should Be Present?

Generally, the only persons who should be present during the interview are the investigator, the person being interviewed, and his/her representative where appropriate. [See discussion regarding right to representation.] Occasionally, however, the investigator may choose to have a third party present as a witness to the interview.

The presence of a third party is particularly useful if the interview is not being tape recorded. In this instance, the third party may serve to corroborate information provided during the interview. When an interview is not tape recorded, persons interviewed may later deny saying what was communicated during the interview, regardless of what the investigator’s notes reflect. A third party present during the interview will be able to corroborate the information that was, in fact, provided during the interview.

In addition, if the investigator is a man and a sexual harassment complaint made by a woman is being investigated, the investigator may want to consider having another woman present. Female complainants sometimes feel uncomfortable communicating information to male investigators when the allegations involve sensitive sexual matters. Having another woman present to assist in eliciting information from the complainant is often useful in this type of situation.

c. *The Interview: Introduction and Admonitions*

The following are issues which should be addressed at the outset of an interview:

i. *Nature of the Investigation*

The interview should begin with an introductory statement summarizing the purpose of the interview and the general nature of the allegations being investigated. However, we do not recommend providing persons interviewed with information beyond the fact that they are being interviewed as part of an investigation into “alleged workplace misconduct.” This introductory statement should be prepared in advance, in writing, and read to each person prior to being interviewed.

ii. *What to Tell the Employee That Is the Subject of the Investigation*

The investigator should tell the alleged wrongdoer, in detail, what the allegations against him/her are, including the alleged wrongful acts and/or statements. If they are lengthy and/or complicated, they should be put in writing.

The investigator should then give the alleged wrongdoer an opportunity to respond to each allegation. Types of questions may include asking the alleged wrongdoer to:

- State facts showing that the allegations are not true,
- Provide an excuse or explanation for his/her conduct,
- State whether there was a miscommunication or misunderstanding and explain his/her version of events, and
- Describe his/her relationship with the complainant.

The investigator should also ask the alleged wrongdoer to identify people who should be interviewed, and the information he/she thinks those persons will contribute to the investigation. The investigator should ask the alleged wrongdoer for relevant documents and evidence as well.

Finally, the investigator should ask the alleged wrongdoer what steps he/she believes would be appropriate for the investigator to take to ensure a fair investigation.

iii. *Right of Representation*

Employees participating in investigatory interviews, who have a reasonable belief that discipline may result from the interview, have a right to be represented by their union representative or legal counsel in such an interview upon request.²⁷ While perhaps technically it is not required,

we recommend that prior to the alleged wrongdoer's interview, he/she should be advised of his/her right to representation. In fact, from a practical standpoint, this discussion should occur prior to the day of the interview so the employee can arrange for his/her representative to be present and delays do not occur.

iv. Admonition Not to Discuss Investigation with Co-Workers

To ensure the integrity of the interview and investigatory process, all persons interviewed should be told not to discuss with any other employees:

- The fact that they are being interviewed,
- The existence of an investigation, or
- Any information shared by or with them during the interview process.

v. Admonition That Refusal to Cooperate Constitutes Insubordination and May Subject Him or Her to Discipline

Employees, generally, do not have a right to refuse to cooperate or answer questions in an investigatory interview. Accordingly, such refusal can be grounds for insubordination resulting in discipline, including discharge.

vi. Insubordination

Insubordination exists when an employee refuses to obey an order which a superior is entitled both to give and to have obeyed. For an employee to be insubordinate, the following elements must be present:

- An order must be given;
- The order must be lawful and not cause an unreasonable safety risk;
- The order must be clearly communicated to the employee;
- The order must be communicated by someone with the proper authority to give the order;
- The employee must have understood the order; and
- The employee must have intentionally or willfully refused to comply with the order.

Because the order must be given by someone with the proper authority, the order must be given by either the employee's supervisor or someone else in the chain of command with the proper authority. Outside investigators do not hold such authority. Therefore, if an outside investigator is conducting the interviews, someone from within the agency holding the proper authority must give the order. This can be done through a pre-interview memorandum given to the employee(s) to be interviewed by the appropriate person. The memorandum should inform him/her of the investigation, direct him/her to cooperate in the interview, and inform him/her that failure to cooperate will constitute insubordination which may result in discipline, up to and including termination.

vii. Advise No Retaliation

The person interviewed should be advised and assured that that they will not be retaliated against for assisting in the investigation. The alleged harasser and anyone else who has authority to take adverse employment action against the complainant should be admonished not to retaliate.

viii. Advise Confidentiality, to the Extent Possible

Complaints must be processed as confidentially as possible. Identities should not be disclosed, *except to the extent necessary* to continue the investigation. Statements made by employees should not be disclosed to other employees, unless it is necessary to elicit specific, relevant, and necessary information from the employee.

Occasionally, complaining parties and/or witnesses ask for an assurance of confidentiality before providing information. Prior to being interviewed, the complainant and all witnesses should be told that information provided will be held in confidence *except to the extent necessary* to conduct a full investigation, or *to the extent necessary* to obtain testimony in any hearing which might be held.

Where a complainant insists upon remaining anonymous, it is important to document in writing the fact that the complainant requested his/her identity remain confidential.

4. METHODS OF RECORDING INTERVIEWS: TO TAPE RECORD OR NOT TO TAPE RECORD?

The investigator should either take complete and accurate notes of each interview, or tape record each interview. There are advantages and disadvantages to tape recording interviews that must be weighed by the investigator before considering whether to tape record. However, in most situations, we recommend tape recording interviews.

An advantage to tape recording is that it ensures an accurate record. When taking notes, it is often difficult to record all information that is being provided. Something that may not seem relevant or important when first said may later turn out to be a key fact that might have been missed if relying on the investigator's notes only. The person interviewed may also later forget or deny saying something during an interview, regardless of what is reflected in the investigator's notes. A verbatim record of what was said during an interview ensures accuracy, and provides conclusive support for the investigator's findings of fact.

On the other hand, a disadvantage to tape recording is that it can be intimidating and cause the witness to be reluctant to provide information. As an alternative to tape recording, the investigator may want the person interviewed to sign a written statement of his/her version of events. The written statement should be prepared by the investigator to ensure that it contains all the necessary information, and should be signed by the witness immediately so that he/she does not have time to change his/her story.

Even if an interview is tape recorded, the investigator should always take notes regarding the witness's demeanor and credibility. Indeed, this information should be recorded even if the interview is not being tape recorded and the investigator is relying solely on his/her notes of the interview. The investigator should remain cognizant, however, that his/her notes may be subject to discovery in a subsequent administrative or judicial proceeding and, therefore, should not write anything down that he/she would not want anyone to read at a later date. Thus, no jokes, insults, or insupportable conclusions should be put in writing. The investigator may also want to record his/her observations, interpretations and conclusions on a separate sheet of paper apart from his/her notes of facts gathered.

Important: While consent is not required, notice that the interview is being tape recorded must be given to the person being interviewed! Such notice should be recorded either on the tape or in writing.

If the investigator decides not to tape record and to only take notes, he/she must keep in mind that careful notes must be taken during the entire investigation. The investigator should also document important quotes as spoken by the person being interviewed.

5. INTERVIEW STRATEGIES

a. Establish an Appropriate Interview Tone

In all interviews, the investigator must convey the seriousness which a disciplinary complaint deserves. The investigator must also inform witnesses that the investigation has not been completed and that a decision regarding the issues will only be made after the investigation is complete.

Particularly in interviewing, and in all dealings with the interviewees, it is important to create an atmosphere that is supportive and conducive to the full development of information. In cases where complaints are involved, complainants often believe that by coming forward with their complaints, they are taking substantial risks. These risks include possible retaliation by the perpetrator, the prospect that he/she will not be believed, and possible adverse impact on his/her present job and future promotional opportunities. Given the perception of these risks, the investigator should adopt a tone of non-condescending sensitivity. In all cases, fairness dictates a professional and impartial approach to the interviews.

b. Forms of Questioning: Do's and Don'ts

i. Ask Open-Ended Questions (i.e., "What did he do next? What was your response?")

The investigator should avoid leading questions (i.e., "Isn't it true that you forced her into the room?"). Leading questions point to an answer, suggest that the investigator has prejudged the issue (i.e., the investigator is not impartial), and may make witnesses feel defensive.

Note: For an investigator to ensure that he/she is getting information about what the witness personally observed and remembers, he/she should not tell the witness any of the claims or facts he/she has learned through the course of the investigation. Imparting information to the witness might cloud the witness's memory and make the witness unsure of what he/she actually remembers.

ii. Establish a Foundation

To establish a foundation, the investigator must gather basic information regarding the events and conversations so that the investigator can actually visualize what allegedly happened. If a witness is reporting the content of a conversation to the investigator, the investigator should first determine the identity of each speaker, the date, time and place of the conversation, and whether anyone else was present.

Example

Witness: "We discussed where to go for dinner."

Investigator: "Let me ask you about some preliminaries to be sure I understand the context and content of the conversation.

Where did this conversation take place?

When did this conversation take place?

Who was present?

Who initiated the conversation?

What did he say?

What was your response?

What did he say next?"

iii. Distinguish Opinion from Fact

It is the role of the investigator to gather evidence and reach conclusions based on the evidence. Often, however, witnesses answer questions by providing opinions and conclusions rather than facts. Opinions and conclusions must be recognized as such, and the interview should be re-directed. One way to re-direct it is to ask the witnesses for the facts on which they base their opinions and conclusions.

iv. Follow the Leads!

As previously discussed, it is important that the investigator be flexible when interviewing a witness. The investigator should not rely solely on a script; that is, he/she should also ask questions based upon the answers given by the witness during the interview in order to gather as much information as possible. The investigator should always allow himself/herself the opportunity to re-interview the complainant, witness, and the alleged harasser to follow up on additional information discovered throughout the investigation.

D. ADMINISTRATIVE SEARCHES

Gathering evidence as part of an investigation may involve conducting an administrative search. Searches of public employee property, desks, lockers, and work areas may violate employees' privacy rights as well as Fourth Amendment rights. The courts have held that employees have a reasonable expectation of privacy in areas that they intend to maintain as private depending upon the "realities of the workplace." At the same time, employers have a legitimate interest in maintaining a safe and efficient workplace.

In *Ortega v. O'Connor*, the Ninth Circuit Court of Appeals held that a public employee's Fourth Amendment rights are violated when his office is searched without a warrant and personal materials are seized in response to vague and very old allegations of sexual misconduct.²⁸

In *Ortega*, Dr. Magno Ortega held the position of Chief of Professional Education at Napa State Hospital from 1964 to late 1981. In 1981, he purchased a new computer to be used in his program by obtaining donations and contributing approximately half the cost of the computer himself. Based on concerns regarding the computer purchase, the hospital began an investigation into Ortega's management practices. During the investigation, it was alleged by a staff psychiatrist that Dr. Ortega had engaged in sexual harassment of resident physicians.

Subsequently, Ortega's office was searched without a warrant. The documents searched and read included personal letters from friends and family, as well as sexually explicit letters from several women. Personal possessions as well as state property were boxed and removed. Based on the investigation, Ortega was fired. He filed a complaint in 1982 under 42 U.S.C. § 1983, alleging violations of his Fourth Amendment rights to be free from unreasonable search and seizures. This lawsuit eventually reached the United States Supreme Court, becoming the seminal case on employee privacy rights in the workplace. After the case was remanded to the District Court for further proceedings, a jury found in favor of Ortega, awarding him \$376,000 in compensatory damages plus punitive damages. Another appeal followed, extending the length of this litigation to approximately sixteen years.

The court of appeals affirmed. The court held that the search and seizure of the personal materials would only be lawful in the context of a search regarding allegations of sexual misconduct. Finding that the type of materials taken from Ortega's office, i.e., truly private papers or communications, lie at the core of the First and Fourth Amendment. The allegations of sexual harassment were so old and vague that they could not serve as a basis for reasonable suspicion warranting a search of the employee's private office, let alone such an intrusive search of his personal materials. Moreover, the court held that there was no reasonable suspicion that the evidence of sexual harassment would be found in Ortega's office.

In *Schowengerdt v. General Dynamics Corp.*, a civilian Navy engineer's subjective expectations of privacy in his office, desk and credenza were held not objectively reasonable, given that the Navy employees worked under tight security conditions and were regularly searched.²⁹ Thus, the employee's claim of invasion of privacy based on a warrantless search of his locked desk and credenza did not prevail.

Employees' reasonable expectations of privacy can be diminished by the employer's rules and policies regarding the privacy of specified areas. Thus, it is advisable that employers clearly indicate in their policies that they maintain the right to search employees' offices, desks, and files. In *United States v. Bunkers*,³⁰ the court, relying upon existing postal regulations allowing locker searches, found searches of employee lockers permissible.

A reasonable expectation of privacy can also be destroyed by a regular practice which places an area open to inspection.³¹ In *Chicago Firefighter Union Local 2 v. City of Chicago*, a federal district court upheld a fire department policy authorizing unannounced searches of employee lockers to guard against drug and alcohol use.³²

In *Leventhal v. Knapek*, the United States Courts of Appeal, Second Circuit held that a search of a public employee's work computer did not violate the Fourth Amendment. Here, Leventhal worked as an Accountant for the New York Department of Transportation. The employer received an anonymous letter alleging that Leventhal was neglecting his duties. The employer searched his computer and discovered a personal tax program on the office computer, in violation of DOT policy. Leventhal was transferred to a lower-grade position as a result. Leventhal filed a civil action, alleging that the search violated his Fourth Amendment rights. The Court held that the search was reasonable, that the anonymous letter provided reasonable grounds for initiating the search and it was not overly intrusive.³³

1. PRACTICAL CONSIDERATIONS WHEN CONDUCTING A SEARCH

The searching of employees and their possessions is normally a function of law enforcement. Employer searches are fraught with potential hazards that can ultimately result in sizeable damage awards in favor of employees. Even where an employer has reasonable suspicion or probable cause to believe that an employee may have an item or a substance prohibited by law or policy in his or her possession, or in his or her automobile, the employer should not search an employee or an employee's personal possessions. Employers have several other options:

- Ask the employee to submit voluntarily to being searched or to have his or her possessions searched.
- Call local law enforcement and allow them to search if they determine that it is appropriate.
- Prevent the employee from continuing to work and send the employee home.
- Prepare to institute disciplinary action against the employee.

Unless an item or a substance in violation of the established policy is in plain view of management personnel so it can be seized without a search, management personnel are generally not trained in how to pat search or fully search an individual. Improperly conducted searches can lead to altercations, ill will and lawsuits.

2. GUIDELINES FOR CONDUCTING SEARCHES:

- Retain a key or combination for each locker, desk or vehicle on agency property and notify the employees of this fact. Make sure any lock on agency property is owned and supplied by the employer and forbid employees to use their own locks.
- Provide formal notice to employees that lockers, desks and vehicles may be searched without employee consent or knowledge and that refusal to permit such searches may result in discipline.
- Prepare a written policy concerning searches and have each employee sign a written acknowledgment stating that the employee has received and read the written search policy.
- Secure a valid search warrant prior to conducting a search at the request of the police.
- Conduct searches in an evenhanded and nondiscriminatory manner.
- If possible, obtain consent of the employee before conducting the search.

3. EAVESDROPPING

Employer eavesdropping on employees can take on many forms, such as wiretapping, electronic surveillance, hidden observation, videotaping, and computer monitoring. Federal and state statutory schemes regulate these activities. Further, employer intrusions into areas in which employees maintain a reasonable expectation of privacy must conform to constitutional requirements for searches. The Federal Crime Control and Safe Streets Act, 18 USCA §§ 2510-2520 makes it illegal to intentionally intercept any wire, oral or electronic communication without consent.

a. Telephone Calls

Situations exist when an employer may monitor phone calls of an employee if it is in the ordinary course of business. Such instances have included an employer monitoring telephone solicitations in order to determine the efficacy of an employee's phone sales. In *Watkins v. L. M. Berry Co.*, the employer had a policy of monitoring sales calls as part of its employee training program.³⁴ The employees consented to the monitoring. The court held that because of the company policy, the employer could monitor business calls without violating the Act. However, personal calls in which the employee held a reasonable expectation of privacy were beyond the scope of the employer's policy and thus protected. In other words, once an employer determines that the call is personal and not related to business, any and all interception of the phone call must immediately cease.

There are other situations in which an employer may intercept an employee's phone call in the ordinary course of business if the employer can establish a legal interest in the phone call. In *Briggs v. American Air Filter Co. Inc.*,³⁵ an employer was held not to have violated the Federal Wiretapping Laws by intercepting an employee's phone call who was disclosing confidential

business information to a competitor. In *Epps v. St. Mary's Hospital of Athens*,³⁶ the employer was held not to have violated the law when she intercepted an interoffice phone conversation between two employees who were making scurrilous and disparaging remarks about fellow employees. It is important to note, however, that this rule allowing employers to intercept phone calls in the ordinary course of business, commonly known as the Business Extension Rule, does not extend to everything the employer may believe it has an interest in. If an employee receives a personal call, and even if that phone call pertains to the employee seeking employment elsewhere, the employer may not intercept the call. See *Watkins* cited above.

In *Deal v. Spears*,³⁷ an owner of a store which had been burglarized installed a recording device to automatically and surreptitiously record all telephone conversations in the hope of identifying whether the criminal activity was an “inside job.” The court found that the employer’s request to the employee to restrict the frequency of her personal telephone calls and a warning that the calls might be monitored failed to provide sufficient notice that employee telephone conversations would be tape-recorded.

b. Videotaping

In a case where an Alaska state employee was suspected of stealing cash, the State installed a video camera in the ceiling above the employee’s desk without consent or a warrant. The Alaska Supreme Court ruled that the employee did not have a reasonable expectation of privacy for two reasons.³⁸ First of all, other coworkers had easy access to the employee’s work space. As a result, the camera was less intrusive than if her workspace were more private. Secondly, since the employee worked in an environment with high security requirements, her reasonable expectation of privacy was lower than it would have been in other less sensitive positions.

Courts have held that employees have a reasonable expectation of privacy affording them protection from “public disclosure” of their conversations at work.

c. Electronic Monitoring

The advent of new forms of advanced communications technology raises a myriad of legal questions for public employers. Foremost among these issues is whether employers have the right to access emerging technologies such as voice and electronic mail messages generated or received by their employees. Employer monitoring of and access to voice and electronic mail present significant employment privacy issues. Given that it would be common for personal and business-related messages to be placed on voice or electronic mail, a host of legal questions arise. These questions commonly come into play when employees are on vacation and an employer is concerned about unanswered voice or electronic mail.

The United States Supreme Court has determined that what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected under the Fourth Amendment’s guarantee of freedom against unreasonable searches and seizures. In *Katz v. United States*, the court found the government’s procedures constitutionally invalid when a telephone conversation was monitored by an electronic surveillance device attached to the outside of a public telephone booth where the defendant was prone to place interstate wagers from a particular telephone booth.³⁹ The court concluded the Fourth Amendment “protects

people, not places.” The Fourth Amendment is now held primarily to protect “reasonable expectations” of privacy, including, as in *Katz*, conversations originating from a public telephone booth.

As previously noted, the United States Supreme Court in *O’Connor v. Ortega*, held that work-related intrusions by public employers may be justified by the governmental interest in the efficient and proper operation of the workplace.⁴⁰ With respect to investigations of work-related misconduct, the O’Connor Court stated that:

“Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement or other work-related misfeasance of its employees...Public employees’ expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practice and procedures, or by legitimate regulation.”

Applying this reasoning to the issue of employer’s monitoring of employees’ computer usage, it would seem likely that a court would uphold a public employer’s right to monitor or review an employee’s electronic mail correspondence, either prior or subsequent to initiation of an investigation. However, the outcome would differ when an employer attempts to eavesdrop on an employee’s private conversations.

Federal law allows that an employer has the right to access employee voice and electronic mail messages maintained on the employer’s system. The Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2701(c)(1), protects e-mail messages from interception by and disclosure to third parties, but precludes criminal liability for retrieval of voice or e-mail messages by “the person or entity providing the wire or electronic communications service.” Therefore, federal law allows an employer the right to access employee voice and electronic mail maintained on the employer’s system, but not if an outside commercial system, such as MCI, is utilized. However, that Act applies only to businesses which in some way affect interstate commerce.

There have been a number of invasion of privacy cases involving e-mail. For example, in *Bohach v. City of Reno*, police officers claimed violations of the Fourth Amendment and wiretap statutes and sought to halt their Department’s investigation into their possible misuse of the computerized paging system.⁴¹ The court held that the police officers did not have a reasonable expectation of privacy in their use of the computerized paging system and that the Department could access their electronic messages. The court stated that all the messages were recorded and stored, not because anyone was “tapping” the system, but simply because that was an integral part of the technology which stored messages in the central computer. Further, the Department had notified all users that their messages would be “logged on the network” and that certain types of messages were banned from the system.

The case of *United States v. Simons* involved an employee's use of the Internet.⁴² Mark Simons was employed as an electrical engineer within the Foreign Bureau of Information Services ("FBIS") which is a part of the CIA. Simons had access to both a computer system, owned and operated by the CIA, and to the Internet. The CIA had an employee who managed the computer network for FBIS and who monitored the Internet traffic. The CIA conducted a search of which web sites were being frequented from their computer network and determined that Mark Simons was frequenting pornographic sites and that he had downloaded 1,000 documents that were pornographic in nature.

Mark Simons moved to suppress this evidence claiming that the CIA had conducted an illegal search in violation of his Fourth Amendment rights since the search was conducted without a warrant or other lawful justification. The court held that Simons did not have a reasonable expectation of privacy with regard to any Internet use since his employer had an official policy regarding such use which stated that official business use, incidental use, lawful use and contractor communications were permitted and that audits would be implemented to support identification, termination and prosecution of unauthorized activity and that audits would be capable of recording the various web sites visited by employees.

An employee in *McVeigh v. Cohen* was able to successfully argue that his employer had unlawfully monitored his Internet access.⁴³ Timothy McVeigh (who bears no relation to the Oklahoma City bombing defendant) is a naval officer who sought an injunction to prohibit the Navy from discharging him based on his sexual orientation. The Navy began investigating McVeigh's sexual orientation when a civilian forwarded an e-mail message from McVeigh, sent to her through the American Online Service (AOL), which provided some evidence that McVeigh was homosexual. The Navy then contacted AOL and sought further information about McVeigh in order to determine his sexual orientation. The court held that the Navy's investigation of McVeigh was illegal under the Electronic Communications Privacy Act of 1986 ("ECPA") since the ECPA only allows the government to obtain information from an online service provider if it (a) obtains a search warrant or (b) if it gives prior notice to the online subscriber and then issues a subpoena or receives a court order authorizing disclosure of the information in question. Accordingly, the court suppressed the evidence since it found that the Navy had unlawfully obtained the information.

E. CONCLUDING THE INVESTIGATION

At the completion of the "gathering the facts" phase of the investigation, the investigator should have:

- Gathered and reviewed all relevant **documents**;
- Gathered and reviewed all **physical evidence**; and
- Conducted **interviews** with the complainant, the alleged harasser, and all percipient witnesses.

Remember: The binder should contain copies of all documents, physical evidence, and notes of each interview or transcriptions of interviews that were tape recorded.

SECTION 6 **CONSIDERATIONS OF CONFIDENTIALITY AND PRIVACY**

Confidentiality is implicated in three ways. First, personnel matters must be regarded as confidential. Hence, the fact that an investigation into possible misconduct by a specific employee is occurring should not be divulged to other employees, nor to other managers or supervisors except on a “need to know” basis. If the agency or agency management does not adequately protect privacy concerns, grounds for a lawsuit allegation breach of privacy may be present.

Second, employee witnesses often request that the information they provide be treated “confidentially.” At the same time that the agency should and can attempt to protect the confidentiality of the investigation, a guarantee of confidentiality can both hamstring the investigation and subject the agency and the manager who promised confidentiality to liability. The witness should be told that confidentiality cannot be guaranteed, and that there may be a need to divulge the information provided under certain circumstances.

Third, there is a need to ensure that employees do not divulge to others the substance of the investigative interview. The best means to protect against such disclosure is to order participating employees to refrain from discussing the matter with other employees.

Important: The investigator must be aware that in the event of litigation, the complainant, alleged wrongdoer, or both, may seek disclosure of all of the details of the investigation. While many of these matters might be shielded from ultimate production, the investigator should bear in mind that anything he/she says to witnesses, writes in a report, or even in personal notes, could become the subject of litigation or be disclosed as part of litigation. This possibility emphasizes the need for a correct methodological approach, affording fairness to all witnesses in the process, and ensuring that confidentiality has been maintained.

SECTION 7 **EVALUATING THE FACTS**

A. REVIEW BINDER

At the end of the fact gathering process, the investigator’s binder (See Section 4.D.) should contain the following:

- Documents, i.e., the complaint, the agency’s applicable policies, Complaint and Investigation Procedure, etc.
- Physical Evidence
- Notes or transcriptions of interviews

The next step is to evaluate the facts and make factual findings, or, if requested, to determine whether misconduct occurred. Rarely are investigators faced with one incident or one factual scenario as a basis for misconduct. Rather, investigators often must cull through the documentary evidence and interview notes, transcripts, etc., to determine whether the preponderance of the evidence substantiates a finding of misconduct.⁴⁴ In harassment or discrimination cases, the evaluation will involve review of the *totality of the circumstances*.⁴⁵

B. CREDIBILITY DETERMINATIONS AND DISPUTE RESOLUTIONS

The investigator's decision also requires that he/she weigh the relative credibility of all of the individuals interviewed. After the interviews, important material facts will most likely be in dispute because witnesses tend to remember things differently. This scenario does not necessarily mean that the witnesses are lying. There could be honest differences in recollection and memory failures because of inattention of a witness at a particular time, reliance on hearsay, influence of personal friendships, and the possibility that a witness was not in an adequate position to have heard or observed the matters in dispute. Moreover, a witness might not tell the complete truth because he/she does not want to subject himself/herself or others to possible discipline or other negative treatment. One of the investigator's responsibilities, however, is to make credibility determinations and resolve factual disputes.

These decisions may be resolved by consideration of the following:

- What is the basis of the factual discrepancy?
- Was each witness in a position to observe the conduct in question?
- Does any witness have a motive to lie or tell less than the full truth?
- Were there other possible witnesses to the events?
- Did one of the witnesses make a contemporaneous statement to another person regarding the event?
- Did either witness make a contemporaneous note or write a complaint recording the event close in time to the incident?
- Is the complainant/alleged wrongdoer/witness' version of events internally consistent?
- Is the complainant/alleged wrongdoer's version consistent with other witnesses' version of event?

The investigator should feel free to re-interview the complainant, witnesses, and/or the alleged wrongdoer during the evaluation phase of the investigation to help clarify factual discrepancies, inconsistencies, or other issues.

C. REVIEW AGENCY RULES, POLICIES, AND THE LAW

Before an investigator can properly evaluate the facts, he/she must, of course, be aware of the type of behavior which constitutes misconduct as prohibited by the agency's policies. The investigator, therefore, should review relevant policies before he/she begins evaluating the facts.

SECTION 8 WRITING THE REPORT

A. CONTENTS OF THE REPORT

Once the investigator makes a particular finding, or when requested, decides as to whether misconduct has or has not occurred, he/she should organize the basis for the decision in writing. There are any number of ways to prepare a written report. We recommend the following outline/organization for the written report:

- Introduction.
- Methodology and Persons Interviewed. While it is recommended that the identity of the persons interviewed be disclosed in the report, it is not necessary to identify which witness provided what information. Some investigators use a number or letter identification so that witness names are not used in the actual report.
- Background Facts. This category depends upon the complexity and nature of the investigation; it may not be necessary.
- Allegations.
- Chronology. It may be appropriate, depending on the nature of the allegations, to combine the allegations with the chronology.
- Findings of Fact.
- Conclusions. It may be appropriate to combine the findings of fact and conclusions, depending on the nature of the allegations and findings. *However, the investigator should only make conclusions if he/she has been given the responsibility of doing so.*
- Recommendations (including recommended disciplinary action if there has been a finding of misconduct). *Recommendations as to what type of corrective action should be taken should only be included if the investigator has the responsibility for making such recommendations.* If corrective action is recommended, the agency should be ready and willing to implement those recommended actions.

Once the investigator has decided on the outline or the approach he/she is going to take in writing the report, it is time to prepare the written report. A sample written report with examples of language to include in the report is attached in the Appendices.

B. ATTACHMENTS TO THE REPORT

The investigator may choose to attach relevant documents to the written report. Such documents might include any physical evidence gathered during the investigation (including “love” letters, pictures, drawings, or other writings).

C. CONFIDENTIALITY OF THE REPORT

The investigator’s written report should be maintained in confidence. A copy should not be given to the complainant, [alleged] wrongdoer, or anyone else, unless there is a substantiated need-to-know. There are circumstances, however, where disclosure of the report may be appropriate or required by law. For example, if misconduct is found to have occurred and the harasser is disciplined, a copy of the report should probably be attached to the Notice of Intent to Discipline.⁴⁶ However, compliance with due process principles does not necessarily require disclosure of the investigator’s binder, particularly the notes gathered during the investigation.

If litigation ensues as a result of the alleged misconduct and/or investigation, the written report and the investigator’s binder, including the investigator’s notes, may be required to be disclosed during the discovery process.

Important: Confer with legal counsel before producing the written report and/or any other materials gathered during the investigation!

SECTION 9 RETALIATION

Taking an adverse employment action against an employee for assisting in an investigation is unlawful. Therefore, we recommend that the person(s) to be interviewed be advised that they will not be retaliated against for assisting in the investigation. This practice is also a means of encouraging cooperation if the person to be interviewed is reluctant to provide information.

The alleged wrongdoer should further be admonished that he/she shall not retaliate against the complainant or anyone else associated with the investigation for having complained or being involved in the investigation. This admonition should also be given to anyone else who has the authority to take adverse employment actions against persons involved in the investigation.

APPENDIX A

SAMPLE INVESTIGATOR'S CHART

Creating a chart can be a useful tool in sorting out the allegations and issues to be investigated. For example, in a case where a female employee alleges that her male supervisor inappropriately touches her shoulder when speaking to her, an investigator's chart might look like this:

<u>Issue No. 1:</u>	Is the complainant alleging that her supervisor has touched her in a sexual manner?
<u>Needed Facts:</u>	Need to determine if the complainant believes that her supervisor is making sexual advances on her. Need to know if the supervisor has made any verbal statements to the complainant that could constitute sexual advances? Need to know the exact circumstances when the supervisor touches the complainant.
<u>Issue No. 2:</u>	Does the supervisor touch other employees, including males, in the same manner?
<u>Needed Facts:</u>	Need to know if the supervisor touches other employees in the same manner. Also need to know if the supervisor only touches female employees, or also touches male employees in a similar manner.
<u>Issue No. 3:</u>	Have any other employees witnessed the supervisor touch the complainant?
<u>Needed Facts:</u>	Need to know if any employees have witnessed the supervisor touch the complainant. Need to know if any employees have overheard the supervisor making inappropriate statements to the complainant.
<u>Issue No. 4:</u>	Has the complainant informed her supervisor that his conduct is unwelcome?
<u>Needed Facts:</u>	Need to determine if the supervisor has continued touching the complainant after being informed that the conduct is unwelcome.

APPENDIX B

SAMPLE MEMO USED PRIOR TO INVESTIGATIVE INTERVIEW

TO: (Employee Under Investigation)

FROM: (Investigator)

An administrative investigation is currently being conducted into the events which occurred on (date). (Give a brief description of the event(s) which prompted the investigation).

You are ordered to report to (location) on (date) at (time) to answer questions relating to this administrative investigation. Failure to be present will be considered an act of insubordination and can be an independent basis for disciplinary action, up to and including dismissal. (Name, classification or assignment) will be in charge of the investigative interview. The following employees will also be present during the investigative interview. (List by name and classification or assignment).

The investigative interview will be recorded. You will have access to the tape if any further proceedings are contemplated or prior to any further investigative interview at a subsequent time. You have the right to bring your own recording device and record any and all aspects of the investigative interview.

You have the right to be represented by a representative of your choice who may be present at all times during the investigative interview. This representative shall not be a person subject to the same investigation. Your representative shall not be required to disclose, nor be subject to any punitive action for refusing to disclose, any information received from you while under investigation in non-criminal matters. You shall provide me with one (1) working day's notice if you will be represented by legal counsel as we may then require counsel to also be present.

(If this investigative interview occurs during off-duty time, then add: "You shall be compensated for your time in accordance with regular department procedures (list provision).")

If you have any questions prior to the investigation, please do not hesitate to call. My phone number is _____.

RECEIVED:

Date Employee's Name

PERSONAL SERVICE WITNESSED BY: _____ DATE: _____

APPENDIX C

SAMPLE STATEMENT AND QUESTIONS FOR USE AT THE BEGINNING OF THE INVESTIGATIVE INTERVIEW

Good morning. The date is _____, and the time is _____. As you know, I am [insert name and title]. In addition to myself, also present are [insert names and titles]. This is an investigative interview.

I've asked you to come to this meeting to provide information about events that apparently occurred on [date]. The events concern [insert general information about what misconduct may be involved]. There is a possibility that the information obtained through this meeting could lead to disciplinary action against you.

I'm tape recording this meeting to be sure that there is a clear record of what occurred during the meeting, i.e., the questions I asked and the answers you gave. We will give you access to the tape if further proceedings occur and you may use your own tape recorder during this interview. Also, if you request, a copy of this tape will be made available to you for your review.

You have a right to be represented by the representative of your choice during this investigative interview. *[If no representative is present: Do you waive your right to have a representative present during this investigative interview?] [If a representative is present:]* I understand that [insert name of representative] is present to represent you. _____, I will be asking questions directly to [insert name of employee], and will require [him/her] to respond directly. You are free to make any necessary clarifications or statements and to participate fully in this process.]

At any time during this interview, you will be allowed to use the bathroom, get a drink of water, or have a short rest break.

Did you receive my memo of [date]?

Do you fully understand the contents of that memo?

Do you have any questions before we begin?

Do you understand fully what I've said so far?

APPENDIX D

SAMPLE STATEMENT IN THE EVENT EMPLOYEE REFUSES TO RESPOND TO QUESTIONS OR SUBMIT TO INVESTIGATIVE INTERVIEW

You should be advised that if you refuse to respond to questions or submit to this investigative interview you shall be considered insubordinate and subject to disciplinary action, up to and including dismissal because of the act of insubordination.

The question (repeat exact wording of question, or if that is not possible, the gist of the question) is directly related to this investigation (if necessary, state exactly how question is related). Your refusal to answer that question may result in punitive action for insubordination and misconduct should you persist in your refusal. Your refusal to answer questions is a direct violation of the following sections of the Personnel Rules:

(List all relevant sections, i.e., duty to cooperate in investigations, duty to obey lawful orders of supervisors, etc.)

Do you still refuse to answer that question? (If the answer is “Yes,” “What is your reason for refusing to answer that question?”)

APPENDIX E

SAMPLE WRITTEN REPORT

Introduction

Language Where Outside Investigator:

This report contains Findings of Fact and Conclusions as to whether or not the alleged misconduct occurred. [Name and title of individuals] requested that the investigator determine whether certain allegations verbalized by [name of complainant] are, in fact, true and, if so, whether they violate [name of agency]'s policy prohibiting harassment in the workplace. Prior to the investigator's fact-finding, he/she was not associated with the [agency] in any manner and was a complete stranger to the [name of agency]. The investigator did not know and had never met [name of complainant], [name of alleged harasser], or any of the witnesses with the exception of [name witness(es)].

Alternative Language Where "Internal" Investigator:

The Human Resources Manager is very familiar with the [name of agency] policies and procedures, particularly the Harassment Policy. He/She has also received training in Harassment in the Workplace and in how to conduct an investigation. He/She has, in fact, conducted approximately _____ investigations. Part of his/her responsibility includes submitting a recommendation with findings and conclusions.

Methodology and Persons Interviewed

Written Complaint

The investigator received, reviewed and analyzed the written complaint. He/She, therefore, based his/her investigation on the allegations contained in the written complaint.

Verbal Complaint

The investigator first met with [individual to whom complainant complained] to determine the nature of [complainant's] allegations. At the time he/she began the investigation, there were no written allegations nor was there a written complaint. Consequently, it was necessary to obtain background information regarding the allegations of which [individual to whom complainant complained] was aware. During that meeting, he/she gave the investigator the chronology of which he/she was aware as well as the allegations of which he/she was aware. [Person to who complained] did not comment or opine in any manner regarding the substance of the [complainant's] allegations. He/she simply stated the allegations as he/she knew them to be in a factual manner.

The investigator next met with the complainant on [date]. Thereafter, he/she began interviewing the individuals listed below. These interviews were conducted on [list dates]. The persons interviewed were:

[List Names Of Interviewees]

At the outset of each of the interviews, the investigator assured each witness of the confidentiality of the investigation (unless it were to result in a hearing or litigation). Although the investigator had the impression that several of the witnesses did not want to be involved in this investigation, not one of them appeared to withhold or distort information or to evade my questions.

In addition to reviewing the complaint and interviewing the witnesses identified above, the investigation consisted of the following:

1. A review of selected provisions of the [Agency] Personnel Rules and Regulations.
2. A review of selected provisions of the Memorandum of Understanding between the [Agency] and [Association].
3. Written documents provided to the investigator by the following employees: [list names of employees].

Background Facts

[Name of the complainant] has worked for the [name of agency] since [date]. Her immediate supervisor is [name of supervisor (in this case, alleged harasser)]. She has worked in the position of [name of position] for ____ years. She has been an employee of the [agency] for ____ years. As is true of most sexual harassment investigations, particularly those that involve allegations of retaliation as this one does, the chronology of events is very important. It is essential to consider the allegations in light of the chronology. Sexual harassment allegations must be considered in light of the “totality of the circumstances.” The [name of agency] policy on (sexual) harassment entitled [name of policy] provides:

[Quote Prohibitions of Harassment From Your Agency’s Policy]

Consequently, this report will outline by month, sometimes date and year, the incident and/or allegation.

Chronology/Allegations

[Gives dates and incidents and/or allegations in paragraph/list form.]

Findings of Facts

Many of the allegations of (sexual) harassment by [name of complainant] are contained in the Chronology above. Because some of the allegations did not include time frames, there are allegations contained in these Findings of Fact that are not referred to above. The allegations were provided to the investigator in his/her interview with [name of complainant] on [date of interview]. The investigator subsequently received a copy of a written complaint from [name of complainant].

[List each allegation and make a factual finding as to whether it occurred in the manner alleged by the complainant. In many reports, you may wish to include your conclusions as to whether the alleged misconduct occurred in this section as well.]

Example:

[Name of complainant] claims that [name of alleged harasser] referred to her as [term referring to women and/or term of endearment]. [Discuss what complainant and harasser stated in interviews. Discuss other witnesses' knowledge. It is advisable not to refer to witnesses by name unless it is obvious who the witness is or when the witness is in a high-level position and clearly would not object to being mentioned by name.]

At least two other witnesses the investigator interviewed stated that they were also referred to as "_____." Neither of them was offended by the term. They stated it was used in a joking, non-offensive manner.

One other witness referred to the fact that [name of complainant] was called "_____." This witness appeared to consider the term to be somewhat degrading. The investigator finds that [name of alleged harasser] referred to [name of complainant] as a "_____." In light of the circumstances surrounding the statement as described above, the investigator does not find that the term was sexual, nor does he/she find that it was intended to be offensive. Further, in light of [name of witness/or generically refer to as witness] description of how [name of complainant] behaved with respect to the term, the investigator does not find that the statement was unwelcome. [A finding of unwelcomeness should only be included if it is an element of harassment in the agency's policy.]

Conclusions

[Refer to standard for harassment based on the agency's policy. An example follows.]

The agency's policy defines "sexual harassment" as follows:

[Quote From Your Agency's Policy. An example follows.]

"Sexual Harassment" – Sexual harassment occurs when unwelcomed sexual advances, requests for sexual favors, and other verbal or non-verbal conduct of a sexual nature is:

1. Made either explicitly or implicitly a term or condition of employment, or a participation in other programs, services or activities; or
2. Used as a basis for employment or business decision affecting such individual; or
3. Has the purpose of effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.”

The agency's administrative regulations and procedures further clarify sexual harassment to include:

1. Making unsolicited written, verbal, physical and/or visual contact with sexual overtones...verbal examples include, but are not limited to: derogatory comments, innuendoes, slurs, jokes, epithets. Physical examples include, but are not limited to: assault, touching, impeding, or blocking movement...
2. Continuing to express sexual interests after being informed that the interest is unwelcome (reciprocal attraction is not considered sexual harassment).
3. Making reprisals, threats of reprisals, or implied threats of reprisal following a negative response.”

In determining whether or not harassment occurred, the totality of the circumstances were considered, including the following:

1. Whether the conduct was verbal, physical, or both;
2. How frequently it was repeated;
3. Whether the conduct was hostile and patently offensive;
4. Whether the alleged harasser was a co-worker or a supervisor;
5. Whether others joined in perpetrating the harassment; and
6. Whether the harassment was directed at more than one individual.

Sample Language for Conclusion Where No Harassment is Found:

The totality of the circumstances, the investigator's assessment of [complainant's] perceptions, [alleged harasser's] perceptions, and their respective credibility, as well as the investigator's interviews with all of the other witnesses, finally lead to the conclusion that there was no sexual harassment in violation of the agency policy. The fact that [alleged harasser] may have used poor judgment in his/her dealings with [complainant] does not rise to the level of sexual harassment on his/her part. The investigator does not find that [complainant's] perceptions with respect to the sexual harassment allegations are credible based on the investigator's finding that a reasonable woman would not have perceived the conduct as did the complainant under the "reasonable woman" standard.

Sample Language for Conclusion Where Harassment is Found:

As stated above, the totality of the circumstances were considered in determining whether the agency's policy was violated. While the Findings of Fact do not contain any serious findings

which in and of themselves would constitute sexual harassment in violation of the agency's policy, when these allegations and findings are considered in the totality of the circumstances and, according to the six factors listed above, it is the investigator's finding that [complainant] was subjected to some workplace sexual harassment in violation of the agency's policy based upon these sexual innuendoes and physical touching.

On the other hand, while the physical touching may not have been in a sexual manner, that physical touching combined with inappropriate comments which included sexual innuendo constitutes sufficiently pervasive conduct to be sexual harassment in violation of the [name of agency]'s policy.

Attachments

The attachments, if any, should be identified and listed at the end of the report.

- Agency Policy
- Complaint
- Physical Evidence [specifically identify]

ENDNOTES

- ¹ The Equal Employment Opportunity Commission ("EEOC") is the agency responsible for enforcing the provisions of Title VII of the Civil Rights Act of 1964 prohibiting discrimination, including harassment, in the workplace.
- ² EEOC: Policy Guidance on Sexual Harassment, 8 FEP Cas. Manual (BNA), at 405:6685, n. 7, 405:6699, Section E (1990).
- ³ *Bator v. State of Hawaii*, 39 F.3d 1021 (9th Cir. 1994); *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988).
- ⁴ EEOC: Policy Guidance on Sexual Harassment, 8 FEP Cas. Manual (BNA), at 405:6700, Section E (2)(1990).
- ⁵ *Saxon v. American Tel. and Tel. Co.*, 10 F.3d 526 (7th Cir. 1993).
- ⁶ *Carmon v. Lubritzol Corp.*, 17 F.3d 791 (5th Cir. 1994).
- ⁷ 42 U.S.C. § 2000e(k); *Easton v. Crossland Mortgage Corp.*, 905 F.Supp. 1368, 1378 (C.D. Cal. 1995)(gender harassment); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1462 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 733 (1995)(gender harassment); EEOC v. *Hacienda Hotel*, 881 F.2d 1504, 1515, n. 8 (9th Cir. 1989)(pregnancy harassment).
- ⁸ *Easton v. Crossland Mortgage Corp.*, 905 F.Supp. at 1380 (C.D. Cal. 1995).
- ⁹ See *Trent v. Valley Electric Ass'n*, 41 F.3d 524, 526 (9th Cir. 1994).
- ¹⁰ *Harris v. Forklift Systems*, 510 U.S. 17, 114 S.Ct. 367, 370 (1993).
- ¹¹ *Heyne v. Caruso*, 69 F.3d 1475 (9th Cir. 1995), citing *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994).
- ¹² 15 U.S.C. § 1681b.
- ¹³ 15 U.S.C. § 1681d.
- ¹⁴ 15 U.S.C. §§ 1681n-s.
- ¹⁵ *Yohay v. City of Alexandria Employees Credit Union*, 827 F.2d 967 (4th Cir. 1987).
- ¹⁶ 15 U.S.C. § 1681a(f) (Emphasis added).
- ¹⁷ 15 USC § 1681b defines the "permissible purposes of consumer reports." 15 U.S.C. § 1681a(d)(1)(A)-(C).
- ¹⁸ "Consumer report" also does *not* include communications among persons affiliated with the same agency as the person making the report. 15 U.S.C. § 1681a(d)(2)(ii)-(iii). 15 U.S.C. § 1681a(d)(2).
- ¹⁹ 15 U.S.C. § 1681a(e).
- ²⁰ *Harding v. Dara Transport, Inc.*, 914 F.Supp. 1084 (D.N.J. 1996).
- ²¹ *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990).
- ²² *Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2000).
- ²³ *Meritor Sav. Bank v. Vinson* (1986) 477 U.S. 57, 1065 S.Ct. 2399.
- ²⁴ *Heyne v. Caruso*, 69 F.3d 1475, 1479 (9th Cir. 1995).
- ²⁵ *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 733 (1995).
- ²⁶ *Steiner, supra*, 25 F.3d at 1464.
- ²⁷ *Nat'l Labor Relations Bd. v. Weingarten, Inc.* (1975) 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171.
- ²⁸ *Ortega v. O'Connor* (9th Cir. 1985) 764 F.2d 703, rev'd 480 U.S. 709.

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- 29 *Schowengerdt v. United States*, 944 F.2d 483 (9th Cir. 1991), *cert. denied*, 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 650 (1992).
- 30 *United States v. Bunkers*, 521 F.2d 1217 (9th Cir. 1975), *cert. denied*, 423 U.S. 989, 96 S.Ct.400, 46 L.Ed.2d 307 (1975).
- 31 *United States v. Speights*, 557 F.2d 362 (3rd Cir. 1977).
- 32 *Chicago Fire Fighters Union, Local 2 v. City of Chicago*, 717 F. Supp. 1314 (D.Ill. 1989).
- 33 *Leventhal v. Knapek*, 266 F.3d 64 (2nd Cir. 2001).
- 34 *Watkins v. L. M. Berry & Co.*, 704 F.2d 577 (11th Cir. 1983).
- 35 *Briggs v. American Air Filter Co.*, 630 F.2d 414 (5th Cir. 1980).
- 36 *Epps v. St. Mary's Hospital of Athens*, 802 F.2d 412 (11th Cir. 1986).
- 37 *Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992).
- 38 *Cowles v. Alaska* (2001) 23 P.3d 1168, *cert. denied*, 534 U.S. 1131.
- 39 *Katz v. United States* (1967) 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576.
- 40 *O'Connor v. Ortega* (1987) 480 U.S. 709, 107 S.Ct. 1492.
- 41 *Bohach v. City of Reno*, 932 F.Supp. 1232 (D. Nev. 1996).
- 42 *United States v. Simons*, 29 F.Supp.2d 324 (E.D. Vir. 1998).
- 43 *McVeigh v. Cohen*, 983 F.Supp. 215 (D.D.C. 1998).
- 44 *Meritor Sav. Bank v. Vinson*, *supra*; *EEOC: Policy Guidance on Sexual Harassment*, 405:6681, Section A; 29 C.F.R. § 1604.11 (b).
- 45 *Harris v. Forklift Systems*, *supra*; *Meritor Sav. Bank v. Vinson*, *supra*; *EEOC: Policy Guidance on Sexual Harassment*, *supra* at 405:6681, Section A; 29 C.F.R. 1604.11 (b).
- 46 *Loudermill v. Cleveland Board of Education* (1988) 488 U.S. 941, 109 S.Ct. 363.