

I. PREFACE

Whether an employee makes a formal written complaint or an informal verbal complaint, arguably the most critical aspect of responding is the ability to conduct a prompt, thorough and effective investigation.

These investigation tools are for those management employees who must conduct investigations and make difficult decisions based upon the facts available to them. The goal of this training is to prepare staff to thoroughly gather the facts, so they can confidently make employment decisions and take effective remedial measures. The elements of this training encourage the investigator to uncover all the relevant facts, not just the facts that may support a certain outcome. In other words, an objective investigator tries to uncover “the good, the bad and the ugly” no matter what.

Each investigation is unique and fact specific. The elements outlined here will guide a thorough and effective investigation. Therefore, if the investigation is challenged, the investigator can explain how they gathered and weighed the evidence, and then explain the basis for their decision and remedial action.¹

II. LEGAL REQUIREMENTS FOR INVESTIGATIONS

All investigations should be prompt, thorough and effective. The investigator should gather evidence, so that he or she can make a decision as to what occurred -- the “findings of fact.” If there is a dispute in the evidence, the investigator should rely on a preponderance of evidence to determine what occurred.

Two significant California court cases explain how employers should conduct their investigations prior to termination of an employee. Both cases provide employers with guidelines by which to judge the effectiveness of their investigative procedures.

A. COTRAN V. ROLLINS HUDIG HALL INT’L (1998) 17 Cal.4th 93 (“Cotran”)

In this case, the California Supreme Court adopted a standard it characterized as the “objective reasonableness of the employer’s factual determination of misconduct.” Under this standard, the employer satisfies its good cause obligation if the decision is based on:

Fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pre-textual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that include notice of the claimed misconduct and a chance for the employee to respond.

¹ *This presentation provides general investigation techniques for employment-related investigations, but does not specifically address any employer’s particular policies, regulations, procedures or bargaining agreements. If there is doubt about how to proceed in a given situation, consult upper management and/or legal counsel.*

This ruling established that an employer need only have a good faith belief that a worker engaged in misconduct to establish “good cause” for terminating employment. The court also ruled that the jury’s role in a wrongful termination lawsuit is to determine whether the employer acted with “a fair and honest cause or reason, regulated by good faith” and not whether the worker actually engaged in the misconduct alleged. The Supreme Court held that the employer does not have to prove that the alleged misconduct occurred, but rather that it had a reasonable good faith belief that the wrongful conduct took place.

B. SILVA V. LUCKY STORES, INC. (1998) 65 Cal.App.4th 256 (“Silva”)

In *Silva v. Lucky Stores, Inc.*, the California Court of Appeal provides guidance as to what should constitute “an appropriate investigation under the circumstances,” as raised under *Cotran*. *Silva* provides that, in order to pass legal muster, an investigation must have strong indicia of fundamental fairness.

“Employers who fire employees for misconduct are not required to prove that the alleged misconduct actually occurred. Rather, the employer must show that it reasonably believed that the alleged misconduct took place and otherwise acted fairly.”

Although *Silva* applied the *Cotran* standard, the court also articulated three questions that must be answered in the affirmative for an employer to meet the good cause termination standard.

1. Did the employer act in good faith in making the decision to terminate?
2. Did the decision to terminate follow an investigation that was appropriate under the circumstances?
3. Did the employer have reasonable grounds for believing the employee had engaged in the misconduct?

Silva further provides that investigations should be conducted pursuant to guidelines, which are:

- Investigations should be conducted by written policy, which prescribes how the investigation should be performed.
- The investigation should be performed by a well-trained, objective investigator.
- The investigation should be performed as soon as possible after the allegations are known, and it should be conducted in a confidential manner.
- The investigation should provide all witnesses, the alleged victim, and the accused with the opportunity to be fully and fairly heard.
- The investigation results should be documented.

The *Silva* court provided ten factors that led to their decision that Lucky Stores conducted an “appropriate investigation.” Those factors were:

1. The investigator was an uninvolved human resources representative.
2. The investigator was trained on how to conduct a proper investigation.
3. The investigation was conducted promptly.
4. The witness information obtained was written in the company’s witness forms.
5. Witnesses were instructed to provide their own written statements.
6. The questions asked by the interviewer were open-ended which attempted to elicit facts as opposed to opinion.
7. Many of the interviews were conducted off-site or by telephone for confidentiality.
8. The investigator encouraged interviewees to contact him later, if needed.
9. The accused was promptly notified of the charges and provided an opportunity to challenge, correct or clarify the information presented.
10. After the completion of the investigation, the accused was given the opportunity to comment on the information collected.

Note: The *Silva* court found these factors indicative of a reasonable, appropriate, and effective investigation. They are not all necessarily required (or appropriate) for all investigations by all employers.

III. IMPORTANT DEFINITIONS

A. *Direct Evidence*

1. Direct evidence is evidence that someone observed or heard first hand. An eye-witness provides direct evidence of what he or she saw.

B. *Circumstantial Evidence*

1. Circumstantial evidence provides an inference of guilt or innocence. When Scott Peterson changed his looks and drove towards Mexico with cash, this was circumstantial evidence of guilt.

C. *Corroborating Evidence*

1. Corroborating evidence tends to support direct evidence. If the victim immediately reported the harassment to HR, HR's confirmation of what the victim reported is corroborating evidence to support the victim's story.

IV. THE ELEMENTS OF VALIDATING THE FACTS

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| Element 1: | Plan the Investigation and Prepare for Interviews |
| Element 2: | Recognize and Record Relevant Evidence |
| Element 3: | Opportunity for Response |
| Element 4: | Organize the Evidence |
| Element 5: | Follow-Up |

Element 1: Plan the investigation and prepare for interviews

A. *Promptly Review the Complaint*

1. Ask the following questions:
 - a. Investigator: Who is an appropriate investigator?
 - 1) Trained and Qualified
 - 2) Impartial and unbiased
 - 3) Thorough
 - 4) Consider using counsel or an outside investigator when there are: complicated legal issues or allegations, multiple complainants, witnesses, and/or respondents, allegations against a member of senior management.
 - 5) Consider Seeking Legal Advice About an Investigation
 - a) To identify or understand the elements of applicable law
 - b) When the complainant, respondent or witnesses are represented by counsel during the investigation
 - b. Guidelines: What policy, regulations, or procedure guide responding to the complaint? Is there a uniform complaint procedure?
 - c. Agreements: Are collective bargaining agreements relevant?
 - d. Identify Laws: What laws and/or policies apply to this complaint?

- e. Review Laws: Do I understand the relevant laws so that I know what to look for when interviewing the complainant, witnesses and respondent?
- f. Paid Administrative Leave: Are there issues that warrant paid administrative leave for the respondent pending the investigation?
- g. Prepare Questions: What subjects do interviews need to cover to be able to determine if there have been any violations of law or policy? If it is a sexual harassment complaint, ask questions to determine if the conduct was unwanted, if it was of a sexual or gender-related nature, if it was severe or pervasive, and if it reasonably created a hostile, offensive or intimidating work environment.

1) Start with broad, general questions about the subject matter and work towards more specific questions about the allegations.

B. *Prepare Memos to the Investigation Participants*

- 1. Consider preparing a memo from the appropriate management employee to the complainant, respondent and witnesses. Each memo is slightly different, but all memos should contain the following:
 - a. A brief, general description of the investigation without revealing any names or other identifying information.
 - b. Introduce the investigator.
 - c. Direct the participant to tell the truth.
 - d. Give admonishment against retaliation.
 - e. Give confidentiality directions.

C. *Choose an Appropriate Environment for Interviews*

- 1. Location
 - a. Interview people in a location where the identity of who is being interviewed is not obvious to the community involved in the complaint.
 - b. Conduct interviews at another location; close blinds; use off-hours, etc.

2. Interview Room
 - a. The interview should be conducted in a private room.
 - b. Try to remove distractions by turning off phones.
 - c. Allow the interviewee to have easy access to exit. (Don't block the person's access to the exit.)
 - d. Have a clear visual of the person being interviewed.
 - e. Have tissue available in the event someone becomes emotional.

Element 2: Recognize and record relevant evidence

A. Tips for Getting the Most Relevant Evidence Out of an Interview

1. Have Confidence. Investigators are expected to make determinations, even when it's not obvious what happened. If the complaint is a "he said, she said" situation without other witnesses, it is dangerous to just "warn both parties to behave and call it a day." The investigator must thoroughly investigate any corroborating evidence, evaluate the feasibility of each story, evaluate any biases or motives, assess the credibility of the interviewees, and make a good faith decision as to what occurred.
2. Be Prepared to Make Credibility Determinations. The Equal Employment Opportunity Commission (EEOC) recommends that an investigator consider several factors for credibility determinations:
 - a. The inherent plausibility of each person's story;
 - b. Corroborating evidence tending to support or contradict each person's story;
 - c. Each person's motive to lie; and
 - d. Each person's demeanor, including whether the person appears to be telling the truth when interviewed about the incident.
 - e. An employer may also consider the past record of the person, especially if there is a history of similar behavior or false allegations.
 - f. None of these factors is determinative, but they may be helpful when assessing the credibility of witnesses.

3. Be a Good Listener.
 - a. A good investigator is a good, neutral listener.
 - b. A good listener is sensitive to the interviewee and makes them feel that what they have to say is important. However, the investigator should not empathize so much that it appears he/she is on “their side.”
 - c. A good listener notices gaps in the interviewee’s story and follows-up with more questions to fill in the gaps.
 - d. A good listener identifies details that should be reported to the employer.
 - 1) When any investigation participant is represented by counsel
 - 2) When the victim indicates potential workers’ compensations claim(s)
 - 3) When others are identified as victims or potential bad actors
 - 4) A good listener notices new legal theories expressed by the complainant
4. Be a Keen Observer. Observe the interviewee while he or she is talking. Determining credibility involves listening to what the interviewee says, how he or she says it, and observing what body language, if any, is used while responding.
 - a. Establish normal behavior patterns for the interviewee. When making introductions or chatting about procedures, observe the witness’s normal communication patterns. Does he or she use a lot of hand movements or fidgeting movements? Does he or she mumble, speak loudly or softly? What kind of eye contact is normal for this person?
 - b. Observe the overall attitude of the witness. Is the witness cooperative, forthcoming, helpful? Is the witness reserved, angry, snappy?
 - c. Watch for expressions of emotion. Is it reasonable for the person to express emotion at this time? Was there a lack of emotion or too much?
5. Ask Good Questions. Asking good questions leads to receiving clear responses.

- a. Avoid leading questions. For example: “You told her you didn’t like that, is that right?” (Instead ask, “What did you do next?” “Did you say anything?”)
 - b. Avoid compound questions. For example: “What time did you get there and who did you see?”
 - c. Avoid beginning a question with “Do you recall...?”
 - d. If someone responds to a question with “I don’t remember” or “I don’t recall,” ask follow-up questions to ascertain if it could have happened, but they just don’t remember.
 - e. Allow for silence after asking a question.
 - f. Don’t be afraid to ask the question again if the person fails to answer it.
 - g. Ask follow-up questions about other evidence.
 - h. Ask enough questions to visualize the incident from start to finish with all the available details.
6. Ask for a Demonstration.
- a. Have the witness demonstrate the behavior. Take detailed notes and observe the person’s ability to recall details.
 - b. If feasible, tour the scene of the event with the witness. If that’s not possible, have the witness draw a diagram of the location.
7. Take Thorough Notes.
- a. Benefits to investigator:
 - 1) Contemporaneous record of the evidence gathered.
 - 2) Demonstrate thoroughness of the investigation.
 - 3) Demonstrate neutrality of the investigator.
 - 4) Support the investigator’s findings.
 - b. Risks to investigator:
 - 1) Demonstrate failures in the investigation.

- c. Thorough notes should include the gist of the question asked, the content of the verbal response from the witness, and any credibility issues such as non-verbal behaviors.
- d. Consider using a short hand or typing interview notes. Shortly after the interview, review notes and fill-in any short-hand or gaps.
- e. Query: Is a written statement from the interviewee appropriate?
- f. Query: Is tape recording the interview appropriate?

B. *Interview the Complainant*

- 1. In most investigations, gathering evidence begins by interviewing the complainant, instead of starting with the respondent or witnesses.
- 2. Even though the complainant may have submitted a written complaint, an interview is necessary to collect all relevant details, to examine credibility, and to confirm there are no more allegations.
- 3. Who can be present during the interview with the complainant?
 - a. Is it appropriate to interview the complainant alone?
 - 1) Benefits for investigator include the opportunity to build rapport and ability to observe more natural behaviors
 - 2) Risks to investigator include potential allegations of wrongdoing against the investigator
 - b. Can the complainant bring an attorney, union representative, spouse/ partner, parent/guardian, and/or other support person?
 - 1) Typically, a complainant does not have a right to bring an investigation interview. However; some employers allow non-disruptive support person to be present; especially if there are claims of sexual misconduct. There are benefits and risks to consider.
 - c. Gather information from the complainant, not the support person.
 - d. If a support person is too disruptive, set ground rules and consequences for not following rules.
- 4. Give introductory comments to complainant.
 - a. Confirm receipt of memo from management.

- b. Give copy of any pertinent policies or confirm receipt of policies.
 - c. Ask if any questions about the memo or other policies and procedures.
 - d. Explain the documentation process, if any.
 - e. Offer assurances that the employer will take the complaint seriously.
 - f. Notify complainant that they will receive the results of the investigation.
 - g. Engage in other conversation to get to know the complainant before asking difficult questions.
5. Gather the facts from the complainant.
- a. Ask the complainant to explain exactly what happened. Ask clarifying Who, What, When, Where, Why and How questions for each allegation.
 - b. If there is more than one allegation, ask the complainant to start from the beginning and go through each allegation in chronological order.
 - c. Ask the complainant how the alleged conduct made him or her feel.
 - d. Ask the complainant if the alleged conduct affected the work environment.
 - e. Ask the complainant about eye-witnesses or corroborating witnesses.
 - f. Ask the complainant about what remedy they hope to receive.
 - g. After discussing all allegations, ask if there is “Anything else?”
6. What about a reluctant complainant?
- a. Try to ascertain why the complainant is reluctant:
 - b. Explain the employer’s duty to investigate once notified of a complaint.

C. *Interview the Witnesses*

1. Determine which witnesses to interview first.
 - a. Interview the eye-witnesses and corroborating witnesses first so their memories are fresh. The character witnesses can wait until the end.
 - b. Interview the witness with the most information first; then other witnesses.
2. Who can be present with the witness?
 - a. Can the investigator interview a witness alone?
 - 1) Benefits for investigator include the opportunity to build rapport and ability to observe more natural behaviors
 - 2) Risks to investigator include potential allegations of wrongdoing against the investigator
 - b. Is a witness allowed to bring an attorney, union representative, spouse/partner, parent/guardian, and/or other support person?
 - 1) Typically, a witness does not have a right to bring an attorney or union representative in an investigation interview. The employer may allow it. There are risks and benefits to consider.
 - c. Gather information from the witness, not the support person.
 - d. If a support person is too disruptive, set ground rules and consequences for not following rules.
3. Give introductory comments to witness.
 - a. Confirm receipt of memo from management.
 - b. Ask if any questions about the memo or other procedures.
 - c. Explain the documentation process, if any.
 - d. Explain that the witness will not receive the results of the investigation due to confidentiality rules.
 - e. Engage in other conversation to get to know the witness.

4. Gather the facts from the witness
 - a. Eye-witnesses: Ask them to explain in detail what they observed.
 - b. Corroborating witnesses: Ask them to explain in detail what the complainant or respondent told them and how the complainant acted.
 - c. Character witnesses: Ask questions to ascertain the credibility of the person they are vouching for.
 - d. Ask for relevant documents or other evidence (e.g., relevant e-mails, etc.).
 - e. Avoid fishing expeditions, especially if they have a reputation for gossip!
5. What about a reluctant witness?
 - a. Avoid asking witnesses to participate, because most will say something like, “No, thank you.” Instead, offer different times and/or locations for the interview, so they can choose what is most convenient.
 - b. Explain that the employer needs to know what they witnessed.
 - c. Explain the importance of witnesses in our system of justice.
 - d. Explain the civic duty involved with providing relevant evidence.
 - e. Reassure the witness of the employer’s stand against retaliation.
 - f. Reassure the witness that others are also participating in the investigation. (But do not give out names of other witnesses.)

Element 3: Opportunity for response

- A. *Prepare for Interview with Respondent.*
 1. Respondent should have the opportunity to fully respond to each and every allegation. To provide that opportunity, be very prepared for the interview.
 2. What should the investigator give to the respondent and when?
 3. Who is present with respondent?
 - a. Is it appropriate to interview the respondent alone?

- 1) Benefits for investigator include the opportunity to build rapport and ability to observe more natural behaviors.
 - 2) Risks to investigator include potential allegations of wrongdoing against the investigator.
 - 3) Another risk is that the union may claim the employee had a right to have union representation. (See e.g., Weingarten.)
- b. Can the respondent bring an attorney, union representative, spouse/partner, parent/guardian, and/or other support person?
- 1) A respondent employee may have a right to have a representative present during the investigation interview. There are benefits and risks to consider.
- c. Gather information from the respondent, not the support person.
- d. If a support person is too disruptive, set ground rules and consequences for not following rules.
- B. *Give Introductory Comments to Respondent.*
1. Confirm receipt of memo from management.
 2. Give copy of any pertinent policies or confirm receipt of policies.
 3. Ask if any questions about the memo or other procedures.
 4. Notify respondent that he or she will receive the results of the investigation.
 5. Remind respondent about rule against retaliation.
 6. Engage in other conversation to establish rapport before asking difficult questions.
- C. *What if the Respondent Refuses to Answer Questions?*
1. A respondent may refuse to answer any questions because he or she believes that an answer could implicate guilt in a criminal matter or for some other reason.
 - a. With assistance of legal counsel, the employee's failure to respond may be grounds for discipline, if done properly.

- b. Explain that the investigator's job is to weigh the evidence, and if he or she does not participate in the interview process, the respondent will not be "weighing in" and the weight of the evidence may go against them.

- 1) This should not be a "threat." Even if the respondent refuses to participate in an interview, the investigator must weigh all the credible evidence to determine what happened.

D. *Gather the Facts from the Respondent.*

1. Get the details of what occurred using Who, What, When, Where, Why and How questions.
2. Get confirmation, admission or denial for each and every allegation.

Element 4: Organize the evidence

A. *Review All of the Evidence Gathered*

1. Review all of the relevant documents, tangible evidence, and interview notes.
2. Review all of the applicable policies, regulations or other procedures again.
3. If anything was missed or important questions forgotten, ask more questions.
4. If something is unclear or confusing, ask clarifying questions.
5. In a disputed matter, if credibility is too close to call, conduct another interview with each person.

B. *Weigh the Evidence for Each Allegation.*

1. Apply the "preponderance of evidence" standard. Does a simple majority (50% plus a feather) of the evidence weigh more on one side?
2. If the evidence is not disputed, the evidence "weighs" to one side.
3. If the evidence is disputed, look at all evidence closely and determine which evidence is most persuasive. Be prepared to explain why some evidence was more persuasive than other evidence.

- C. *Make a Factual Finding for Each Allegation.*
1. A factual finding is a conclusion about what happened, based upon a preponderance of the evidence.
 2. Address each allegation separately before making a finding about the whole complaint
- D. *Review All the Factual Findings to Determine if a Violation of Law or Policy.*
1. In many claims of discrimination or harassment, the employer must look at the totality of the circumstances to determine if there is a pervasive pattern of harassment. The employer should look at all of the sustained allegations and form a conclusion as to whether there was a violation of law or policy.
- E. *Prepare a Confidential Investigation Report.*
1. The beginning of the report should state the date of the complaint, the names of all people interviewed, the documents reviewed, and the procedures followed.
 2. Write-up each allegation separately.
 3. Directly under each allegation, explain all evidence relevant to that allegation.
 4. When necessary, discuss credibility assessments after describing the evidence.
 5. After describing the evidence, make a factual finding.
 6. If appropriate or necessary, draw a conclusion.
 7. Continue this pattern to address all of the allegations.
 8. Prepare a final analysis and conclusion at the end of the report.

Element 5: Follow-up

- A. *Determine an Effective Remedy.*
1. If the complaint has merit, determine how to implement an effective remedy.
 2. An effective remedy is action reasonably calculated to end the misconduct by imposing sufficient penalties on the offending employee.

3. Consider taking actions to improve the victim’s employment environment, such as counseling, transferring the offender, changing a work schedule, etc.
4. Conduct “follow-up” with the complainant, the respondent and the respondent’s supervisor to determine if the remedy has been effective.

B. *Communicate the Results of the Investigation to the Complainant.*

1. Send a letter to the complainant regarding the results of the investigation.
 - a. Include the allegations and findings from the report. “Cut and paste” the allegations and findings from the investigation report.
 - b. In general, the complainant does not have a right to see all of the evidence or the analysis of the evidence.
 - c. Explain the overall legal conclusion (e.g., explain to the complainant that, while the investigation revealed that Bruce engaged in inappropriate behavior which will be addressed, he did not violate the anti-harassment policy because the conduct was not sufficiently severe or pervasive).
 - d. Explain what actions have been or will be taken to address the findings of inappropriate behavior. The legal and practical guidelines for releasing information to a victim appear to be changing.
 - e. Remind the complainant about maintaining confidentiality, reporting any retaliation, and communicating any further problems to the employer.
 - f. Explain appeal rights and procedures, if any.
2. Personnel File: Do not place the complaint or any correspondence to the complainant in the complainant’s personnel file. Maintain the investigation documents in a separate, confidential investigation file.

C. *Communicate the Results of the Investigation to the Respondent.*

1. Send a letter to the respondent regarding the results of the investigation.
 - a. Include the allegations and findings from the report.
 - b. In general, the respondent does not have a right to see all of the evidence at this point. He/she also does not have a right to see the evidentiary analysis.

- c. Explain the legal conclusion to the respondent as well.
 - d. Remind the respondent about maintaining confidentiality, avoiding retaliation, and communicating any further problems to the employer.
 - e. Explain appeal rights and procedures, if any.
 - f. Consider providing the respondent an opportunity to respond to the results of the investigation.
 - g. If the conclusion is that misconduct occurred, notify the respondent that the supervisor will address the misconduct in a separate communication.
2. Personnel File: Do not place the letter to the respondent about the results of the investigation in the personnel file at this point. If the employer takes disciplinary action based upon the findings, attach the letter to the disciplinary document and place it in the personnel file.
- D. *Disciplinary Action against Respondent.*
1. Employee Discipline: Disciplinary action may include, but is not limited to, counseling, verbal warnings, training, a letter of reprimand, reassignment or transfer, suspension or dismissal. Documentation of discipline is essential. If applicable, notify the respondent and provide an opportunity to respond (check any collective bargaining agreement and/or employment policies).
 2. Be aware of and follow progressive discipline principles related to employees, as may be required by policy, contract, or practice.
- E. *Consider Communication to Witnesses Regarding Closure of the Investigation.*
1. Though not legally required, consider notifying witness(es) that the investigation has ended, thank them for participation, and remind them about confidentiality.
 2. Witnesses sometimes ask about the results of the investigation. Remind the witness that the results are confidential and cannot be released.

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