
ROLE OF THE COORDINATOR

WHAT IS A COORDINATOR?

A person whose job is to organize events or activities and to negotiate with others in order to ensure they work together effectively.

INTERACTION

- Provide guidance for situations
- Step in and assist when asked to assist (by student or employee)
- Ensure all steps of the process are completed

INFLUENCE

- Training
- Investigations
- Ensure process is followed
- Leverage relationships appropriately.

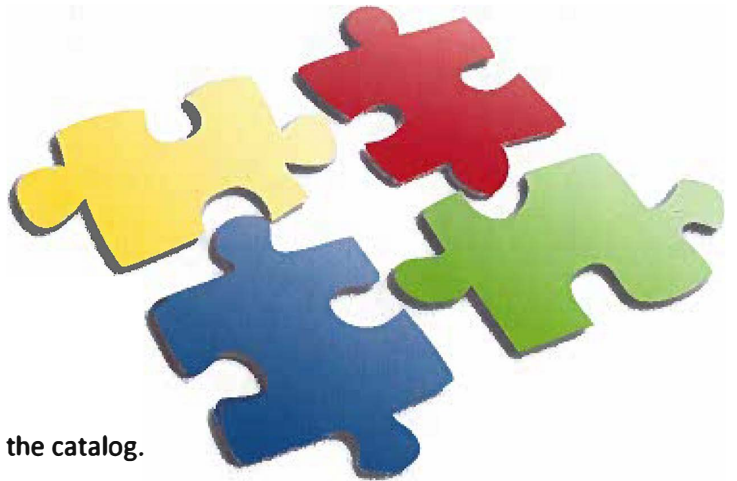
Ex. Program Supervisor observed situation and works with student regularly. Assist the Program Supervisor if needed by Supervisor can provide letter to student and ask if they need accommodations.

FOLLOW-UP

- Recordkeeping
- Provide letters and assistance information

RETALIATION & GRIEVANCE POLICY

- Retaliation is prohibited!
- Grievance policy should be followed as listed in the catalog.
Be sure to avoid skipping steps.
- Ensure you know these policies and how to prevent
- Get help! If these occur talk to the Title IX Coordinator, DOE or Campus Director



INITIAL STATEMENT RECEIVED: NOW WHAT?

VICTIM FOLLOW-UP

- Ensure victim is notified of next steps in the process.
- Compose confirmation letter to complainant.
- Determine need for and implement Academic Accommodations or Interim Measures with support from Program Supervisor and Director of Education
- Ensure the victim is encouraged to call law enforcement or seek medical attention.
- Support them if he or she chooses not to call. (*except in emergency situations*)
- Provide assistance in contacting law enforcement or local support resources if needed.

PRE-~~I~~INVESTIGATION

- Notify complainant(s), respondent(s), and witness(es) of pending investigation and to preserve evidence.
- Submit a Clery Incident report on Teclink if applicable.
- Ensure no conflict of interest(s) exists prior to start of investigation.

DON'TS

- Do not insist on a written statement.
- Avoid having victims tell their story multiple times.
- Do not drive students anywhere.

SCOPE OF INVESTIGATION

WHAT IS SCOPE?

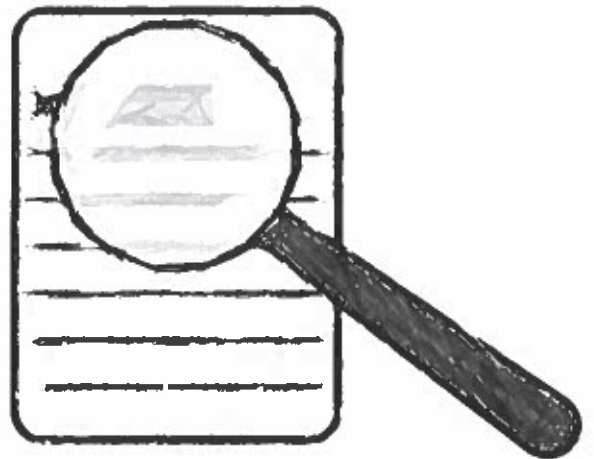
The extent of the area or subject matter that something deals with or to which it is relevant. Scope determines the issues to be investigated and what questions needed to be answered.

TO DETERMINE THE SCOPE OF YOUR INVESTIGATION, CONSIDER THE FOLLOWING:

1. What specifically are you investigating?
2. What policies need to be considered in this situation?
3. Who is involved?
4. Who needs to be interviewed?
5. What evidence needs to be considered?

OTHER CONSIDERATIONS:

- Scope changes
- After each interview, re-evaluate for changes to scope.



SCENARIO: SCOPE

COMPLAINT:

Example: Student feels that a female instructor hitting on him and other student comments are creating a hostile environment for him.

INTERVIEWS:

- Student (complainant)
- Instructor
- Program Supervisor
- Witness statements
- Student Respondents

EVIDENCE:

- Attendance records
- Texts
- Student database notes
- Grades
- Emails

POSSIBLE POLICY AND/OR CONDUCT VIOLATIONS

- Sexual Misconduct policy
- Code of ethics / conduct
- Student code of conduct

TIMELINES

INVESTIGATIVE PROCESS

30 days from the initial complaint is the recommended time frame.

THIS TIMELINE CAN BE INFLUENCED BY:

- Law enforcement investigation
- Necessity of decision (end of term, graduation, etc.)
- Availability or unavailability of a witness or relevant/material documents
- Recalcitrance of a witness and/or any necessary party
- Delay or other uncooperative actions of any necessary party
- Number of witnesses
- Coordination with law enforcement efforts
- Holidays and vacation periods
- Any other unforeseeable event/circumstance which impacts the investigation

PLAN YOUR TIMELINE AS YOU PLAN YOUR INVESTIGATION.

- When do you want to have interviews done?
- How much time do you need for follow-up?
- How long does it take you to complete a report?

BEFORE INTERVIEWING ENSURE YOU COMPLETE THE FOLLOWING:

- Notifications of start of investigation
- Review of paper evidence (*as available*)
- Plan interview questions

ACCOMMODATIONS & INTERIM MEASURES

WHY ARE ACCOMMODATIONS OR INTERIM MEASURES OFFERED?

- Ensure safety of complainant and campus community
- Preserve educational or work environment
- Deter retaliation
- Ensure complainant is not disproportionately impacted

ACADEMIC ACCOMMODATIONS (STUDENT)

- Re-scheduling of assignments and/or testing without penalty
- No penalty for absence or missed professional grades
- Leave of absence (LOA) or Student Support Plan (SSP)
- Special arrangements for completion of labs or hands-on testing
- Access to counseling services
- Changes in class schedule (Transfer course sections, times, or withdraw from a course)
- Ability to re-take courses with no charge or penalty
- Additional tutoring or open lab time
- Enforcement of any court, college, or law enforcement no contact or restraining order
- Assistance or accommodations with any disabilities that may have occurred

INTERIM MEASURES (EMPLOYEE)

- Change in work schedule or job assignment;
- Access to counseling services;
- Enforcement of any court, college, or law enforcement no contact or restraining order;
- Assistance or accommodations with any disabilities that may have occurred
- Leave of Absence (LOA)

WHO SHOULD BE INVOLVED?

Title IX Coordinator should be involved in any accommodations.

STUDENT:

- Director of Education
- Program Supervisor
- Other staff who need-to-know

EMPLOYEE:

- Campus Director
- Direct Supervisor

GATHERING EVIDENCE

INTELLITEC RECORDS

- Attendance or Time Cards
- Student Database notes
- Gradebooks and/or Grade Sheets (transcript)
- Student or HR files for relevant records (leaves of absence, support plans, etc.)
- IntelliTec emails
- Class and Scheduling Rosters

EXTERNAL RECORDS

- Personal Emails
- Text messages
- Social Media conversations and/or posts
- Written statements (provided not required)
- Pictures
- Videos and recordings

QUESTIONS TO CONSIDER

- Who has the complainant(s) and respondent(s) come in contact with in regards to the complaint?
- What departments are involved?
- What records are generated in that department?



REVIEWING EVIDENCE

REVIEWING INTELLITEC RECORDS

1. Are there any trends?

Ex. Student always called in to report absences but since the event has stopped communicating.

2. Do events presented to you match the evidence?

Ex. Student stated they were absent the day after stalking incident. Attendance record matches

3. Have there been any drastic changes that correlate with the events?

Ex. Grades were A's and B's and since the incident have become D's and F's.

4. Can you confirm that the complainant(s) and respondents(s) were in contact with each other?

Ex. Email provided shows the instructor was contacting the student after hours regularly.

5. Database notes and emails should be read for additional details, discrepancies or consistencies

Ex. Database states that the student has no absences but the student says they missed two classes after the incident.

EXTERNAL RECORDS

1. What additional details do these provide that weren't in the original complaint?

Ex. Student failed to mention that he sent the instructor a message asking if she was married first.

2. Does the evidence corroborate the complaint?

Ex. Text messages received from instructor asked student if he was married.

3. Who else may be involved or can assist in details?

Ex. Facebook posts has 3 different students commenting on the situation, not just the one mentioned by the complainant.

FOR INTERVIEW

- Make a list of details and/or information you want to ask about during the interview.
- Who needs to be asked about it and what follow-up information do you need to make the evidence clear?



INTERVIEWS: DEVELOPING QUESTIONS

PLAN QUESTIONS FOR EACH PARTY

- Complainant(s)
- Witness(s)
- Respondent(s)



TWO TYPES OF QUESTIONS

DIRECT QUESTIONS

PROS

Addresses specific facts, events, or claims
Blunt or uncomfortable questions can force answers

CONS

Elicits short answers and short stories
Person doesn't talk as much or elaborate

EXAMPLES

- Do you discriminate?
- Did you hit the other student?

INDIRECT QUESTIONS

PROS

Elicits more comprehensive responses
Puts direct questions into context

CONS

Answers may have no bearing on investigation

EXAMPLES

- What do you consider inappropriate or discriminatory behavior?
- Can you tell me about the incident that occurred between you and the other student?

Investigation: Questions for Accuser

Aug 21, 2014

Meeting with: _____ Date: _____

Investigator(s): _____

Introduction:

- *Thank the employee for his/her time & cooperation*
- *Address the nature of what is being investigated*
- *Explain that the matter under investigation is serious and the company has a commitment/obligation to investigate the claim*
- *Explain that no conclusion will be made until all of the facts have been gathered and analyzed*
- *State that any attempt to influence the outcome of the investigation by retaliating against anyone who participates, providing false information or failing to be forthcoming can be the basis for corrective action up to and including termination*

Questions:

1. Who committed the alleged inappropriate behavior?
2. What exactly happened?
3. When did the incident occur or is it ongoing?
4. Where did the incident occur?
5. How did you react?
6. Did you ever indicate that you were offended or somehow displeased by the act or offensive treatment?
7. Who else may have seen or heard the incident?
8. Have you discussed the incident with anyone?
9. Did the person who harassed you harass anyone else? If so, who?
10. Do you know whether anyone complained about harassment by that person? If yes, who?
11. How has the behavior affected you and your job?
12. Did you seek any medical treatment or counseling as a result of the incident?
13. Are there any notes, physical evidence, or other documentation regarding the incident(s)?
14. Is there anyone else who may have relevant information?

15. Do you have any other relevant information?
16. What action do you want the company to take?
17. When did you first learn of the Company's Anti-Harassment and EEO Policy? (If not provide a written copy of the policy and note below).

OTHER EMPLOYEE RELATIONS TOPICS | INVESTIGATIONS

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HR POLICIES & PROCEDURES

Investigations Are Tricky—These Sample Questions Will Help

HR Policies & Procedures (<http://hrdailyadvisor.blr.com/category/hr-policies-procedures/>) | Stephen Bruce, PhD, PHR | Tuesday · December 28, 2010

Misconduct investigations are never easy for any HR manager. But they're necessary and no one's going to escape that duty for long. To make the job a little easier, attorney Jennifer Brown Shaw offers her suggestions for how to brief and question the complaining employee, the accused employee, and witnesses.

Shaw is a partner in the law firm of Shaw Valenza LLP in Sacramento. Her comments came during the Society for Human Resource Management Annual Conference and Exposition held in San Diego. Here are her tips:

What to Tell the Complaining Employee(s)

- Our company is committed to compliance with the law and its policies, and will conduct a prompt and thorough investigation to determine whether inappropriate conduct has occurred. If so, the conduct will be stopped and appropriate corrective action will be taken.
- The purpose of the interview is to obtain a thorough understanding of what has occurred, and to identify all evidence and witnesses who may have knowledge of the incident.
- Your name will be used in the investigative process only as and/or if necessary.
- There will be no retaliation against you for making a good-faith complaint. Notify management or HR immediately if you believe retaliation has occurred or is occurring.
- Keep the matter confidential to protect the integrity of the investigation.

Note: Depending on the nature of the complaint, the employer may want to consider options to separate the complaining employee and the accused employee during the investigation.

Questions for the Complaining Employee(s)

For each allegation that the complaining employee raises, the investigator should ask him or her:

1. What occurred?
2. When (include the date, appropriate time period involved)?
3. Where did it happen?
4. How did it happen?
5. Who did or said what? In what order? Was anything else said or done?
6. If there was physical contact, describe the contact in detail. Demonstrate the physical contact.
7. How did you respond?
8. Have you ever reported this incident before? If so, to whom? When? Response?
9. Did you discuss the incident(s) with anyone? If so, who? Where? When? What was said?
10. Are you aware of any other incident(s) involving this person? If so, who? What? Where? When?
11. Do you know why it happened?

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12. What is your relationship with the respondent?
13. Why are you coming forward now?
14. Are there any notes, documents or other evidence to support your claims? Did the respondent give you anything in writing, or any gifts or other items?
15. Were there any witnesses? Who was nearby? Within earshot?
16. Who else may have relevant information?
17. Was your work affected? How?
18. How did the situation make you feel?
19. What outcome would you like to see from this process?

What to Tell the Accused Employee

We are investigating a complaint of alleged inappropriate conduct involving you. (Inform the respondent of each allegation in sufficient detail to enable a full response.)

- The purpose of the interview is to obtain a thorough and accurate understanding of what has occurred, and to identify all evidence and witnesses who may have knowledge of the incident.
- Keep the matter confidential to protect the integrity of the investigation.
- It is against the law and internal policy to retaliate against anyone who has filed a complaint or participates in the investigation of the complaint. Notify management or HR immediately if you believe retaliation has occurred or is occurring.

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Questions for the Accused Employee

1. What occurred?
2. If denied, what motive would anyone have to make these allegations up? Where were you at the time alleged incidents occurred? Who witnessed your presence?
3. When did it happen?
4. Where did it happen?
5. How did it happen?
6. Who did or said what? In what order?
7. How did the complainant(s) respond?
8. Are you aware of any other incidents involving the complainant(s)? If so, who? What? Where? When?
9. Are you aware of any other complaints by the complainant(s)?
10. Do you know why it happened?
11. Are there any notes, documents, or other evidence to support your version of the facts?
12. Who else may know relevant information?
13. Did you discuss the incident(s) with anyone prior to this interview? If so, who?

In tomorrow's *Advisor*, Shaw's suggestions for interviewing witnesses, plus an introduction to a very practical collection of 10-minute training modules for your supervisors and managers.

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Interviews: Etiquette

HOW DO YOU ENSURE A SUCCESSFUL INTERVIEW?

- **INTERVIEWS SHOULD BE CONDUCTED IN A VERY SPECIFIC ORDER.** Complainant first, respondent, then witnesses. Questions or plans for an interview may change based on each party's individual interview.
- **CONDUCT IN PERSON.** Telephone interviews should be considered next if the person cannot meet with you and email should always be the last resort. Observing body language is very beneficial and in person conversations ensure you are asking follow-ups and can help to clarify information.
- **BRING A WITNESS.** Having an additional person in the room can avoid the he said, she said situation and helps to ensure your safety in any situation.
- **PRIVATE LOCATION.** Interviewees are much more responsive when the interview is conducted in a private location rather than an open, accessible area with other students and staff.
- **PROMOTE YOUR SAFETY.** Don't isolate yourself from an exit that provides you a means of retreat and ensure that you maintain at least an arm's length of reach between you and the interviewee.
- **BE PREPARED.** Have paper and pen or a laptop. Ensure your questions are prepared and that you are not exhibiting signs of nervousness. This is not an inconvenience for you.
- **SET THE TONE.** Be friendly, not combative and ensure they feel as though they are the most important person in the room.
- **EXPLAIN THE PROCESS.** Ensure the person knows that participation is beneficial to them. Explain the overall process and that you'll be taking notes during the interview.

INTERVIEWS: CONDUCTING

CONDUCTING AN INTERVIEW: BASIC TIPS

- Take your time!
- Systematically work through prepped questions.
- No assuming or inferring. If you're not clear on the response, ask a follow-up question.
- Keep a neutral tone. Be friendly and avoid accusations.
- Avoid confrontation, this is not their trial.

ASKING FOLLOW-UP QUESTIONS

Let them finish their current response and take a note on the question you want to ask.

- **CONTRADICTIONS:** If the question is due to contradictory information, wait until the end of the interview to ask the follow-up. Continue looking for additional inconsistencies.
- **CONFUSION:** If you are simply confused because they used a wrong pronoun, ask for clarification immediately.

EXAMPLE OF ADDRESSING A CONTRADICTION.

"Okay, I have a few follow-up questions. Talk to me about xxxxxx." If they contradict themselves again, call it out. *"But earlier you said xxxxxx. Help me understand the discrepancy and know which is right."*

ASKING THE UNCOMFORTABLE QUESTION

Observe the interviewee for the below reactions and avoid shaming or appearing nervous when you ask the question by:

- Rushing
- Changing the tone of your voice
- Fidgeting (body language)
- Avoiding Eye Contact

FINALIZING THE INTERVIEW

- Anything else I should know that is relevant?
- Anything we should ask the other party?

WRAP UP THE INTERVIEW

This can be done by saying, "Only have a few last questions," or "That's the end. Thank you for your time." If necessary, dismiss them.

SPECIAL CONSIDERATIONS

RESISTANCE

Not unusual for interviewees to be reluctant or resistive to participation.

THE WHY'S

- Fear retaliation
- Witnesses don't want to be involved
- Uncomfortable with whole situation

COMBATING RESISTANCE

- Ensure that they understand that any attempts at retaliation are handled immediately.
- Establish Rapport through explaining the process and introducing yourself.
- Get them to relax before asking questions.

COMBATIVENESS

Often respondents or witnesses will be combative and resist all parts of the process.

Reduce this behavior through:

- Kindness
- If that fails, just get through the process.
- Explain that lack of participation is harmful
- Explain why you need their help
- Often, they don't believe in the process. You need their buy-in to get results.



INTERVIEWS: REVIEWING

POST INTERVIEW

- Ensure scheduling allows for time between interviews.
- Review your notes immediately after each interview.
- Finalize any thoughts or notes you have made.

WHY?

- Waiting can lead to confusion or forgetting what you meant.
- Each interview may lead to changing the plans or questions for the next interview.
- Compare your interview with the next interview questions.
- Adjust accordingly and ask any additional questions needed.

COMPLETING THE REPORT

AUDIENCE: Third-party Reviewer

WRITING:

- Use complete sentences and correct grammar
- Use quotes only when needed to highlight specific examples or to emphasize key phrases and slang
- Someone other than you should be able to read and comprehend the events detailed

TIME FRAME:

- Complete as soon as possible
- Leave time for your review and management review
- Ensures that you don't forget details of the interviews

FORMATTING:

- Use the standard investigation report provided
- Interviews should be laid out in the report in chronological order
- Include times and days when listing interview information

ADDITIONAL REQUIREMENTS

- Letters should be completed at the same time.
- The entire report should be assembled in pdf format into one file.

NOW WHAT?

- Re-read your report for errors or missing information
- Spell Check
- Try free online audio readers for read-back: <http://ttsreader.com/>

FOLLOW-UP

- Ensure that no items need follow-up
- Schedule additional interviews/phone calls / emails if needed
- Schedule time with the DOE or Campus Director to discuss conclusions and recommendations

CONCLUSIONS

COMPLETING A CONCLUSION

1. Read the report!
2. Ensure familiarity with all details and evidence provided
3. Apply Preponderance of the Evidence: 51% standard

Is this more likely to have happened than not?

QUESTIONS TO CONSIDER

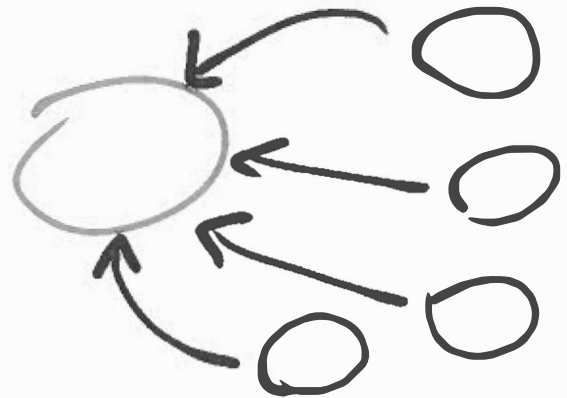
1. Was a law violated?
2. Was a school policy violated?
3. Was the code of conduct or ethics violated?
4. Try role reversal. If you reverse the roles of male / female in this investigation, would you look at your conclusion differently? What if you substituted age or ethnicity into the situation?

JUSTIFY YOUR ANSWERS

- Explain your logic and thought process.
- Why did you reach this conclusion?
- If your conclusion is no, why was there a complaint?
- See 5-Why's Analysis

FORMATTING

- Bullet point conclusion for organizational purposes
- Clear and concise statements
- This is not a recap – focus on outcomes only



RECORDKEEPING

PAPER RECORDS

Maintain a separate Title IX File accessible to you that includes:

- Initial complaint information (email, written notifications, incident report, etc.)
- Evidence collected
- Completed Investigation report
- Additional correspondence (notifications to/from parties, discussion with Campus Director, etc.)
- Interim Accommodations or Measures paperwork
- Letters (confirmation and investigation complete letters)
- Permanent accommodations or measures paperwork
- Follow-up paperwork to include written warnings, terminations, proof of trainings, etc.

DIGITAL RECORDS

- Maintain a digital folder, accessible to you including any of the above received
- Use standard naming procedures

THE DO'S OF TITLE IX RECORDS

- Title IX paperwork should only be accessible to need-to-know personnel
- Requests for copies of reports may require redactions
- Maintain permanent records
- Never add notes to the database or anywhere accessible to all personnel
- Emails should be sent to need-to-know personnel when discussing details (including email titles)



Grappling With Questions of Scope in Workplace Investigations

By Mark Flynn

Experienced investigators appreciate the importance of defining and maintaining clarity of scope in workplace investigations. Scope is a critical component of any workplace investigation and should be revisited throughout the investigative process. Scope also touches central aspects of the investigation process. Grappling with questions of scope confirms its significance and brings focus to the profession of workplace investigation. This article strives to demonstrate that and provide a few practical applications.¹

Scope management responsibility

Scope describes the issues to be investigated. That seems simple enough. Notwithstanding the simplicity of the definition, complications related to investigation scope are often the most vexing for workplace investigators. Both defining and maintaining a clear understanding of the investigation's scope is essential to an effective investigation. Maintaining an understanding of scope is emphasized because investigation scope is often a moving target. Scope expands, contracts, morphs, and sometimes births separate investigations altogether. For that reason, investigation scope must be actively managed throughout the process.

The next time things go awry in your investigation, step back and consider whether attention to scope identifies a path to success. "Success" in this context often lies in managing expectations of the employer, complainant, respondent, and participating witnesses. Defining and maintaining a clear understanding of scope, as well as effectively conveying that to relevant parties, is essential. Although the necessity or advisability of conducting a workplace

investigation may be well established², employers frequently undertake investigations without attention to this basic principle.

Managing scope and managing expectations should be regarded as the responsibility of any workplace investigator. It is the investigator's duty to manage workplace investigation scope even though the employer, not the investigator, is the ultimate decision maker on many questions. The investigator is also responsible for communicating his or her role and documenting investigation scope for the participants, including the employer.

Professional responsibilities

The process of managing expectations begins with initial conversations between the employer and investigator. The process may start when the employer asks the investigator, "Do we need an investigation?" Deliberations on this question usually focus on whether facts or assertions pertaining to suspected or alleged misconduct are in conflict. Defining scope is underway at this stage.

Whether to investigate is well positioned at the start of AWI's *Guiding Principles*. The statement of the guiding principle on whether to investigate is also important to the subject of scope: "An impartial workplace investigation should occur when an employer has determined that one is necessary." After the employer determines the initial scope of the investigation (often with assistance from the investigator) the investigator is charged professionally with executing an appropriate investigation. Defining scope, and other aspects of the investigation process, should be inextricably intertwined with the tenants of an appropriate investigation

¹ AWI's 2012 publication, *Guiding Principles for Investigators Conducting Impartial Workplace Investigations* ("Guiding Principles"), provided strong guidance in this effort, as did previous *AWI Journal* (previously entitled *AWI Quarterly* and *CAOWI Quarterly*) publications.

² Investigations are often legally required in situations involving charges of unlawful discrimination. More accurately, investigations in response to unlawful discrimination claims are essential to an effective defense to those charges. See footnotes 11, 12, and 14. More broadly, workplace investigations support preventative law or litigation avoidance strategies. Broader still, investigations address, and work as a tool to resolve, workplace conflict.

(one that is prompt, impartial, and thorough).³ This is the mantra of successful, effective investigators. The role of an objective and neutral fact finder and the investigator's commitment to conducting an appropriately thorough investigation in a reasonable time frame must be nonnegotiable.

The employer relies on the investigator to represent the elements of an appropriate investigation, but always remember that the investigator enjoys no authority not conferred by the employer to meet that end.⁴ While employers usually recognize the importance of a prompt, impartial, and thorough investigation, it may be the role of the investigator to redirect the employer toward these aspirations.⁵ Likewise, the investigator should identify impediments or diversions in many of several potential forms along the way.

Reasonable care and reasonable failures

Distinguishing between legal and nonlegal issues is not always the best guide for deciding whether to investigate or how to define scope. Potential or actual legal issues are typically viewed as the most important to investigate formally. Oftentimes what constitutes a legal issue is not clear. This is especially true in the context of "hostile-work-environment" complaints where the detail does not provide a connection to a legally protected characteristic in employment. Importantly, any hostile-work-environment complaint may indicate issues worthy of investigation. This is especially true when the investigation enables the employer to head off a problem before it might become a legal issue. It is also true when the investigation addresses conduct that violates an employer's legitimate behavioral or performance expectations.⁶ Hot-button words like "harassment," "discrimination," and "hostile work environment" complicate matters. Understanding rules affecting employer liability in the EEO context is important.

The United States Supreme Court's landmark 1998 decisions *Faragher* and *Ellerth* are pivotal to the development of the workplace investigation profession in the United

States.⁷ ⁸ The US workplace and the US courts have further explored the exercise of reasonable care to promptly stop and prevent instances of workplace harassment ever since.⁹ As is well known, EEO policies (including complaint procedures) and responsive workplace investigations demonstrate reasonable care. Interestingly though, it seems the second factor of the *Faragher/Ellerth* affirmative defense does not receive as much attention from the courts or plaintiff's Bar.¹⁰ Ask yourself, when is it reasonable for an employee not to make a complaint of unlawful discrimination? Responses to that question should inform best practices in workplace investigations including questions of scope.

Consider the hostile-work-environment complaint where the detail provides no apparent connection to a legally protected characteristic in employment. The practical response to this situation encompasses significant questions of scope. Certainly, the investigator should pursue questions about the perceived motivation of the accused, in combination with factual descriptions of the problematic conduct at issue. The more sensitive question is if the investigator should ask whether the alleged harassing conduct is perceived as influenced by a legally protected characteristic in employment when the complainant has identified none. Resolving that question in the present investigation nearly eliminates the potential for the assertion of unlawful discrimination later. Importantly too, even where the complainant takes the opportunity to point to a protected characteristic only when specifically asked, he or she must explain why that alleged motivation did not come up earlier and how it reasonably coexists with the prior statements. This approach requires careful questioning and strong documentation.¹¹

More precarious is where an employer dismisses the hostile-work-environment complaint because it does not present a legal issue on its face. At a minimum the employee complaining of a hostile work environment needs a lesson in equal employment opportunity guided by refer-

³ See *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal.4th 93 (Cal. 1998); *Silva v. Lucky Stores, Inc.*, 65 Cal.App.4th 256 (Cal.App. 1998).

⁴ I rely on this observation in describing investigations as "internal" even if performed by an outside (third-party) investigator. For me, an "external" investigation of an employer is one performed by any of several state or federal authorities such as the EEOC, OFCCP, NLRB, or law enforcement. These agencies do not require the employer's permission to investigate or define scope.

⁵ There are possible negative consequences to the investigator and to the employer if scope is inappropriately narrowed to the point where the investigation is not thorough or complete. See, *In re Enron Corp.*, 235 F. Supp. 2d 549 (S.D. Tex. 2002) (finding whitewash investigation of limited scope can support negative inference of securities fraud); *EEOC v. Cal Psychiatric Transitions, Inc.*, 644 F. Supp. 2d 1249 (E.D. Cal. 2009) (failure to investigate harassment claim while investigating other issues supported punitive damages award).

⁶ "Bullying" complaints presented as charges of hostile work environment provide a contemporary example.

⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁸ *Burlington Indus.*, 524 U.S. 742 (1998).

⁹ See also *Kolstadt v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (discussing circumstances in which punitive damages may be awarded under Title VII, finding that rule avoiding vicarious liability for employers accomplishes Title VII's objective of motivating employers to detect and deter violations).

¹⁰ The employer avoids automatic liability for sexual harassment by supervisors that does not involve a tangible employment action where: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee *unreasonably* failed to take advantage of any preventive or corrective opportunities provided by the employer. *Faragher*, supra, note 5 (emphasis added).

¹¹ Workplace investigation interview documentation technique is beyond the scope of this article. Again, the scope question blends with an important aspect of investigation.

ence to the employer's EEO policy. To give that complaint short shrift as a "nonlegal" issue without explaining hostile work environment as a legal term of art is risky. That could leave the lasting (and often-discussed-amongst-co-workers) impression that this employer does not conduct thorough investigations or live up to its EEO policy. This jeopardizes the employer's expectation that employees take advantage of its complaint procedures. Risking a jury's deliberation over whether a plaintiff genuinely and reasonably misunderstood the employer's initial dismissal of his claim is an unenviable position for an employer.

What else drives scope?

The scope sets up the "playing field" and determines what questions need to be answered. The applicable legal framework or the employer's performance and behavioral expectations inform the issues for investigation. The investigation must gather the facts to answer the questions posed by scope.

Sometimes investigators are engaged to make policy violation determinations for the employer. Some investigators focus solely on fact finding without making employer policy violation determinations. The typical justification for the latter approach is the preservation of employer discretion on internal policy violation questions. Even where the investigator will make a determination on policy violation, initial findings of fact support the subsequent analysis of employer policy on the basis of those facts. A staggered approach applies, not inconsistent with the internal human resources (HR) professional who moves from workplace investigator back to the HR Manager responsible for discipline. The picture is similar for investigators charged with advancing legal conclusions. In all cases the investigator and employer must develop a mutual understanding in regards to the content of findings and any report, which ties to scope.

Understanding legal theories is important to defining scope. For example, in a sexual harassment claim an investigator must appreciate the necessity of looking at whether the alleged conduct was unwelcome by the complainant. This is true even if the investigator is not tasked to make the legal conclusion—whether unlawful sexual harassment occurred. The fact-based-only approach should still incorporate relevant information, such as facts that demonstrate that the alleged conduct was subjectively unwelcome to the complainant.¹² Another (nonexhaustive) example is comparator evidence to reasonably consider how similarly situated employees have been treated.

¹² Similar questions arise around disability and religious discrimination issues involving reasonable accommodation where the investigator should know to explore evidence of an interactive process and evidence to support analysis of "undue hardship" on the employer where accommodation is denied for that reason.

Investigation-type designations, too, present similar questions related to scope. Conduct investigations are usually most straightforward because they relate to allegations of specific behavior. For example, when alleged remarks evidence sexual harassment or racial harassment on their face, what to investigate (scope) is pretty clear.¹³ It gets trickier when the alleged conduct at issue is purportedly motivated by a legally protected characteristic but that is not evident from the behavior or remark itself.¹⁴ That usually requires the investigator to delve deeper into the context of the workplace to make an informed finding. Trickier still is when the alleged discrimination occurred in lack of selection, like hiring or promotion, where it becomes necessary to evaluate a broad range of information to determine whether a protected characteristic held by the complainant, or the complainant's protected participation or opposition, influenced the lack of selection.¹⁵

Workplace assessment challenges

Workplace investigations go to "what happened?" Workplace assessments go to "what's going on?" Assessments present the most significant challenges, and attendant investigator responsibilities, regarding scope. Whether workplace issues need an assessment rather than an investigation draws a distinction largely reflected in scope. An investigation typically involves discernible characters (complainant, witnesses, and respondent) and specific allegations. An assessment lacks such specificity. In an assessment there is only a problem or problems that affect the organization overall or seem to derive from a discrete work group. Assessments demand great attention to scope at inception and throughout. This is not "just semantics."

The upside to receiving a request to investigate under circumstances that call for an assessment is that the employer must have significant faith in your knowledge of employment law/human resources and your skills and abilities as a workplace investigator. An alternative downside may be that the employer simply does not appreciate the complexity of the problem. When the latter appears true, emphasize the tremendous importance of continuous attention to scope. Without that attention, the project resembles paying an investigator to document responses from a large number of employees on the question, "What would you like to complain about today?"

A common concern in conducting assessments relates to who or how many employees to interview. Here again, scope blurs with investigation planning. A conscientious employer focused on thoroughness might initially suggest that you should interview everyone in the fifty-person department where the need for assessment centers. As in any

¹³ This is often described as direct evidence of discrimination.

¹⁴ This may be indirect evidence of discrimination.

¹⁵ Unlawful retaliation claims, which now represent the most common formal charge filed with the EEOC, are another example.

investigation, focus on what's necessary and reasonable. For example, it might not be necessary to interview every witness to alleged misconduct when a lesser number will suffice.¹⁶ Investigations are inherently disruptive to the workplace. It is the responsible investigator's objective to make the investigation as least disruptive as is practicable. For the fifty-person department assessment, consider assisting the employer in crafting a communication to the entire department that outlines the issues of concern (scope). Advise the employees that an organizational assessment will ensue. Some employees will be asked to participate, but all are welcome to confidentially request participation. Emphasize that this process is exceptional and not intended to diminish the expectation that employees utilize the employer's complaint process as workplace issues may arise. Fifty just decreased to ten, and this approach still allows the employer to solicit participation from individuals it suspects possess material information.

Documenting scope

Documenting a statement of scope for the investigation based on a mutual understanding with the employer often provides welcome clarity. It is good practice.¹⁷ Recollections are rarely perfect and may be more susceptible to change as situations intensify or additional decision makers become involved. If, or when, a change in scope occurs, then the statement of scope should change too. Where that happens, consider documenting the revised statement of scope without abandoning the earlier version. It might be significant later or signal to you as the investigator that some interview backtracking is necessary. Also, recognize that documenting the scope of the investigation is only marginally beneficial if it is not contemporaneously shared with the employer. Clarifying the mutual understanding of scope of the investigation is most important. Planning to do so in the end-product investigation report misses the mark.

Scope is often defined by presentation of a complaint. The issues to be investigated are generally the allegations presented. For example, the employer notifies the investigator that it has received a complaint of harassment that requires an investigation. The first question may be whether the complainant has provided a written statement of complaint. A written complaint is often helpful in clarifying the scope of the investigation. Granted, a written complaint

can sometimes prompt more questions than it answers. Regardless, written complaints provide an early opportunity to examine scope and get a sense of the range of issues. A written complaint may also identify anticipated witnesses at the outset of the investigation.

Written complaints are often encouraged under the employer's EEO/antidiscrimination policy. Encouragement is fine, but employers need to understand that it is not advisable to require the provision of a written complaint.¹⁸ EEO policies, like unlawful discrimination/harassment training for managers and employees, should encourage early (read "immediate") identification and communication of complaints well before conduct rises to the level of unlawful harassment. Still, it is often a good idea to invite the provision of a written statement upon notice of a complaint. First, the timing of the request arguably starts the clock on "prompt" investigation. Second, the request provides an opportunity to direct the complainant toward presentation of facts, identification of quotes, dates, and witnesses. This expedites clarification of scope and the investigation process overall.¹⁹

Even where a written complaint exists, the appropriate scope of the investigation may be far from clear. The written complaint may be a fifteen-page, single-spaced, stream-of-consciousness narrative that incorporates a constellation of criticisms, protests, and asserted wrongs. Perhaps one or two examples assert gender discrimination. The employer may decide to limit the scope of the investigation to the potential gender-discrimination issues. This not-uncommon scenario calls upon all the skills and experience of the investigator. A fairly expansive discussion of the issues with the complainant typically follows. While the interview presents an opportunity for the complainant to express his or her concerns, it is the investigator's responsibility to sort through the issues and determine how they relate to the scope of the investigation. The investigator's job is to gather sufficient facts to determine what happened in order to make findings regarding the relevant allegations. The complainant must understand that all the issues identified in her initial complaint and discussed in her investigation interview will not necessarily be included in the scope of the investigation. This requires explaining to the complainant that the investigator is focused on collecting information at this stage to support further refinement of investigation scope. This approach demonstrates a balance between the employer and complainant perspectives. Equally important, the investigator is assured that he or she has explored the issues

¹⁶ If three of ten witnesses corroborate the telling of an inappropriate joke at a staff meeting, it's probably not necessary to interview the other seven, unless the purpose of doing so is to demonstrate that the organization takes such conduct very seriously. Absent that purpose, it's best to go straight to the accused to determine whether there is conflicting information necessitating further investigation.

¹⁷ Bright line rules for conducting workplace investigations should be scrutinized and rescrutinized in later investigations. Perhaps the most telling statement from a seasoned investigator is that, "no one investigation looks like another." Likewise, what is appropriate in one investigation is not necessarily appropriate under different circumstances. This fact is well presented in the first footnote of the *Guiding Principles*.

¹⁸ A popular misunderstanding among employers is that only a "formal" complaint, presented in writing, requires action. Notice is notice, and can derive from actual notice or "constructive" notice, meaning what the employer reasonably should have known.

¹⁹ Of course, workplace investigators may have varying opinions on these points.

sufficiently to determine whether ambiguous elements of the initial complaint might reasonably give rise to gender-discrimination claims at a later date.²⁰

Setting limitations on scope

“Ancient history,” or not?

Imagine that another fifteen-page, single-spaced, type-written statement of complaint details a host of alleged discriminatory behaviors over a ten-year period. Employers are usually eager to engage in a scope discussion under these circumstances; one that limits the relevant scope to allegations that purportedly occurred in, say, the last two years. While this may appear patently reasonable on its face, perhaps even well beyond the applicable statutory limitations period, there is need for caution. In 2002 the Supreme Court decided *Morgan v. National Railroad Passenger Corp.*,²¹ which clarified application of the continuing violations doctrine to lawsuits brought under Title VII of the Civil Rights Act of 1964. The continuing violation doctrine tolls limitations periods for allegedly discriminatory conduct that is deemed continuing in nature. It makes intuitive sense in hostile-work-environment situations where harassing conduct may not be especially severe but is pervasive over time. The Court limited its application under Title VII to hostile-work-environment claims, precluding “recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period.”²² An act contributing to the claim of unlawful hostile work environment must still occur within the limitations period. From there, a court (and by extension a workplace investigator) must determine if more dated incidents are acts contributing to the more recent act.²³

Therefore, it is important for the investigator to explain to the employer that investigation scope must consider this doctrine. It also requires consideration of what allegations represent discrete acts of discrimination or retaliation.²⁴ Whenever possible, it is usually best to be comprehensive with the complainant’s concerns in order to determine all the facts, dated or not. Most employers appreciate that problem employees should not and do not enjoy a statute of limitations period at work. Importantly, if you take the comprehensive approach, save room with the complainant to limit the scope later and provide clear communication should that occur.

²⁰ Another responsibility of the professional investigator is to apply one’s knowledge of the law to ascertain what potential legal claims exist.

²¹ *Morgan v. National Railroad Passenger Corp.*, 536 U.S. 101 (2002).

²² *Id.*, at 2.

²³ *Id.*, at 14.

²⁴ Importantly, under the Court’s more recent definition of what constitutes actionable retaliation in *Burlington Northern*, potential acts of retaliation are not so clearly “discrete acts.” See *Burlington Northern & Santa Fe Railroad Co. v. White*, 126 S. Ct. 2405 (2006).

“Been there; done that”

Exercise caution when the presentation of issues for investigation involves issues that the employer has previously investigated. While this may be the request of the complainant, it may not be in the employer’s best interest to re-investigate if the prior investigation was adequate, i.e., reasonable and appropriate under the circumstances. If evident deficiencies in the previous investigation encourage a *de novo* review, then do that. Otherwise, it is a slippery slope. It is important to appreciate that not every investigation looks alike. Where a complainant presents a combination of new and previously addressed concerns, a compromise is likely available to assure witnesses that the current investigator is aware of the prior investigation and the related facts.

Controversial counterclaims

Workplace investigations are stressful and emotional for almost everyone, but especially the complainant and respondent. Understandably, people become upset and defensive. Counterclaims often arise. Remember though, a counterclaim is not necessarily within the scope of the investigation already started. Yes, it potentially involves the same employees, but that is not the same thing. A statement by a witness, “He started an investigation against me!” is not a compelling allegation; that’s the easy example.

A more difficult situation is where the employer (and respondent) want to expand the scope of investigation into areas that are not germane to the underlying complaint prompting the investigation. The potential for an unlawful retaliation claim exacerbates the problem. For example, assume an alleged sexual harassment complaint is lodged by a newly hired, poorly performing employee against a long-term, successful manager. From the start it is clear that the employer is bothered by the allegation and associated disruption to the work environment. The employer wants the scope of the investigation to include the complainant’s unrelated short history of poor performance to highlight its belief that the complaint lacks merit and is motivated by the complainant’s fear of losing her job.

Keep the employer and the investigation process focused on responding to the sexual harassment allegations. A parallel “investigation” of performance issues under these circumstances is not immediately relevant to the harassment complaint and so may indicate retaliation. That might be the first genuine and significant legal issue to show itself. That said, a history of performance issues under this hypothetical is certainly relevant to credibility, which will become the focus as the investigation develops. Even in the absence of prior documented discipline, the investigation will likely justifiably move there based on testimony. Moreover, seasoned investigators have observed situations where complaints appear to represent a “preemptive strike” in advance of discipline.

Regardless, workplace investigations are not a good substitute for performance documentation. Here, find counsel to empower the employer to go forward with justified (and well-documented) progressive discipline if everyone can agree that the discipline is in no way influenced by the harassment allegation. Yes, there very well may be an unlawful retaliation complaint, but that should be defensible under these hypothetical facts. Avoiding the issue for fear of a retaliation complaint only puts off the problem and diminishes the probative value of the real performance deficiencies.

“Don’t go there”

The most serious dilemmas related to investigation scope occur when the investigator finds herself at odds with the employer. The best way to avoid this is to get ahead of such issues through candid, substantive discussions about scope early in the process. Regardless, conflicts can develop.

An example of this conflict is when the issues under investigation connect to employees the employer did not anticipate would be involved.²⁵ The investigator should inform the employer and explain why new information or testimony appears relevant and potentially material. If the employer restricts the investigator’s access to certain employees or information, there is a problem. The professional responsibility of the investigator is at odds with the authority of the employer. This can be a serious ethical dilemma when such restriction reasonably relates to the established scope of the investigation. In that case, the investigator may choose to refer the matter to higher authority in the organization.²⁶ Often the investigator chooses to document his request to the employer, the employer’s denial, and the investigator’s perception of the resulting impact.²⁷ Another option is that the employer stops the investigation. Or, the investigator might determine that she is ethically prohibited from continuing under the restriction.²⁸

Some might reasonably view the above as less of a scope issue and more a question of investigator discretion regarding

relevant witnesses and evidence on issues within a defined scope. Consider that the scenario illustrates how the professional responsibility of the investigator is inextricably intertwined with the established scope. Defining scope, therefore, results in the imperative of establishing mutual understanding with the employer.

When developments or new information fall outside the established scope of the investigation, the investigator should apprise the employer. There, the employer determines the appropriate course of action including whether and how to investigate. This is not always clear to the overzealous investigator, who has misconstrued the parameters of his independent investigation.

Conclusion

In preparation for writing this article I reviewed earlier issues of the *AWI Journal*²⁹ to see how the subject of investigation scope has been treated. A number of references demonstrated the significance of scope questions in the performance of workplace investigations and how scope questions often touch other critical aspects of the workplace investigation process. While not an encapsulation of this article, a particular quote observes the magnitude of scope questions. It evinces a compelling holistic perspective in advocating that workplace investigations be viewed as a critical element of a litigation prevention strategy instead of viewing investigations only as a narrow obligation to avoid legal liability. “The way we frame a problem can dictate the resources, expectations, and outcomes to any solutions we devise.”³⁰ It espouses the significance of scope determinations for the limited context of workplace investigations and the work environment generally. Workplace investigations, and professional judgment and care regarding questions of scope, can and should contribute to positive employment environments.



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²⁵ Cases citing the “cat’s paw” theory to establish unlawful discrimination provide good examples of such unexpected developments where a deeper investigation reveals an underlying biased influence on a separate unbiased decision maker. Under this theory, the employer assumes liability even if the supervisor who takes an adverse action does not act from a biased intent but the bias of another supervisor in the course of events influenced the final decision. See *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011).

²⁶ See Cal. Rules of Prof. Conduct 3-600 or CO. Rules of Prof. Conduct 1.13.

²⁷ Whether that documentation is embedded in the investigation report or maintained elsewhere is another issue.

²⁸ See Cal. Rules of Prof. Conduct 3-700 or CO. Rules of Prof. Conduct 1.16.

²⁹ Previously entitled *AWI Quarterly* and *CAOWI Quarterly*.

³⁰ Remmers, C. “Alternative Dispute Resolution Design: Don’t Forget Workplace Investigations.” *AWI Quarterly*, 3, no. 1 (January 2012): 11.

How to Conduct a Workplace Investigation

Don't be found guilty of a sloppy workplace investigation. Learn how to avoid costly mistakes.

By Dori Meinert

James Castelluccio, a former IBM (<http://www.ibm.com/us/en/>) vice president, was awarded \$4.1 million in 2014 by a federal judge after a jury in Connecticut found that the then-61-year-old employee was wrongly terminated because of his age.

Before the trial and afterward, U.S. Magistrate Judge Thomas P. Smith harshly criticized IBM's internal handling of an age-discrimination complaint that Castelluccio had taken to HR before he was let go.

While the HR investigator had concluded that the executive was treated fairly, the judge said the HR report was one-sided and blocked IBM from submitting it as evidence at trial. Specifically, he noted that the HR report failed to include evidence favorable to Castelluccio, including his performance reviews.

The judge wrote that he suspected "the purpose of the investigation was more to exonerate IBM than to determine if Mr. Castelluccio was treated fairly."

IBM settled the case out of court in 2015 for a dollar amount that is confidential, according to Castelluccio's attorney, Mark Carta. An IBM spokesman declined to comment.

The ruling is one example of how a poorly conducted internal investigation can cost a company financially and damage its reputation, not to mention the reputations of the HR professionals tasked with overseeing such a probe.

10 Common Investigation Mistakes

1. Failing to plan.
2. Ignoring complaints.
3. Delaying investigations.
4. Losing objectivity.
5. Being distracted during interviews.
6. Using overly aggressive interview tactics.
7. Not conducting a thorough investigation.
8. Failing to reach a conclusion.
9. Failing to create a written report.
10. Failing to follow up with those involved.

"The IBM case should serve as a wake-up call to HR managers across the United States," says Lorene Schaefer, an employment lawyer and workplace investigator in Atlanta. "In today's world, being able to conduct an effective internal investigation that will withstand legal scrutiny is a core competency for HR professionals."

"The public and employees and your jury members expect more today. They're more sophisticated," says Schaefer, founder of Win-Win Resolve, which provides training in workplace investigations.

On the other hand, a properly conducted investigation—one that is prompt, thorough and impartial—can help defend a company should a lawsuit be filed later. By ensuring a fair investigative process, HR professionals also can help build morale and trust among employees.

"Some people will not be happy regardless of the decision you make," says Denise M. Domian, senior vice president of HR at The Bonton Stores Inc. (<http://www.bonton.com/>) in Milwaukee. "But trying to make sure we are going about it in a way that is sensitive and meaningful can help diminish their dissatisfaction. Even if they're not happy with the answer, at least they feel they've been heard."

It's Complicated

Conducting workplace investigations is one of the most challenging duties that HR professionals must take on. Workforce demographics are shifting. New laws are constantly popping up. Managers make mistakes because they aren't properly trained or they're under pressure to resolve complaints quickly. Employees are more aware of their rights.

"I don't know any other business area where things can change so dramatically in a fairly short period of time as far as legislation or best practice or new research," says Faith Laframboise, North American manager of HR for Spirol (<http://www.spirol.com/>), a fastener manufacturer based in Danielson, Conn. "That makes it incredibly challenging to stay on top of everything."

She recalls the trepidation she felt conducting her first workplace investigations. "It was a challenging and quite intimidating thing to have to handle for the first few times," Laframboise says.

Ideally, with proper training and experience, a novice investigator over time develops a greater comfort level in handling complaints, she says. But the task is not for the faint of heart.

"There's a quagmire of potential landmines that you have to navigate through," Laframboise says, "and sometimes you don't always know that when you're heading into it."

Make a Plan

While many HR departments investigate every employee complaint, employers are legally mandated to investigate harassment, discrimination, retaliation, safety and certain other types of complaints.

Once the decision to investigate has been made, some HR professionals may be tempted to immediately start scheduling interviews. However, good investigators will first create a plan that answers these questions:

- Who will investigate?
- What will be investigated?
- What evidence needs to be collected?

- Who will be interviewed?

"You need to clearly define the purpose of the investigation and the scope of the investigation," Schaefer says. "If you don't understand the purpose of the investigation, you will get off track."

Be Objective

While it may be tempting to tune out an employee who has made many prior complaints, don't do it. "The 10th time they come to you, you still have to listen to them as if it were the first," says Sheila Felice, HR and risk manager for the optical division of Swarovski Optik NA Ltd.,

(<http://www.swarovskioptik.com/sid=4PRUgtXluuRgoGQDedBsrzvl4v13ywVRkqtcnNbGQTyPA=?CacheDisabled=>)based in Cranston, R.I.

"We don't have the luxury of becoming jaded or forming opinions before the investigation is complete," she says. "You can't pass judgment or form an opinion based on personal feeling or prior dealings."

Tiffany Cardwell, PHR, vice president of HR for Signature Healthcare (<http://tcrevolution.com/>)'s rehab segment in Louisville, Ky., advises, "Never make assumptions unless you have facts and data to back it up. Sometimes the HR person is too close to the topic, and their judgment may not be where it should be."

Be alert to any potential conflicts of interest when choosing an investigator. In an Illinois workplace harassment case, an appeals court criticized Chrysler's internal investigation because, among other things, a principal HR investigator looking into an employee's complaints of anti-Semitic death threats and property damage was married to someone on the employee's list of suspects. A jury awarded \$4.2 million to the Chrysler employee, but the amount was reduced to \$300,000 by an appeals court last year.

'He Said, She Said' Cases

With proper planning, HR professionals can better address "he said, she said" cases that tend to cause them to throw their hands up in frustration.

Before interviewing witnesses, gather physical evidence that might validate the complaint. For example, e-mail messages might show that a male supervisor has made inappropriate sexual comments to a female employee, which corroborates the female employee's complaint.

Then, plan the order in which interviews will be conducted.

"In determining which person to interview next, I ask, 'What's my risk of feeding the rumor mill, and what's my reward going to be? Is my reward really going to be greater than the risk?'" says Natalie Ivey, SPHR, author of *How to Conduct Internal Investigations* (Results Performance Consulting Inc., 2013) and president of Results Performance Consulting Inc. in Boca Raton, Fla.

Ivey recalls a harassment case in which a male employee was accused of coming on to a female worker at the copy machine. "He claimed he was making copies, but I had evidence that his copier code was never used. I was able to gather the information beforehand and confront him last," she says.

Finally, plan questions in advance and use open-ended questions to draw information out of the witnesses.

"You have to have really great interview skills to be able to confront people who are lying and, at the same time, coax reluctant people to share and give you a statement so you have other evidence to substantiate the allegations," Ivey says.

Avoid Aggressive Tactics

Auto parts retailer AutoZone (<http://www.autozone.com/>) has been the target of numerous lawsuits challenging its use of aggressive interview tactics to extract confessions from employees suspected of theft.

In 2006, jurors awarded Joaquin Robles \$7.5 million after concluding that AutoZone investigators falsely imprisoned Robles when they held him in a back room and threatened him with arrest if he didn't confess. The award was reduced to \$700,000 on appeal.

At the time, AutoZone investigators used an interrogation method called the Reid Technique, frequently used by police and security officers to detect whether a suspect is lying.

Saul Kassin, a psychology professor at John Jay College of Criminal Justice in New York City, testified as an expert witness in Robles' trial. He calls the Reid method "out of step with science" because it relies on behavioral cues that detect anxiety, not deception. "So, the problem is somebody becomes a suspect on very thin grounds," Kassin says.

While employee theft is a big problem in the retail industry, not all retailers use the controversial Reid Technique for investigation interviews.

"We would rather err on the side of caution," says Domian of The Bon-Ton Stores.

The company's loss prevention investigators share the evidence they have with HR before questioning an employee, and HR sits in on that interview. Ultimately, HR decides whether disciplinary action is needed. Regional HR directors are available to guide the HR managers in individual stores, and company attorneys are often consulted, according to Domian.

HR professionals should be more like Joe Friday, the lead character from the TV series "Dragnet," than Eliot Ness, who doggedly pursued gangster Al Capone, says James Galluzzo, SPHR, HR director for the South Carolina State Housing Finance and Development Authority in Columbia, S.C.

A quote associated with Joe Friday, "Just the facts, ma'am," reminds Galluzzo that HR is acting as a fact-finder.

"Ask straightforward questions to get straightforward answers, and always be respectful," he advises. "Lawsuits can be avoided if there is a perception of fairness and respect that is delivered across the board."

Even the location of interviews can affect the outcome of the investigation. Schaefer has seen HR professionals interview witnesses on the warehouse floor in full view of their co-workers. Employees are less likely to share information under such circumstances, she says, and they will likely be reluctant to come forward to report any misconduct in the future.

Determining Witness Credibility

When there are conflicting versions of events in harassment cases, the U.S. Equal Employment Opportunity Commission suggests using the following factors to assess witness credibility:

- **Plausibility.** Is the witness's version of the facts believable? Does it make sense?
- **Demeanor.** Does the witness seem to be telling the truth?
- **Motive.** Does the person have a reason to lie?
- **Corroboration.** Are there documents or other witnesses that support the witness's version of events?
- **Past record.** Does the alleged wrongdoer have a past record of inappropriate conduct?

The Investigative Report

Every report should include:

- The incident being investigated, with dates.
- The individuals involved.
- Key factual findings and credibility determinations.
- Applicable employer policies or guidelines.
- Summaries of witness statements.
- Specific conclusions.
- The name of the person making a final decision.
- Issues that couldn't be resolved.
- Employer actions taken.

Source: SHRM How-to Guide: How to Conduct an Investigation. (www.shrm.org/ResourcesAndTools/tools-and-samples/how-to-guides/Pages/howtoconductaninvestigation.aspx)

Be Quick but Thorough

While HR professionals have many demands on their time, it's critical to investigate an allegation quickly, Laframboise says. "You just have to make it a priority and set the time aside."

Stretching an investigation out over a lengthy period tells employees the alleged misconduct isn't important.

As time goes by, it will become more difficult to collect evidence and get witnesses to talk. Details are forgotten. Documents disappear. Bad behavior continues.

Some HR departments may get by for years doing less-than-thorough investigations without the kind of serious repercussions that get a company's name into the headlines.

"But it just takes once," Laframboise says, for significant reputational damage to be done.

Another mistake that Schaefer has seen involves HR professionals who fail to focus on the employees being interviewed. In some cases, the interviewer is constantly interrupted by phone calls or texts. One of Schaefer's fellow attorneys recently testified on behalf of a fired employee who won a \$1 million award in an arbitration case. The employee complained that the investigator didn't even look at him during the interview or listen to his side of the story.

Maintain Confidentiality

Encourage all those involved in the investigation to keep the proceedings confidential to protect the integrity of the process. If word leaks out, other employees will lose trust and might refuse to share what they know. A word of caution is in order for the HR team as well.

Never share information with a colleague if he or she wasn't directly involved, Felice advises. "It's not that you can't trust your colleagues. It's about mitigating risk whenever possible."

However, don't promise an employee that his or her complaint will remain confidential, because it might be necessary to share the information down the road.

Reach a Conclusion

Ultimately, the investigator must weigh the evidence and conclude whether company policies were violated or misconduct occurred. Many HR investigators are reluctant to do this, Schaefer says.

"People don't want to decide that someone's not telling the truth," she says. "It's human nature. We don't want to call someone a liar."

In a criminal trial, prosecutors must prove "beyond a reasonable doubt" that an act occurred. However, the standard for workplace investigations is "the preponderance of the evidence." Is it more likely than not that the incident occurred?

For guidance, Schaefer recommends using the U.S. Equal Employment Opportunity Commission (EEOC) (<http://www.usa.gov/directory/federal/equal-employment-opportunity-commission.shtml>) instructions on how to make credibility assessments and the standard jury instructions for the federal circuit court of appeals.

The investigator should document any factual findings in a written report. Some HR professionals, particularly at smaller companies, are lax about finalizing their investigations with a written report, Ivey says.

"There's nothing that documents how they got from the complaint to substantiation to termination," she says.

If the company terminates an employee and that person later files a retaliation complaint with the EEOC, the HR investigator will want to have case notes and witness statements to protect himself in court.

"A lot of times," Ivey says, "a well-written report can help you minimize the risk of liability."

Follow Up

Even after a written report is submitted, HR must take additional steps:

- Submit the findings to the decision-maker (typically not the investigator), who will determine what disciplinary action to take. The decision-maker, either a high-level HR professional or a business leader, should be high enough in the organization to determine how people in similar situations have been treated, Schaefer says.
- Notify the employee who made the complaint that action was taken—even if details can't be shared for privacy reasons.
- Reintegrate the employees involved back into the workplace, shifting focus from the complaint to the changes the investigation has brought about.
- Remind managers that retaliation won't be tolerated, and check back within six months to ensure that there has been none.
- Review the investigation to determine what could be done better the next time.
- Look for patterns in complaints that might suggest more training is needed to avoid similar problems in the future.

While every complaint is unique, having a well-defined, consistent process in place can ward off future lawsuits. Treating employees with respect during the process has additional rewards: building employee trust and creating a better work environment.

As Ivey says: "The best investigation is the one you don't need to conduct."

EMPLOYEE RELATIONS COMPLIANCE

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