

# THE DIRTY DOZEN: HOW TO COMPROMISE THE EFFECTIVENESS OF A WORKPLACE INVESTIGATION

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Investigations of workplace misconduct require orderly and methodical practice to ensure that they will pass the scrutiny of lawyers, governmental agencies and other stakeholders if they are challenged. All too often, investigations are handled in a manner that leaves them open to criticism and challenge. Many of these errors committed are predictable, preventable and repeated over and over again.

This article attempts to outline a variety of errors, particularly those most notable, that tend to occur repeatedly in investigations practice. With practical insight, planning, and a commitment to a

disciplined process, those who are responsible for workplace investigations of misconduct can promote a realistic outcome to what typically amounts to a stressful and often divisive employee relations situation, thereby avoiding the possibility of the situation spiraling quickly in to a sea of uncertainty. Whatever the result or outcome of the investigation, one that is conducted properly not only becomes legally defensible but is also consistent with notions of fairness and justice required by today's workforce.

## **NUMBER 1—FAILURE TO CALL AN ATTORNEY WHEN ONE IS NEEDED**

One would think that the decision to call an attorney to guide an employee relations issue or a workplace investigation would be made logically and would be dependent upon the seriousness of the issue or complaint. Unfortunately, however, organizations make these decisions based upon a variety of factors unrelated to the seriousness. Much of this failure

has a great deal to do with failing to recognize the seriousness of the risk itself and concluding that the organization and its staff are fully capable of handling the matter. All too often the result is the “half-baked” investigation. The organization forges ahead on its own, begins the investigation, and somewhere down the line realizes that the matter is well beyond its capabilities. At this point, counsel is called in who reviews and, at times, modifies the strategy and ongoing investigation. The result is internal turmoil and uncertainty as the investigation must, at times, be begun anew, witnesses are interviewed again and erroneous conclusions undone.

Occasionally, the organization fails to call in the attorney for fear of spending money. Here, the clock-watching bean counters get in the way and hope that the organization can muddle through the firestorm without the attorney's clock running. Organizations that have this concern can do one of two things: replace the bean counters or replace their attor-

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neys. Time and again, this type of thinking is penny wise and pound foolish. Hindsight, being 20/20, always advises that in the throes of litigation, the organization would have been far better off from both a fee perspective and organizational dynamic perspective calling in the attorneys to assist it in resolving the issue or complaint at the outset.

### **NUMBER 2—FAILURE TO TAKE THE COMPLAINT SERIOUSLY**

How does the recipient of the complaint know how seriously to consider it? Offhanded comments can amount to putting the employer on notice that something awful is bubbling under the surface. Unfortunately, these comments may be brushed aside by the untrained or unwary—the untrained believing that some sort of formality needs to be put forth by a complainant (i.e., in a formal document) or the unwary being too busy to consider the implications of failing to act.

Not everyone who is the recipient of inartful statements by an employee has the skills to decide whether those statements are ones that amount to a claim of discrimination or harassment and should be taken seriously. Therefore, an effective process must be put into place to ensure that seemingly offhanded comments are directed to the right person to handle. Thus, when the manager in a hallway overhears something, he or she must be trained at a minimum that this might be something that will result in organizational turmoil or liability. The process needs to ensure that someone is available that the supervisor can turn to who is qualified to distill this informa-

tion and act accordingly. How many times does an employee in litigation allege that he or she reported his or her complaint to management time and time again to no avail? Quite a few. The organization that can effectively and quickly pass this information to an appropriate party each and every time will ultimately be able to demonstrate a consistent and fair process that nips potential problems in the bud and resolves issues before they explode.

### **NUMBER 3—FAILURE TO ESTABLISH A PROTOCOL TO PROMOTE THE MAXIMUM AMOUNT OF OBJECTIVITY**

Related to Number Two above is the premise that once a matter is taken seriously, the organization skimps and cuts corners to expedite the resolution of the issue, or otherwise bury the issue under the rug to avoid embarrassment or protect an important party in the organization. Examples of this are found when witnesses are permitted to control the timing and length of investigatory interviews because of their “busy schedules.” At times, individuals controlling the purse strings do not want to call attorneys or retain outside experts to conduct investigations for fear of spending money. Again, the 20/20 rule cited above will likely come back to haunt the organization.

Delegating the task of conducting an investigation to the supervisor in charge of the area, either for expedience or convenience sake, will likely be questioned for its perceived lack of objectivity and on the presumption that the supervisor lacks sufficient training to conduct a workplace investigation.

Interference also compromises the investigation when the investigator is not given unfettered access to evidence and witnesses. While these limitations may not be overtly stated, internal investigators often are hindered in their ability to be objective merely as a result of their own reporting relationship. In one example, the human resource manager reported to a senior financial officer. There were glaring missteps and omissions in his initial investigation. When later questioned about them, he indicated that he would never question something that happened in his boss’s area of responsibility.

### **NUMBER 4—FAILURE TO FOLLOW ORGANIZATIONAL POLICIES**

One of the most obvious, although seemingly illogical, problems is when an organization fails to follow its own policies. When there is a decentralized process of employee relations, it is not at all uncommon for policies to be administered differently throughout an organization. A way to avoid this is to conduct proper management training and communication to ensure that everyone is on common ground. What are the policies that are relevant to the issue at hand?

When a member of senior management suddenly takes over and wants to do things “his way” because of the presence of an important client, a senior level witness or subject in the investigation, or for purely political reasons, it is entirely possible for policies to be ignored, broken, or simply overlooked. Even without the pressure imposed by senior level employees, all too often there is a policy

in place that governs the subject or issue at hand and it is ignored. The first thing to do in the heat of the moment of an investigation is to ascertain what policies apply to the situation—well beyond the EEO/Harassment policy—and be sure to follow them. Often litigation abounds where the organization is alleged “in this instance” to have failed to follow its own policy. The conclusion then drawn is that the organization’s motive must have been discriminatory.

### **NUMBER 5—FAILURE TO TAKE APPROPRIATE, CONSISTENT, OR ADEQUATE NOTES**

The purpose of notes in an investigation is to summarize what occurred with each of the witnesses and to provide a general overview of how the investigation was conducted. Notes should obviously be orderly, clear, and consistent. The basis of this issue is the concern that the notes may not adequately portray what really happened in the interview. This may occur for a variety of reasons. One of the biggest reasons is that the investigator fails to plan enough time in the investigatory process to review his or her notes after each interview and ensure that they actually reflect the course of the interview. As a result they are taken in a haphazard, rushed manner leaving the opportunity for omissions and inconsistencies. For the investigator’s notes to pass muster, they should be able to tell the order of interviews, how much time was spent with each interviewee, where the interview took place, what was addressed in the interview, who was present, and what evidence was shared.

In a deposition years later, the investigator will be asked to explain the notes, as a record of what occurred in the investigation. The reasons for inconsistencies, which could have logically been explained when the interviews took place, are long forgotten and are now subject to question.

### **NUMBER 6—FAILURE TO INTERVIEW ALL WITNESSES**

Somewhere along the way, the question will be raised regarding who was interviewed and why. Like a television crime show, questions will surface about mysterious witnesses who were not questioned. Obviously, hindsight helps provide clarity. One of the most important jobs of an investigator, after finding the facts, is to be able to explain why he did what he did at all points in the investigation. In other words, why were certain individuals selected to be interviewed and others were not? The interviewer should always ask each witness if there is anyone else that should be spoken with. Always ask who can corroborate statements that the witness has made. The interviewer should avoid cutting corners because he or she thinks a witness is trustworthy or that another lacks credibility. Seek not only to corroborate but also to disprove statements or claims made. In addition, be sure to review and understand documentation that can help corroborate statements or claims made. If documentary evidence is technical in nature, the investigator will need to demonstrate that he or she understands it.

### **NUMBER 7—FAILURE TO CLARIFY AND CONFIRM**

Witnesses always explain issues with descriptive terms. Does the investigator understand the descriptive words used by a witness? Is the investigator’s definition of “gross” the same as someone else’s? This typically occurs, not surprisingly for example, when there is an accusation that alcohol is involved. Witnesses describe conduct in terms of others being drunk or inebriated. Obviously, the perception of the truth is influenced by the witness’s own consumption of alcohol and his or her perspective on what it means to be drunk. In one example, an angry customer complained that staff was routinely imbibing in too much alcohol at client functions. She described staff as drunk and disorderly. Relying on statements made by the customer, management sought to immediately discipline the employees accused. Upon further investigation, it was apparent that the angry customer, herself, consumed as much alcohol as the accused employees. By focusing on the amount consumed by each of them, examining their behavior, and confirming with other witnesses rather than drawing premature conclusions helped the investigator draw the correct conclusions.

Instead of relying on vague descriptors from a witness, the investigator needs to be sure he or she understands what witness said and what he or she is talking about. He should reconfirm his understanding of what was said by the witness without putting words in the witness’s mouth.

This will help to avoid reaching erroneous conclusions and helps to avoid reaching conclusions too soon in an investigation.

### **NUMBER 8—FAILURE TO ASK THE HARD QUESTIONS**

Investigations concerning conduct that is graphically sexual in nature or concern, including topics such as child pornography, for instance, often require a strong stomach. They can be awkward, embarrassing, or just plain sickening. An investigator who does not have the stomach to ask direct and, at times, what could be perceived as disgusting and shocking questions, should not conduct the investigation. In addition, witnesses must be presented with the allegations clearly and specifically.

For a variety of nonsensical reasons, some organizations choose to be deliberately vague when confronting a witness. It is not at all uncommon, sadly, for organizations to hear from an employee that she was told inappropriate statements by another employee. Rather than confronting the accused with the specific statements alleged and the identity of the individual who brought the complaint forward, the organizations merely calls the accused on the carpet, reports that he or she said something “bad” and admonishes him not to do it again. Any inquiry regarding the details is brushed aside under the guise of confidentiality. Unless there is a fear of retaliation or harm to the complainant (which there should not be with the appropriate policies and systems in place), this type of conduct does nothing to promote an opportunity to resolve workplace issues and provide a learn-

ing opportunity for employees to correct their own behavior.

### **NUMBER 9—FAILURE TO CONSIDER OTHER EVIDENCE IN THE ABSENCE OF CORROBORATING WITNESS STATEMENTS**

An inexperienced investigator will often conclude that because there are no witnesses to corroborate the allegations, the allegations did not happen. However, the reverse is sometimes the case. Without witnesses, the investigator must consider and rely upon other evidence, often relating to witness credibility, to assess the facts as they are alleged. In addition, the investigator needs to consider the motive behind statements that were made, documentary or other behavioral evidence that is inconsistent with the statements made by witnesses and a whole host of other factors that, in the absence of supporting statements, can indicate that something is awry.

### **NUMBER 10—FAILURE TO FOLLOW UP WITH THE CLAIMANT AND/OR TAKE ADVERSE ACTION WHEN MISCONDUCT IS FOUND**

Feedback to the complainant and the accused traditionally marks the close of any investigation. Where no violation of company policy is found, the organization must be sure to balance the need to be responsive to the claimant with the fact that there are no findings against the accused. All too often the claimant is seeking to satisfy a vendetta or is seeking justice of some sort. The key in any communication is to reasonably assure the claimant that the organization took the complaint seriously, investigated properly,

and that it remains committed to a workplace free of misconduct. This is particularly important as the organization ultimately wants to resolve the issue in house rather than creating a sense of doubt on the part of the complainant such that he or she looks outside the organization to resolve the issue. The organization would also be well advised to follow up with the complainant further down the road to ensure he or she has experienced no further problems with the accused, has no further concerns, and does not have a claim of retaliation.

Feedback to the accused, particularly where misconduct is found, must be consistent with the level of violation. All too often, where a violation is found, particularly where the accused is a favored son, the penalty is a mere slap on the wrist. Where the penalty does not match the severity of the offense, the organization leaves its motives to question and its commitment to a workplace free of misconduct open to doubt. Even though most organizations attempt to keep the penalty under wraps for the sake of confidentiality, the adverse action must send the appropriate message to the offender and others who may learn of the penalty.

### **NUMBER 11—FAILURE TO BE ABLE TO EXPLAIN WHAT YOU DID IN THE INVESTIGATION AND WHY YOU DID IT?**

When assessing the objectivity and thoroughness of an investigation, hindsight brings a number of concerns to light. At the time of the investigation, something the investigator did seemed like a good idea then, and yet many years later in a deposition or threatened litigation,

these actions are called into question or criticized as compromising the integrity of the investigation. Each decision the investigator makes (about what to ask, whom to ask, the order of witnesses, the length of time spent with a witness, the presence of note takers and/or scribes, and so on) must be made logically and thoughtfully. Even the simplest things can be questioned—why were certain notes written and others typed? For each of these, the investigator must be able to explain why she did what she did when she did it to demonstrate that each witness was appropriate to the investigation, that no important witnesses were omitted, that each was given full opportunity to present observations and that any conclusions

drawn were plausible based on the evidence available at the time of the investigation.

**NUMBER 12—FAILURE TO USE THE MATTER AS AN OPPORTUNITY TO IMPROVE THE ORGANIZATION AND ITS EMPLOYEE RELATIONS PRACTICES**

Every organization should use a workplace investigation as a learning experience. They should assess how policies can be improved, how they are communicated to employees, and how they are administered. Organizations should also seek to improve their investigation strategies. How can the process be improved? How can the skills of internal investigators be improved? How can feedback be communicated effectively so as

to resolve the issue fairly? What additional training needs become apparent? What should have been done but was not and why? And lastly, how can the organization get back on track right away so as to minimize the disruption that a lengthy investigation may cause?

**CONCLUSION**

Approaching any workplace investigation in a methodical and thoughtful manner can serve to help any organization effectively minimize the disruption and costs associated with serious workplace issues. By avoiding the dirty dozen, investigators can promote fair and objective investigations, minimize the potential for risk and enable the organization to get back on track more quickly.

