

Chapter 1

Investigator Fears, Motivations, and Jargon

INVESTIGATING HARASSMENT AND DISCRIMINATION CLAIMS can be intimidating and stressful. Very personal and intimate details of co-workers' lives can be revealed. Employees are often angry, embarrassed, and emotional. Investigations may affect people's lives and the workgroup's ability to interact and accomplish objectives. The liability of the organization is also at stake. The conclusions of an investigation can determine the future of all of those involved, including the organization itself. Over the years of teaching the art of investigating to many different people, the authors have learned that investigators are plagued by many similar fears and motivated by differing values and needs.

An Investigator's Greatest Fears

The task of investigating can be daunting. Here are some common fears that both experienced and inexperienced investigators have.

Am I Doing It Right? With so much at stake, it is not surprising that investigators are most concerned about whether their investigations are competent. Training and knowledge are critical to building confidence, and this manual provides the tools to conduct proficient investigations. In addition, the courts have recently concluded that organizations must conduct only a "reasonable investigation," *not* a perfect one. Finally, the organization, not the individual investigator, is ultimately responsible for the adequacy of the investigation and its outcomes.

Do I Have What It Takes? Investigators often ask themselves: "Am I emotionally biased?" "Am I too impatient?" "Am I a good listener?" "Can I deal with the embarrassment or anger that employees may feel?" "Can I ask the tough questions?" There is no way to judge a particular investigator's emotional responses to

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investigations without actual experience. This manual can help the investigator control his or her emotions and judge the appropriate response to these questions. For instance, understanding the psychological impact of harassment, described in Chapter 3, can help an investigator anticipate emotional responses without taking the anger or emotion personally. This manual will show the investigator how to build a support team (attorneys, management, other investigators) so that one person's limits or shortcomings do not undermine the investigation.

Will I Harm People? Because investigations can have a significant impact on employees and on the organization, it is natural to fear harming others. Investigators play only one role in what should be a team of managers deciding what the evidence means and how to remedy the complaint. The team approach provides some protection against a mistaken decision that may cause unintended harm to those involved. A thorough and proficient investigation is also the best tool to ensure that employment actions are fair. This manual will help prevent undeserved harm and promote fairness.

Will Management Do the Right Thing? This manual can be used to train management as well as investigators. When the investigator, human resources, and management work as a team to resolve complaints, it is more likely that management will make good decisions. Most poor decisions are made because management is not trained and thus does not understand harassment and discrimination, the issues underlying the behavior, and appropriate corrective responses. This manual enables the "investigative team" to be on the "same page," operating from the same set of principles and goals.

Will My Investigation Make the Problem Worse? Sometimes investigations discover a "tomb of skeletons." For instance, ethical or financial misconduct might be uncovered. More victims and perpetrators may be identified. The investigator must understand that such revelations do not result from a poor investigation. Instead, uncovering additional misconduct may result from a good investigation. Uncovering such misdeeds provides an opportunity for management to correct and remedy many things that are damaging the employees or the organization.

Will This Investigation Harm Me? Many investigators fear that playing the role of an "internal cop" may damage their own careers, reputations, relationships with others, or emotional well-being. These fears are realistic only when the organization allows an investigator to become a scapegoat for inappropriate behavior or to

become the focus of controversy. This manual describes what organizations should do to create a culture of respect and adequate systems to prevent and resolve harassment and discrimination.

An Investigator's Greatest Motivations

Given the fears investigators commonly hold, why do people choose to be investigators? We have also learned over the years that investigators have many different reasons for wanting to practice this art. These include the following:

The Challenge and Excitement Investigations are intellectually and emotionally challenging and are rarely boring. The art of investigating appeals to highly analytical and curious people who enjoy new and stimulating tasks.

Making a Difference Investigators tell us they believe their work helps to eradicate discrimination and harassment and solve workplace problems. These investigators make a positive contribution to their organizations when they eliminate barriers and promote a respectful culture.

Studying People Many investigators are drawn to the work because they have a fascination for people. They like engaging with diverse people and enjoy the challenge of understanding people's behavior.

By reading this manual, the investigator may come to understand many other motivations for continuing to perform the investigative role.

Investigating harassment claims in organizations can be a complex and difficult task. The fears described in this chapter are common and real. But these fears need not be realized when investigators have learned what is presented here.

Interpreting Legal Jargon

Sometimes investigators fear making a mistake because they misunderstand legal issues or terms. Understanding legal jargon helps eliminate the mystery of the legal system. Listed below are terms used in this manual.

Names Used for the People or Entities Involved

Complainant The person who brings forward a complaint of discrimination, harassment, or retaliation. Many administrative agencies use this term to avoid any connotation that might imply, prior to investigation, that the complaint is

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valid. Thus, in conducting an investigation, avoid using the term “victim,” because to do so implies you have drawn a conclusion about the claim’s validity.

Respondent This is the name given the responding party when a complaint is filed in an administrative agency like the EEOC. Generally, the respondent is the employer.

Plaintiff The person or entity who initiates legal action in court by the filing of a complaint. In the discrimination and harassment area, this is generally the employee.

Defendant The person or entity sued by the plaintiff in court. In discrimination and harassment cases, this is generally the employer and any supervisors who are sued for their participation in the harassment and discrimination.

Names Assigned to the Entity That Will Adjudicate Disputes

EEOC (Equal Employment Opportunity Commission) This is the U.S. governmental entity that investigates claims of discrimination in employment. The agency also issues regulations interpreting the discrimination laws and provides the public with interpretive guidance on compliance with these laws. Complaints generally may be filed with the EEOC within 180 days of the time of the discriminatory act, or within 300 days if the EEOC has an agreement with a state agency to process claims. Proceedings in the EEOC do not involve a jury trial or result in a judgment, but instead generally involve an investigator interviewing witnesses and producing a summary report. The EEOC can, however, decide to sue an employer as the plaintiff if the agency believes that the issue at stake is an important one.

Trial Court When a complaint is filed in court, the first court to hear the case is called the trial court. This is the court that will rule on any motions and make any other necessary rulings. This is also the court where a jury trial will take place, if necessary.

Appellate Court After the trial court has completed processing of the case, the party who loses often has a right to appeal the case to a higher court. The appellate court will not take additional testimony, but instead will rule solely on the legal theories applicable to the case.

Administrative Agency Often a complaint about discrimination or harassment will first be presented to an administrative agency prior to being filed in court. The EEOC is such an administrative agency. Many states also have administrative agencies assigned to process complaints of discrimination and harassment. These agencies do not hold jury trials, and often they do not even have the power to make a binding determination of the issues.

Human Rights Commission Many states have state agencies such as a Human Rights Commission, a Fair Practices Commission, or a similar agency. This agency generally functions the same as the EEOC, except on a state level. Many times, a complainant will file a complaint with both the EEOC and the relevant state agency.

Common Terms Used in Litigating Claims

Affidavit When a party wants to submit information to a judge in a court case, to ask a judge to make a particular ruling prior to trial, the request may be accompanied by a statement by witnesses who can verify the facts important to the request. Attorneys will draft a document with the relevant facts, and the witness will swear to the veracity of the facts.

Affirmative Defense A term used to describe the burden of the employer to disprove that discrimination or harassment occurred. In the legal world, a claim must be proven by providing evidence that meets the criteria outlined by statute or the courts. In defining the elements of proof necessary, the courts define the elements by identifying which party has the burden of proving each fact. When the elements of proof are called an “affirmative defense,” this means that the defendant, generally the employer, has the burden of proving those facts. This term is important in understanding liability for harassment, as described in Chapter 2.

Deposition This is a technique used in litigation, after a court complaint is filed, to discover information known by the other parties. In a deposition, the person giving testimony is placed under oath and asked questions and must respond by providing the information. This process is described more fully in Chapter 13.

Discovery The formal process by which the parties gather information from opponents in a court case. The taking of a deposition is one method of discovery. This is described more fully in Chapter 13.

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Additional Terms Defined in the Manual

In addition, the following terms are defined throughout the text.

ADA (Americans with Disabilities Act) Defined in Chapter 2.

ADEA (Age Discrimination in Employment Act) Defined in Chapter 2.

Attorney-Client Privilege Defined in Chapter 8.

Attorney Work Product Defined in Chapter 8.

Burden of Proof Defined in Chapter 2.

Corroboration Defined in Chapter 10.

Credibility Defined in Chapter 10.

Cross-Examination Defined in Chapter 13.

Discrimination Defined in Chapter 2.

Harassment Defined in Chapter 2.

Hostile Work Environment Defined in Chapter 2.

Liability Defined in Chapter 2.

Prompt Corrective Action Defined in Chapter 11.

Protected Class Defined in Chapter 2.

Quid Pro Quo Defined in Chapter 2.

Retaliation Defined in Chapter 2.

Titles VI, VII, IX Various Congressional Acts that define discrimination in employment and education, defined in Chapter 2.

Experience with investigations will help to dispel many of the fears a novice investigator may have. With experience, the investigator will come to understand the “jargon” and become adept at handling difficult investigations. The remainder of this book provides the necessary guidance to reduce the fear of the unknown, and allow the investigator to enjoy the investigative process.