

Just How Good Is That Investigation?

Tips for deposing investigators in employment cases

By Judith A. Rosenberg

The first thing savvy employers do when they receive a complaint about harassment, discrimination or retaliation is call their lawyer. The second call, made by the attorney or the employer, is often to an investigator. Since 1998, the courts made it clear that employers have a duty to take “prompt corrective action” when there is a complaint and that a prompt investigation is the most significant measure an employer can take to address complaints. As a result, workplace investigations of these complaints are now the norm. (See *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 789 and *Swenson v Potter* (9th Cir. 2001) 271 F.3d 1184 [“The most significant immediate measure an employer can take ... is to launch a prompt investigation to determine whether the complaint is justified.”]) Government Code § 12940 (k) makes it a separate statutory violation when an employer does not take all reasonable steps to prevent discrimination and harassment.

An investigation is the first effort to exhaustively journal the events that led to the complaint in an objective, neutral

framework. Of course, events ratchet upward rapidly if an investigation determines that the allegations are unfounded and the employer asserts there is nothing to be done to address the employee’s complaints. At this point the aggrieved employee and their attorney may have additional claims of retaliation or adverse employment actions such as termination. Where does the investigator’s report fit into evaluation of the strengths and weaknesses of a case?

The employer must disclose the report if it wishes to raise the affirmative defense that it took prompt action in response to the complaint. To the extent the report is exhaustive, the report provides the foundation for the defense and puts the plaintiff on notice about witness statements, conclusions about credibility and any analysis of the basis for the investigator’s conclusion that the complaint is unfounded. To discredit the investigator’s conclusions, a plaintiff’s attorney must demonstrate the investigator was biased in favor of the employer or that the investigation was flawed.

As an ex-plaintiff’s lawyer who also worked as a management consultant and a neutral consent decree monitor, I am, of course, confident that my own investigations are truly neutral and independent. I doubt you can find an investigator who admits to being biased. Unfortunately, when I review investigator’s reports as an expert witness I see not all investigators are neutral, capable, organized or thorough.

I was retained as the plaintiff’s expert in a case which provided (in my opinion) a textbook example of an investigation gone wrong. The allegations involved not only sexual harassment but assault on the employee’s husband with a baseball bat.

My opinion about the adequacy of the investigation was based on reviewing the investigator’s deposition testimony. On every front, you will see, the investigator failed to follow basic guidelines for a neutral, prompt and thorough investigation. Her conclusion, based on her flawed process, was the allegations were not sustained.

The Williams (Susan and Ted) and Carters (Sam and Kate) were neighbors; their children played together, they socialized at one another’s homes occasionally. Sam, a high level executive, helped Susan get a job at his company, but she did not work for him.

The two families and their children were at the Carter’s home for dinner. According to the plaintiffs, Sam backed Susan into a corner when they were alone and told her he could help her get a promotion if she cooperated with him. Susan’s husband, Ted, came into the room and saw his wife looking upset. Heated words were exchanged and a melee ensued, ending when Sam hit Ted in the head with a baseball bat. Susan called 911 several times; the Carters took the phone and hung up. Eventually the police and an ambulance arrived. Ted went to the emergency room; neighbors came to the house to look after the children and the police took Susan, Sam and Kate to the station to give statements.

The next week the company sent Ms. Miller, a new in-house attorney with no experience in employment law, to investigate Susan’s complaint.

What went wrong during the investigation was exposed during Ms. Miller’s deposition, which demonstrated her bias and failure to follow established or reasonable practices when conducting the



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investigation. It documented her serious errors which undermined her conclusion that the sexual harassment and assault allegations were unfounded.

CHOICE OF INVESTIGATOR

Internal investigators

Ms. Miller was not a good choice for an investigation involving a senior executive in a potentially high-profile case which opened the company up to claims of harassment and a potentially serious personal injury claim. Given his prominent status in the company and the investigator's minor position, it might be difficult for her to conclude that Sam was involved not only in harassment but also an assault.

Many employers use Human Resources staff or in-house attorneys to save money; they may be penny wise and pound foolish. Internal staff may not be properly trained to do investigations and their neutrality will always be suspect, by the complainant and others interviewed, and by a plaintiff's attorney or a jury. Witnesses, the complainant and even the accused often view an internal investigator as someone from "corporate" who is simply trying to protect the company and has no interest in determining what really happened.

The investigator should be someone who does not have a relationship with any of the parties, who can neutrally and

diplomatically obtain information and who will not be subject to political pressures from superiors. The investigator should have enough status or tenure with the company to evaluate behavior of high level executives who may have direct or indirect authority over the investigator's position, or alternatively, be an outsider who has no identifiable place in a corporate hierarchy.

If the investigation in your case was done by an in-house investigator, you should start by asking about the investigator's position within the organization and illuminate their relationship, if any, with those involved in the investigation. This will establish at the outset whether the investigator is or can be neutral, concerned for finding the truth, and not beholden to any party.

Does the investigator have a personal or professional relationship with any of the individuals involved – the complainant, accused or witnesses?

Does the investigator have the status within the organization to be able to address issues involving top management if the complaint involves high level executives or managers?

Does the investigator report to anyone in the complainant or accused employee's chain of command? Does the accused have oversight of the investigator's department? Do any of the people involved have the ability to affect working conditions, promotions, career opportunities or other employment situations?

Employer's Outside Attorney

Some employers ask their employment attorneys to do the investigation. This can create problems for defense attorneys, who may then be unable to handle litigation because of a conflict. The neutrality of these attorneys is also subject to attack since the employer has an on-going relationship with the attorney or the firm.

Outside Investigator

The safest bet is for the employer to bring in an outside neutral investigator who has no relationship with the company or employees. This helps avoid issues about neutrality and corporate relationships that arise when the investigator is in-house or the employer's attorney. However, it is still important to explore the relationship between the investigator and the employer.

Relationship with Employer or Attorneys

The relationship between the investigator and the employer or defense attorney may provide fertile territory to obtain information about biases. An investigator who has worked with the same law firm or done investigations for the employer on other occasions might be characterized as biased rather than neutral. The investigator may hope to get more work from the firm or employer, and so is motivated to reach conclusions that protect the employer.

Investigate the investigator – review the CV, find out their rates, and ask if they have testified in other cases and what their opinions were in those cases. Find out who contacted them about the case.

How many investigations have they previously done for this employer? (This is not necessarily a problem for the defendants because the investigator then knows and understands the company's business. However, in some situations, employers hire investigators to conduct inquiries into problems involving employees who previously made complaints or who were the target of complaints.)

How many investigations have they done for the law firm or attorney who retained them or referred them to the client? Are they currently working on any other investigations for the attorney, the law firm or the employer?

How many times have they determined that a complaint was unfounded in investigations they have done for this employer or law firm?

Do they have a social or other type of relationship with anyone involved in the investigation?

Training, Experience and Credentials

Ms. Miller was a new attorney with no experience in employment law. During her deposition, plaintiff's counsel highlighted problems with her lack of preparation and understanding of investigation techniques and requirements.

Ask the investigator about their training experience and credentials. Just because an investigator has not done numerous investigations does not mean that their investigation is flawed. (Even the best trial lawyer has to have a first trial.) However, experience will affect credibility or the weight a jury may give a report and conclusions.

Does the investigator have proper legal credentials for conducting investigations? Are they an attorney, labor representative, licensed private investigator, management representative or human resources consultant? (Calif. Bus. & Prof. Code §§ 7522 and 7523 regulate who may conduct investigations. It provides investigations may be conducted by internal employees, attorneys "performing duties as an attorney at law," or licensed private investigators.)

How many investigations have they done? Have they investigated these types of complaints before or investigated complaints in similar organizations?

Have they ever worked for a plaintiff or has all their work been for defendants? In most cases, an investigator will be retained by employers. An investigator who is also an expert witness for plaintiffs or who worked as a plaintiff's attorney or neutral may be – or appear to be – less biased.

How often have they found complaints were unfounded?

What did their training teach them about planning an investigation?

What are the critical pieces of an interview and what does the investigator need to make conclusions about credibility and an assessment of the validity of the allegations?

INVESTIGATION PLAN, INTERVIEWS AND REPORT

Plan

A good investigation starts with a clear plan of how to proceed based on the information the investigator is given when retained. Ask about the planning and work done before the investigator started the interviews. A plan should include at a minimum a list of witnesses (which can be expanded as the complainant, accused or others name additional people who should be interviewed), a list of documents to obtain (including emails, tape recordings, text messages, memos) and a list of all the potential witnesses suggested by any documents or information received.

Ms. Miller did not prepare a statement of the scope of the investigation or roadmap for the process. She was vague about whether she was to investigate only the harassment complaint or to collect information about the assault allegation.

The number of people Ms. Miller failed to interview about the events of the evening is nothing short of astounding. She interviewed only four people – Susan, Sam and Kate Carter and the Carter's teenage son. (Naturally Sam's family supported his claim he acted in self-defense. They had no information about the alleged harassment.) She did not attempt to interview Ted Williams to get information about the events or his injuries.

Numerous other people might have had information relevant to the allegations. Ms. Miller did not attempt to interview any of them. These potential witnesses included:

- The police officers;
- The paramedics;
- Emergency room staff;
- Neighbors who might have heard statements about the harassment or altercation;
- The older children who were present.

Ask to see the investigation plan and draft questions. Does the plan include an introduction describing the process, the need for confidentiality, the reason for the investigation? Are the questions open-ended? How is confidentiality maintained during the interviews?

A well-organized investigator will generally contact the complainant to get all the details of the allegations, names of witnesses and generally evaluate the

demeanor and credibility of the complainant. They might then decide to talk with others who might have information before interviewing the accused. Information from others may allow a more neutral evaluation of statements made by the accused. It is also good practice for the investigator to interview the complainant again after talking with the accused and any other witnesses to confirm statements made during the first interview and provide an opportunity for the complainant to respond to any contradictory statements.

Ms. Miller started her interviews by talking to Sam on the telephone because he was "a busy executive." The telephone interview was a serious mistake because she was not able to evaluate his demeanor and credibility or ensure that she had his complete attention during the interview. She should have insisted on a face-to-face meeting.

Because she spoke with him first, she did not have specific information about Susan's complaints or statements from others, so she could not ask him about these allegations directly. She did not talk with him again after completing her other interviews and never spoke to Susan again after their initial interview.

Be sure to ask what information the investigator had before starting the interviews and where they got it. If they did not review documents before interviewing the complainant, accused or any of the witnesses, did they follow up with them to ask about information in the documents? Did they talk to all witnesses that were suggested by the complainant or others?

If it is not possible for the investigator to meet with the complainant or the interview occurs after the investigator has talked with others or the accused, the investigator should document their efforts to talk to the complainant and explain why they did not interview the complainant first.

Ask to see the investigator's retention letter. It will not only give you information about the scope of the work but also about the investigator's fees and any other arrangements with the employer. Ask whether the employer sent a letter directing the investigator's work. Does the investigator allow the employer to dictate what occurs or did they tell the employer they makes decisions about how to proceed?

Documentation of Interviews

Investigators have many methods for note-taking, ranging from handwritten notes to having a court-reporter or a note-taker present. Some allow the witness to review and sign off on the notes at the end of the interview, others send a typewritten copy for the witness to review and make changes to after the interview and some do not provide an opportunity for a witness to review the notes. There is no agreed-upon "best practice" for this process, but it is important to determine what the investigator's standard practice is and whether it was followed. In any event, an investigator should keep careful track of notes and documents after completing the report.

During her deposition, Ms. Miller admitted she lost some of her notes and had no memory of what was contained on those pages. Other pages of notes were illegible and she was unable to read her own handwriting. Her deposition transcript included comments by the defense attorney attempting to help her decipher her notes. This was a particular high point for the plaintiff's attorney during the deposition.

Documents

Ms. Miller failed to obtain copies of critical documents and tapes. During her deposition, she said she contacted the police department once to ask for a copy of the police report but did not follow up when they did not provide one. She could not explain why she did not request copies of the ambulance or emergency room reports or the 911 tapes.

An investigator should collect as many documents as possible as close to the beginning of the investigation as possible. This would include written documents, copies of emails, texts messages or video or tape recordings, and copies of any other documents that memorialize anything relevant to the investigation. The investigator should begin by asking the employer to provide all documents related to issues raised in the investigation and should then ask parties and witnesses what other documents they have.

During my deposition of Ms. Miller, the defense attorney suggested that all of the adults were drinking and that none of their statements were credible. There is nothing

in the report that addresses this issue. A police report and medical reports might have provided facts which might have allowed Ms. Miller to draw conclusions about whether any of the individuals had been drinking.

Report

The investigator's report should provide a statement about the specific focus of the investigation, an outline of a plan, and a list of documents reviewed and witnesses who were interviewed. It should reflect whether the investigator instructed parties and witnesses about confidentiality. The investigator may not have transcribed written notes, but should at a minimum provide a summary of statements from witnesses and parties and an explanation for conclusions about demeanor and cooperation. Finally, the report should include a conclusion by the investigator about whether the allegations were founded and the basis for the conclusion.

Ask whether the investigator gave the attorney or employer a copy of the report to review before it was finalized. This is not an unusual practice because the investigator may want to include additional information if the client has questions. However, it is important to find out what discussions occurred and what changes, if any, were made to the report before the final version was completed.

Generally, an employer or attorney wants a written report. They may choose to have only an oral report if the facts clearly establish that the complaint has merit. This is risky for a number of reasons. If there is no written report, you can challenge the investigator's memory. You can also suggest that the employer was attempting to hide facts and in fact did not have a thorough investigation if it chose not to have a written report.

You may not find an investigator who made as many mistakes as Ms. Miller, but there will almost certainly be areas in an investigation where the investigator may demonstrate lack of experience, lack of thoroughness or lack of thoughtful preparation. A careful deposition can help you develop facts which demonstrate the investigator's bias or the flaws in the investigation and give you ammunition to move your case towards a successful settlement or verdict. ■



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