A "How To" Guide for Employee Investigations

The Challenge & Opportunity of District Workplace Investigations

Suppose you get a call from the office at lunch, and learn that, just this morning, a teacher has come into the central office and said that she has been getting “sexually harassed” by the building’s evening custodian, all this year.

What, exactly, should you do?
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History & Evolution of Employer Defenses, and Moving Target of Legal Requirements

In 1998 the US Supreme Court created an affirmative defense for employers to certain types of harassment claims. The defense requires employer to prove two elements. The framework has been extended to many types of harassment, retaliation, and similar claims.

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Adopting Anti-Harassment Policies, and Supervisor Training on Harassment

First prong of the affirmative defense requires the employer to prove it took reasonable care to prevent and to promptly correct harassment.

Result: Districts established Board policies prohibiting discrimination and harassment, and then trained supervisors to prevent harassment.
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Adding Formal Complaint Procedures, with Training and Protections for Complainants

Second prong requires employer to prove that the employee unreasonably failed to use the complaint process the employer provided.

Result: Districts broadened Board policies, with complaint forms & procedures & options, and train employees how/where to file complaints.

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Ensuring Prompt, Neutral, Thorough, Professional, and Effective Investigation

Now, Districts have policies, and employees do file complaints. Who wins? As area of law continues to develop, focus is on investigation.

Result: Focus now is on the legal sufficiency professionalism and effectiveness of the District’s investigation and of its response.
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Focus is the Quality and Effectiveness of District's Investigation, and its Response.

No longer enough to adopt Board non-discrimination and anti-harassment policy. No longer enough to adopt a formal complaint procedure and designate Title VII coordinator. No longer enough to receive & log harassment complaints, and investigate them to indecision.

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Example of Employer Liability (or Denial of Summary Judgment)

• Gilooly v. Mo. Dept. HSS (8th Cir. 2005)
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Result: Denial of Summary Judgment or Potential Finding of District Liability
Failure to investigate, investigate *promptly*, or to investigate *well* is potentially fatal to District’s affirmative defense against employee claim.
Such facts will prevent District from winning on summary judgment, and may lead to District liability, in claim by either of the employees.

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Examples of Summary Judgment (or Avoidance of Employer Liability)

- **Richey v. City of Independence** (8th Cir. 2008)

- **Alvarez v. Des Moines Bolt Supply** (8th Cir. 2010)
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Result: Winning Summary Judgment (or At Least Avoiding Employer Liability)
Prompt, effective investigation into complaint, with reasonable response calculated to end any harassment, usually fatal to harassment claims. Well-documented investigation results generally lead to employer avoiding liability, and often to achieving victory on summary judgment.

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Effective Attacks and Common Pitfalls on Insufficient Workplace Investigations:
1) Attack the neutrality, legitimacy, and/or thoroughness of the District’s investigation.
2) Question the adequacy of the notes, records, and documentation supporting the investigation.
3) Provide evidence of improper treatment of parties during and/or after the investigation.
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In Current Legal Environment, Successful Defense to Employment Claim Requires:

Proof of a well-planned, well-executed, thorough, and professional investigation.
Proof of a solid, neutral investigation and appropriate follow up allows the District to successfully defend against claims filed by: 1) the victim, 2) the accused, or even 3) both.

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Effective Investigation Techniques

Do the investigation “by the book.” (or Policy)

Standard to start by interviewing accuser first.
Get as much detail as possible. Ask plenty of open-ended questions, and listen carefully.

Ask “is that all?” and “is there anything else?”
Get names of any potential additional witnesses.
Any evidence? Any documents? A statement!
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Effective Investigation Techniques
Standard approach is to interview other witnesses next, review documents and info; begin confirmation or lack of corroboration.
Start with broad questions, do not lead witness.
Listen carefully, and follow up on information.
Ask "is that all?" and "is there anything else?"
Get names of any additional potential witnesses.

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Effective Investigation Techniques
Move investigation forward by interviewing other potential witnesses, repeating interviews if needed (it is), and reviewing relevant info.
Documentation, personnel file, & other sources.
Timecards? Emails? Video cameras? etc.
Careful notes of interviews (facts, not opinions)
and copy & retain all documents, videos, etc.
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Effective Investigation Techniques
Typical practice is to interview the accused last. Allows you to have all facts available, and best sense of external reality, to assess accuracy.

Start with broad questions, do not reveal info. Listen carefully and follow up on information. Ask “is that all?” and “is there anything else?” Any witnesses? Any documents? A statement!

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Valuable Neutral / Official Source: Guidance from "Behind Enemy Lines"


www.eeoc.gov/policy/docs/harassment.html

Print it, read it, file it & mention it in your report.
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Valuable Source of Guidance:
www.eeoc.gov/policy/docs/harassment.html

Whether to investigate? (EEOC = 'yes')
When to start investigation? ("immediately")
Who should investigate? (neutral, professional)
What order to interview the parties and witnesses
- Start with accuser / complainant / victim
- Then other witnesses. Then accused = last.

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Valuable Source of Guidance:
www.eeoc.gov/policy/docs/harassment.html

What questions to ask accuser and witnesses:
("Who, what, when, where, why and how").
- Who committed the alleged harassment?
- What exactly occurred, or what was said?
- When did it occur, and is it still ongoing?
- Where did it occur? How often? (Etc.)
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Valuable Source of Guidance:
www.eeoc.gov/policy/docs/harassment.html

What questions to ask accuser and witnesses:
- How did you react when that happened?
- Was anyone else present when this happened?
- Did you tell anyone about it when it occurred?
- Do you know of anyone else it happened to?
- How has this affected you since it happened?

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Valuable Source of Guidance:
www.eeoc.gov/policy/docs/harassment.html

What questions to ask accuser and witnesses:
- Are there any notes, physical evidence, emails, letters, video or other documentation of this?
- Do you know of any other relevant info on it?
  - How has this incident affected your job?
  - How would you like to see matter resolved?
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Assess & Determine Credibility

Be prepared to weigh and determine credibility. Common credibility concerns include witness demeanor, bias or motivation, consistency with other information, and just basic plausibility.

You do it as a parent. Sometimes as a spouse. You do it in HR; in hiring; reason for leaving prior job? Unexplained gaps in employment?

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Do Your Job: Reach a Conclusion

After thoroughly investigating, review all interview notes, information, documentation. Then draw conclusions as to what happened. It is not enough to resort to "inconclusive." Make a decision. Investigations are intended, and expected, to generate a conclusion. Look at the info again. Interview again. Decide.
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Finish the Job: Write a Report

Complete the Investigation and Come to a Defensible, Supportable Conclusion.

Then, write it, support it and defend it.

Assume the investigation file will be reviewed critically by Plaintiff’s lawyer, and reviewed at least ‘skeptically’ by a judge and/or by a jury.

Justify and explain decision in written report.

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Justify and explain decision in written report.

What sort of record will you provide of your own objective and professional investigation?

This is the “opportunity.” The report should set out your notes, evidence, findings of fact, and conclusion. It should be factual, objective, and balanced. The written report is HR’s chance to shine: Professional, effective, and conclusive.
 Recent real life example scenario #1
A 6th grade female student reports to Principal:
Mr. Teacher put his hands on my leg / and
grabbed my bottom / and touched my thigh

Recent real life example scenario #1
A 6th grade female student reports to Principal:
Mr. Teacher put his hands on my leg & bottom...
- Special education classroom setting
Student had a prior report vs. “student B” —
(not proven, and viewed as likely falsified).
Mr. Teacher has reprimand in his file for forgery.
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Recent real life example scenario #1
"A female student report re: Mr. Teacher"
Building Principal and Administration
Initial Actions (file) & witness interviews
Open-ended questions & written statements
Follow up with witnesses on new information
Decisions on inherent plausibility / credibility
Report and additional follow through.

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Recent real life example scenario #1
"A female student report re: Mr. Teacher"
Conclusions from Investigation: alcohol, smoking at school, co-worker harassment, & lying (above and beyond inappropriate student contact)
Apparent "copycat" student = aide confirmation.
Written Report & Recommendation for dismissal
Mr. Teacher resigned and surrendered license.
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Recent Real Life example scenario #2: in the Higher Education setting
Male undergraduate student worker reports:
"Mr. Professor has "sexually harassed" me while I am working in the department lab.

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Recent Real Life example scenario #2: in the Higher Education setting
Male undergraduate student worker reports:
"Mr. Professor has "sexually harassed" me...
Mr. Professor’s full name is Mr. Professor Emeritus, & he is a major donor to University.
So major, the department lab is named for him
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Recent Real Life example scenario #2:
“A student worker report re: Mr. Professor”
Supervisor, Dept. Chair, University EEO office.
Initial Actions (file) & witness interviews
Open ended questions & witness statements
Follow up with witnesses & new information
Written report & additional follow through
Additional legal actions by both parties

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Recent Real Life example scenario #2:
“A student worker report re: Mr. Professor”
Student changed his major from chemistry, & was eventually told could not work for Dept.
Mr. Professor violated reprimand letter & ban, was eventually escorted off campus by police
Sued: - Milligan v. S. Illinois Univ. (7th Cir. 2012).
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Additional Areas of Concern in the School District Setting

1) 'Mandated Reporter' Considerations
2) Employee and Student Privacy Issues
3) 5th Amendment Rights / *Garrity* Issues

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Additional Areas of Concern

'Mandated Reporter' Considerations

State law requires almost all school district employees to report to Children's Division of Dept. of Social Services, if have reasonable cause to suspect child abuse or neglect.

http://dss.mo.gov/cd/pdf/guidelines_can_reports.pdf
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Additional Areas of Concern

'Mandated Reporter' Considerations

Failure to report is a Class A misdemeanor.

Good faith reporters are immune from civil or criminal liability, even if report ultimately false.

24 hour child abuse / neglect hotline:
(1-800-392-3738)

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Additional Areas of Concern

School Employee Privacy Issues

Consent is always sufficient.
Try to obtain consent to search.

Difficult questions arise when District wishes to conduct a search without employee consent. In this situation, there are two key legal issues.
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Additional Areas of Concern

School Employee Privacy Issues

First, is it even a search? Was there a "reasonable expectation of privacy."

Second, if there was a reasonable expectation of privacy, then was the search nevertheless "reasonable" at its inception, and in its scope.

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Additional Areas of Concern

School Employee Privacy Issues

The existence of a reasonable expectation of privacy depends on the facts of each case.

Common fact issue is whether the District, by its own actions and policies, has created or defeated a "reasonable expectation of privacy"
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Additional Areas of Concern

School Employee Privacy Issues

Reasonable / Justified at its inception

If so, the District must have reasonable grounds for conducting a search: reasonable basis to suspect that search will turn up evidence of misconduct, or it must be done for a non-investigatory, work-related purpose.

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Additional Areas of Concern

School Employee Privacy Issues

Reasonable / Justified in its scope

If so, the search must also be justified in scope. To justify the scope of a search, the measures used must be related in scope to the circumstances that justify the search, and must not be overly broad or excessively intrusive, in light of the nature of the misconduct.
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Additional Areas of Concern

5th Amendment Rights / Garrity issues

5th Amendment states “No person shall be compelled in any criminal case to be a witness against himself.”

This means that the employee could refuse to speak with you on Constitutional grounds if the interview involves a potentially criminal matter.

Can an employee “Take the 5th” and refuse to answer?

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Additional Areas of Concern

5th Amendment Rights / Garrity issues

Under Garrity, District has the right to tell employee:

“If you refuse to answer our questions, we can take that refusal as a negative inference that you did what we are questioning you about, and we can use your refusal as grounds for discipline.”

If the employee still refuses to talk, you can discipline for the refusal, and/or draw an “adverse inference” …
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A female student and a friend walk into your office.

The previous week she had broken up with her boyfriend. Just two days before the meeting she received a message from the male teacher. She tells you about an exchange that she had with a male teacher at the school via a Facebook chat. She says that both her friend and the friend’s mom view the exchange by the teacher as “inappropriate.”

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A female student and a friend walk into your office.

She offers to give you a print out of the exchange. If you accept the print out, will you have ‘searched’ the student or the teacher in any way?

The first question always is: did you have consent? Here, the student is offering to give you the print out. So you have her consent.
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You accept the chat log and read through it.

It’s creepy.

*It includes comments ranging from:*

“So is there a boy on the radar yet for you?”
“You’re still waiting till marriage, right?”
“Oh, a very aggressive girl huh? :) That’s fun!”

*To the most inappropriate comment:*

“What is the most orgasms you have had? By the way, you are going to delete this convo when we are done?”

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A female student and a friend walk into your office.

Should you do begin an investigation?

Must be investigated and appropriately disciplined.
It’s equally inappropriate, regardless of the media.

Compare: verbal comment overheard by principal
Compare: written note passed to student in class.
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A female student and a friend walk into your office

Are there any DCFS “Hotline” issues raised?
Are there any employee privacy issues raised?
Are there any criminal / Garrity notice issues?
What is the appropriate investigation process?

Conclusion

Questions?

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