EMPLOYMENT INVESTIGATIONS

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State Bar of Texas
26TH ANNUAL
SUING & DEFENDING GOVERNMENTAL ENTITIES COURSE
July 31- August 1, 2014
Austin

CHAPTER 9



DEDE WILBURN CHURCH

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DeDe Church is a nationally recognized trainer on employment issues and a renowned expert in the field of workplace investigations. With more than 22 years of experience, DeDe has personally trained thousands of employees and managers, investigated well over 200 internal complaints, and guided her clients through countless workplace conflicts. Some of DeDe's clients include Whole Foods Market, Baker Hughes Incorporated, Texas A&M University, MD Anderson Cancer Center, Freebird's, Petco, Anadarko Petroleum Corporation, and the City of San Antonio. In recognition of her skills, DeDe is often invited to speak at distinguished conferences and serve as a resource for the media.

In her training workshops, DeDe combines practical tips, real-world experiences, and an interactive style to create the perfect environment for managers to learn and practice critical leadership skills. DeDe is a vibrant and engaging speaker who is highly acclaimed by upper echelon executives as well as lower level employees. Because she has conducted successful training in exclusive boardrooms and open break rooms, as well as once at a city garbage dump, she is comfortable reaching every level of workforce. DeDe's clients consistently compliment her ability to make learning fun.

When conducting an investigation, DeDe brings a depth of knowledge and a consistent ability to find the facts without causing unnecessary disturbances. DeDe is comfortable working through complex, multi-layered complaints, and witnesses often say they feel at ease when talking with her because of her approachable nature. Because she was a distinguished litigator, she knows how to draft a reliable investigation report that will withstand courtroom scrutiny.

In her former role as an Assistant Attorney General, DeDe received the prestigious Presidential Citation from the President of the Texas State Bar in recognition of outstanding service to the citizens of Texas. Her Bachelor of Arts degree is from Louisiana State University, magna cum laude, and she received a Doctorate of Jurisprudence with Honors from the University of North Carolina School of Law in Chapel Hill, North Carolina.

With offices in Austin, Dallas, and Houston.

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Discussion Points When Retaining an Outside Investigator

1) Please describe your overall approach.
   [Being thorough without causing unnecessary disruption.]

2) Are you searching for policy violation, legal violation, or only to substantiate allegation? [Usually only to substantiate/not substantiate allegation.]

3) How will you handle scope creep?
   [Check with counsel/client before pursuing new allegations or talking to witnesses not previously mentioned.]

4) When/Who will invite witnesses to interviews?
   [Usually company's HR rep. immediately prior to interview.]

5) Do you record interviews?
   [Make sure the approach is in keeping with your company policy.]

6) Notes
   Do you keep notes of conversations with counsel?
   Do you read your notes back to witnesses before they leave their interview to ensure accuracy? [Best practice.]
   If public agency, are you aware your notes may be turned over under the Public Information Act?

7) Do you talk with each witness about retaliation and confidentiality?
   [Have retaliation policy visible for witnesses. Discuss confidentiality per NLRB ruling.]

8) When you ask the complainant how s/he wants the situation resolved, what if s/he requests a pay-out of a certain amount? Will you then mediate between the parties? [This could jeopardize the appearance of impartiality.]

9) Do you make recommendations?
   [Not in investigative report. The entire report could be undermined if recommendations are not followed.]

10) Who will circle back with parties to tell them the outcome of the investigation?
    [Usually this should be done by HR or internal manager.]

11) Are you comfortable testifying if necessary?

SAMPLE INTERNAL INVESTIGATION WORKSHEET

I. COMPLAINT

Complainant:_____

Accused:_____

Complaint was made: ____ verbally ____ in writing ____ other

Complaint was made to this person :_____ on this date:_____

Summary/basis of complaint: ☐ Race ☐ Color ☐ Religion ☐ Gender ☐ Pregnancy

☐ National Origin ☐ Age ☐ Disability ☐ Retaliation ☐ Sexual Harassment

☐ Other - *If complainant does not use one of the terms above, put exact complaint in quotes here:*_____

Remedy requested:_____

II. INVESTIGATION PREPARATION

Scope of Investigation:

_____

Findings will be delivered to this person(s):_____

DATE:

_____ All relevant documents, emails, personnel files, etc. gathered & reviewed

_____ Initial witness list compiled and the order of witness interviews decided

_____ Witnesses contacted verbally/in writing (circle one), told about interviews, and reminded about confidentiality and non-retaliation.

Any related past allegations (including dates, names of parties):

_____

III. INVESTIGATION

Witness (name/title)	Date	Corroboration (Yes, No, partial)
1.		
2.		
3.		
4.		
5.		
6.		
7.		

(continue on back if necessary)

***Each witness is thanked, informed about confidentiality and non-retaliation, and given investigator's contact information. Non-parties are told they will not be informed about the ultimate investigation findings in an effort to protect privacy.*

Summary of findings:

IV. POST INVESTIGATION ACTION

Date Action

_____ Report completed and delivered to relevant personnel

_____ Findings communicated in writing/verbally (circle one) to complainant

_____ Findings communicated in writing/verbally to accused

_____ Any disciplinary measures taken:_____

_____

_____

_____ Checked back with relevant parties regarding any retaliation or additional concerns
_____ (14, 30, & 60 days following communication of findings)
_____

_____ Complaint file closed

_____ _____
Investigator's signature Date

Investigative Report Template

C O N F I D E N T I A L and P R I V I L E G E D

To:
From:
Date:
Re: (*e.g.*, Investigation of harassment complaint – Dep't Name)

I. Allegation(s)

-Complainant's name, title, dept (or anonymous)
-Form of complaint (written, verbal, other)
-Date complaint was filed
-Recipient of complaint (HR, supervisor, etc.)
-Substance of complaint including policy allegedly violated (BRIEFLY)
-Respondent's name, title, dept
-Date of alleged incident(s)
-Relief requested by complainant

II. Information Reviewed

-The following people were interviewed: (name, title, and dept)
-The following documents were reviewed: (attach addendum if lengthy)

III. Relevant Policies/Procedures

-Restate specific policies that impact the investigation in any relevant way

IV. Findings of Fact

-When possible, restate allegation(s) as heading
-List information which substantiates or refutes each allegation and the source of such information
-Limit information to that which is within the scope of the investigation and directly relates to the ultimate conclusion

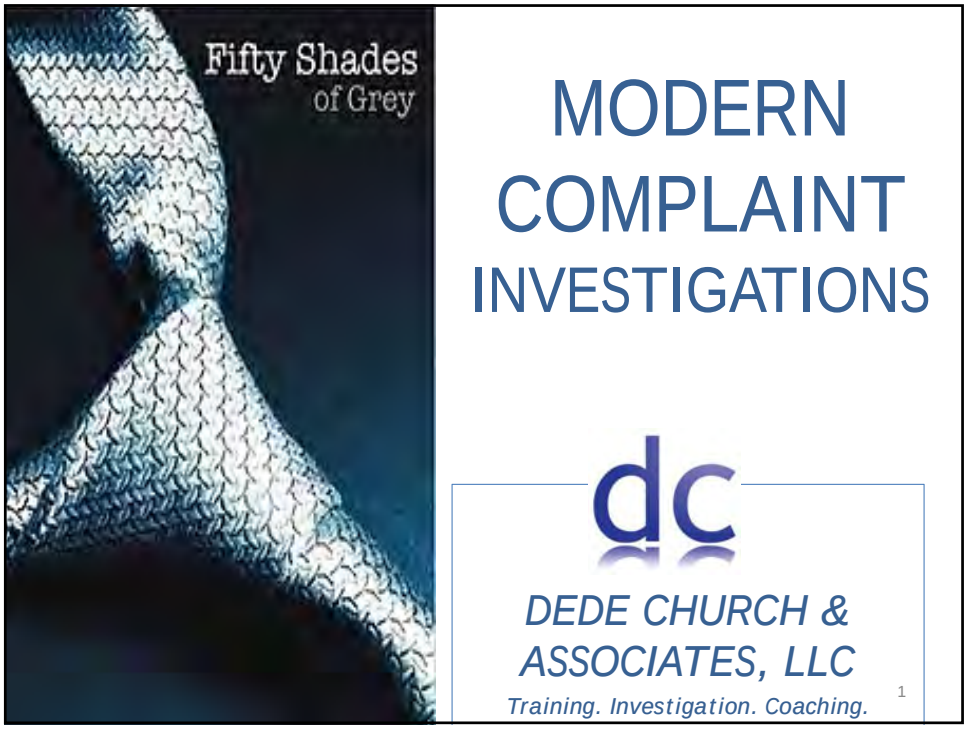
V. Analysis of Information

-May be necessary only in complex cases
-List extenuating circumstances, such as suspicions of bias on the part of a witness and the source of those suspicions

VI. Conclusion

-Restate each allegation and check one below.
___ Information indicates allegation is substantiated
___ Information indicates allegation is unsubstantiated.
___ Information does not establish either the truth or falsity of the allegation.
___ Information does not indicate whether allegation is substantiated, but some appropriate follow-up actions are needed.

(If necessary in complex cases, use narrative form to state conclusion.)


Fifty Shades
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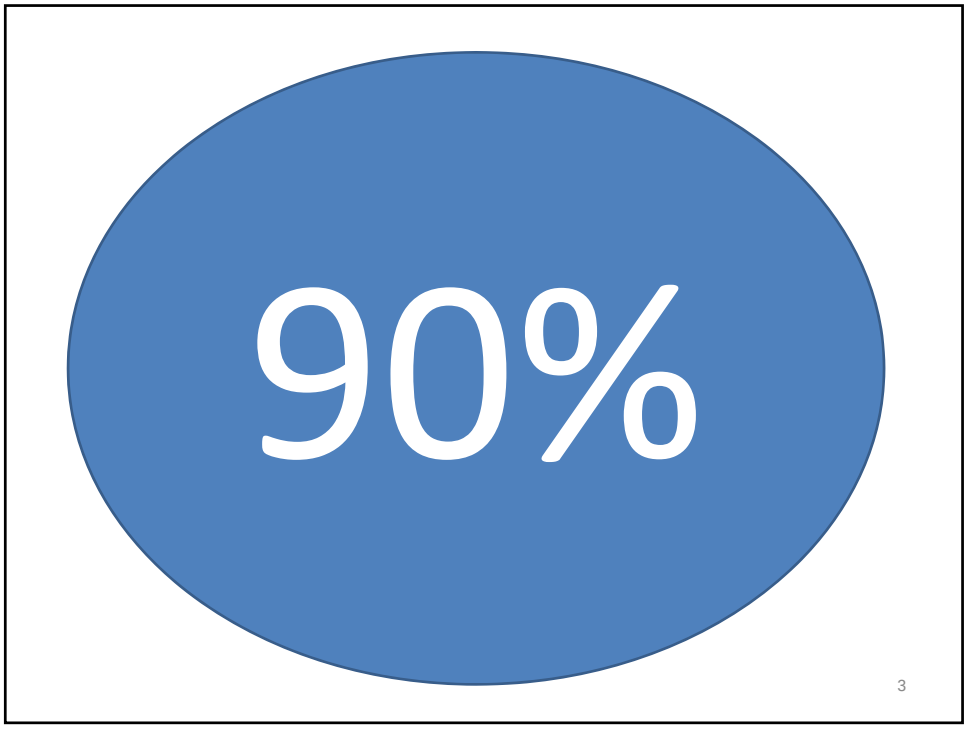
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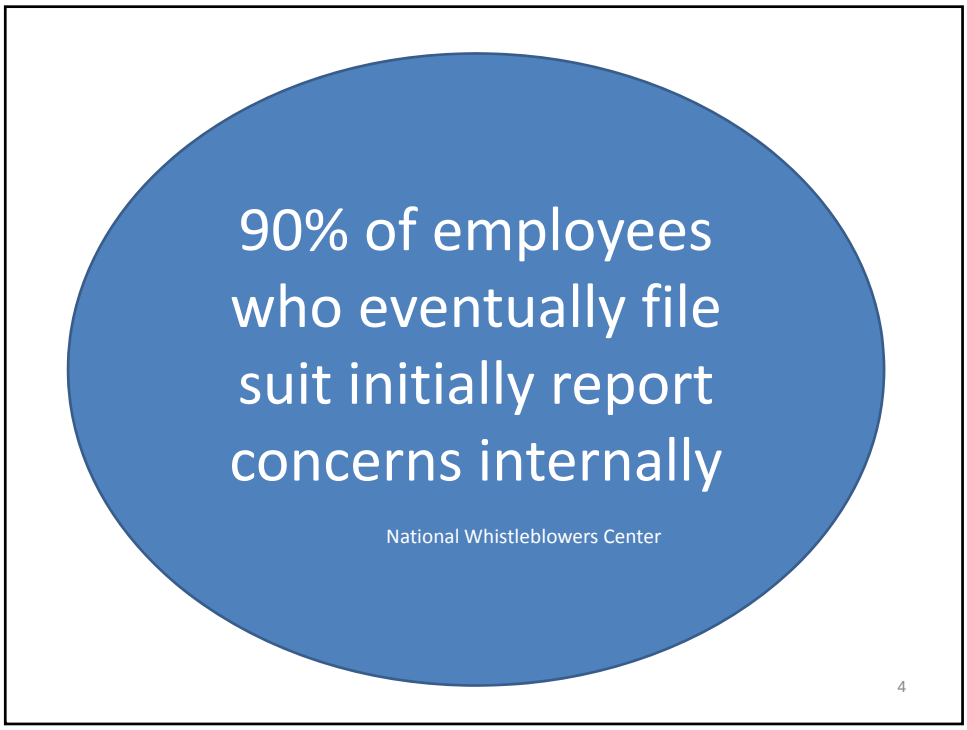
90% of employees who eventually file suit initially report concerns internally
National Whistleblowers Center
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Procedural Fairness

- Voice
- Neutrality
- Respectful Treatment
- Trustworthy Decision Makers

A



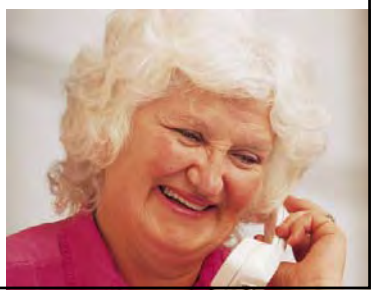
B



C



D



"In-Groups" At Work

To those in our own groups, we:

- Are more generous in explanations for their behavior
- Show greater empathy, respect, and cooperation
- Distribute more resources
- Evaluate them more positively

GitHub



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Why Do We Investigate?

1. Resolve problem
2. Identify & correct patterns/trends
3. Restore morale/Gain trust
4. Look for/prevent subtle bias from becoming a problem
5. Establish affirmative defense/Meet legal requirements

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Mistakes I've Seen (very recently)

- Failure to raise complaints/take action ourselves
- Assuming we know what alleged offender will say
- No follow-up with complainant
- No disciplinary action or action is too severe




Investigation Olympics!


First Topic: Using an investigation as a defense
Use whatever defense you've got!

If a court finds fault with your investigation, can it preclude you from telling the jury about it?

1. Yes
2. No
3. I don't know but this is a pretty scary concept!

Answer: Yes!

Castelluccio v. IBM, (D. Ct. Conn. Jan. 2014)

"The plaintiff's bar is growing increasingly sophisticated in its strategic efforts to preclude employers from introducing into evidence these types of investigations."

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Second Topic: Stopping the Investigation



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If the complaining employee signs a severance agreement, you do not need to continue the investigation.

1. True
2. False
3. It depends on how well the severance agreement was written!

Answer: False!

Castelluccio v. IBM, (D. Ct. Conn. Jan. 2014)

Court: The employer's decision to stop the investigation was "further proof that the investigation was not trying to get the facts but was only trying to exonerate the employer."

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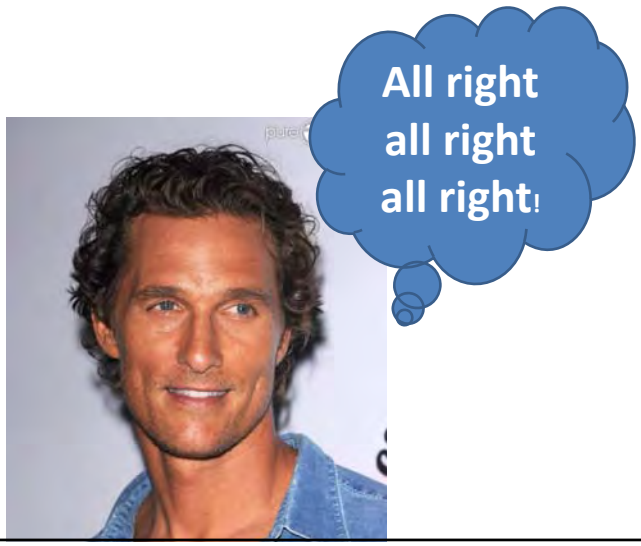
Third Topic: Burden of proof



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Legal burden of proof in internal investigation:

1. Beyond a reasonable doubt
2. Clear and convincing
3. More likely than not
4. Whomever is least likely to sue

Answer: **Trick Question!**

This is not a legal proceeding, so there is no "burden of proof." However, when weighing the information gathered, the investigator determines whether it is **more likely than not** that the complaint can be substantiated.

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Final Topic: Your conclusion



It's to your advantage to serve up the right conclusion

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You should draw a conclusion of "inconclusive" if you just don't know what happened.

1. True
2. False
3. I don't know and can we just look at Andy Roddick and Brooklyn Decker a little longer?

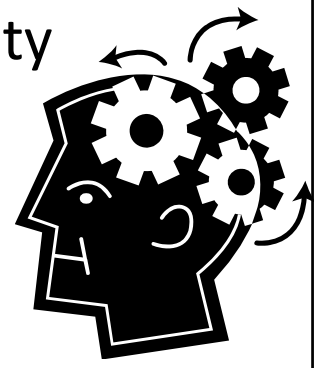
FALSE!

- If you don't know what happened, then the complaint is UNSUBSTANTIATED!
- But again, conclude that the complaint is substantiated if it is more likely than not that the misconduct occurred



EEOC Credibility Factors

- Inherent plausibility
- Demeanor
- Motive to Falsify
- Corroboration
- Past record



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Congrats to the Winners!

3 Parting Gifts

Choose the Right Investigator

Make a logical decision

- Are you likely to be a witness?
- Are you likely to be viewed as biased?

Give thought to perspectives of all parties

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Retaining an Investigator



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OVERVIEW SHEET

- EnsureS that your investigation is consistent and thorough.
- See Handout

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REPORT

- Detailed verbal report first
- Then decide on written report
  - Executive summary
- Avoid editing
  - Preserve investigator's independence
  - Addendum

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No! No! No!

The evidence I uncovered reveals beyond a reasonable doubt that the perpetrator committed aggregious sexual harassment against the victim.

I recommend immediate termination.

BETTER:

"Based on the witnesses interviewed and the information reviewed, the complaint is substantiated."

Written Report

- Critical document! Write as if jury is reading over your shoulder
- No adjectives or adverbs
- No reference to self/1st person
- Avoid "evidence"
- Usually offer Conclusion but no Recommendations in this doc



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REMEMBER:
The Standard is Not "Perfection"

The issue was not the truth or falsity of the . . . allegation but "whether the employer reasonably believed the employee's allegation and acted on it in good faith."

Jackson v. Cal-Western Pkg Corp, (5th Cir. 2010).

Many Thanks For Your Time, Attention, and Participation.

Practical Answers to HR Problems

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