

5 egregious errors that endanger employment investigations

By Robin E. Shea on August 05, 2011



Earlier this summer, in writing about [reference information for bad employees](#) (I call them "the Axis of Evil"), I mentioned employment investigations, noting that this was a topic for another post. Well, today is the day. Now that the Supreme Court has officially recognized ["cat's paw" liability](#) for employers whose decisions are tainted by an individual with an unlawful motive, it is more important than ever for employers to conduct workplace investigations that are above reproach.

And because it's more fun to talk about mistakes than what people do well, I'm going to focus on five workplace investigation errors that I see regularly.

Error No. 1. The man* who knew too much. This is a very common mistake when the investigator is someone from the same worksite as the individuals involved, and knows the "cast of characters." "TMI" is not a good thing. Hear me out. The problem is that someone who already knows the cast of characters can have a very difficult time keeping an open mind.

**The masculine shall be deemed to include the feminine, and vice versa.*

Ideally, a workplace investigation will be done by someone from outside, who can investigate objectively. But if the investigation absolutely *must* be done by someone who knows everyone involved, the investigator should keep in mind the cliche, "Even a stopped clock is right twice a day." Just because the complaining employee is a known drama queen and the accused is a thrice-decorated war hero who rescues little kitties from the tops of trees and gives all of his money to the poor (or the complaining employee is a lovable Sunday school teacher who drives only 15 miles a week, and the accused is [Tiger Woods](#)) it is possible that, in this case, *just this once*, the roles are reversed. OK, probably not, but at least as an investigator you should keep that attitude to the best of your ability. You can turn your brain back on when it's time to assess your evidence and determine what really happened.

Error No. 2. Dangling leads. I cannot tell you how many times I've been asked to review an employer's investigation, and the notes say, "Joe didn't see Bill make a pass at Mary, but he said that we should talk to Susan, who works in the same area and might have seen something." I scour through the rest of the notes to find the interview of Susan, to no avail. The reason? Nobody followed up on Joe's suggestion that Susan be interviewed. Fortunately, we usually catch this type of thing while there's still time to go back to Susan and find out what, if anything, she knows. But companies shouldn't be having to waste precious legal fees hiring lawyers to point out such obvious omissions to them. (Save us for the hard stuff!) Investigators need to follow all leads provided by the accuser, the accused, and the witnesses. If they don't, and if the mistake isn't corrected before there is an EEOC charge or lawsuit, you can bet the government/plaintiff's lawyer will use the lack of follow-up to its/his/her advantage.

Error No. 3: Accepting conclusions as "facts." Another mistake I see all the time. Investigator asks, "Is Tifanye sexually harassing the men she works with?" Amber replies, "I feel that Tifanye is very inappropriate with the guys." Or my personal favorite: "Oh, you know, Tifanye is Tifanye." These are not facts. These are conclusions, and they don't tell you anything. A good investigator will say, "Amber, tell me what Tifanye does with the guys that you consider inappropriate," or "Tell me what you mean when you say Tifanye is Tifanye." If the investigator doesn't do it, you can be sure that the EEOC or a plaintiff's lawyer will.

This, by contrast, is a factual statement: "Yesterday, I overheard Tifanye telling Dave that his jeans really made his butt look cute. Dave turned bright red and walked away." Or this: "Every day, Tifanye is talking about how 'hot' Steve is. Steve never says anything to her, but he's told me several times that he is uncomfortable and tries to avoid her."

See the difference? Now you have some information!

Error No. 4: "You don't wanna get mixed up with a guy like me, Pee-wee. I'm a loner. A rebel." And you know those "Do not remove under penalty of law" tags they put on mattresses? Well, *I cut one off!* (Sorry - I got carried away.) In all cases, and especially if the investigation is conducted by the man* who knew too much (see **Error No. 1**), someone else ought to review the findings of the investigator to make sure that all leads have been followed (see **Error No. 2**) and that conclusory statements have been supported by facts (see **Error No. 3**), and that there is adequate factual support for the preliminary conclusion of the investigation. The reviewer should also assist in determining what really happened and what the appropriate action should be. The reviewer ideally should be an in-house attorney, a corporate-level Human Resources professional, or an outside attorney, preferably with expertise in employment law. He or she should also be someone who is not personally involved with the cast of characters, or only minimally involved.

Error No. 5: "We will keep everything you say strictly confidential. Except, of course, when we talk about it." It is impossible to keep an investigation completely confidential. You cannot interview accused parties or witnesses without disclosing at least some of the reason for asking the questions. If you tell an employee that everything will be kept confidential, and then she finds out that you've been talking, she is rightfully going to be ticked off at you. Better to say, "We will keep

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everything that you say as *confidential as we can*, but of course we may have to talk about this with other people involved in the investigation. I can assure you that we will not discuss this with anyone who doesn't have a legitimate need to know." Employees are not stupid. They will understand and will appreciate your honesty.

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