



MN NEWS

SPECIAL REPORT

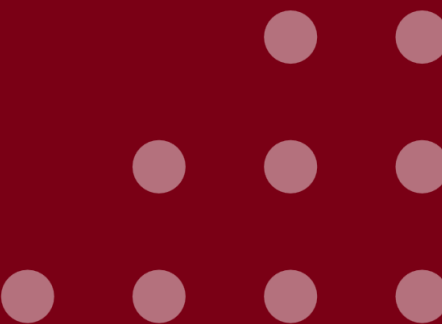
Workplace Investigations

This is a fictional scenario that is entirely imagined and intended only to provide a context for discussions of current legal issues and potential workplace interactions. Any resemblance to actual persons, names, events or circumstances is entirely coincidental and not intentional. In addition, the information and related discussion is not intended as legal advice, and is for general informational and educational purposes only. While we hope it is informative, it also does not fully address the complexity of the issues or steps employers must take under applicable laws—which are also subject to change, even frequently, with or without prior notice. You should not act upon any information provided without seeking professional legal counsel tailored to your specific situation. For legal advice on these or related issues, please consult qualified legal counsel directly.

WORKPLACE INVESTIGATIONS

BREAKING NEWS

- Workplace investigations are fact findings conducted in response to complaints of inappropriate conduct in the workplace, i.e. sexual harassment, discrimination, code of conduct violations, retaliation.
- Their purpose: to obtain accurate and truthful information so that a fair decision can be made in response to a complaint of workplace misconduct.

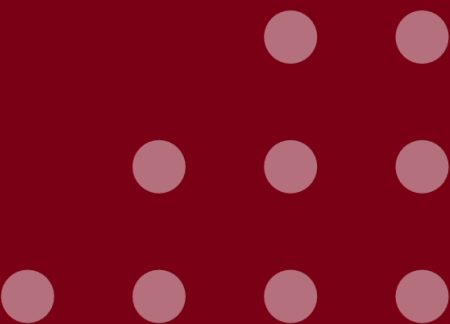


Legal Reasons

- Comply with policy and the law
- Inform appropriate corrective action
- Reduce liability from claims and establish *Faragher/Ellerth* affirmative defense
- Prevent further harm/liability

Practical Reasons

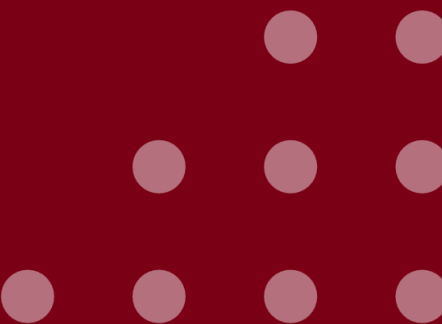
- Learn what happened
- Employee relations
- Set culture that encourages others to report



WORKPLACE INVESTIGATIONS

BREAKING NEWS

1. Decision to Conduct an Investigation
2. Choice of Investigator
3. Scope of Investigation
4. Investigation Planning
5. Communicating with Employer Representatives and Witnesses
6. Confidentiality and Privacy
7. Evidence Gathering and Retention
8. Witness Interviews
9. Documenting the Investigation
- 10. Investigation Findings (Credibility Factors)**
- 11. Reports**



Credibility Factors

Credibility Factors

- Primary Credibility Factors
 - Corroboration or lack thereof
 - Opportunity and capacity to observe
 - Consistent or inconsistent statements
- Secondary Credibility Factors
 - Plausibility
 - Bias
 - Motive to lie
 - Past history
 - Reputation for veracity or deceit
 - Manner of responding to questions
 - Demeanor (*proceed with caution!*)



CORROBORATION OR LACK THEREOF

Corroboration by present witness:

- Tangible information
- Witness statements from someone who was present and observed the incident
- Witness statements from someone who was not present for the alleged incident but directly observed similar incidents with the respondent



Sales Representative Lucy Anderson and other employees who have heard Amanda make comments to and/or about Paul being “out all the time.”

CORROBORATION OR LACK THEREOF

Corroboration by contemporaneous reporting:

- Documented in a journal
- Discussed at the time the event occurred
- Saw or heard something shortly after the event

Tip: Always look for corroboration when it comes to hearsay.



Paul reached out to his former colleague, Jonathan Peck, after overhearing Amanda's comment, to share how things were going since Jonathan left the Daily Grind. He told Jonathan about the incident and sent a text to his wife about it as well.

OPPORTUNITY AND CAPACITY TO OBSERVE

- Must have personal knowledge to satisfy this credibility factor
- “How do you know?”
 - Heard it OR observed it



During the project meeting, Lucy saw Amanda roll her eyes at Paul and heard Amanda's comment about Paul complaining "again."

Later, Amanda told Lucy that Paul "always seemed to be absent for some reason."

CONSISTENT OR INCONSISTENT STATEMENTS

- Look for consistency or inconsistency in the witnesses' statements
- Inconsistent statements may arise in multiple contexts:
 - During the interview
 - In past emails or documents
 - During past conversations with other witnesses



Amanda said she understands that Paul recently underwent surgery and does not take issue with his need to take leave related to surgery. But Amanda has also made comments that Paul always seems to be absent.

PLAUSIBILITY

- When something seems reasonable or probable

Note: This is different than corroboration.



Paul's second accommodation request looks substantially different from his first request; therefore, it's plausible that Paul used AI to generate the request.

BIAS

Be aware of witness's potential for bias:

- Bias in favor of or against a party
- Bias in favor of or against an outcome
- Financial or personal interests



Lucy and Amanda are close friends who regularly spend time outside of work together. Lucy and Amanda are also close friends with Kyle, and his promotion allows the three of them to work closer together.

MOTIVE TO LIE

- Everyone can have a motive to lie
- Not everyone with a motive to lie will do so
- Examine the relationships between individuals and potential biases—do not make assumptions
- Understand the context



Paul is frustrated by The Daily Grind's strict in-person work requirements and limited parking close to his office – as a result, he has a motivation to use AI to create his second accommodation request.

Amanda does not want to be disciplined for retaliating against Paul – as a result, she has a motivation to deny that Paul's leave and/or accommodation requests were a motivating factor.

MANNER OF RESPONDING TO QUESTIONS

- Inconsistencies in the manner of responding, or a failure to respond may warrant further inquiry

Questioning Amanda:

1. “Did you say that Paul was “complaining again” during the project meeting?”
Did he tell you that?
2. “Did you say that Paul was “complaining again” during the project meeting?”
Everybody knows he complains all the time.
3. “Did you say that Paul was “complaining again” during the project meeting?”
That doesn't sound like something I would do.



PAST HISTORY

- **May or may not be helpful if there is:**
 - A prior substantiated finding for similar behavior
 - A history of unfounded or malicious complaints
- **Be aware of bias when considering past history**

Tip: Inquire and follow up.



When Paul was out on leave, Sales Representative Becky Johnson brought a complaint to HR about Amanda overlooking her for a project in favor of someone who did not have kids.

REPUTATION FOR VERACITY OR DECEIT

- Use with caution
- What is the basis for the reputation?
- Consider the source and reliability
- Consider similarity to the current situation
- A person's occupation should not weigh into your decision



Becky Johnson tends to be overdramatic and often exaggerates situations. When Becky heard of Paul's complaint, she claimed she wasn't surprised given how Amanda treated her.

DEMEANOR

Problematic credibility factor:

- Witnesses can honestly be mistaken about something and may believe they are telling the truth
- Witnesses may be nervous because it is a stressful process, not because they are lying
- Witnesses may have cultural differences
- Witnesses may be neurodivergent



Amanda does not make consistent eye contact and repeatedly taps her fingers on the table while being interviewed.



Types of Reports

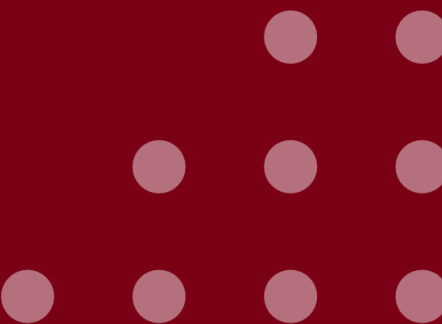
Types of Reports—Comprehensive Investigation Report

- Big comprehensive report
- Contains investigation background/methodology, relevant evidence, credibility assessments, and detailed analysis
- Well-reasoned analysis



Note:

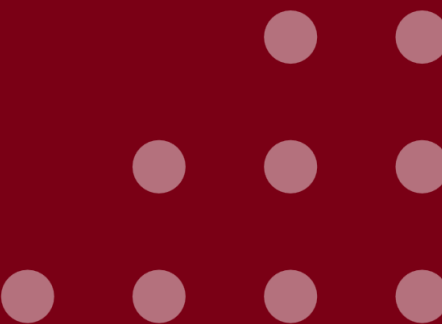
For all three reports, you must do a review of the evidence, credibility assessments, and analysis.



Types of Reports—Executive Summary

BREAKING NEWS

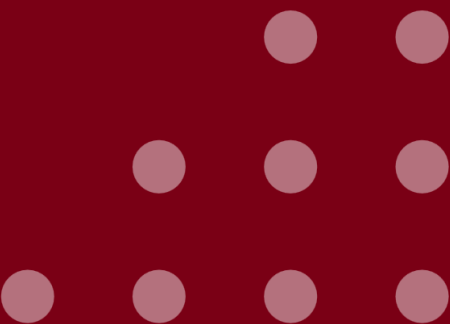
- Shorter version of events
- Contains investigation background/methodology
- Contains only the allegation(s) and findings
- Includes the analysis



Types of Reports—Verbal Reports

BREAKING NEWS

- Shorter version of events
- Require written documentation (notes, summary, logic of findings, analysis) to create

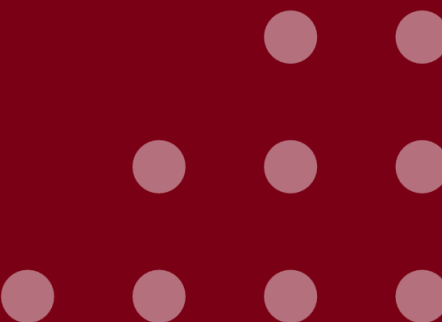


Report Structure

Report Contents

BREAKING NEWS

- **Introduction**
- **Investigation methodology**
 - Witness list
 - Documents reviewed
 - Standard of proof – preponderance of evidence/balance of probabilities/more likely than not
 - Statement of independence
 - Justification for evidence reviewed or not
 - Policies
- **Factual Background**
 - Undisputed information
 - Provides context to the allegations
- **Evidence**
 - Allegations
 - Response
 - Witness statements
- **Analysis and findings**
 - Credibility assessment

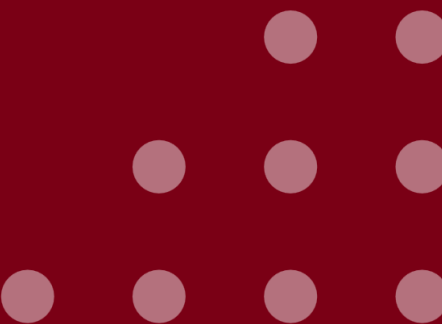


Factual Background Information

- Information not directly related to the allegations, but relevant for context
- May include:
 - Employment history
 - Relevant background
 - Prior complaints
 - Facts related to each allegation
 - Other
- Case specific
- Be open to reorganizing and restructuring

Strategy Tip:

Depending on the allegation(s), information from this list may be more appropriate in the Allegations section of the report.



Evidence

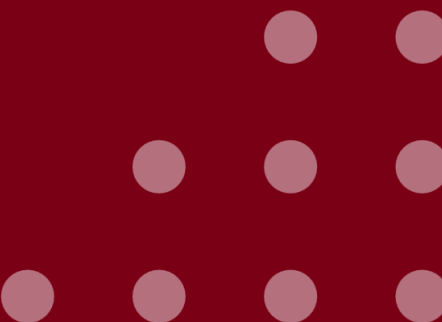
BREAKING NEWS

Make sure that anything relied upon in the findings appears in the Evidence section of the report.

- **Include:**
 - Complainant's allegations
 - Respondent's response
 - Witness interviews/statements
 - Documentary evidence
- **Leave out:**
 - Extraneous information that is not relevant to your analysis

Strategy Tip:

If you discuss a fact in your analysis, then it should appear in the Evidence section of the report.



Strengthening the Report

Analysis and Key Report Writing Components

LIVE ●

Key Components:

1. Clear and unequivocal findings
2. An evidentiary standard that is clearly stated and applied
3. The scope and findings aligned
4. Credibility factors properly applied
5. The Report includes all significant facts, including facts that tend to substantiate the allegations and those that tend to not substantiate the allegations
6. The analysis logically and persuasively explains why the findings were made (instead of contrary findings)
7. The writing is clear, understandable, and easily readable

Key Consideration #1

LIVE ●

To Strengthen the Report

Are There Clear and Unequivocal Findings?

- ✓ Do the hard work so that the client/stakeholder understands the clear finding and can competently respond to the complaint

When writing your report, ask yourself:

- ✓ Have you made a finding that is clearly communicated to the reader?
- ✓ Does the decision maker have the answer they need to take appropriate action?
- ✓ Is it obvious from the findings that the allegations are either substantiated or unsubstantiated?

Key Consideration #2: Evidentiary Standard

LIVE ●



Preponderance of the Evidence

- Almost always the standard in workplace investigations
- More likely than not
- Evidence on one side outweighs, or is more than, the evidence on the other side
- Greater than 50/50



Clear and Convincing

- Only if policy requires
- Rarely comes up in workplace investigations
- Limited context in which it is used – e.g., university context and whistleblower claims
- Highly probable



Beyond a Reasonable Doubt

- Never used
- Typically applies in the criminal arena

Key Consideration #3

LIVE ●

To Strengthen the Report

Are the Scope and Findings Aligned?

Make sure the report:

- ✓ Properly frames the scope
- ✓ Addresses each factual allegation
- ✓ Addresses each claim (e.g., harassment, discrimination, retaliation)
- ✓ Describes how scope creep/expansion was handled
- ✓ Provides the client/stakeholder with information to respond to the complaint
- ✓ Refrains from making findings that are outside of scope

Key Consideration #4

LIVE ●

To Strengthen the Report

Are the Credibility Factors Properly Applied?

- ✓ Identify credibility factors in your report and/or analysis
- ✓ Use credibility factors to weigh and analyze the evidence
- ✓ Use credibility factors to tip a decision one way over the other
- ✓ Only use credibility factors that apply in the circumstances, and explain how/why that credibility factor strengthens or undermines witness credibility

Key Consideration #5

LIVE ●

To Strengthen the Report

Does the Report Include Significant Facts Tending to Substantiate the Allegations?

- ✓ Show the reader all facts that are relied upon in the findings
- ✓ Start with the most compelling factors
- ✓ End with the factors that support the finding, but were given the least weight in your analysis

Key Consideration #5

LIVE ●

To Strengthen the Report

Does the Report Include Significant Facts Tending to Not Substantiate the Allegations?

- ✓ The analysis must include facts that go against, or contradict, the finding made
- ✓ Use neutral language: Complainant and Respondent. Not victim, accused, harasser, and/or perpetrator
- ✓ Watch adverbs. (“He denied.” vs. “He vehemently denied.”)
- ✓ Use quotation marks for language cited by Complainant (“intimidated and bullied”)
- ✓ Avoid inflammatory language, moral judgments, or loaded words

Key Consideration #6

LIVE ●

To Strengthen the Report

Does the Analysis Logically and Persuasively Explain Why The Findings Were Made Instead of Contrary Findings?

- ✓ Explain your thought process
- ✓ Show both sides
- ✓ Analyze, do not regurgitate facts
- ✓ Use credibility factors
- ✓ Create a timeline for retaliation
- ✓ For retaliation and discrimination claims, discuss legitimate business reasons and any factors that may suggest why the stated business reasons are not legitimate
- ✓ Use charts, visual aids, graphs to weigh evidence

Key Consideration #7

LIVE ●

To Strengthen the Report

Is the Writing Clear, Understandable, and Easily Readable?

- Write it right (Writing 101)
- Avoid problematic language that may cause your statements to be interpreted in ways you did not intend or that make you look biased
- Ensure readability
 - Write for a 9th-grade reading level
 - Improve readability using statistics in your preferred software
- Proof the report
 - Get a proofreading buddy
 - Use a proofreading checklist

Reported By

LIVE ●



Celeste Mountain Monroe

Miller Nash LLP

Celeste.MountainMonroe@MillerNash.com



Christine A. Slattery

Miller Nash LLP

Christine.Slattery@MillerNash.com