

## Effective Workplace Investigations



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When you learn about risky conduct:

- T** Take it seriously
- A** Act fast
- G** Get help

Duty to Act

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A screenshot of a web-based form titled "SEPARATION NOTICE" from the State of Georgia Department of Labor. The form includes fields for Employee Name (Mike Jones), SSN (2 3 3 4 5 6 7 8 9), Period of Last Employment (04/01/2014 to 04/30/2014), Reason for Separation (LACK OF WORK), and Position elimination details.

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## Reason Matters



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## Reasons to Terminate:

- Harassed Francine
- Made sexual comments
- Sent sexual messages
- Poor work performance
- Insubordination



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## Evidence Matters

- What can you **prove**?
  - To the EEOC or a jury?
  - To your boss?
- How do you **know**?
  - If the decision is right?
  - If business objectives are met?
- Will it be **perceived** as fair?
  - By the employee?
  - By other employees?



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## Why to Investigate

- Legal risk
- Business risk
- Culture risk

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## When to Investigate

- Legal risk:
  - Possible safety issue
  - Possible adverse finding of law
- Business risk:
  - Serious performance or misconduct issue
  - Possible public relations issue
- Culture risk:
  - Possibility of termination or serious corrective action
  - Possibility of undermining employee motivation

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## When to Investigate

- Subject matter is in the Company's **control**
- There is actual or potential **conflict**
- There are serious potential **consequences**

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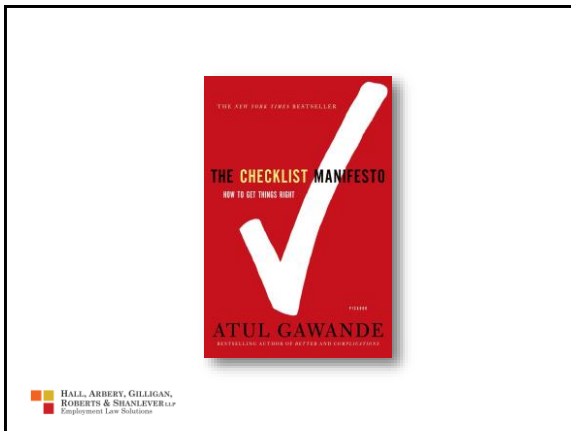
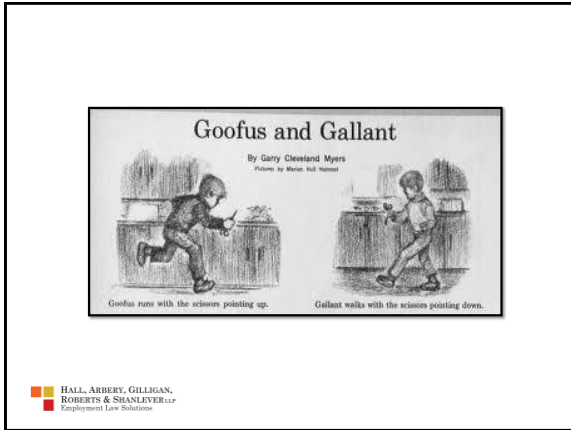
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## Form Matters



- Will the EEOC or a jury be **convinced**?
- Can the business rely on your **conclusions**?
- Will you and the Company have **credibility**?

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- ### 1. Initial intake and assessment
- Understand the concern
  - Understand the context
  - Is it within Company's control?
  - Is it an actual conflict?
  - Is it a matter of consequence?
    - Will investigation reduce risk?
    - Will investigation improve decision?
    - Will investigation reinforce values?
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- ### 2. Immediate responsive steps
- Respond to complainant
    - Thanks for reporting
    - Issues taken seriously
    - Retaliation not tolerated
  - Consider steps to limit potential harm
    - Separation of employees?
    - Suspension pending investigation?
    - Other steps without presumption?
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- ### 3. Plan the investigation
- Who will conduct it? Get help if needed
    - Is an outside investigator needed?
    - Should it be an attorney?
  - Second manager for assistance
  - Confidential file created
  - Identify potential witnesses and documents
  - Outline key issues for interviews
  - Consider order of interviews
  - Modify plan as needed
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## 4. Gather information and evidence

- Collect relevant available documents
- Second interview of reporting employee?
- Proceed with interviews
  - Employees' duty to cooperate
  - Emphasize confidentiality
  - Explain importance of process

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## 4. Gather information and evidence (cont'd)

- Proceed with interviews (cont'd)
  - Ask about all relevant details (who, what, when, where, why, how)
  - Ask about other witnesses
  - Obtain "all sides of the story"
  - Listen closely and follow up
  - Observe & record credibility indicators
- Promptly review and finalize notes
- Collect witness statements as needed

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## 5. DRAFT investigation summary memo

- Identify all participants
- Explain how issue came to attention
- Summarize concerns being investigated
- Steps taken and evidence considered
- Relevant background information
- Summarize findings (by issue or timeline)
- Consider privilege (if applicable)

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## 6. Follow-up interviews

- Additional interviews may be needed
- Identify gaps in information
- Identify material discrepancies
- "Two sides to every story"
- Thorough but efficient—best judgment

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## 7. Review file and reach determination

- Confirm that file is complete
- Review notes and documents objectively
- Assess credibility of witnesses
  - Identifiable reasons documented
  - Behavior, demeanor, circumstances
  - Special caution exercised here
- Determine facts, not legal interpretation
- Not all investigations are conclusive

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## 8. Finalize investigation summary memo

- Include factual findings and conclusions
- Update steps taken & evidence considered
  - Consider attaching documents
  - Consider attaching witness statements
- Include credibility assessments
- Include all relevant facts and context
- Edit, proofread, sign, and date

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### 9. Determine appropriate action plan

- Confer with relevant decision makers
- Consider degree of conclusiveness
- Consider relevant policies
- Consider precedent, if any
  - Past: similarly situated employees?
  - Future: will you treat others the same, regardless of whether they are "good" or "bad" employees generally?

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### 9. Determine appropriate action plan (cont'd)

- Consider mitigating factors, if any
- Consider expectations previously set
- Consider possible alternatives
- Consider possible need for legal guidance

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### 10. Implement action plan

- Communicate to accused employee outcome & action plan (e.g., corrective action form)
  - Reiterate relevant policies, confidentiality, and protections for all participants
- Communicate to reporting employee outcome & action plan (generalized)\*
  - Reiterate thanks, confidentiality, and protections under relevant policies

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#### Sample corrective action memo:

From: Management  
Re: Mike Jones

Mike sexually harassed our female employees. His immoral behavior has finally come home to roost. Tony is laid off until further notice effective 10/11/16.

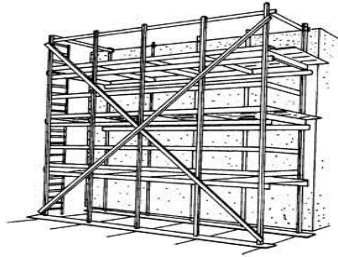
\_\_\_\_\_  
Mgr Signature

\_\_\_\_\_  
Date

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Stick to the **F.A.C.T.S.**

- **F**actual, not conclusory
- **A**ccurate on every detail
- **C**ontemporaneous, never backdated
- **T**horough, including all relevant facts
- **S**arcasm- and cliché- free

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1. Investigation notes

- State the date, time, and place
- Identify those in attendance
- Note questions by manager
- Note information provided by witness (exact wording if possible)
- Describe behavior & demeanor observed
- Stick to the F.A.C.T.S.

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2. Investigation report

- Explain how and when the issue came to your attention (person, date, time, etc.)
- Explain investigation process (sources of information, steps taken to investigate)
- Provide summary of facts as concluded; stick to the F.A.C.T.S.
- Show analysis, including applicable rules and credibility factors
- State conclusions (“violation of policy” or “unable to substantiate”)

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3. Corrective action memo

- Identify key participants and dates
- Identify the problem (e.g., comments, behavior) and explain why it is a problem
- Stick to the F.A.C.T.S.
- Include relevant history and context
- State the action taken and reasons
- Set expectations for the future
- Deliver and preserve the document

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Sample corrective action memo:

From: Sara Smith, Manager  
To: Mike Jones  
Date: October 11, 2016  
Action: Written Warning

Mike, you are receiving this written warning because you have violated our Civility Policy. Our investigation revealed that you made comments of a sexual nature to Francine Johnson on Tuesday, October 4 and Friday, October 7. This is contrary to our commitment to a respectful working environment. Although this is the first instance we are aware of, any further violation of our Civility Policy will result in severe disciplinary action, up to and including termination of your employment. Further, you are reminded that retaliation in any form will not be tolerated.

Sara Smith                      Mike Jones                      October 11, 2016  
Mgr Signature                      Team Member Signature                      Date

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Key messages from today:

- ✓ Reasons matter
- ✓ Evidence matters
- ✓ Form matters
- ✓ Fair process is vital . . .
  - to reduce legal risk
  - to improve business decisions
  - to preserve culture of integrity

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