



ASSOCIATION OF
WORKPLACE INVESTIGATORS

The Wide World of Workplace Investigations: Recent Case Law and Legislative Developments

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- › NLRB's position on confidentiality and recording rules for workplace investigations continues to evolve
- › Recent decisions and EEOC guidance regarding what constitutes a sufficient workplace investigation
- › Recent Supreme Court and appellate decisions regarding legal standards likely to be relevant to workplace investigations

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NLRB LIMITS ON WORKPLACE INVESTIGATION RULES



- › **The NLRB's ever-changing position on confidentiality and recording policies for workplace investigations**
 - *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)
 - *Banner Estrella Medical Center*, 362 NLRB 1108 (2015)
 - *The Boeing Co.*, 365 NLRB 154 (2017)
 - *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019)

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NLRB LIMITS ON WORKPLACE INVESTIGATION RULES



› Starbucks Coffee Co., No. 04-CA-252338 (NLRB Feb. 13, 2023)

- Under *AT&T Mobility, LLC*, 370 NLRB No. 121 (NLRB 2021), an employee who makes an audio or recording video in the workplace may be engaged in Section 7 protected activity, depending on the facts and circumstances.
- Here, employees engaged in protected activity because they recorded meetings of managers to preserve evidence should they need it for a future retaliation claim.

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NLRB LIMITS ON WORKPLACE INVESTIGATION RULES



› Stericycle, Inc., No. 04-CA-137660 (NLRB Aug. 2, 2023)

- NLRB will evaluate workplace rules on a case-by-case basis, finding such rules presumptively unlawful if an employee "could" reasonably interpret the rule to have a coercive meaning (i.e., infringe upon Section 7 rights), from the perspective of an employee who is: (i) economically dependent on the employer, and (ii) contemplates engaging in protected concerted activity.
- Employers may rebut the presumption that a rule is unlawful by "proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule."

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NLRB LIMITS ON WORKPLACE INVESTIGATION RULES



› Takeaways



- Don't presume employees may lawfully be instructed to maintain confidentiality during the course of all investigations, or not to make recordings in the workplace.
- Consider tailoring confidentiality instruction to focus on the need to protect the parties and witnesses, and to ensure that the recollection of events is accurate and based on personal knowledge.
- Consider affirmatively informing employees that the confidentiality instruction is not intended to prevent them from discussing wages, hours, benefits, or other terms and conditions of employment with each other.
- Ultimately this is usually the employer's, not the (outside) investigator's, call to make.

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RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS



› ***Mastripolito v. Jefferson Health*** – New Jersey, 583 F. Supp. 3d 622 (Feb. 2, 2022)

- Plaintiff alleged that employer failed to take appropriate remedial measures after she reported that a coworker sexually assaulted her.
- The Court began by reiterating the principle that "the law does not require that investigations ... be perfect."
- Court considered HR investigator's failure to consider evidence regarding alleged harasser's workplace conduct 10+ years prior to incident at issue, and found:
 - evidence of past misconduct toward patient had little probative value
 - evidence of conduct of a somewhat similar nature toward plaintiff's co-worker was potentially probative.

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RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS



› ***Nelson v. Lake Elmo Bank***, -- F.4th --, 2023 WL 4876450 (8th Cir. Aug. 1, 2023)

- Plaintiff (a woman) was fired after being accused of making sexual advances toward a female subordinate at a local bar. Plaintiff claimed she had just been engaging in banter.
- Plaintiff claimed the HR investigation was a sham.
- HR had interviewed plaintiff and the subordinate, and concluded based solely on those interviews that plaintiff's conduct violated the harassment policy.

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RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS



› ***Nelson v. Lake Elmo Bank***, -- F.4th --, 2023 WL 4876450 (8th Cir. Aug. 1, 2023) *Continued*

- › Plaintiff claimed the investigator:
 - Did not interview two witnesses she had identified, and
 - Disregarded evidence about similar past interactions.
- › Court found:
 - Employer's decision not to interview all suggested witnesses did not make investigation a "sham"
 - In this case, decision not to interview other witnesses was reasonable because plaintiff admitted to the alleged conduct, and also because it helped maintain confidentiality.

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RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS



› *Crosbie v. Highmark Inc.*, 47 F.4th 140 (3d Cir. 2022)

- Plaintiff was fired following an investigation into alleged inappropriate comments he made to a female co-worker.
- Plaintiff claimed he was fired in retaliation for whistleblowing concerning fraud.
- Court agreed that HR investigation into co-worker's allegations was not a sham, noting that HR interviewed:
 - plaintiff and complainant;
 - eyewitness who corroborated the complainant's allegations;
 - employees who knew of past issues between plaintiff and complainant; and
 - a manager knowledgeable concerning the alleged fraud issue.

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RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS



› *Owens v. Unified Gov't of Wyandotte Cty/ Kansas City*, 2022 WL 2131117 (D. Kan. June 14, 2022)

- Plaintiff was investigated by employer's HR department for not meeting residency requirements for position. After a lengthy investigation, Plaintiff sued, claiming investigation created a hostile work environment.
- To avoid a conflict of interest, employer hired outside counsel to investigate harassment complaint.
- Outside counsel conducted two-month investigation and found insufficient evidence to conclude workplace policies were violated.

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RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS



› *Owens v. Unified Gov't of Wyandotte Cty/ Kansas City*, 2022 WL 2131117 (D. Kan. June 14, 2022) *Continued*

- However, the court found there was sufficient evidence for plaintiff's claim to go to trial because HR investigator:
 - Had not started the investigation by examining documentation, which the written policy referred to as being "important" to an investigation;
 - Failed to respond to plaintiff's inquiry about the investigation status on numerous occasions;
 - Referred to plaintiff's dwelling as a "shack";
 - Conducted more extensive investigation than was typical.

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RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS



› *Doe v. Stonehill College, Inc.*, 55 F.4th 302 (1st Cir. 2022)

- Plaintiff, a college student expelled for violating the school's sexual misconduct policy, argued that the school's investigation was not fair and thorough.
- Court criticized investigators for not explaining credibility assessment in written report.
- Court agreed that evidence suggested investigators had not properly assessed credibility.

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RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS



› *Doe v. Stonehill College, Inc.*, 55 F.4th 302 (1st Cir. 2022), continued

- Investigators did not:
 - Consider evidence that complainant was not forthcoming about her prior consensual sexual activity with plaintiff
 - Explain why plaintiff's explanation of Snapchat messages to complainant regarding the incident was not credible
- Court's concluded that the "investigators' report plausibly reflects a failure to grapple with the complex credibility assessment presented by" the students' conflicting accounts.

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RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS



› Courts continue to admit expert evidence regarding industry standards:

- *Shampine v. US Foods, Inc.*, 2022 WL 17098731 (E.D. Tenn. Nov. 21, 2022) (expert relied on EEOC Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, the AWI Journal, and the Association of Corporate Counsel's InfoPak on Internal Investigations)
- *Mueller v. Daugherty Sys., Inc.*, 2021 WL 3754582 (N.D. Ga. June 14, 2021) (expert relied on her experience as an attorney, guidelines from SHRM and AWI, and the EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors)

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EEOC'S GUIDANCE ON "PROMISING PRACTICES" FOR CONDUCTING INVESTIGATIONS AT FEDERAL AGENCIES



› Federal Agency MUST:

- Start "prompt, thorough, and impartial investigation" **no later than 10 days** after "becoming aware" of complaint
- Take immediate corrective action that is also "proportionate to the severity of the conduct, the impact on the overall workplace, the disciplinary history of the harasser, and other relevant factors," and ensure the corrective action does not penalize the alleged victim
- Ensure investigations are not conducted by individuals who have a conflict of interest or bias in the matter
- Conduct investigative interviews with alleged victim, alleged harasser, and "third parties who could reasonably be expected to have relevant information"
- Protect the confidentiality of all parties "to the extent possible, consistent with a thorough investigation and with relevant legal requirements"

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EEOC'S GUIDANCE ON "PROMISING PRACTICES" FOR CONDUCTING INVESTIGATIONS AT FEDERAL AGENCIES



› Federal agency should:

- Have a complaint tracking system that includes information about how long investigations take, and have a general time limit for conducting investigations
- Provide corrective action within at most 60 days from harassment substantiation
- Have "standards and procedures for eliminating conflicts of interest in investigating harassment allegations and taking corrective action"
- Maintain a written report "documenting the investigation, findings, and recommendations"
- Convey the outcome of the investigation to the alleged victim and alleged harasser, as well as preventative/ corrective actions taken, "where appropriate and consistent with relevant legal requirements"

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TAKEAWAYS



- › Understand the employer's confidentiality instructions to participants, and the rationale for the instructions.
- › Interview all relevant witnesses and understand scope of prior investigations in similar circumstances, which are relevant to risk of accusations of overkill or engaging in a "sham."
- › Explain rationale for credibility determinations and do not avoid exploring credibility with respect to sensitive but critical issues.
- › Start and complete investigations promptly – EEOC may view "best practices" for federal agencies as relevant to private employers.

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LEGAL DEVELOPMENTS AFFECTING WORKPLACE INVESTIGATIONS



› *Groff v. DeJoy*, 143 S. Ct. 2279 (June 29, 2023)

- **Issue:** When may an employer deny a religious accommodation?
- **Answer:** Only when it can show that the burden of granting the accommodation will result in substantial increased costs in relation to the conduct of its particular business.
- **Takeaway:** Employers may not deny a religious accommodation, such as exempting employees from working on Sundays, because it would impose more than a de minimis cost. Instead, they must provide the accommodation unless it would result in substantial increased costs to the employer.

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LEGAL DEVELOPMENTS AFFECTING WORKPLACE INVESTIGATIONS



› *Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974 (9th Cir. 2023)

- **Issue:** Can playing misogynistic, slur-filled music in the workplace, where it can be heard by employees of all genders, create a hostile work environment when the complaint was made by men and women?
- **Answer:** Yes.
- **Takeaway:** Be careful in concluding that an employee who engages in conduct that does not target specific employees, or that affects employees of all genders, does not violate policy because they are an "equal opportunity harasser."

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LEGAL DEVELOPMENTS AFFECTING WORKPLACE INVESTIGATIONS



› *Mallory v. Norfolk Southern RR Co.*, 143 S. Ct. 2023 (June 27, 2023)

- **Issue:** Did a Pennsylvania court have personal jurisdiction over a corporate employer in a suit brought by a non-resident employee solely based on the employer being registered to do business in that state?
- **Answer:** Yes, because Pennsylvania has a statute requiring that corporations registered to do business in the state consent to jurisdiction in the state, and the statute is valid/ not unconstitutional.
- **Takeaway:** It is important to consider all jurisdictions in which an employee may sue—and whether those jurisdictions have statutory provisions similar to Pennsylvania's—particularly in matters involving remote employees.

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SUMMARY OF TRENDS



- › NLRB scrutiny of statements to employees in the investigation context
 - **Stericycle**: investigative confidentiality and other workplace rules must be justified by employer on case-by-case basis
 - **Sunbelt Rentals, 372 NLRB 24 (2022)**: reaffirmed *Johnnie's Poultry* rule regarding disclosures to union-represented employees being interviewed in connection with investigating unfair labor charges
- › Increased recognition of industry standards for conducting investigation and increased risk if those standards are not met
- › Potential increase in claims regarding conduct that does not target specific individuals and affects those outside and inside a protected class

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