

A Legacy of Excellence



# Workplace Investigations: Avoiding Common Mistakes and Pitfalls

John C. Romeo, Gibbons P.C.



**HUMAN RESOURCE  
ASSOCIATION  
OF SOUTHERN NEW JERSEY**



# Why Conduct an Internal Investigation?

- Stop Inappropriate Behavior/Prevent Future Occurrences
  - Encourage employees to come forward
  - Improve employee morale
- Increase likelihood of identifying and resolving problems internally
- Avoid and/or Limit Liability
  - As to both the complainant and the accused
- It's the right thing to do!

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# However . . .

- A deficient investigation:
  - Reduces likelihood of employees bringing future concerns forward
  - Negatively impacts employee morale/trust
  - Increases likelihood of litigation
  - Negates affirmative defense
    - May render employer liable to victims and alleged wrongdoers



A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Why Conduct an Internal Investigation?

- The failure to conduct an investigation or a poorly conducted investigation will not shield the employer from liability:
  - Summary Judgment denied where employer failed to speak to the complainant or conduct an investigation for four weeks following receipt of a complaint. See, *Bennett v. New York City Dep't of Corrections*, 705 F. Supp. 979 (S.D.N.Y. 1989).
  - Summary Judgment denied where employer interviewed complainant and witnesses four months after complaint filed and interviewed alleged harasser four months later. See, *Sorlucco v. New York City Police Dep't.*, 971 F.2d 684 (2d Cir. 1992).
  - Summary Judgment denied where HR director urged complainant not to make her complaint too graphic, and then interviewed only the complainant and the alleged harasser. See, *Freytes-Torres v. City of Sanford*, 270 Fed. Appx. 885 (11<sup>th</sup> Cir. 2008).

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

gibbonslaw.com

# Why Conduct an Internal Investigation?

- **\$15 Million** jury award against supervisor and employer where employee filed internal complaint, but company deemed her complaint unfounded without even conducting an investigation. *Nestler v. Chartwells Dining Services*, No. 02-CV-1115, 2005 WL 2333458 (N.D.N.Y. Sept. 23, 2005)
- **\$1.9 Million** jury award where, despite numerous reports to manager, the employer failed to take immediate and corrective action. *Hope v. California Youth Authority*, 134 Cal. App. 4<sup>th</sup> 577 (2005)
- **\$2 Million** jury award where a co-worker placed a camera under the desk of two women and posted the pictures on a pornographic website. The women sued the company for maintaining a hostile environment and failing to take corrective action once it was aware of the situation. *Kidder, et al v. Ocwen Financial Corp.* (Fla., 2005)

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

gibbonslaw.com

# Making Matters Worse:

- Potential Claims:
  - Intentional infliction of emotional distress
  - Defamation
  - Discrimination
  - Retaliation
  - Invasion of privacy
  - Wrongful termination
  - Breach of contract
  - Assault and battery
  - Negligent retention/supervision
  - False imprisonment
  - Negligent misrepresentation



A Legacy of Excellence

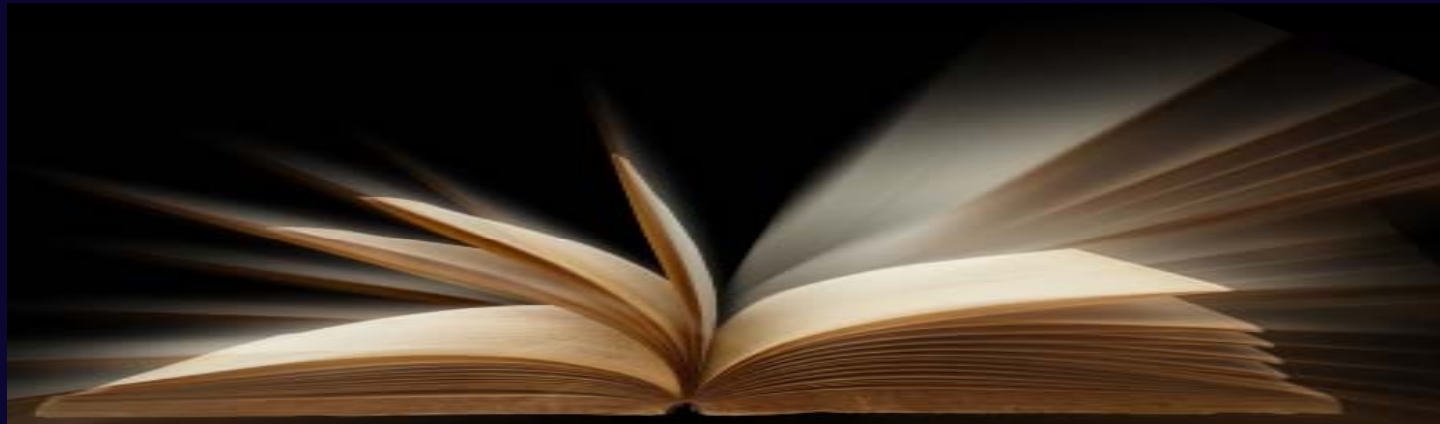


Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Read The Last Chapter First!

- Make sure investigation will actually help avoid/limit liability
- Investigations will be challenged:
  - Deposition
  - Trial
  - Arbitration
- Be prepared to defend your investigation (including your process, your objectivity and your compliance with company policy)



A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Before You Receive a Complaint:

- Written Policies with clearly articulated complaint procedures
  - Disseminate to and train all employees
- Written Process on how company will respond to Complaints
  - Can be included in non-harassment policy
  - Centralized point of contact
- Written Procedures on conducting the investigation
  - But needs to remain fluid
- Designate a pool of investigators
  - Train your investigators
  - Make sure they will make a good witness
    - HR, Legal, Internal Audit, etc.
- Follow the Process!

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Before You Receive a Complaint:



- Employer's duty includes instructing all supervisors and managers to address or report to appropriate personnel complaints received
  - All complaints should be reported to designated personnel
  - Duty to report observed misconduct
- Train your Supervisors and Managers!
  - Entire process is lost if the report never makes its way to the appropriate personnel

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# When to Investigate:

- Do NOT promote form over substance
- Generally, you should investigate if:
  - Employee brings complaint forward
  - Supervisor or Manager brings forward a complaint made to him or her
  - Employee brings forward complaint on behalf of a co-worker
  - Anonymous complaint
  - Rumors?
- “Investigations” may differ significantly



A Legacy of Excellence

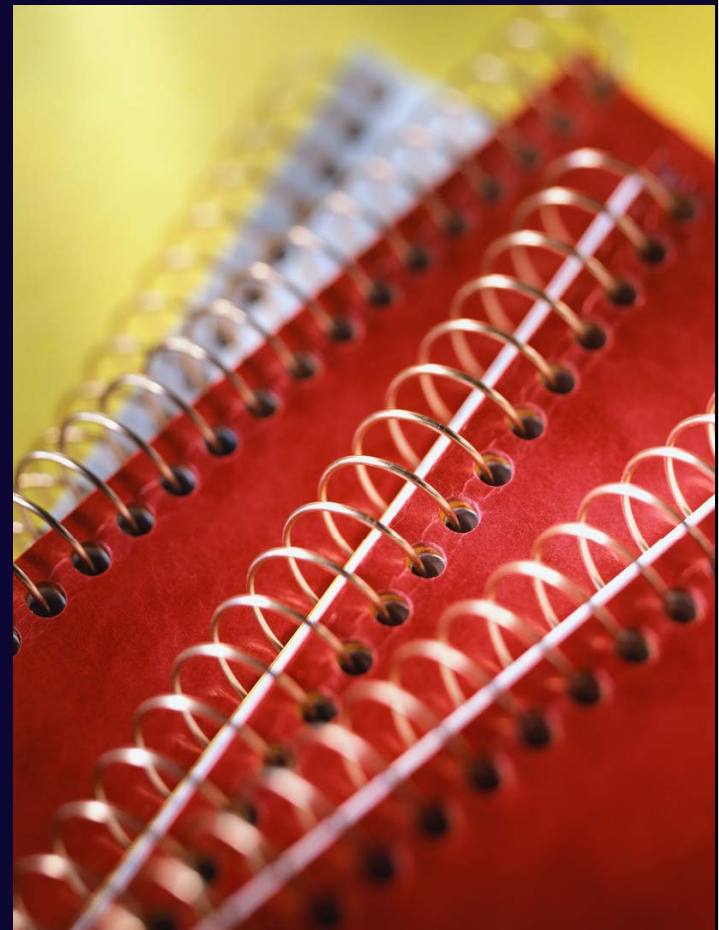


Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# When to Investigate:

- If No investigation is necessary:
  - Document the reasons why no investigation was conducted
  - Follow-up with the employee
  - Remind the employee to report any new or additional information
- Don't make decision in a vacuum
  - Communicate with HR and/or legal counsel



A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

## Be Prepared For:

“I’m just telling you this to get it off my chest  
– I do not want you to investigate it . . .”

“I don’t want anyone to get in any trouble  
because I complained.”

“You believe me – don’t you?”

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Goals of the Investigation:

- Prompt response
- Explore potential misconduct
- Conduct an objectively fair investigation
- Lay foundation for carrying out effective remedial measures
- Prepare record for potential litigation
- Preserve documents/evidence
- Big Picture – to learn the facts



A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Preliminary Considerations:

- Take a step back before starting the investigation
- Know what you are investigating
  - A failure to understand the issues can result in bad decisions regarding the investigation
  - Are there any laws governing the investigation

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

## Preliminary Considerations: (cont.)

- Make strategic decisions regarding:
  - Scope of the investigation
  - Whether the Status Quo can remain in place
    - Interim measures necessary?
  - Who should conduct the investigation
  - Formality of the investigation
  - Identify subject matter experts
  - Document retention
- Remain Flexible
- Be prepared to defend your strategic decisions

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Avoid Common Pre-Investigation Mistakes

- Don't focus on motive of complainant
  - That may be relevant at conclusion phase – but not yet
- Don't look only for magic words:
  - “harassment” or “discrimination”
  - Based on a protected class
- Don't jump to early conclusions
  - And definitely don't seek to get to an end
- Don't rely on your personal knowledge of individuals involved
- Don't ignore the “Boy who cried wolf”
- Remember the Big Picture

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Selecting the Investigator:

- Avoid any actual or perceived conflict of interest
  - Personal relationships
  - Witness
  - In same chain of command as complainant or alleged wrongdoer
  - Otherwise interested in the outcome of the investigation
- Investigator must have requisite skills for the investigation at hand
  - Should have been properly trained in conducting investigations
- Investigator must have credibility (e.g., no history of misconduct)
- Must be *sufficiently* high level employee
- Remember – this person may be your witness

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Selecting the Investigator:

- Choose investigators from:
  - Human Resources
  - Compliance & Ethics
  - Internal Audit
  - 3<sup>rd</sup> party (Independent Investigator/HR Consultant)
  - Inside Counsel
  - Outside Counsel
- Give serious consideration to utilizing more than one investigator on more serious/complex investigations
- If using a 3<sup>rd</sup> party investigator, you may be required to provide a “summary” of the investigation

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Conducting the Investigation:

- Gather Relevant Documents:
  - Policies and Procedures
  - Organizational Charts
  - Personnel Files
  - Electronic Files (email, texts, IM's etc)
  - Cell phones
  - Supervisor Files
  - Code of Ethics
  - Documents provided by (or referenced by) the Complainant
  - Prior complaints/investigations
  - Social networking sites?
- Be sure to take steps early in the investigation to retain relevant documents
- Consider whether a litigation hold is appropriate

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Conducting Witness Interviews:

- Start with the Complainant
  - Anonymous?
- Determine who to interview next:
  - Alleged Wrongdoer or potential witnesses?
- Plan must remain flexible
  - Add or re-interview witnesses
- Determine where interviews should take place
  - Consider witness concerns
  - Never in a fishbowl
- Outline the Issues/Questions
  - Which documents?
- Prepare a standard introduction
- Union representation
  - Attorney?



A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Conducting Witness Interviews:

- Standard introduction:
  - Introduce yourself and identify your role with the organization
  - Brief explanation of matter and witnesses' role
  - Confidentiality
    - Expectations of witness
    - Attempts to influence outcome violates company policy
    - “to the extent possible” as investigator
  - Zero-tolerance policy on retaliation
    - Do not retaliate
    - Advise us if you feel you are being retaliated against
  - Obligation to tell the truth!
  - No conclusions will be made until investigation is complete
  - Follow up with additional information
    - Provide contact information

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Control the Interview:

- Funnel your questions
  - Start with open ended questions
  - Then funnel down to specifics
- Get as much detail as possible
- Keep witness on point
  - Continue asking question until the question you asked is answered
  - Stick to the facts
- Remain Flexible – Don't stick to your script
- Do not be afraid to ask the difficult question
- Avoid legal terms or drawing legal conclusions
- Don't become the witness
  - You're asking the questions – not answering them

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Control the Interview:

- Only disclose information the witness needs to know
  - Try not to attribute quotes to co-employees
- Reiterate what you've heard and what you're writing in your notes
- Always provide witness the opportunity to share additional information
  - "Is there anything else I should know"
- Always ask for potential witnesses and documents
- Always remain professional
- Always remain neutral
  - Don't show an inclination to believe one side of the story

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Special Considerations when Interviewing the Complainant

- Get as much detail as possible
- Consider getting a written statement
- Identify each alleged unlawful act (or act in violation of company policy)
  - For each act, identify:
    - What happened?
    - Who was involved?
    - Who had knowledge?
- Determine whether the complainant made any prior complaints
  - Or whether he or she has talked with any co-employees about the issue
- Ask what relief the complainant would like to see?
  - Do not make any promises!
  - Reconsider status quo

A Legacy of Excellence



Newark

New York

Trenton

Philadelphia

Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Special Considerations when Interviewing the Alleged Wrongdoer

- Address each issue raised in the complaint
  - Consider whether you disclose name of complainant
- Be sure to give him or her an opportunity to address all allegations
- Ask about similarly situated employees
- Ask for any relevant witnesses, documents, motives, etc.
- Reiterate confidentiality and retaliation warnings
- Do not give appearance of any pre-disposition either way

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

## Control the Interview:

*Do I need a lawyer?*

*Can we talk off the record?*

*I really do not want to get involved!*

*Who else are you talking to?*

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Documenting the Investigation:

- Document every step of the investigation
  - Include dates, times, locations and persons present
- Document all witness interviews
  - Even document the reasons why you may choose not to interview a potential witness
- Document the facts – not your own conclusions
  - Avoid conclusory legal terms like discrimination and harassment



A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Documenting the Investigation:

- Assume your notes will be discoverable
  - Be careful of what you write in your notes (or otherwise on the paper)
- Make credibility assessments after each interview
  - Demeanor
  - Consistency
  - Inherent plausibility
  - Motive to falsify
  - Bias
  - History
  - Corroboration
- When documenting credibility do not simply draw conclusions
  - e.g., “I think he was lying”

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

## Before You Conclude Investigation:

- Go back to original plan to see if you completed tasks
  - If you did not, why?
- Be sure you followed company policy/procedures regarding conducting the investigation?
- Do any witnesses need to be re-interviewed based on subsequently learned information?
- Are there any new issues that were raised that need to be investigated?
- Is there any other information that would help solidify your conclusions?
- Have counsel review your investigation for mistakes/opportunities

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Documenting the Investigation:

- Prepare a Written Report of the Investigation
  - Describe complaint
  - Describe investigative process
  - List documents reviewed and witnesses interviewed
  - Summarize FACTS learned during the investigation
  - Attach relevant documents
  - Reach conclusions only on the evidence obtained during the investigation
    - But avoid making a legal conclusion
    - No need to make recommendations as to corrective action in the report
- Report should be distributed only to those individuals responsible for making a final determination as to remedial action

A Legacy of Excellence



Newark

New York

Trenton

Philadelphia

Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Take Corrective Action:

- Facts of Investigation should be reported to those individuals charged with taking appropriate corrective action.
  - Prompt and effective
  - Corrective action must be designed to stop the conduct
- If complaint is substantiated:
  - Some level of discipline should take place
  - Consider training (individual and/or group)
  - Follow up with complainant periodically
  - Remind parties about retaliation
- If complaint is NOT substantiated:
  - Still consider whether training is appropriate
  - Still follow-up with complainant
  - Still remind parties about retaliation
- Either way, make sure to have additional review of future discipline or negative employee evaluations concerning the complainant

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

gibbonslaw.com

# Follow up Communications:

- Review with counsel first
- To Complainant:
  - Detail may depend on type of investigation and the complainant's role
    - Victim or co-employee
  - Reiterate non-retaliation
  - Invite follow-up for new facts or future complaints
- To Alleged Wrongdoer:
  - Provide general conclusions of investigations
  - Set forth corrective action, if applicable
  - Reiterate non-retaliation warnings
  - Reiterate company policy
  - Set forth expectations for future conduct and potential consequences for future violations

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

# Top 10 Mistakes Made During Workplace Investigations:

1. Jumping to conclusions – and then gearing investigation to prove your pre-conceived result
2. Allowing the wrong people to influence the investigation (too quick to support management)
3. Failing to give the alleged wrongdoer a fair chance
4. Delay!
5. Too much information – allowing personal knowledge/reputation to influence the investigation

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

## Top 10 Mistakes Made During Workplace Investigations:

6. Dangling leads (failing to look into open issues or talk to potential witnesses)
7. Poor Documentation
8. Accepting conclusions as fact
9. Breaching confidentiality
10. Making decision in a vacuum

A Legacy of Excellence



Newark New York Trenton Philadelphia Wilmington

[gibbonslaw.com](http://gibbonslaw.com)

A Legacy of Excellence



# Questions?

**John C. Romeo, Gibbons P.C.**