

Defining and Investigating Bullying Behavior

By Catherine Mattice

Bullying behavior can take a tremendous toll on targets and witnesses—causing depression, burnout, and even symptoms of Post-Traumatic Stress Disorder, or PTSD.¹ Organizations with employees that report bullying behavior commonly experience reductions in work quality and production, as well as decreased employee collaboration, safety, loyalty, and retention. Investigators are sometimes called upon to investigate alleged bullying behavior, and those who serve in HR roles or as employee trainers and coaches may be asked to assist organizations in implementing corrective action.

There is clear legal guidance as well as clear definitions when investigating harassment or discrimination complaints. However, “bullying” is typically not legally prohibited and is often more subjective behavior, so there is less guidance for determining whether bullying behavior has occurred or for corrective actions an organization can take when it exists. Compounding the problem is the lack of common nomenclature used to describe bullying—which can include abusive conduct, emotional abuse, and aggression—along with the fact that most employers are not savvy in addressing it.²

This article assists investigators and organizations in identifying and correcting bullying behavior by:

- Defining bullying;
- Describing categories of bullying behavior to assist in identifying it;
- Providing guidance for investigating allegations of workplace bullying; and
- Offering advice for organizations to help manage and minimize workplace bullying.



Defining Bullying

To effectively investigate and ameliorate workplace bullying, it is necessary to be able to recognize it. There is no universally agreed upon definition of workplace bullying in academia or in the various state laws that exist to address it. However, the following concepts consistently appear in academic definitions.³

Bullying is repeated and ongoing behavior that often involves:

- Abusive conduct that may create an intimidating atmosphere at work;
- Psychological or physical harm to targets and witnesses; and
- A psychological power imbalance between the person engaging in it and the targets and witnesses.

A different kind of psychological power imbalance often exists between the person engaging in bullying and organizational leadership in which bullying occurs, who frequently perceive individuals charged with bullying as important in terms of profitability or efficiency. Leadership may fear that aggressive leaders who are called out on their aggressive behavior will leave, and their abilities to bring in money or get results will go with them. As a result, people engaging in bullying sometimes feel empowered to continue without fear of repercussions.

Malice is also sometimes used in legal definitions of bullying or abusive conduct—for example, in California⁴ and Puerto Rico⁵ laws. However, Nevada,⁶ Tennessee,⁷ and Utah⁸ also have laws related to abusive conduct, and do not include malice in their definitions.

Categories of Bullying Behavior

A review of the many research surveys related to toxic behavior at work and the many lists of bullying behavior in mainstream arti-

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President's Message

I have often described my workload as overwhelming. Many of you can relate.

As a self-employed external investigator, it troubles me to say “no thank you” to any new client who calls seeking assistance. It is even more challenging to say “no thank you” to an existing client with whom I have enjoyed working.

When the COVID-19 pandemic started in March 2020, many of us were worried that our work as independent investigators would dry up. As weeks of sheltering in place turned into months, some had a genuine fear there would no longer be a need for workplace investigations. What were we thinking? Whereas I used the word “overwhelming” in 2019 to describe a typical investigator’s workload, the word I now use is “crushing.”

I am surely not alone, feeling as though I work more hours now than ever before. Those of us who used to spend a lot of time in the car traveling to and from interviews or to our offices are instead spending those commuting hours on Zoom. Our days feel longer. We don’t have the downtime we used to have in the car listening to music or podcasts, or catching up with friends and family on the phone.

But despite the long days and the increased stress level associated with work, our members stuck with us. AWI has thrived during this challenging time—and for that, I am truly grateful to our board of directors, our committee chairs and their members, our local circle convenors and those who attend, as well as the many who volunteer to support AWI by writing articles for the *AWI Journal* and presenting at the annual conference or a seminar or webinar.

The work we performed in 2020 has already paid off significantly this year. In April, AWI held its first virtual training institute, which not only exceeded the Institute Committee’s expectations, but received incredibly positive feedback from the attendees. We’re excited to offer two more virtual institutes in the year ahead, as well as an in-person training institute in Orlando in November.

The Annual Conference Committee is deep in the planning stages for our first conference to be held outside of California. Although we have no way of knowing for sure whether we’ll be able to meet in person in Denver this October, the committee members are considering all options and remain optimistic that an in-person conference will take place. However, they are also prepared to quickly switch gears to a virtual conference format if safety dictates doing so.

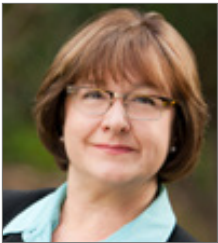
I also want to acknowledge AWI’s Diversity & Inclusion Task Force, which we anticipate becoming an Advisory Committee before the Annual Conference. This group, led by Dina Horvath and Oliver McKinstry, is working to not only better understand AWI’s diversity, but to make the organization more inclusive in an effort to further the association’s stated mission: “promoting and enhancing the quality of impartial workplace investigations.”

While it’s unfortunate that we haven’t been able to spend any time together in person for more than a year, transitioning to virtual programming allowed us to serve members who, for whatever reason, cannot attend live events. We have learned that we can serve our members—even during a global pandemic.

As I have said repeatedly, AWI is an incredibly collaborative and collegial organization. The fact that we have continued to grow and thrive during the toughest of times is a testament to our fabulous members.

At the risk of sounding like a broken record, I urge you to get involved in AWI by joining a committee, taking part in local circle meetings, writing an article for the *AWI Journal*, or attending one of our amazing educational programs—including the AWI Training Institute, Annual Conference, and monthly seminars and webinars.

Karen Kramer
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Letter From the Editor

Dear Friends and Colleagues,

Whether we are peeking out, tip-toeing out, or bursting out, most of us are in the world more than we were a year ago at this time.

With a mix of delight and trepidation, I am also venturing out. I am interested to see how the changes to investigations that we experienced during the pandemic will translate into a post-pandemic world. Will employees continue to work remotely? Will employers still ask us to conduct investigations remotely? As people return to the workplace, what new issues will arise in investigations? AWI will say attuned to these issues and others, and I'm very glad to have a group of smart, committed AWI colleagues to help navigate them.

We've put together an issue that is full of practical advice for investigators, beginning with some thoughts on investigating bullying—a subject that has been top of mind in many jurisdictions for years, and has become increasingly important in the United States. In our last issue, we looked at bullying through a Canadian lens, where the bullying investigations are more evolved than in the U.S. In this issue, Catherine Mattice contributes her expertise in “Defining and Investigating Bullying Behavior.” Mattice focuses on behaviors that investigators can look for and specific ways to ask about bullying in the workplace. This evolving issue can be a real challenge for investigators, and the article provides a roadmap to address these inquiries.

An issue near to my heart (and mind) is report writing. The best information in the world isn't worth much if it isn't communicated effectively. As my friend Keith Rohman says: “The investigation is the report and the report is the investigation.” Eli Makus and I enjoyed presenting an AWI webinar on writing last summer and we are happy to provide, “Writing Investigative Reports: Practical Pointers” in this issue. Many thanks to Breanna Jones for writing the article with us. Regardless of one's experience level, there is always something to learn about writing.

Lynn Hollenbeck addresses the question of difficult witnesses in “Disarming the Uncooperative Witness.” Firmly grounded in a rapport-based approach, Hollenbeck suggests strategies for encouraging witnesses to open up. Whether interviews are done via videoconference or in-person, her ideas will help all of us when confronted with a witness who is not happy to see us.

Finally, many thanks to Dina Hovarth for her thoughtful case note on *Garcia-Brower v. Premier Auto*. This case is a reminder of the importance of conducting an appropriate investigation before discharging an employee. For those of you who are interested, another recent California case, *King v. U.S. Bank* (53 Cal. App. 5th 675 (2020)), addresses the same concern. In both of these cases, the California Court of Appeal questioned whether the underlying investigation was adequate.

As our fearless leader Karen Kramer makes clear, this year AWI is offering many ways to learn about investigations and to be together, both virtually, and—fingers crossed—in person. I look forward to seeing your smiling faces.

As always, many thanks to everyone who makes the *Journal* possible. It truly takes a village.

Wishing you all health and peace.

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cles reveals that bullying behaviors can occur in person or online, and may be verbal or nonverbal.

A different kind of psychological power imbalance often exists between the person engaging in bullying and organizational leadership in which bullying occurs.

All bullying behaviors can be placed in one of three categories.

1. Aggressive communication

Examples include:

- Insults, offensive remarks, snide comments, name-calling;
- Shouting, yelling, angry outbursts; and
- Puffed-up chests, angry facial expressions, aggressive gestures, getting in another's personal space.

2. Humiliation

This may include:

- Ridiculing or teasing in public or private;
- Spreading rumors or gossip;
- Publicly pointing out mistakes, or repeatedly bringing up an old mistake that has been corrected; and
- Blaming others for problems that are not their fault or within their control.

3. Manipulating work

Some examples are:

- Removing tasks imperative to job responsibilities without explanation, leaving a person lost on how to be successful and how success will be measured;
- Giving unmanageable workloads or impossible deadlines;
- Changing tasks so often the workload becomes confusing;
- Hiding tools, items, clothing, documents, or instructions necessary to perform the job;
- Using employee evaluations or disciplinary procedures to inaccurately claim poor performance; and
- Claiming poor performance without offering useful feedback, job training, or performance coaching.

Most bullying behavior includes two or more of these categories. In other words, a person who only teases others with sarcastic

remarks would likely not be labeled a bully. When the sarcasm is coupled with insults, aggressive body language, punitive punishment, and impossible workloads, however, others—particularly subordinates who feel a power imbalance—begin to use the word bullying when describing interactions.

Example: *A leader was sent to coaching because he was allegedly bullying in the workplace. In this case, an employee had a physical reaction while being yelled at—diagnosed by his doctor as a panic attack.*

The leader was allegedly engaged in angry yelling in addition to:

- *A puffed-up chest, bulging eyes, and a vein popping out of his forehead (aggressive communication);*
- *Putting his feet on the table in a power pose while he lectured people about why their ideas were stupid (humiliation); and,*
- *Removing people from projects the instant they did something he didn't approve of (manipulation).*

Combined with making people feel incompetent when they ask questions, leaning over tables to get in people's faces, and other behaviors, the leader's behavior created a lot of fear. This behavior was classic bullying because it included oral statements and physical behavior in all three of the categories described above.

Example: *A leader was assigned to coaching because several complaints were made against her. Two employees who filed a formal complaint threatened to quit unless they were moved out of her department.*

The leader engaged in:

- *Eye-rolling, facial expressions expressing disgust or annoyance, hammering her fist, emotional outbursts, and erratic behavior (aggressive communication);*
- *Belittling others, openly questioning others' competence, and consistently interrupting others with fervent impatience (humiliation); and*
- *Managing inconsistently—aggressive one day, disengaged the next, forcing staff to do their work her way or not at all, delegating work inconsistently, and inciting "drama" and conflict (manipulation).*

This leader's behavior constituted bullying, again involving three of the categories discussed above.

Tips for Conducting Investigations

The first step for an investigator is to carefully review a company's policy to determine how the organization defines workplace bullying. Keep in mind, however, that there are likely many other

behaviors employees consider to be bullying even if a policy does not mention them specifically. In addition, without legal controls, investigators may need to refer to general principles of fair human interaction and management at their own discretion.⁹

These issues should be explored in scope discussions with the client. Bear in mind that investigators' primary roles are to determine what events occurred; they may or may not be called upon to determine whether the events constitute "bullying." However, investigators should study every complaint in detail to understand what the complainant emphasized.¹⁰

Internal investigators who need to decide whether a bullying policy was violated should keep in mind that bullying most often crosses all three behavioral categories mentioned previously. Once interviewees have shared basic information, investigators can go back through their notes and ask more detailed questions targeted to whether bullying behavior was involved.

In one study, 45 percent of respondents perceived that the employer did nothing when they filed a complaint; 18 percent perceived that the employer actually made the situation worse.

Example questions include:

- When you say, "crazy eyes," can you elaborate on what that looks like?
- When you say she stands too close, how many feet away is she?
- You mentioned yelling a few times. What is he doing when he's yelling? How loud is his voice? What are his facial expressions like when he's yelling?
- You said she's not approachable. What does she do when approached with questions, for example?
- What's he doing when he's "lecturing" people? How is his body language? What is his tone of voice like?
- Give me examples of the unrealistic expectations. How are the expectations communicated? How do you know if you are meeting them or not? What happens if you don't meet them?

Interviewing Alleged Bullies

As with any investigation, the alleged perpetrator is not likely to admit wrongdoing. However, a good investigator likely can determine whether an individual has engaged in the discrete behaviors that add up to bullying.

In seeking facts from the accused, ask pointed questions, such as:

- How close were you standing to Akiko during that meeting?
- How many days prior to its due date did you give Shawn the assignment? Did you feel it could be completed in that amount of time, given his other work responsibilities? What was your reaction when he told you he hadn't completed it on the due date?
- When the interns come into your office to ask you questions, what is your response?

Also consider more general questions, such as:

- When you get frustrated with others, how do you respond?
- How do you generally communicate expectations about workload and work product?
- Can you think of a time you might have been perceived as yelling? What was the situation? How often does that type of situation occur?

Advice for Organizations

The literature is rife with evidence that human resources professionals and their employers are not addressing bullying in helpful ways. In one study, for example, 45 percent of respondents perceived that the employer did nothing when they filed a complaint, and 18 percent perceived that the employer actually made the situation worse.¹¹ Indeed, targets express much dissatisfaction with their interactions with human resources, partly because HR staff often attempt to reframe the situation, and provide temporary solutions rather than address root causes.¹²

Workplace bullying should never be seen as an individual problem focused solely on perpetrators and their targets, but as a social phenomenon.

As noted, bullying behavior is not explicitly illegal in most jurisdictions. However, it is important that an organization stop the behavior from recurring and help overcome its negative effects. Advice to employers often centers around having a policy and delivering training, but these steps alone will not minimize bullying if the environment does not support them—that is, if complaints are trivialized, investigations are too drawn out, or employees are not held accountable for what is covered in a training program.

An anonymous employee survey from a third party can be key to uncovering organizational risk factors and what employees need to

recover from bullying incidents and build up their feelings of psychological safety. An organization can then use the survey results to plan and implement actions for change. Performance management systems that hold people accountable and measure collaborative communication, for example, provide the opportunity to address and correct negative behavior early, before it escalates to bullying.

Those who engage in bullying behavior can also be coached in more effective communication strategies. A coach typically engages in 360-degree interviews to provide the individual with insight about how he or she is perceived so that those perceptions can be changed. Some people being coached may be unaware of the impact their behavior has upon targets and witnesses. To inspire participation in coaching, and demonstrate that change is required, the individual should be advised of consequences if no change is made.

Finally, all levels of the workforce—employees, supervisors, and managers—may benefit from training programs focused on assertiveness and bystander intervention, conflict management, positive communication, and other essential interpersonal skills. Managers should also be trained in holding employees accountable for positive performance and behavior, coaching employees who step out of line, and in mediating conflicts. Empowering managers is sometimes a key factor in creating a culture that does not tolerate bullying and harassment.

In the end, workplace bullying should never be seen as an individual problem focused solely on perpetrators and their targets, but as a social phenomenon occurring in the context of organizational risk factors. Bystanders, managers, and leaders have the power to positively influence the outcome. Investigators also have the power to positively influence the outcome by carefully investigating bullying complaints, and in some cases, offering the organization advice for resolving them.



Catherine Mattice is the founder and CEO of Civility Partners, a consulting firm focused on turning around toxic work cultures through training, coaching, conducting employee surveys, and executing strategic plans. She has written three books on workplace bullying, appeared in national media, and delivered many presentations on workplace bullying. Active in the International Association for Workplace Bullying and Harassment, and one of the founders of the National Workplace Bullying Coalition, she can be reached at Catherine@CivilityPartners.com.

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Writing Investigative Reports: Practical Pointers

By Susan Woolley, Eli Makus, and Breanna Jones

Writing is an essential part of any investigator's work, yet good writing can be challenging. It takes effort, practice, organization, and time. Writing investigative reports can be especially difficult because the writer must convey large amounts of information clearly and concisely to a diverse audience. A poorly written report fails to do that, and in the process can undermine even the best fact finding.

This article provides practical tips for writing effective investigation reports.

Why Write?

Step one in any writing project is to understand why you are writing. Workplace investigators usually write to summarize information they have gathered and explain the factual findings they made. While investigators prefer that readers agree with their factual findings, the purpose of an investigative report is primarily to communicate facts and analysis, not to advocate for a certain position.

Putting thoughts into words can be overwhelming, making it hard to stay focused—even as the clock keeps ticking.

Understanding this purpose influences many of the writer's decisions, from the format of the report to word choices. For example, in a persuasive or advocacy piece, one might describe a person's reaction to a traumatic event by noting that the person was "devastated"—language that tells the reader how to interpret information.

In an investigative report, on the other hand, the writer would explain the facts underpinning the conclusion implied by the word "devastated." Did the person lose her job? Did she suffer other economic impacts? Did she seek treatment for physical or mental suffering due to the event? A factual report will generally not attempt to provoke a response from the reader, but will clearly explain the facts. Readers may conclude on their own that the consequences



were "devastating," but the author of an investigative report shows readers what happened, rather than telling them what to think.

Who Is Your Reader?

Step two is to identify your reader. Good writing keeps the reader central. An investigative report has many potential audience members. The author may initially write it for the client, who must then make a decision about the employment dispute at issue. Some investigation reports, however, are likely to be used in litigation or be publicized. But members of the press, judges, juries, or the involved parties may all eventually read an investigative report. Therefore, an investigator should always present the facts objectively, showing respect for all witnesses. A fair and balanced tone can help an investigator avoid argumentative or confusing words, as well as any subjective opinions or overly informal language.

Getting Started

With the goal of the report and the reader firmly in mind, the investigator can start getting words on paper or screen.

Even with all the facts assembled, beginning a report is never as painless as an investigator would hope. Putting thoughts into words can be overwhelming, making it hard to stay focused—even as the clock keeps ticking. Sometimes, making another pot of coffee or taking an afternoon stroll sounds far more appealing than staring at a blank screen. However, while such distractions may clear the mind for a moment, they can also make it even harder to get back on task, causing the cycle to start all over again.

Here are a few practical thoughts to help overcome procrastination.

Brainstorm

It can help to let the mind wander over facts learned during an investigation. Jotting down salient points in no particular order can get the creative juices flowing. In his book, *The Winning Brief*, legal writing expert Bryan Garner suggests starting every writing project by spending some time thinking creatively about how to get your point across. As he puts it: "When first working on a project, let the [internal] madman loose for a while."

Make an outline

An outline can help organize the chaos that the inner madperson has unleashed, breaking down a report to its main components.

For investigators, visualizing a report through an outline can help determine how to best organize its structure, such as by witness or issue. With the right planning, the author can map out the contents of a report before writing in the details, saving time from potential revisions and rewrites later.

Draft timelines

Timelines are essential. Many investigators begin their investigations with a timeline and add to it as the investigation proceeds. Drafting a timeline can help organize thoughts as well as the evidence that the investigator has collected. A timeline, by its nature, situates the facts in relation to one another, which can provide important context when considering issues like causation. A solid timeline can also provide the backbone for the investigative report.

Using templates can help investigators ease the pain of procrastination.

Use templates

Templates save time by helping organize content and ensuring consistent formatting. Most lawyers and human resources professionals use templates all the time. Litigation filings and personnel documents are often based on templates. Templates can also help investigators ease the pain of procrastination. Modifying a template provides a gentle way for an investigator to start typing.

Start with the easy part

Even when following an outline, a report does not need to be written sequentially in one long, continuous sitting. In fact, some parts of the report may be easier to draft before others. Start with the easy part and other sections will be less difficult. Timelines and templates provide natural places to start.

Write as you go

Many investigators swear by the “write as you go” method. As witnesses are interviewed or information examined, the investigator writes the corresponding section of the report. Analyses are, of course, left until after all information has been gathered. This method avoids the procrastination problem, because writing begins when the investigation begins. Some investigators prefer to gather all information before writing so they have an understanding of the universe of information facing them. There is not a right or wrong approach, but if procrastination persists, consider the Another commonly forgotten element of good writing is the

Good Grammar Matters, Too

As with any piece of writing, an investigative report relies on the basics of grammar to convey its message. You can gather all the relevant information available, but all that work is wasted if the reader cannot easily understand the report. Poor writing causes the reader to pause, or even to stop completely, to decipher what the investigator is trying to communicate. Every time the reader stops, the report loses impact and the investigation loses credibility with the reader. Clients are not looking for Pulitzer Prize-winning prose. Concentrating on the basics of good grammar helps produce clear, concise reports.

The following chart illustrates a few basic grammar rules that writers regularly ignore. Incorporating these basic rules will dramatically improve any investigative report.

The Rule	Bad	Better
Use the active voice, not passive voice	The ball was thrown by Bob to Bill.	Bob threw the ball to Bill.
Choose a tense and stick with it.	She first went to the store, buys food, and then will walk home.	She went to the store, bought food, and then walked home.
Write in short, declarative sentences.	The books, which previously had been lined up with proper thought and precision on the shelf up above, were now scattered willy-nilly on the floor right below, without a care at all.	The books had been neatly lined up on the shelf but were now carelessly scattered on the floor.
Use plain language.	The aggrieved party expostulated that she had been maltreated by the representative of management who regulated her quotidian activities.	The complainant said her supervisor treated her unfairly.
Choose strong verbs.	The witness appeared upset.	The witness wept.

Another commonly forgotten element of good writing is the paragraph. A good paragraph expresses a single idea. Too often, investigators write reports in a stream-of-conscious style that reflects how witnesses shared information during interviews. This often causes muddled paragraphs with little structure and multiple topics. The investigator's task is to distill information gathered during the investigation in a manner that is easy for the reader to follow, and also true to the witnesses' statements. Using clear, single-topic paragraphs to distill information is a key tool in achieving this task.

Every good paragraph begins with a clear topic sentence. A topic sentence expresses the main idea of a paragraph and alerts the reader to what will follow. Topic sentences are, therefore, part of the map that guides the reader through the report. By reading only every topic sentence in a report without any supporting details, a reader should still have a clear idea of what the writer is communicating.

Consider the Reader

Most readers are busy people. Although investigators intimately understand all the moving parts of an investigation, the reader does not have that same level of familiarity. Investigators can make reading their reports less daunting by thinking about the report from the reader's perspective. When writing reports, investigators should frequently ask: "What can I do to make my reader's life easier?"

The "write as you go" method avoids the procrastination problem, because writing begins when the investigation begins.

The purpose of writing an investigative report is to inform the client of the facts clearly and concisely. Using more words does not make a report better. Investigators should instead focus on writing with clarity and directness to avoid any potential confusion for their readers.

Reading level is important. Some scientific treatises are written for PhD-level readers. Investigative reports, in contrast, may be read by people of varying levels of experience and education. All potential audience members should be able to understand the report. A good rule is to aim for a ninth-grade reading level or lower. Word processing programs have internal tools to gauge the reading level of the report.

Investigators should also balance the importance of context. Because readers do not know all the circumstances and background,

an investigator must balance the goal of conciseness with the need for context. The report should contain sufficient context and background so the reader can follow the flow without seeking out other sources to clarify things such as reporting relationships, business divisions, and other foundational information.

Being considerate of the reader sometimes involves remembering simple rules, such as these.

- Use people's real names unless there is a good reason not to do so. Provide a list if there are many witnesses.
- Make clear to the reader who people are and why they are important. If a witness has not been mentioned for several pages, provide a reminder of who they are. Doing so provides necessary context for a reader to follow the flow of the report.
- Include a table of contents for documents that run more than 10 pages in length.
- Leave white space. Readers assimilate material more easily if there is white space on the page. This is easy to provide. For example, instead of single-spacing documents, use an option that provides slightly more space between lines (such as the 1.5 setting in Microsoft Word). Break up long paragraphs into smaller bits. Also, use tables, bulleted lists, and other tools to more effectively convey information beyond narrative prose.
- Use acronyms sparingly, if at all. Businesses love acronyms. But chances are excellent that no one outside the organization, or perhaps the department within the organization, will have any idea what they mean. Readers become grumpy when forced to scroll through a report to figure out what an acronym means.
- Don't fall in love with your own words. Prune zealously. Bear in mind that there are no Pulitzer Prizes for investigative reports.
- Remember what the point of the report is—and stick to it.

A report is, in essence, a guide or map to the information that the investigator has discovered. Any good guide should include elements to make it more user-friendly. Bold and larger-sized headings, differing fonts, and other formatting serve this purpose by orienting the reader within the report. Graphs, tables, bulleted lists, and charts also help the reader by organizing information into a concise format, and can be easier to digest than wordy paragraphs.

Analyzing, Not Regurgitating

Investigators should walk the reader through a report, synthesizing information to make it both readable and accurate. Lengthy quotations from transcripts or documents defeat this purpose. Long quotes inevitably include irrelevant material, slowing down the reader. In addition, the process of synthesizing ensures that the investigator understands the importance of the information in context—a critical step not guaranteed by inserting a quote.

Analysis also refers to the investigator's evaluation of and conclusions about the facts. A list of facts does not constitute an analysis.

Analysis considers the facts and explains *why* those facts support or refute the investigator's conclusion. In simple terms, when the writer tells the reader that a fact is important *because of* (whatever the reason is), there is a good chance the writer has analyzed the information.

The words "why" and "because" are emphasized here as they are they are central to an analysis. If these concepts are missing, chances are the writer has merely regurgitated facts.

Finalizing the Draft

Once an investigator completes the writing process, an investigative report will finally become more than just a collection of ideas. But the job is not done after the first or even second draft. Completing an investigation report requires multiple drafts, revisions, and rounds of proofreading.

After so much time with a draft, investigators can easily, though unwittingly, overlook errors in their own work. But errors often stand out to the reader and detract from the actual content of the report, leading to poor comprehension and potential misinterpretation of the information presented.

To catch and correct mistakes before submitting a final draft, investigators should proofread their work, then take the time to let it rest before proofreading it again. Enlisting additional proofreaders can help further refine a report by finding issues that the original writer overlooked.

Ultimately, investigators must remember that a report not only provides their clients with the facts and findings, but also highlights the investigator's skills in the field. By writing well, investigators can stand out from the crowd and showcase their work.



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Disarming Uncooperative Witnesses

By Lynn Hollenbeck

Uncooperative witnesses can stymie investigations.

Whether the stonewalling stems from a fear of getting involved, worry about retaliation, reluctance to be a “rat,” or just plain guilt about the alleged misconduct, a witness who is defensive, recalcitrant, angry, or tight-lipped presents a challenge. Luckily, these contrarians generally comprise only a small percentage of witnesses that workplace investigators encounter.

But just in case, wise investigators should always have a full toolbox at the ready to disarm uncooperative witnesses—which here includes complainants, respondents, and others who may have relevant information. Here are some tools that experienced investigators have found effective.

Don't dive right in, but first build rapport by discussing an innocuous topic, such as the weather or the individual's work history.

Foster Comfort and Trust

It can be scary for employees to be called in an interview, as well as disruptive to their schedules. First, make clear that you appreciate them by thanking them for taking the time to cooperate with the investigation.

If the investigation is conducted remotely, make sure you look right at the camera to make eye contact with witnesses. Explain your role and the need for their help about their observations and recollections.

Hopefully, the employer will have already given some background as to why witnesses are being interviewed and has assured them of your lack of bias. It may still be helpful to explain to witnesses the process by which you were selected and assure them of your impartiality. Make clear that your purpose is to conduct a neutral, thorough, and unbiased investigation. Let them know that when the investigation concludes they will be informed of the findings, if that is the case.



Don't dive right in, but first build rapport by discussing an innocuous topic, such as the weather or the individual's work history. Many employees enjoy talking about their work. What role do they play in the company? What do they most enjoy about their work? Establish a comfortable bond and trust before zeroing in on the allegations at issue.

Find Out the Reason for the Reluctance

Take the time to understand where witnesses are coming from and what may be making them reluctant. Some individuals will ask if they can testify anonymously or if the report will be confidential. While you can't promise confidentiality, you can assure them that your report will only be disseminated to the decisionmakers. If there is fear of possible reprisal, show them the company's anti-retaliation policy and advise them of the proper person to contact if they feel any retaliation for cooperating with the investigation.

Give witnesses the chance to express all of their concerns and emotions. Let them know that you understand their feelings of fear or of being judged unfairly. Show that you are empathetic with their concerns, but explain the reasons for going forward. As a good example, one investigator related the anecdote of a sexual harassment complainant who balked at sharing her story. The investigator explained that it was the company's obligation to look into these allegations, and that if she did not cooperate in the investigation, the opportunity to prevent such conduct would be lost, and others could be similarly harmed. This explanation resonated with the witness, and she then cooperated.

Get Them Talking

The general consensus among a recent panel of investigators is that if you can just get witnesses to start talking, they will continue to talk.

One investigator shared the experience of a witness who absolutely refused to even sit down in the chair to cooperate. On impulse, she made a bargain with the witness that if she sat down in the chair for just 10 minutes, she would then let her go. The interview lasted for two and a half hours.

If you sense reluctance, start out off-topic, then gently steer the conversation to the relevant issues.

If a witness claims not to remember anything, don't rush to the next question. Rather, embrace the pause. Give the witness time to think. Pauses can also signal to witnesses that you expect them to have some information, and gives them a chance to reconsider if they are holding back information.

If you sense reluctance, start out off-topic, then gently steer the conversation to the relevant issues.

Let Them Feel in Control

Transform the situation from an interrogation of the witness into a working relationship. Communicate that you are working together to solve a problem. Asking for a narrative description can help put the witness in control rather than in the position of passively waiting for each question.

Most people get a sense of satisfaction from telling their own stories. Don't lock in witnesses with specific and yes/no questions. Rather, give them room to expand. Some details may be irrelevant to the allegations at issue, but along the way pertinent information can come out. "Can you help me to understand?" works well as a non-confrontative way of addressing inconsistencies after the witness is done speaking, rather than interrupting to point out inconsistencies.

Remain Calm and Neutral

If witnesses become combative or overly emotional, take a break. Remain neutral, quiet, and calm. Let witnesses express themselves and listen actively.

Sometimes calling people by their first names has a calming effect. When the witness calms down, acknowledge his or her emotional state and then continue the interview. Patience and persistence are your best friends here.

Document, Document

If nothing works, and the witness still refuses to cooperate, document that reluctance and advise the client. The employer may decide to remind the employee of the duty to cooperate, if it exists, and the consequences of not cooperating.

Your second shot at the interview is likely to go much more smoothly.



Lynn Hollenbeck has more than 25 years of experience in litigation in addition to advising and counseling both employers and employees. Her experience encompasses workplace issues including discrimination based on race, gender, disability, and leaves of absence, as well as retaliation, whistleblowing, bullying, and sexual harassment. She is senior counsel at Diamond McCarthy LLP in San Francisco, and is licensed in California, New York, and Connecticut. She can be reached at LynnHollen@sbcglobal.net.



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CASE NOTE: *Garcia-Brower v. Premier Automotive Imports* Court Underscores Importance of Investigating Before Firing

By Dina Horvath

The recent case of *Garcia-Brower v. Premier Automotive Imports of California*¹ is another reminder why an investigation is an essential first step for employers to undertake before terminating an employee.

In January of 2014, Tracey Molina applied to work at Premier Automotive Imports for a Contracts/DMV Clerk position. Premier is an automotive retailer regulated and licensed by the Department of Motor Vehicles (DMV). Premier's job application asked whether the applicant had ever pled guilty or no contest to, or been convicted of, a misdemeanor or a felony. The application further instructed that the question should be answered in the negative as to any conviction for which probation had been successfully completed and the case dismissed. Molina truthfully answered "no" to this question. She did not disclose a 2010 conviction for misdemeanor grand theft on her job application because it had been judicially dismissed in 2013 and then expunged from her record—and as a result, she was not obligated to disclose it.

As an additional part of the application process, Molina had to submit to a criminal background check performed by a third-party private company, which she passed. Based on her job application and background check results, Molina was hired in February 2014.

On March 7, 2014, Molina had been working for Premier for approximately four weeks, when the DMV mistakenly reported to Premier that Molina had an active criminal conviction. Premier's office manager doublechecked the first background check performed by the private company and found no mention of the conviction. Despite this known discrepancy, neither the office manager nor the legal counsel contacted the DMV for more details. Nonetheless, Premier decided to terminate Molina for "falsification of the job application" and scheduled the termination meeting for March 10, 2014.

Termination Decision

Prior to terminating Molina, Premier did not interview her, nor did it initiate an investigation concerning the discrepancy between the background check and the DMV report. During the termination meeting, Molina explained to her supervisors that her conviction had been judicially dismissed and the information provided by the DMV was incorrect. But Premier continued the termination, despite her clarification.



On March 19, 2014, Molina appealed the DMV's reported decision and two weeks later, the DMV corrected the error and provided Premier with a corrected background check—showing that Molina's conviction had been expunged. However, despite receiving this new information, Premier did not reinstate her.

Complaint to Labor Commissioner

About a month after being terminated, Molina filed a retaliation complaint against Premier with the California Labor Commissioner. The commissioner ultimately found in Molina's favor and ordered Premier to reimburse her lost wages with interest, pay a civil penalty, and reinstate her to former position or a similar position.

Premier appealed and the administrative appeal of the decision was denied. When Premier failed to comply with those orders, the California Commissioner, Lilia Garcia-Brower, filed an enforcement action on Molina's behalf.

This case should serve as a lesson to all companies that may feel there is no time to conduct an investigation prior to making a termination decision.

Trial Court Proceeding

In March of 2018, the labor commissioner sued Premier on Molina's behalf, alleging that Premier unlawfully retaliated against Molina for exercising her right to omit disclosure of the dismissed conviction on her job application, and had relied on the dismissed conviction as a factor for terminating Molina's employment.

The matter proceeded to trial. At the close of the commissioner's case, Premier filed a motion for nonsuit, asserting that controlling statutes prohibiting retaliation and misuse of criminal offender records² required proof that Premier knew Molina's conviction had been dismissed when it decided to terminate her.

The commissioner asserted that Premier had sufficient knowledge because it cited “falsification of the job application” as the reason for termination and had made a termination decision based on inconsistent information regarding Molina’s conviction. The commissioner further provided that Molina’s statement during the termination meeting—that her conviction had been dismissed—put Premier on notice. The trial judge agreed with Premier, and granted the nonsuit based on the failure to demonstrate that the dealership knew at the time that it fired Molina that she did not really have a conviction.

The Appeal

The court of appeal reversed. It found that the commissioner presented sufficient evidence to prove that Premier was aware or had reason to believe that Molina’s conviction was dismissed and presented sufficient evidence that it had retaliated against Molina and that her termination was impermissible and therefore the matter had to go to a jury.

The court further acknowledged that while there was no evidence Molina’s supervisors were initially aware that the DMV’s report citing a criminal conviction was actually judicially dismissed, it found that Premier was put on notice when it was made aware there was a background check discrepancy between the third party and DMV. In fact, the court noted that three of Premier’s employees testified that there was a clear conflict with the information received, yet no one took steps to investigate the discrepancy before deciding to terminate Molina.

After noting that Molina’s conviction had been expunged and that Premier had failed to interview her or to contact the DMV for clarification before firing her, the court added:

The evidence further established that the DMV’s mistake was corrected after Molina’s appeal to the agency within a matter of weeks, but Molina was not rehired by Premier. In short, there was sufficient evidence from which a jury could infer that Premier had no interest in clearing up the confusion surrounding Molina’s dismissed criminal conviction. The company’s rush to fire her without investigation, and its stated basis for doing so—a “falsified” job application—could be viewed as pretextual, and a fact finder could conclude that the real reason Premier discharged Molina was its discovery that she had not disclosed a dismissed criminal conviction.

Current Status of the Case

The judgment of trial court was reversed, and the matter remanded to the superior court for a new trial, now slated to begin on October 11, 2022.

In its opinion, the superior court underscored that in the retrial, the Commissioner will be permitted to introduce evidence in support of Molina’s claims—“including evidence concerning the termination meeting and relevant post-termination events such as Moli-

na’s efforts to correct the DMV error and Premier’s knowledge of and actions concerning those efforts.”

Lessons to Be Learned

This case should serve as a lesson to all companies that may feel there is no time to conduct an investigation prior to making a termination decision.

Premier made its decision to terminate Molina quickly, based on information it believed to have come from a credible source. However, Premier was also faced with conflicting information from a third-party provider and directly from Molina during the termination meeting. This additional information should have signaled Premier’s decision-makers to stop, consider, and reconcile the known discrepancy prior to making a termination decision.

As the court noted, the prudent step that was clearly missed was an investigation. The investigation into the matter would have served to inform all the decision-makers of the facts prior to termination. Also, Premier’s inability to act on post-termination information and reinstate Molina after learning that the information used to make a termination decision was inaccurate opened it to a claim of retaliation by not taking the appropriate level of ownership and empathy.

While we await on a jury decision on this matter, the insights provided by the court of appeal provide clear guidance into how employment decisions and failure to investigate concern are scrutinized by the court.

This case also serves as a reminder in a related context that the California Supreme Court has held in *Cotran v. Rollins Hudig Hall International, Inc.* that an adequate investigation by an employer prior to discharge requires at a minimum that the employee be provided “notice of the claimed misconduct and a chance for the employee to respond.”³



Dina Horvath serves as a board member of AWI and currently manages workplace investigations at Amazon. Prior to holding that position, she practiced law in the Boston, Massachusetts area, specializing in workplace investigations and other labor and employment matters. She has 15 years of experience representing public and private sector entities in labor and employment matters, and has conducted hundreds of workplace investigations. She can be reached at dinamary.horvath@gmail.com.

1 Garcia-Brower v. Premier Auto. Imps. of CA, 55 Cal. App. 5th 961 (2020).

2 CAL. CODE OF CIV. PROC. §§ 98.6 and 432.7.

3 *Cotran v. Rollins Hudig Hall Internat'l, Inc.*, 17 Cal.4th 93 at 108 (1998).

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