

**INVESTIGATING
EMPLOYEE
AND
STUDENT-RELATED
COMPLAINTS**

**Schools Legal Service
Orange County Department of Education**

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INVESTIGATING EMPLOYEE AND STUDENT-RELATED COMPLAINTS

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Ronald D. Wenkart
General Counsel
Orange County Department of Education
200 Kalmus Drive, P.O. Box 9050
Costa Mesa, CA 92628-9050

SCHOOLS LEGAL SERVICE STAFF
Ronald D. Wenkart, General Counsel
Claire Y. Morey, Counsel
Lysa M. Saltzman, Counsel
Karen T. Meyers, Counsel
Norma Garcia, Paralegal

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INVESTIGATING EMPLOYEE AND STUDENT-RELATED COMPLAINTS

REASONS TO INVESTIGATE

Federal and state laws require investigations in a number of circumstances, such as when a student or employee alleges unlawful discrimination or harassment. Moreover, as stewards of public resources, school districts and community college districts are obligated to engage in self-regulation. For practical purposes, it is best for schools and colleges to follow up on alleged wrongdoing before an outside agency is called in to investigate. Further, districts may be able to decrease their liability in some cases with a good investigation. For example, a district may avoid some damages if it can establish it took reasonable steps to prevent and correct sexual harassment.¹

APPLICABLE LAWS AND POLICIES

It is not possible to list here each and every law that may come into play during an investigation. The following is a list of some of the most common laws and regulations that will guide investigators. In the employment context, investigators should be aware of federal and state laws, such as:

- Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.* (prohibits discrimination in employment);
- Age Discrimination in Employment Act of 1967, 29 USC 6239(a) (protects employees age 40 and older);
- Americans with Disabilities Act, 42 USC 12101 *et seq.*;
- Family and Medical Leave Act of 1993, 29 USC 6901 *et seq.*;
- California Fair Employment and Housing Act, Government Code section 12900 *et seq.*; and
- California Family Rights Act, Government Code sections 12945.1 and 12945.2

In the student context, investigators should be aware of federal and state laws, such as:

- Title IV of the Civil Rights Act of 1964, 42 USC 2000c-8 (prohibits segregation);
- Title VI of the Civil Rights Act of 1964, 42 USC 2000d *et seq.* (prohibits race, color, or national origin discrimination);
- Title IX of the Education Amendments of 1972, 42 USC 2000h *et seq.* (prohibits sex discrimination);

¹ See State Department of Health Services v. Superior Court (McGinnis), 31 Cal.4th 1026, 6 Cal.Rptr.3d 441 (2003).

- Section 504 of the Vocational Rehabilitation Act of 1973, 29 USC 794 (prohibits discrimination against disabled persons);
- Individuals with Disabilities Education Act, 20 USC 1400 *et seq.*;
- Education Code section 260 (ensuring that school programs and activities are free from discrimination);
- Title 5, California Code of Regulations, Sections 4600-4687 (uniform complaint procedures); and
- Title 5, California Code of Regulations, Sections 4900-4965 (nondiscrimination in school programs and activities)

Investigators employed or retained by community college districts to investigate complaints of discrimination should be aware of Title 5 of the California Code of Regulations, Section 59300 *et seq.*, which contains specific requirements regarding such investigations. Please note that this workbook does not cover the rights and obligations of peace officers who may be employed by districts. Investigators who are not familiar with the rights and obligations set forth in the Peace Officer's Bill of Rights, California Government Code sections 3300-3312, are advised to work with legal counsel in an investigation involving a peace officer.

Most importantly, the investigator should research the applicable board policy and administrative regulations governing the investigation to which he or she has been assigned. The investigator should not begin the investigation until he or she has confirmed with the responsible district administrator which policy and procedures are applicable.

CHOOSING THE INVESTIGATOR

Investigators must be independent and unbiased both in fact and appearance. They have duties of fairness, objectivity, thoroughness, ethical behavior, and observance of legal and professional standards. Investigators should be selected based on their qualifications, expertise and writing ability, as well as their availability to complete the investigation in a timely manner.

Individuals who are asked to conduct an investigation need to disclose to the responsible district administrator any potential conflicts of interest. Such conflicts may be personal, professional or financial. Conflicts may be actual, meaning the investigator has an interest in the outcome of the matter, or perceived, meaning the investigator may be viewed as having an interest in the outcome of the matter. Both types of conflicts must be considered by the appointing authority. Thus, the potential investigator should disclose his or her relationship or familiarity with the complainant, the respondent and individuals who are likely to be witnesses, as well as any interest the investigator might have in the outcome of the matter. An investigator should not be appointed to a particular matter if there are any reasonable concerns about the investigator's objectivity.

Outside investigators (those who are not employees of the district) must be licensed as attorneys or private investigators.²

PRIVACY ISSUES AND CONFIDENTIALITY

Since most investigations concern allegations of personal or professional wrongdoing, the respondent has a vested interest in making sure the allegations are not repeated unnecessarily. It must be remembered that the allegations may or may not be substantiated by the investigation. The right to privacy is explicitly guaranteed by the California Constitution, Article 1, Section 1, which states:

“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

It is critically important to prevent unnecessary harm to a respondent’s reputation if the charges are not substantiated. Complainants and witnesses also have privacy rights and may need to be protected from retaliation. It is therefore, important not to disclose information regarding respondents, complainants or witnesses to individuals who do not have a “need to know.”

Claims of defamation may arise from an investigation in which information is spread beyond those who have a “need to know.” Best practices in protecting privacy/confidentiality rights include:

- Avoiding the use of e-mail during the investigation;
- Ensuring that the confidentiality of documents (hard copy and electronic) is maintained;³ and
- Avoiding discussion of the allegations except as necessary to solicit information from parties and witnesses.

Despite these cautions about privacy and confidentiality, it is important for investigators not to promise anonymity to any of the involved individuals. Investigators may assure participants and witnesses that protection of their identity, and the information they provide, will be maintained to the extent possible within the legitimate needs of law and the investigation. It may be necessary to reveal the name of a party or witness in order to investigate the matter effectively.

² Business and Professions Code section 7521 *et seq.*

³ Beware of placing investigation-related documents on a shared server. Hard copies should be kept in locked file cabinets.

DEFINING THE SCOPE AND TIMELINE OF THE INVESTIGATION

Complainants do not always carefully describe the scope of their complaints. Thus, it is sometimes necessary to meet with the complainant to understand the nature of the complaint, even before beginning the investigation. (The complainant does not determine the scope of the investigation; the responsible district administrator holds that power.) The scope is based on the alleged violation and the applicable laws and policies. The investigator should determine what policy or expectation is alleged to have been violated before moving forward in collecting information. The investigator also should be clear as to what time period is involved in the investigation. Some board policies provide that complaints must be filed within a certain period of time after the incident giving rise to the complaint. The district may determine to investigate allegations that were not filed by the complainant within the “statute of limitations,” but the investigator should ask the responsible district administrator for such a determination before proceeding with the investigation.

Investigators also need to be clear that the investigation is backward-looking; complainants should not be permitted to continue adding new allegations as the investigation proceeds. If new information does come to light, the investigator should confer with the responsible district administrator to make the call as to whether to include the new allegations in the scope of the investigation.

The investigator must be mindful of how quickly the investigation needs to be completed. Such timelines often are set forth in board policy. Some board policies require that the complaining party agree to any extension of the timeline for investigation. The investigator will need to balance the need to be thorough with the need to complete the investigation in a timely manner (or request an extension of time, if necessary). Investigators do not have the luxury of unlimited time. Nevertheless, investigators should not make findings until they have enough information to be confident in the accuracy of their findings.

COLLECTING AND MAINTAINING EVIDENCE

Once the investigator is clear on the scope of the investigation, the investigator should put together an investigation plan. This is a working document that will evolve as the investigation proceeds. It should list: (1) the policies and procedures governing the investigation process; (2) the substantive law or policy alleged to have been violated; (3) the time period under consideration; (4) possible witnesses; and (5) relevant documents and other physical evidence.

The first issue the investigator should consider is whether there is a need to secure evidence, such as a computer hard drive or electronic communications. Investigators should be cautious, however, as most districts have computer use/electronic communications policies that may limit the investigator’s access to electronic information. The district may have an approval process that needs to be followed before preserving or accessing electronic information.

Investigators should be cautious in making sure any searches of an employee's office or other area in which the employee has a reasonable expectation of privacy is consistent with federal and state laws. The first approach may be to simply ask the individual for the document or other evidence. Investigators should seek legal advice before conducting searches.

Investigators do not have the authority to compel people to cooperate with the investigation. If a witness is not cooperating, the investigator should contact the responsible district administrator for guidance. The district may determine to direct the person to cooperate with the investigation (assuming the witness is a district employee), but the investigator would not be the person issuing such a directive. It is important for investigators to remain neutral and non-threatening.

Investigators should request all relevant documents from each party and witness, even if the investigator already has a copy of the document. Additional copies may have relevant notations. In addition, it is important to know whether a party may be attempting to withhold documents. Investigators should request copies of documents, rather than originals. Documents to collect may include:

- Personnel files;
- Desk files (sometimes referred to as “drop files”);
- Project files;
- Notes, diaries, e-mails, calendar entries; and
- All other documents relevant to the allegations.

The scope of the document request is based on the scope of the investigation. For example, it may not be necessary to review an employee's medical file if the allegations have no relationship to information contained in such file. Investigators should balance privacy rights versus the need to examine all relevant information.

It is important to keep track of the source of each document received. Some investigators find it helpful to maintain a spreadsheet of documents that references the source of the document, date received, and a short summary of the document. Documents can then be numbered and referenced by their exhibit number in the investigative report.

EVIDENTIARY ISSUES

Investigators should be mindful of the standard of proof applicable to the investigation. Most investigators will be applying the “preponderance of the evidence” standard of proof as that is the standard used in most civil proceedings. It is a lower standard of proof than that used in the criminal context (proof beyond a “reasonable doubt”). “Preponderance of the evidence” means that one body of evidence has more

convincing force than the evidence opposed to it.⁴ It is useful to think of a preponderance of the evidence as a 51% (or more) certainty that a fact has been established. The burden of proof is generally on the moving party, i.e., the person or entity making a claim or charge. For example, in a discrimination investigation involving a K-12 school, the complainant bears the burden of proving the allegations by a preponderance of the evidence. Some investigations may involve a “probable cause” standard of proof. This standard applies in the context of discrimination investigations in the community college context.⁵

Investigators will often seek legal advice during the course of an investigation. It is important to keep all written communications containing legal advice (e.g., letters and e-mails from attorneys and notes of conversations with attorneys) in a separate file so the information does not become commingled with the investigative file. The investigative file may at some point need to be turned over to a third party and it is important not to waive the attorney-client privilege by disclosing legal advice.

REQUESTS FOR REPRESENTATION

The complainant may ask to bring someone to the interview. Unless the written procedures speak to this issue (most do not), this is left to the investigator’s discretion. It is probably best to make the complainant comfortable by allowing a support person to be present, provided that person is not expected to be a witness, and provided the support person agrees to maintain the confidentiality of the information. If the complainant is represented by counsel, it is customary to allow counsel to be present; the complainant will likely refuse to participate if counsel’s presence is denied. The investigator should speak to the district’s counsel before proceeding, however. The investigator will probably want to warn the complainant’s counsel that he or she should not interfere with the interview and should allow the complainant to speak for himself or herself.

The respondent also may request to bring a representative to the interview. If the respondent is part of a bargaining unit, *Weingarten* rights apply; thus, since the interview may lead to discipline, the employee must be permitted to bring a representative.⁶ Employees need not be informed of the right to union representation, nor is postponement required when a particular union representative is not available as long as another representative is available. The union representative may speak on behalf of the employee but the employee may be required to respond to job-related questions. The union representative does not have the right to cross-examine or interrogate supervisors or third parties who may be present. If the respondent is not part of a bargaining unit, there is no right to representation. However, as with requests from the complainant, the investigator may determine to allow a representative to be present in the interest of

⁴ See 1 Witkin, Evidence, *Burden of Proof and Presumptions*, Section 35 (4th ed. 2000).

⁵ 5 Cal. Code Regs., Section 59334. “Probable cause” involves a determination as to whether a reasonable person could entertain a strong suspicion that an allegation is true. See *Cooley v. Superior Court*, 29 Cal.4th 228, 127 Cal.Rptr.2d 177 (2002). This standard is even easier to meet than the preponderance of the evidence standard.

⁶ *NLRB v. Weingarten*, 420 U.S. 251, 95 S.Ct. 959 (1975); See also *Redwoods Community College District v. Public Employment Relations Board*, 159 Cal.App.3d 617, 205 Cal.Rptr. 523 (1984).

obtaining the best cooperation from the respondent. In such cases, the representative needs to agree in advance to maintain the confidentiality of the information.

Witnesses may request to bring a representative, but even if the witness is part of a bargaining unit, unless the interview may lead to discipline, the witness has no right to representation. Generally, witnesses should not need a representative present since they can be assured that they are not the subject of the investigation, and that the law protects them from retaliation. When a witness is hesitant to cooperate, investigators should inquire as to why the witness is concerned as there may be a way to address the concern. Investigators should try gentle reassurance and ask if the witness would at least be willing to answer a few general, background questions. (Often once the witness gets talking, the level of cooperation increases.)

OVERLAP WITH CRIMINAL INVESTIGATIONS

In some instances, a criminal investigation may be pending at the same time the district is trying to conduct an internal investigation. Under such circumstances, it is possible that the respondent will refuse to cooperate with the district's investigation. In such cases, the investigator should contact the responsible district administrator who will work with the district's counsel in responding to the objection. In all cases in which a criminal investigation is pending, the investigator should make contact with the detective responsible for the criminal investigation to determine whether the detective has any objection to the district's plan for investigation. Generally, the police will not object to a school or college investigation, but occasionally the police department will ask the investigator to hold off on certain interviews until the police department has completed all or part of its investigation.

INTERVIEWS

Interviews should be conducted in person unless an in-person interview would be impracticable or would cause undue delay. Interviewers need to be able to assess the body language of the interviewee since that may affect the investigator's credibility determinations. This is the same reason that juries are expected to view witnesses as they are testifying. In some cases, however, it is exceedingly expensive or time-consuming to conduct an in-person interview, such as when the interviewee does not live in the state. The complainant, the respondent and key witnesses should be interviewed in person. For more tangential witnesses, interviews may be conducted by telephone if the circumstances warrant. Occasionally, a non-district witness will agree to a telephone interview only; in such cases, it is advisable to proceed as the witness demands as that is the only way to obtain any information from the witness. However, the investigator will have to determine whether he or she is able to adequately assess the credibility of the witness.

Each interview should be conducted separately in order to preserve the integrity of the investigation. Individuals may feel pressure to provide certain information in front of others, which may or may not reflect the facts. It is particularly important in

harassment and discrimination investigations, as well as retaliation investigations, that the complainant not be forced to address the allegations directly with the respondent. Forcing the complainant to confront the person he or she is accusing may be considered retaliation.

Interviews typically proceed in the following order: (1) complainant; (2) respondent; (3) witnesses; (4) re-interview complainant, if necessary; and (5) re-interview respondent, if necessary. Investigators may deviate from the above order when there is a good reason to do so, although the complainant should be interviewed first if at all possible. Generally, it is preferable to interview the respondent before interviewing witnesses as the respondent may provide information that makes further interviews unnecessary. The respondent may admit to the allegations, for example. In some cases, it is necessary to interview one or more witnesses before interviewing the respondent, however, because the exact nature of the allegations cannot be known without talking to witnesses.

Some investigators tape record their interviews so they can have a verbatim record of the exchange and free themselves from the task of taking notes during the interview. Investigators who choose to tape record their interviews must have the consent of all parties to the interview. Failure to obtain such consent is a criminal offense.⁷ The consent to be taped should be given orally by each individual present once the tape is running. Other investigators choose not to tape-record interviews because the presence of a tape recorder may impact the willingness of the interviewee to be candid. Tape recorders often make people hesitant to speak freely. Many investigators feel they can build rapport much easier without the presence of a tape recorder. Moreover, the transcription of tape recordings is time-consuming and expensive.

The basic rules of interviewing focus on making the interviewee comfortable and getting the interviewee to talk as much as possible. Thus, investigators typically start with “easy” questions, such as questions about the interviewee’s education and work experience. Investigators use open-ended questions and are not afraid of pauses in the conversation which may encourage the interviewee to speak. Since the goal is to collect information, rather than disseminate it, investigators should be careful of sharing facts with the interviewee and should discuss the process of the investigation, rather than the substance. Investigators should use “who, what, where, why and how” questions and should keep the chronology of the events in mind at all times. It is often tempting to share one’s feelings about the investigation; however, investigators should not succumb to this temptation. It is certainly acceptable to thank the individual for coming forward and/or cooperating with the investigation, but the investigator should not indicate a probable outcome before all the information has been gathered.⁸

All interviewees, including complainants and witnesses, should be told of their obligation to maintain the confidentiality of the allegations and the information provided

⁷ Penal Code section 632.

⁸ Even then, only certain parties will have a right to know the outcome of the investigation. Dissemination of results will be discussed below.

during the interview. The investigator should inform each interviewee that a failure to maintain confidentiality may result in discipline and/or civil liability.

It is useful to explore motives with interviewees. For example, if an interviewee denies a certain allegation to which another person attests, it would be helpful to ask the interviewee why he or she believes the other person would fabricate the allegation. Investigators should always ask the interviewee whether he or she has kept a log or notes concerning the allegations.

When interviewing the complainant, the investigator should explain his or her neutral role and provide a description of the process. The investigator should explain that he or she has no interest in the outcome of the matter. It is helpful to inquire whether the complainant has shared the allegations with anyone else. Also, the investigator should ask the complainant for a list of people with relevant information. If the list is long, the investigator should ask the complainant what specific information each person would have concerning the allegations. The investigator is not obligated to interview each person suggested by the complainant, but should make a reasoned decision as to whether each person needs to be interviewed. Most investigators feel it is helpful to ask the complainant what he or she would like to see happen as a result of the complaint.

In interviewing the respondent, the interview should keep in mind two goals: gathering information and providing the “accused” a fair opportunity to respond to the allegations. The investigator should not be accusatory in tone as no findings will have been made at this point. While the complainant’s story may have sounded compelling, the respondent may have information to share that will call into question the complainant’s credibility. Generally, it is helpful to explore the relationship and past history of the complainant and respondent. The respondent should be asked to provide relevant documents and a list of witnesses. Again, if the list is long, the respondent should provide specifics as to what each witness would be expected to say. Although a written response typically is not required, it is a good idea to ask the respondent if he or she would like to provide a written response to the allegations. The investigator should warn the respondent not to try to speak to the complainant or witnesses regarding the allegation. The investigator also should caution the respondent not to engage in any behaviors that might be perceived as retaliatory.⁹

Arranging interviews with witnesses can be a delicate task in that interviewees often demand certain information prior to the interview, while the investigator would prefer to ask his/her questions face to face in order to be able to assess the interviewee’s credibility. Moreover, witnesses generally do not have a right to be informed of the nature of the allegations. It is recommended that investigators share as little information as possible when setting up the interview. For example, an investigator might state: “I have been assigned to investigate a complaint filed by an employee. You are not the subject of the investigation. I need to meet with you because I believe you may have

⁹ Retaliation is anything that would deter a reasonable person from making a complaint. This would include adverse employment actions and a host of less severe actions. The law protects witnesses, as well as complainants, from retaliation.

relevant information. I cannot discuss the specifics of the allegations with you, but will be happy to answer any questions you have regarding the process of the investigation. Please do not discuss this matter with anyone.”

The investigator will need to inform the witness that because of confidentiality obligations, he or she is not permitted to discuss the nature of the complaint. Witnesses should be informed that while they may believe they are aware of the nature of the complaint, they should not jump to conclusions and must not share the information with anyone else. The best method for witness questioning is to use a funnel approach in which the investigator asks broad, open-ended questions and then focuses on more detailed questions. The investigator should be careful not to suggest the answers, but to let the witness describe the situation in his or her own words. The investigator should ask for relevant documents and should ask the witness whether there are other people who have relevant information. It is helpful to review the witness’s answers to make sure there are no misunderstandings.

Some investigators ask the witness to sign a summary of the information provided during the interview. While this can be helpful in avoiding misunderstandings or confusion, it also can prolong the process as witnesses often fail to review the statement in a timely fashion. Investigators should use their discretion in deciding whether signed witness statements are critical to the investigation, or whether an oral summary provided at the end of the interview is sufficient. The investigator should encourage witnesses to contact him or her with any additional information that comes to mind. It is very important to reiterate the importance of confidentiality, including possible liability for defamation and invasion of privacy.

Some investigations involve unpredictable people or circumstances. Investigators should take precautions if they feel their safety may be in jeopardy during an interview. Investigators may choose to have a note-taker or observer present, or to have plain-clothes police officers nearby. Investigators should be sure that the exit out of the room is not blocked. If the situation feels unsafe, the investigator should conclude the interview and reschedule under circumstances that ensure a greater degree of protection.

MAKING CREDIBILITY DETERMINATIONS

Inexperienced investigators sometimes believe there is no further obligation to make a finding if the two sides provide conflicting information and there are no witnesses to the incident. This is a fundamental misconception of the investigator’s role. It is the investigator’s obligation to make credibility determinations based on all of the information. Certain factors should be applied in making such determinations:

- Inherent Plausibility. Is the testimony believable on its face?
- Demeanor. Did the person seem to be telling the truth or lying (and why)?
- Motive to Falsify. Did the person have a reason to lie?

- Corroboration. Is there witness testimony or physical evidence that corroborates the party's testimony?
- Past Record. Does the respondent have a history of similar behavior in the past?¹⁰

When an investigator is having a difficult time making a credibility determination, the best approach is usually to re-interview people with relevant knowledge. Sometimes the interviewee will make statements that are inconsistent with the information he or she provided earlier. This inconsistency would weigh against the person's credibility. Conversely, if a person is able to tell of events in a similar fashion on multiple occasions, his or her credibility is strengthened.

There may be some instances in which even a very thorough investigation will not reveal the facts by a preponderance of the evidence (or other standard or proof that may be applicable). In such cases, the investigator should state that the investigation is "inconclusive" as opposed to stating that the allegations are false. Again, this will occur only rarely as investigators generally should be able to make credibility determinations. Investigators should keep in mind that they are not being asked to determine whether an interviewee is lying; they are being asked to determine if the person is credible. It may be that the interviewee believes certain facts to be true, yet the investigator finds that the interviewee is not credible because of a lack of corroborating evidence, inconsistent statements by the witness, or other considerations.

SPECIAL ISSUES CONCERNING RETALIATION COMPLAINTS

The California Legislature has enacted whistleblower legislation known as the "Reporting by School Employees of Improper Governmental Activities Act (the "Act").¹¹ The Act protects school district and community college district employees who report improper governmental activities. Section 44112 defines an "improper governmental activity" as an activity by a public school agency or employee that (1) violates a state or federal law or regulation; or (2) is economically wasteful or involves gross misconduct, incompetency, or inefficiency. Investigators should be mindful of the breadth of this law. A complainant need not cite to this law specifically in order for it to apply to a claim of retaliation. For example, if an employee files an internal or external complaint of discrimination, and then later alleges that he or she suffered an adverse action, the provisions of the Act (including the shifting burden of proof and "clear and convincing" standard of proof, as discussed below) likely would apply.

Under Education Code section 44113, it is unlawful to use or attempt to use one's official authority or influence to intimidate, threaten, coerce, command (or attempt to intimidate, threaten, coerce, or command) any person for the purpose of interfering with the person's right to disclose a suspected improper governmental activity to a school administrator or board member.

¹⁰ EEOC's Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999), <http://eeoc.gov/policy/docs/harassment.html>.

¹¹ Education Code section 44111 *et seq.*

A finding of retaliation requires three elements: (1) that the complainant engaged in a protected activity; (2) that the complainant suffered an adverse action; and (3) that there is a causal link between the protected activity and the adverse action. In any civil or administrative proceeding (including an internal investigation), once it has been demonstrated by a preponderance of evidence that an activity protected under the Act was a contributing factor in the alleged retaliation against a former, current, or prospective public school employee, the burden of proof shall be on the supervisor, school administrator, or public school employer to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the public school employee had not engaged in protected disclosures or refused an illegal order.¹²

Thus, if a school employee establishes by a preponderance of the evidence that he or she suffered an adverse action because of a protected activity (disclosure of a suspected improper governmental activity or refusal to obey an illegal order), then the burden of proof shifts to the supervisor or manager. The supervisor or manager must establish by clear and convincing evidence that the action was taken for reasons independent of the protected activity. The “clear and convincing” burden of proof is a higher standard than the “preponderance of the evidence” and is met only where there is a “high probability that a fact is true.”¹³

Evidence of retaliation (as with evidence of discrimination) may be circumstantial. Courts will consider whether the respondent had knowledge of the complainant’s protected activity, the timing of the adverse action and differences in how the respondent was treated as opposed to other employees. Given that the law is unsettled with regard to proving the causal link between an adverse action and a protected activity, investigators are advised to contact legal counsel for advice.

WRITING THE INVESTIGATIVE REPORT

Reports should be objective and well written and should not contain typographical errors. Investigators generally find that they are better able to proof-read the report if they have set it aside for a day or two once the draft is complete. A thorough investigative report should contain the following sections:

- Scope and manner of investigation;
- Summary of the allegations;
- The response to the allegations;
- Summary of the evidence, including witness interviews;
- Credibility determinations;
- Findings of fact; and

¹² Education Code section 44114(e).

¹³ See Judicial Council of California Civil Jury Instruction Number 201.

- Legal conclusion (but only if called for under the applicable procedures).

The “scope and manner of the investigation” is a brief summary of the policies and procedures governing the investigation, as well as the steps the investigator took in gathering information. The investigator may set forth a list of people interviewed and a summary of the documents reviewed. The investigator may discuss any procedural issues that arose, as well as any interviews or evidence the investigator chose not to obtain or was unable to obtain (and why).

The “summary of the allegations” is either a verbatim recitation of the complaint, or a summary of the complaint in the investigator’s own words. Since most written complaints filed with districts generally do not contain each and every factual allegation, it is usually helpful for the investigator to summarize the allegations in full and attach the written complaint as an exhibit.

The “response to the allegations” is a summary of the respondent’s version of the events. If the allegations are numerous, it is helpful to set forth each allegation followed by the respondent’s response. Again, the tone of this section should be neutral and objective.

The most important sections of the report are those that set forth the investigator’s credibility determinations and analyze the factual issues in dispute. In writing the credibility section, the investigator should carefully describe the factors that weigh in favor of – and against – the witness’s credibility, and should set forth his or her determinations. As stated above, the question is not whether the person is “lying,” but whether the person’s statements are credible based on all of the evidence.

In the “findings” section of the report, the investigator should apply a four-step process: (1) define the issue; (2) identify the relevant policy or law; (3) set forth the evidence that weighs in favor of the complainant’s allegations, as well as that which detracts from it, and; (4) make a finding by explaining why the evidence supporting or refuting the allegation is more persuasive. The “findings” section should state the standard of proof the investigator is applying.

The report should contain a “legal conclusions” section only if required by law or policy. For example, in discrimination investigations for community colleges, the investigator must draw a conclusion as to whether there is probable cause of discrimination.¹⁴

The most effective investigative reports are those that use short, clear sentences. The report should discuss all material evidence, whether or not it supports the investigator’s conclusions. The report should make findings on all material factual disputes. A factual dispute that does not relate closely to the essential aspects of the complaint may be left unresolved at the discretion of the investigator (although such

¹⁴ 5 Cal. Code Regs., Section 59334.

“minor” disputes often relate to credibility and should, therefore, be addressed). The report should include references to exhibit numbers. Relevant exhibits should be attached to the report. A sample investigative report is attached as part of this workbook.

CLOSING MATTERS

The report should be provided only to the district administrator who assigned the matter to the investigator. Questions concerning the report or the investigator’s findings should be directed to that administrator. The investigator should continue to safeguard the confidentiality of the investigation and all evidence received. The investigator may inform the complainant and respondent when he or she has completed the investigation and may refer the complainant and respondent to the responsible administrator for further information. Any outside requests for information should be referred to the District’s Public Records Act coordinator.

Some investigators retain only their final report and exhibits; they destroy their notes once the investigative report is finalized. Other investigators retain their interview notes. There really is no right or wrong answer to the question of whether to retain interview notes. However, the investigator should keep in mind the advantages and disadvantages of each approach. The investigator should understand that if he or she retains interview notes, they will be disclosed to both sides should the matter end up in litigation. Thus, the interviewer will have to explain any discrepancies that may exist between the interview notes and the investigative report. On the other hand, some investigators find that certain peripheral information contained in interview notes does not make it into the final report and yet can be helpful if the investigator is called to testify.

An investigator should have a consistent practice as to retaining or destroying interview notes. If the investigator decides he or she will destroy interview notes, that destruction should occur at the same point in each investigation (e.g., after the report is finalized). No destruction may occur once the district is notified of litigation, threatened litigation, or an investigation by a criminal or civil authority, as that would be considered spoliation of evidence. In such cases, all evidence, including documents and electronic files, must be preserved, even if the evidence would otherwise be destroyed pursuant to the district’s document retention/destruction policy.

Investigations often involve complicated legal questions involving matters of process and evidence, as well as substantive questions of law. Investigators are advised to consult with legal counsel early and often in conducting investigations to ensure a fair, thorough and legally defensible investigation.

SAMPLE INVESTIGATIVE REPORT

**Complaint of Sexual Harassment
Made by Darla Darling**

XYZ School District

April 10, 2008

Investigation conducted by Irma Investigator

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I. Scope and Manner of Investigation

On March 4, 2008, Darla Darling raised a complaint of sexual harassment against her Supervisor, Sam Supervisor. On March 10, 2008, XYZ School District asked me to conduct an investigation into Ms. Darling's claims.

In investigating the allegations, I interviewed the following individuals on the dates noted.

Name	Date
Darla Darling	March 11, 2008
Sam Supervisor	March 12, 2008
Ronda Russo	March 13, 2008 (by phone)
Mel Maintenance	March 13, 2008
Ian Instructor	March 13, 2008
Tim Teacher	March 13, 2008

II. Darla Darling's Claims

Ms. Darling has been an administrative assistant in the District since March 13, 2007. She was hired by and reports to Sam Supervisor. Ms. Darling began serving as Mr. Supervisor's assistant beginning in August of 2007 when Ronda Russo, who had been filling that role, transferred to another location.

Ms. Darling states that Mr. Supervisor has sexually harassed her in the workplace since she began working for him. Ms. Darling's claims are summarized below.

A. Inappropriate Workplace Remarks

Mr. Supervisor commented during an office lunch that he liked "dominatrix stuff." This was said in front of co-worker Ronda Russo, who left the room when the comment was made. Ms. Darling told me she questioned Mr. Supervisor if this was "like Pulp Fiction" and she started calling Mr. Supervisor "gimp." She said she just kept joking about it and calling him "gimp" which made him feel uncomfortable and in a week or so he quit talking about it.

Mr. Supervisor told Ms. Darling that she "looked good." He made this type of comment on more than one occasion.

Mr. Supervisor told Ms. Darling he had "developed feelings" for her.

On one occasion, Mr. Supervisor discussed with Ms. Darling that he is "looking to get laid" in "several contexts like what kind of car he drives." He said something like, "how am I going to get laid if I drive a mini van." Around this same time, Mr. Supervisor kept telling Ms. Darling that he would "rock her world."

Mr. Supervisor told Ms. Darling that she was his “work wife.”

Mr. Supervisor told Ms. Darling, “I love you” when she called to check in before returning to work from a vacation.

Over the course of her employment, Mr. Supervisor repeatedly told Ms. Darling that he was going to “spank” her.

On December 19 or 20, 2007, Mr. Supervisor said it would be funny to see Mel’s reaction if he [Mr. Supervisor] and Ms. Darling were in the bathroom or office making sex noises.

On January 16, 2008, Mr. Supervisor talked about his new “girlfriends” on his computer screen. Ms. Darling said she responded by asking about his wife, and he told Ms. Darling that “things aren’t good with his wife.”

On January 20, 2008, Ms. Darling was expressing frustration to Mr. Supervisor about another employee. Mr. Supervisor told her he thought she was “sexy” when she swore. On this same day, Mr. Supervisor told Ms. Darling over the radio he was picking up parts near a strip club.

On approximately January 21, 2008, Mr. Supervisor talked to Ms. Darling after work (after giving her the “silent treatment” all day) and told her that he had done a lot for her and that she “owed” him.

B. Inappropriate Workplace Conduct

According to Ms. Darling, Mr. Supervisor has indicated he is “like a brother” to Ms. Darling, or that she is like his little sister; he used that as a pretext to give her hugs in the workplace. Ms. Darling said he hugged her “at least ten times” with the last time occurring approximately February 1, 2008. At that time, she told him “no” and he did not hug her after that occasion. Ms. Darling said she had, “said no once before.”

In January of 2008, Ms. Darling says that she was under a truck with a new employee, showing him parts of the delivery truck. She said that Mr. Supervisor came by and “slapped [her] ass” while she was under the truck. He then kicked her foot and she kicked him to get him away from her. After work, she confronted him and told him that she did not like his behavior.¹⁵

C. Invitations to Socialize Outside the Workplace

A few months ago, Mr. Supervisor told Ms. Darling that he had thought about calling her to invite her to his house over the four-day weekend that had just passed. Later in the conversation, he told Ms. Darling his wife was at work “that day.”

¹⁵ Ms. Darling said he did not touch her after she told him not to touch her on this occasion.

Mr. Supervisor once invited Ms. Darling to his house and she told him no several times. He would ask her over from time to time, but that eventually stopped.

One day, Mr. Supervisor “continually mentioned” about going on some type of road trip with Ms. Darling.

Mr. Supervisor asked Ms. Darling when she would invite him to her house.

Mr. Supervisor invited Ms. Darling to go to a car show in San Diego. He told her to call him and he would meet her.

One time, Mr. Supervisor asked Ms. Darling to “hang out with him on Saturday to do his car stuff.”

D. Miscellaneous

Ms. Darling complains that on a few occasions, Mr. Supervisor’s work number would appear on her home phone but there was no message left for her. She said this happened about once a week for approximately one month, and then stopped.

III. Sam Supervisor’s Responses to the Allegations

Mr. Supervisor began working as a Supervisor for the District in February of 2007. He recommended the hire for all of his current staff members.

Mr. Supervisor said that when Ms. Darling became his assistant, he took her “under his wing.”

A. Alleged Workplace Remarks

Mr. Supervisor states that the remarks that Ms. Darling attributes to him are either completely taken out of context or simply not true. He also says many of the comments that she seems to imply were one-on-one were actually things said in a group setting. These conversations would take place during the lunch hour or the morning or afternoon breaks.

Mr. Supervisor vaguely recalls that the group was talking about Pulp Fiction at one point and thinks that might be where Ms. Darling gets the “dominatrix” comment.¹⁶

Mr. Supervisor said he never told Ms. Darling that she “looks good.” He said he has asked her if anything was wrong, when she appeared to be stressed. He vaguely

¹⁶ This comment was allegedly made before all of the third party witnesses to this investigation were hired, except Ronda Russo. Ms. Russo does not recall ever talking about Pulp Fiction, and did not hear any comment about dominatrix preferences.

remembers commenting to her the day after one of these days that she must have gotten some rest because she “looked better” or “looked healthier” or “something to that effect.”

Mr. Supervisor says his wife drives a van and he drives a Taurus. He did not ask Ms. Darling how he would get laid driving a van.

Mr. Supervisor remembers telling Ms. Darling on more than one occasion that she needed to lobby for her position (as assistant). He said this was in the context of raising performance concerns with her. He was trying to tell her that she could improve and that he still believed she “had it in her” to be successful. He also told her that her co-workers were having a hard time with her.

Mr. Supervisor said on one occasion he did “a parts run.” He said the reference to the strip club is completely out of context. He called her on the radio and asked her about the location of the store. He said he thought it was next to a big pink building that is a strip club. It is clearly marked and hard to miss. His raising the strip club was for purposes of discussing the location, nothing more.

Regarding some of the comments, Mr. Supervisor said he never said what is being alleged and cannot think of where she would get the idea. He never told her he had feelings for her. He never told her, “I love you.”

B. Alleged Workplace Conduct

Mr. Supervisor said he is a “huggy” person so he likely hugged Ms. Darling, but he believes he would have asked first, or felt she was comfortable with it. He said he has not hugged her in the context that she thinks. With Ms. Darling, he said they would occasionally knock the top of their fists together.

C. Invitations to Socialize Outside the Workplace

Mr. Supervisor said he has invited Ms. Darling to his house. He believes he also invited her boyfriend. He said he would have cleared the invitation with his wife, and his wife and kids would certainly have been around if Ms. Darling had come to his house. She did not. Mr. Supervisor said he has invited many co-workers to his house. He likes to entertain, barbecue, watch sports and visit.

Mr. Supervisor said he talked to Ms. Darling about going on a road trip with him. He said they were joking around about “going for the road,” but it was not something they were planning. Mr. Supervisor said, “My wife would not let me!”

Mr. Supervisor said he never asked Ms. Darling to invite him to her house.

D. Miscellaneous

Mr. Supervisor says Ms. Darling would take photos of a hole in one of their colleague's shorts and then after people left, she would stay and show him pictures of this man's legs being open. She would joke about how he was "hanging out" of his shorts. Mr. Supervisor asked Human Resources to deal with it because it was embarrassing to him. Someone in Human Resources told the employee to buy new clothes and watch his hygiene. Ms. Darling joked about this all of the time.

Mr. Supervisor said he finds Ms. Darling to be "a bit strange." When she first started, he arrived at work and thought the building was on fire. Ms. Darling had a clam filled with incense that she was burning. She was walking around the office and the garage. He asked what she was doing, and she told him she was trying to eliminate the "negative energy" and that she felt spirits were there. He told her she could not do it because it was a fire hazard.

IV. Summary of Witness Interviews

A. Ronda Russo

Ronda Russo currently works as a Supervisor at another site. She transferred from Mr. Supervisor's site in July of 2007.

Ms. Russo served as the assistant to Mr. Supervisor when she was at his location. She said as part of her duties, she would come in around 5:30 a.m. and get things organized in the morning. Ms. Russo said even though her paid time did not start until 6:00 a.m., she liked to be early as a courtesy and to feel more organized about her day. She said Mr. Supervisor did not ask her to be there until a few minutes before 6:00. She explained that Mr. Supervisor needed someone to call his second in command, and he had selected her. Ms. Russo said she never felt that Mr. Supervisor was having her perform duties outside the scope of her work. When she left, Mr. Supervisor asked her who would be a good person to be second in command, and she suggested another employee, not Ms. Darling. She believes that Mr. Supervisor asked this other employee to become the assistant before he selected Ms. Darling.

Ms. Russo said Ms. Darling is not a good role model, and should not be affiliated with the District. She does not work well with others. Employees do not like her and have complained about her. Ms. Russo said, "I would say over half of the employees she works with complained about her."

Ms. Darling did not spend time with the group. "She did not spend any one-on-one time with Mr. Supervisor." It would be an unusual circumstance to see Ms. Darling in the office with Mr. Supervisor. The only time they would have spent one-on-one time together was when they worked on a training manual. This would have been for a two or three-day period. "Other than that, I am certain they didn't spend a lot of time together."

Ms. Russo said, “There was no sex talk at all, period, ever.” Ms. Russo said the only way sex would “ever enter the equation would be when Ms. Darling would show up with hickeys all over her neck. That was the only time that sex was mentioned.” Ms. Darling told Ms. Russo that the hickeys on her neck were from a guy she met in a bar and spent the weekend with, and Ms. Russo said, “That was more information than I wanted to know.” Mr. Supervisor asked Ms. Russo to talk to Ms. Darling about the hickeys.

Ms. Russo said, “Mr. Supervisor has never, ever been out of line with me. For two weeks when I came to the District I trained with him. I was with him for two weeks non-stop. There was no sexual talk, gestures. I think any sexual talk would be out of line with anything I know of working with him.”

Ms. Russo said when Mr. Supervisor visits her site, he will hug her hello and goodbye. She is totally comfortable with it and says it is not inappropriate at all.

Ms. Russo said Mr. Supervisor would talk about his wife and his kids often, but never talked about marital problems or anything personal. When the group would talk at lunch, they would talk about personal issues, such as what kids had done, but “we most assuredly did not talk about sex.”

Ms. Darling did not socialize with the group (four or five people in the office, who ate lunch together every day). A few times she would have lunch with the group, but she would only stay 15 or 20 minutes. Many times she would eat in her car.

Mr. Supervisor invited people to his house with their spouses. He may have invited Ms. Darling, but that would have been to be with his wife and kids participating.

Ms. Russo said she told Mr. Supervisor that Ms. Darling would not be successful even before she reached passed probation. Mr. Supervisor told Ms. Russo that she should take Ms. Darling “under her wing” and help her because he felt that women should support other women. He would have done this for anyone because he is a nice guy.

B. Mel Maintenance

Mel Maintenance is a maintenance worker for the District. Mr. Supervisor hired him.

Mr. Maintenance said the entire group has lunch at the same time. They often all eat together in the office. While someone might go out to get something to eat every once in awhile, there are usually several of them together at lunch. Mr. Maintenance usually eats there. He said the group has never talked about any inappropriate sexual things. He has never heard Mr. Supervisor say anything inappropriate “like that.”

Mr. Maintenance noticed that Ms. Darling and Mr. Supervisor would eat lunch together in his office, sometimes with the door open and sometimes with the door closed. This was “almost every day for awhile.” He does not recall thinking this was strange or anyone else reacting to it in any way. He believes in the four months between when he

started and February of 2008, Mr. Supervisor and Ms. Darling had lunch with just the two of them “at least half of the time.”

Mr. Maintenance has observed Mr. Supervisor with Ms. Darling and has never seen anything out of the ordinary or anything that would cause him concern.

Mr. Maintenance said Mr. Supervisor asked him once if, “I would do her [Ms. Darling].” He replied that he was fine with his girlfriend. In this conversation, just the two of them were present. Mr. Maintenance did not remember the context. He did not remember anything else about the conversation, how it came up, or when or where it was said.

Mr. Maintenance does not know Ms. Darling very well. He says, “Hi” to her and asks how she is doing, but they have not had any personal conversations.

Mr. Supervisor has talked to Mr. Maintenance about having him over for a barbeque and to hang out at his house with his family, but he has not followed up.

Mr. Maintenance said he was leaving work one day and bumped into another car in the parking lot. The next day he received an accident report that was filled out by Ms. Darling and given to him by Mr. Supervisor. Mr. Supervisor ended up telling him it was a joke, but Mr. Maintenance did not think it was very funny.

Mr. Maintenance said he interacts with Mr. Supervisor once or twice a day, but does not have personal conversations. The only thing they have talked about is video games. Mr. Maintenance ended the conversation saying he has never heard Mr. Supervisor say anything inappropriate to Ms. Darling.

C. Ian Instructor

Mr. Instructor is a driver-trainer for the District.

Mr. Instructor says that at one point he received a cell phone call at 1:17 a.m. He says it was Ms. Darling. He does not think that a number showed up on his phone, but he says he knows it was Ms. Darling. The person said, “Hi, it is Darla, what are you doing?” He does not know anyone else named Darla. He is sure it was her voice, “It sounded like her, it was her.” He said she did not say anything inappropriate and never called again. It was not a big deal to him, except the fact that she denied it. “It bothered me that she lied. I wish she would have just said it was her.” He did not file a complaint because he is “not a complaint kind of guy.” He told Ms. Russo about it and she raised it with Mr. Supervisor. They all talked together about it, Ms. Darling denied making the call, and that was the end of the issue.

Mr. Instructor said since that day, he is careful what he says around Ms. Darling. Mr. Instructor does not feel comfortable around her. Also, he did not like that she lied about calling him. He said she is “odd.” She has some strange beliefs and practices.

Mr. Instructor said it is a common practice at lunch for everyone to sit together and “chat.” Sometimes all of them are in Mr. Supervisor’s office. Mr. Supervisor is usually in his office. Mr. Instructor said that Mr. Supervisor “did not have any lunches alone with Darla that I know of.” He said Ms. Darling would go in on occasion to talk to him during the lunch hour. He said Ms. Darling and Mr. Supervisor did spend time together sometimes. This would usually be during the lunch hour or sometimes after work. Ms. Darling rarely stayed late. There were always people around.

Mr. Instructor said he never heard Mr. Supervisor say anything inappropriate to Ms. Darling. He said the only “bawdy” conversation was started by Ms. Darling and was about the employee who was “hanging out” of his shorts. He said Ms. Darling came in while he was talking to Mr. Supervisor and told them that the man’s “balls were hanging out of his shorts.” He said they started joking around and laughing, and Mr. Instructor said, “What are you doing looking down there?”

Mr. Instructor also said he has never seen Mr. Supervisor be affectionate with Ms. Darling.

Mr. Supervisor has told Mr. Instructor that he wants to have him over to his house and get together to play cards.

In the past few weeks, Mr. Supervisor began asking Mr. Instructor to come into his office during the lunch break. He started talking about being unhappy with Ms. Darling’s performance. He also told Mr. Instructor that he was becoming uneasy around Ms. Darling and asked Mr. Instructor to open the door if Ms. Darling came in and shut it behind her.

Mr. Instructor said everyone has received complaints from employees about Ms. Darling.

D. Tim Teacher

Mr. Teacher is a driver-trainer for the District.

Mr. Teacher said the employees break for lunch at 11:30 a.m. for an hour. Most of them grab lunch and sit in the office to eat. Ms. Darling has her own desk and Mr. Supervisor is usually in his office. Sometimes the whole group goes into Mr. Supervisor’s office, informally. Mr. Supervisor does call Ms. Darling into his office during the lunch hour. This occurred approximately two times per week for awhile. Others would sometimes go in with her.

Mr. Teacher said he has never seen Mr. Supervisor be inappropriate or flirtatious with Ms. Darling. He said he teases her, like he teases others. They have friendly banter, like between friends. He would tease her about things, like her pet iguana. Mr. Teacher has never heard Mr. Supervisor make an inappropriate comment about Ms. Darling. Mr. Teacher said he never saw Mr. Supervisor even get close enough to Ms. Darling to touch her and he recalls him always being very professional.

Mr. Teacher has sat and talked with Mr. Supervisor “many times.” Mr. Supervisor has spoken about his wife and his family very warmly. These conversations are usually after work when things are winding down. Mr. Teacher has to wait for the bus so he will clock out and sometimes hang around for a bit. These conversations were always appropriate. The talk would be social. Mr. Teacher said he believes Mr. Supervisor is a “nice, decent guy.”

Mr. Teacher likes Ms. Darling but says she is “odd.” For example, she talked about the fact that her iguana spits on her, and she believes that this means the pet loves her.

Mr. Teacher said he notices things in people and he did note that the relationship between Mr. Supervisor and Ms. Darling changed at some point in late January or early February and they were not as informal with each other. She was not smiling or happy as usual.

Mr. Teacher said his personal motto is to “be kind and do no harm” and he has always perceived Mr. Supervisor to have this same kind of attitude.

V. Credibility Determinations

The account provided by Ms. Darling diverges from the account provided by Mr. Supervisor. Thus, it is necessary to make credibility determinations. In making such determinations, certain factors are relevant to the fact-finder: (1) the inherent plausibility of each person’s story; (2) corroborating evidence that would tend to support or contradict each person’s story; (3) each person’s motive to lie; and (4) each person’s demeanor; that is, whether the person appears to be telling the truth when interviewed about the incident.¹⁷

A. Ms. Darling’s Credibility

I did not find Ms. Darling to be credible in many respects.

Ms. Darling attempted to create an impression that she worked side-by-side and somewhat alone with Mr. Supervisor on a regular basis. However, the evidence shows that for most of the day Ms. Darling and the other employees are working separate from Mr. Supervisor. There is a short morning and afternoon break, and a lunch hour. During the lunch hour, the witnesses stated that the employees typically hang around the office.

While Ms. Darling may have had extra time alone with Mr. Supervisor as his assistant, I do not believe this was a significant amount of time. As the assistant, Ms. Darling stated that she arrived earlier in the mornings, around 5:30 a.m. Witnesses stated that Mr. Supervisor arrives at approximately 7:00 a.m. when others are also arriving at the office. And, while Mr. Supervisor typically stays late, Ms. Darling does not. Accordingly, Ms.

¹⁷ EEOC’s “Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors.”

Darling and Mr. Supervisor would have relatively little time to have conversations that were not heard by others, or interactions that were not observed by others. All witnesses stated they had observed no inappropriate interactions or comments.¹⁸

Ms. Darling complained that beginning in February, Mr. Supervisor began giving her the “silent treatment.” She raised this treatment several times in our interview. While she did not say it directly, she seems to imply that his cold treatment of her was in response to her rebuffing his advances. However, around this time¹⁹ it is clear that Mr. Supervisor became increasingly frustrated with her performance. Ms. Darling even admitted that Mr. Supervisor “could have been mad about some things I had done or not done that he was not happy with.” She says Mr. Supervisor called her into his office on several occasions in January and February and told her that she needed to improve her performance. It is more plausible that Mr. Supervisor’s changed demeanor resulted from Ms. Darling’s escalating poor performance.

B. Mr. Supervisor’s Credibility

I found Mr. Supervisor to be credible.

First, Mr. Supervisor was very forthcoming and shared information with me even when it tended to discredit him. For example, he told me he had talked to Ms. Darling about going on the road. He agreed that he had probably hugged her, on occasion. His explanations about what he had actually said or done were plausible.

Witness testimony corroborated many of the statements made by Mr. Supervisor.

Lastly, the record did not support a finding that Mr. Supervisor engages in juvenile or sexual behavior in the workplace. Not a single witness corroborated these claims. And, the evidence seemed to point to the contrary; that Mr. Supervisor is professional in the workplace. As an example, written warnings during Ms. Darling’s first few months of employment were provided by Mr. Supervisor, with one exception. The warning regarding Ms. Darling’s hickeys was provided by Ms. Russo. One of the reasons for this was Mr. Supervisor’s embarrassment regarding the subject matter. His hesitancy to discuss hickeys with Ms. Darling supports his testimony that he did not engage in offensive or inappropriate sexual banter with her.

C. Credibility of Other Witnesses

Mr. Maintenance said that he had never heard Mr. Supervisor say anything inappropriate, and said he had never witnessed any inappropriate behavior by Mr. Supervisor. Then,

¹⁸ Except Mr. Maintenance’s single assertion.

¹⁹ Ms. Darling says the “turning point” for her was very early on in the relationship. However, she says his “silent treatment” of her did not begin until January or February, much later. The timing suggests that Mr. Supervisor’s changed demeanor was attributable to Ms. Darling’s performance deficiencies, not a reaction to the alleged sexual dynamics.

unexpectedly and somewhat casually, Mr. Maintenance raised a sexually aggressive statement he claims Mr. Supervisor made about “doing” Ms. Darling. The statement seemed at odds with Mr. Maintenance’s description of his interactions with and discussions with Mr. Supervisor. In context with the rest of the interview, it seemed not believable. I was bothered enough about this statement to make a follow-up inquiry. I was aware that a Human Resources staff member, Mr. Manager, had interviewed Mr. Maintenance, among others, regarding Ms. Darling’s claims before this investigation was assigned to me. I asked Mr. Manager if Mr. Maintenance had told him about this alleged comment during their meeting. Mr. Manager said Mr. Maintenance had not. In fact, Mr. Manager had asked him if he had ever heard any sexual statement by Mr. Supervisor about Ms. Darling. Mr. Maintenance had said that he had not heard Mr. Supervisor make any such comments about anyone. This tended to corroborate my assessment that Mr. Supervisor did not make this statement to Mr. Maintenance.

With the exception of Mr. Maintenance, I found the remainder of the witnesses to be credible.

VI. Findings

Based on the facts presented and my credibility assessments, I make the following findings of fact.²⁰

1. The vast majority of Mr. Supervisor’s interactions with Ms. Darling occurred when other employees were present.
2. Mr. Supervisor may have talked generally about Pulp Fiction. Mr. Supervisor may have commented jokingly to Ms. Darling about his “girlfriends” either having to do with a screen saver, a calendar, or a poster in the workplace. I do not find that Ms. Darling found Mr. Supervisor’s conduct to be unwelcome.
3. Mr. Supervisor did not tell Ms. Darling that he had developed feelings for her. He did not tell her, “I love you.” He did not tell her he would spank her.
4. Mr. Supervisor hugged Ms. Darling on one or two occasions. Mr. Supervisor hugs other employees and co-workers. Ms. Darling found this conduct to be unwelcome and asked him to stop. Mr. Supervisor did not hug Ms. Darling after she told him she did not want him to hug her.
5. Mr. Supervisor did not “slap” Ms. Darling’s buttocks when she was under a truck.²¹

²⁰ In making findings of fact, I have applied a preponderance of the evidence standard.

²¹ Ms. Darling says she was under the truck showing the employee parts of the truck from beneath. Accordingly, she would have been on her back. Given this, I find it more likely that Mr. Supervisor’s version is correct. He walked by and kicked her leg lightly to get her attention.

6. Mr. Supervisor and Ms. Darling spent time alone in his office during the lunch hour approximately two or three times a week for several months as part of her Assistant duties.²²
7. Mr. Supervisor invited Ms. Darling to his house, as he has invited other employees. Mr. Supervisor planned that his wife and children would have been home if Ms. Darling had accepted the invitation. I do not find that Ms. Darling found Mr. Supervisor's conduct to be unwelcome.
8. Mr. Supervisor did not ask Ms. Darling about going to her house.
9. Mr. Supervisor joked with Ms. Darling about going "on the road" with her and she joked back with him. I do not find that Ms. Darling found Mr. Supervisor's conduct to be unwelcome.

If you have any questions regarding this report, or if I can provide any further information, please do not hesitate to contact me.

Irma Investigator

April 10, 2008

²² Mr. Maintenance and Mr. Teacher said that Ms. Darling regularly had lunch alone with Mr. Supervisor, while Mr. Instructor testified that he "never" saw this happen. Applying the preponderance of the evidence standard, I find that these private lunches did occur. However, I find they were for legitimate business reasons. Ms. Russo said that she never saw Ms. Darling having lunch alone with Mr. Supervisor. This makes sense because Ms. Darling did not become Mr. Supervisor's assistant until Ms. Russo transferred. This supports the idea that Mr. Supervisor's request for lunch alone with Ms. Darling related to the assistant position. Ms. Darling herself told me that he would ask her to have lunch with him if "he had something to talk about or something for me to do as part of my job."