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Susan Woolley has practiced law for 25 years and has extensive experience with discrimination, harassment, and retaliation investigations. She served as an expert and consultant to the U.S. Department of Justice Civil Rights Division and was appointed by the Los Angeles County Board of Supervisors to the Equity Oversight Panel which reviews and evaluates workplace investigations conducted countywide. Ms. Woolley is an adjunct professor at Loyola Law School, where she teaches Fact Investigation. Michael Robbins is President of EXTTI Incorporated, which provides expert testimony, training, and investigation services in employment matters. Michael has conducted and/ or supervised well over 500 workplace investigations, and has served as an expert witness in nearly 500 cases. Prior to forming EXTTI, he practiced employment law for 20 years. He is the President of the Association of Workplace Investigators (AWI).

MCLE Self-Study:

This Is Not Your Father's (or Mother's) Investigation: How Workplace Investigations Have Changed Over the Past 10 Years

By Susan Woolley and Michael A. Robbins

INTRODUCTION

Employers have been conducting workplace investigations for decades. However, as laws have changed and as courts have provided greater scrutiny of workplace investigations, how investigations are conducted has changed as well. This article addresses many of the developments that have occurred over the past decade.

CHANGES IN THE LAW

A little over a decade ago, the California Legislature added provisions to the California Fair Employment and Housing Act (FEHA)[1] requiring employers to take reasonable steps to prevent discrimination and harassment.

Specifically, California Government Code section 12940(j)(1) states, "[a]n entity shall take all reasonable steps to prevent harassment from occurring." Similarly, California Government Code section 12940(k) states that it is a violation of FEHA "[f]or an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." The failure to take such reasonable steps is an independent violation of the Act, but only if the underlying harassment,

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discrimination, or retaliation is found to have occurred.[2]

Interpreting these newer provisions, courts have held that conducting a proper workplace investigation is one of the "reasonable steps" necessary to prevent harassment, discrimination, and retaliation from occurring.[3] For example, in *Northrop Grumman Corporation v. WCAB*, the California Court of Appeal stated, "[t]he employer's duty to prevent harassment and discrimination is affirmative and mandatory. . . . Prompt investigation of a discrimination claim is a necessary step by which an employer meets its obligation to ensure a discrimination-free work environment."[4]

The result of *Northrop Grumman* and other decisions was to put workplace investigation issues squarely before the trier of fact. However, additional legal developments compelled this as well. For example, the U.S. Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*[5] and *Faragher v. City of Boca Raton*[6] created a limited affirmative defense (under federal law) in circumstances in which the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior.[7]

However, if the employer defends under *Ellerth* and *Faragher*, the

> employer's failure to investigate can undermine both prongs of the affirmative defense: (1) A fact finder may decline to conclude that the employer "exercised reasonable care to prevent and correct [harassment] promptly", if the employer fails to investigate any report of harassment; and (2) Where an employer is known to be reluctant to investigate, it has more difficulty showing that the complainant "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm."[8]

This affirmative defense also placed issues concerning workplace investigations before the judge or jury.

In *Cotran v. Rollins Hudig Hall International, Inc.*, the California Supreme Court held that, at least as to at-will employees terminated for misconduct, as long as the employer conducted an adequate investigation into the misconduct allegations and reached reasonable conclusions as a result of the investigation, the jury's role is not to second-guess the employer's decision to terminate the employee.[9] So, the *Cotran* decision also put workplace investigations into contention in employment-related litigation.

For all of the above reasons, there has been greater judicial scrutiny of workplace investigations. This increased scrutiny necessitated changes in the way investigations are conducted both when litigation is anticipated and when it is not.

CHANGES AT THE BEGINNING OF THE INVESTIGATION

Investigation by Defense Counsel

In the past, it was common for an employer's regular defense counsel to be hired to conduct any workplace investigations needed by the employer. However, this practice can give rise to a conflict between an attorney's duty of loyalty to his or her clients (and the related duty to vigorously defend clients) and the requirement that a workplace investigation be an impartial one. For example, in its *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (Guidance), the Equal Employment Opportunity Commission (EEOC) says: "An employer should set up a mechanism for a prompt, thorough, and **impartial investigation** into alleged harassment." [Emphasis added].[10]

Writing in *Advising California Employers and Employees*, Patricia Perez (a former Commissioner with the California Department of Fair Employment and Housing) explains, "[w]hen an employment attorney is asked to perform an investigation on behalf of the client, it is very important to remember that the attorney's role is of a neutral fact-finder, not of a zealous advocate for one side or the other."[11] Similarly, the Association of Workplace Investigators (AWI) says in its *Guiding Principles for Conducting Workplace Investigations* (2012) (Guiding Principles), "[a]n outside attorney investigator conducting an impartial investigation should appreciate the distinction between the role of impartial investigator and that of advocate."

As a result, over the past few years it has become much less common to find an employer's regular defense counsel conducting workplace investigations for their client. However, there is another reason for this as well.

Workplace investigations have played an increasingly important part in employment-related trials. Plaintiffs' counsel commonly calls the investigator as an adverse witness to show the poor quality of the investigation. Conversely, when the investigation has been adequate, the employer may call the investigator to testify as to the good quality of the investigation. An obvious conflict is presented when defense counsel has both conducted the investigation and is defending the employer in litigation that concerns the investigation. Defense counsel might well have to testify as a witness about his or her own investigation, while defending the employer in the litigation concerning that investigation. Although such testimony is permitted under California Rules of Professional Conduct, Rule 5-210 (as long as there is written informed consent), it is not advisable.

Yet another reason that regular defense counsel increasingly do not conduct workplace investigations is because it may create a perception of a bias. As AWI says in its *Guiding Principles*, "[w]henever possible, the investigator should be someone who is in fact, and who is perceived by the participants to be, impartial." This perception is not only important within the workplace, but also before the jury. That is, the trier of fact may well believe that an investigation conducted by regular defense counsel was not impartial.

Business and Professions Code Issues

Until recently, individuals acting as outside workplace investigators may not have been conversant with the requirements of California Business and Professions Code sections 7520 et seq. In general, the Code requires that all individuals conducting workplace investigations in California be licensed private investigators, or that the individuals meet an exception under the Code. One exception to the licensing requirement exists for "[a]n attorney at law in performing his or her duties as an attorney at law."[12]

In the past, attorneys may have assumed that, because they were attorneys, they met the exception. In fact, it was not uncommon for attorneys conducting workplace investigations to specify in their retainer agreements that they were not performing services as an attorney, thus ignoring the requirement that the attorney be "performing his or her duties as an attorney at law."

Two Attorney General Opinions provide insight in this area. According to the Attorney General, to come within the exception, investigations must be conducted pursuant to an attorney-client relationship.[13] Further, the services rendered must have some connection to the attorney's practice of law, such that the attorney is performing services usually performed by an attorney in the practice of law.[14]

The many implications of these requirements are well beyond the scope of this article. However, no longer is it enough for an investigator simply to be an attorney. Instead, the attorney/investigator must be performing at least limited legal services, and an attorney-client relationship must exist between the attorney/investigator and the employer.[15]

There is yet another implication to the Business and Professions Code's investigation requirements. Although outside human resource consultants once commonly performed workplace investigations, the Code does not allow this. Specifically, outside (as opposed to in-house) human resource consultants who are neither attorneys nor private investigators (and who are not directly supervised or directed by either), are not permitted to conduct workplace investigations in California.[16]

Thus, increased knowledge of the Business and Professions Code has restricted those who may conduct workplace investigations and has changed under what conditions such investigations may be conducted.

When to Investigate

In the past, it was not unusual for employers to fail to conduct workplace investigations when the employer first discovered the allegations—when the complaining party either filed an administrative charge or complaint, or a lawsuit. That practice, too, has changed.

In its Guidance, the EEOC says, "if an employee files an EEOC charge alleging unlawful harassment, the employer should launch an internal investigation even if the employee did not complain to management through its internal complaint process." Further, most employer policies state that, upon receipt of a harassment, discrimination, or retaliation complaint, the employer will conduct a prompt, thorough investigation. Policies do not say that such an investigation will be conducted unless the employee files an administrative charge or lawsuit. Indeed, such a provision would constitute illegal retaliation.[17] Beyond this, employers increasingly want to discover whether harassment, discrimination, or retaliation has occurred so that such actions, if they did take place, can be remedied, regardless of how the employer acquired such information.

As a result, it is increasingly common for employers to conduct workplace investigations even after the employee has gone "outside" to an administrative agency or court.

CHANGES DURING THE INVESTIGATION

The Need to Make Credibility Findings

The days of ending an inquiry at "he said/she said/who knows?" are over. Good practice and case law require investigators to delve into issues of witness credibility and to resolve them. Credibility findings need not be perfect. However, a good faith, objective, and systematic approach based on a thorough investigation is required.

The California Court of Appeal recently confirmed the importance of evaluating credibility in *Mendoza v. Western Medical Center of Santa Ana*.[18] In that case, plaintiff Mendoza complained of same-sex sexual harassment. His manager interviewed him and the alleged harasser simultaneously, and the employer fired both men. Mendoza sued, alleging discharge in violation of public policy, and a jury awarded him more than $200,000. Defendant appealed.

Many lawyers will be most interested in the court's holding that the trial court gave incorrect jury instructions on mixed motives in light of *Harris v. City of Santa Monica*. However, for investigators, *Mendoza* provides a wealth of guidance. In remanding the case for a new trial, the court found that the defective underlying investigation was, in itself, evidence of substantive liability. The court stated that "lack of rigorous investigation is evidence suggesting defendants did not value the discovery of the truth so much as a way to clean up the mess uncovered when Mendoza made his complaint."[19]

The *Mendoza* court described several defects in the underlying investigation. These included: failure to prepare an investigative plan, failure to use a trained professional to investigate, and the decision to interview the complainant and subject simultaneously. The *Mendoza* court singled out for attention the investigator's failure to assess the credibility of both parties. Noting that the investigator did not interview anyone beyond Mendoza and the accused, the court suggested that "a more thorough investigation might have disclosed additional character and credibility evidence for defendants to consider before making their decision."[20]

The *Mendoza* court essentially rejected the position that he said/she said is the end of the inquiry. The court wrote:

> At oral argument, defense counsel asked (perhaps rhetorically) just what employers were expected to do when faced with a scenario in which two employees provide conflicting accounts of inappropriate conduct. Our answer is simple: employers should conduct **a thorough investigation and make a good faith decision based on the results of the investigation.** Here, the jury found this did not occur.[21]

As noted above, the decision need not be perfect. Of course, the depth to which credibility needs to be examined will vary with the circumstances of each case. A civil investigation is not a trial for perjury and every incident need not be investigated to the level of a criminal trial.[22] Being objective and systematic are keys to reliable credibility decisions.[23] Several factors should be included in credibility determinations. Some of those are:[24]

- Corroboration or contradiction
- Witness's opportunity to observe the event
- Prior inconsistent statements
- Plausibility
- Bias
- Motive to lie
- Demeanor
- Character

While a thorough discussion of these elements is beyond the scope of this article, demeanor and plausibility merit special mention.

Demeanor Evidence: Reliable or Not?

A major change for investigators has been growing skepticism about demeanor evidence. The reliability of demeanor evidence has been a hot topic among legal commentators, and among academics the strong trend is to discount the value of demeanor in assessing witness credibility.[25] This position is based largely on experimental evidence from the field of psychology indicating that observers, even those trained in detecting liars, do little better than chance in evaluating live witnesses.[26]

The psychologist Dr. Paul Ekman conducted seminal research on deception and lie detection. He wrote, "How much confidence should be placed in judgments based on demeanor, by layman or expert, about whether someone is lying or telling the truth? The answer from 20 years of research is 'not much.' In every study reported, people have not been very accurate in judging when someone is lying."[27]

The legal system has not adopted this view, however, and the law continues to place a value on demeanor evidence.[28] This tension between jurisprudence and scientific skepticism has implications for investigators. On the one hand, demeanor is still a legally recognized factor in credibility assessment and cannot be ignored. On the other hand, investigators should use caution when resting credibility determinations on demeanor. When the goal is to get to the truth of the matter, more reliable and objective measures of believability should be used.[29]

Plausibility

Plausibility of the witness's account is another factor to be used in credibility determinations. A story can be so unlikely on its face that an investigator need not credit it.[30] For investigators who are familiar with the context in which an event occurred, plausibility can be a powerful tool in deciding whether a witness is telling the truth.

However, plausibility is not entirely objective. The case of *Singh v. Gonzales* provides a good illustration. In *Singh*, a Sikh refugee from India testified that he was detained and beaten by Indian police for participating in a political rally.[31] The Immigration Judge found the story implausible, in part due to her speculation about how the Indian police would have behaved during the refugee's detention. The Ninth Circuit reversed and criticized the IJ's credibility determination, stating that personal conjecture or speculation are not proper bases for making a credibility finding.[32]

Likewise, investigators must avoid conjecture and personal bias when considering what statements are plausible. The investigator should have a good understanding of the context in which the investigation takes place. Some questions to keep in mind for workplace investigations are: What are normal practices and procedures of the organization? What is the organization's culture, and what kinds of behavior are generally accepted in the organization? What kinds of training do employees receive? In addition, careful consideration of one's own biases can help an investigator avoid mistakes.

Confidentiality

Historically, workplace investigators provided confidentiality admonishments to witnesses. Although varying to some degree, generally these admonishments prohibited witnesses from talking about the facts concerning the investigation, at least during the course of the investigation. The purpose was to allow the investigator to conduct as "clean" an investigation as possible. These admonishments were consistent with EEOC Guidance, which counsels the need to maintain confidentiality during a workplace investigation.

All that changed in 2012. Specifically, in *Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro*,[33] the NLRB announced that a broad confidentiality admonishment given during the course of an investigation would, in most circumstances, violate the provisions of section 7 of the National Labor Relations Act.[34] As a result, employers have been reticent to provide broad confidentiality admonishments, notwithstanding the desire to maintain confidentiality during the course of an investigation.

To make matters more complex, however, the *Banner* decision was vacated and remanded to the Board following the U.S. Supreme Court's decision in *National Labor Relations Board v. Noel Canning*, holding that President Obama's recess appointments of Board members Block, Griffin, and Flynn in January 2012 (between pro forma sessions of the Senate) were unconstitutional[35] As a result, employers are left with a difficult choice with respect to confidentiality: either they can provide confidentiality admonishments and risk potentially violating the NLRA, or not provide such admonishments and risk a tainted investigation.

Either way, broad confidentiality admonitions no longer are automatically given during workplace investigations.

What Constitutes an Adequate Investigation?

A perennial question for investigators is a version of that children's back-seat chorus "Are we there yet?" For investigators, this translates into "What constitutes a sufficient workplace investigation?" and "What standards are used to judge this?" Because almost any investigation can continue long after it really should end, it is important to understand how to judge when the investigation is "done." While case law on the subject is still scarce, there are more resources available to help investigators resolve this issue than there were several years ago.

A clear focus on the scope of the investigation from the outset helps this inquiry. Scope determines everything that will happen in an investigation: what issues will be addressed; who will be interviewed; what documents will be reviewed; and all other decisions. As investigator Keith Rohman has written, "[s]cope defines the playing field on which the investigation unfolds." Since scope identifies the questions to be asked, it follows that once the investigation has satisfactorily answered them, the investigation is finished.

The key is to answer questions *satisfactorily*, and understanding scope is not, by itself, enough to determine whether the answers are enough. In California, two early cases established benchmarks by which many investigations are still judged: *Silva v. Lucky Stores* and *Fuller v. City of Oakland*.[37] Among the factors discussed in those cases were:

- Choosing the right investigator
- Being objective
- Investigating promptly
- Interviewing all relevant witnesses
- Seeking out and reviewing relevant documents
- Following up on what is learned
- Conducting a fair analysis of the facts

More recent cases reaffirm the factors identified in *Silva* and *Fuller* and add others.[38] For example, the *Mendoza* court noted the following defects in the underlying investigation:

- Failing to take witness statements
- Not preparing a formal investigation plan
- Delaying
- Interviewing the complaining party and the subject of the investigation simultaneously
- Permitting the investigation to be completed by the parties' supervisor, rather than a trained HR employee
- Interviewing only two witnesses
- Not interviewing other witnesses in order to assess the credibility of the complaining party and subject

Increasingly, professional organizations provide resources for

investigators. For example, the AWI Guiding Principles identify several steps that might be advisable in a workplace investigation, depending on the circumstances. The Society for Human Resource Management (SHRM) has publications such as *Investigating Workplace Harassment* (2008) to assist investigators. Both of these organizations, as well as others, provide training for investigators.

Interviewing Third Parties

In the past, employers were reticent to interview third party witnesses. This was particularly the case when third parties were customers, clients, or former employees. This has begun to change as well. Interviewing such witnesses is now an important part of any workplace investigation.[39]

The EEOC Guidance states when detailed fact finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information.

In *Investigating Workplace Harassment*, Amy Oppenheimer and Craig Pratt write: "Former employees often are good witnesses because they no longer fear repercussions for being forthright. . . . You also may need to interview witnesses who do not work for your organizations, such as clients, customers, or vendors."[40]

As a result, it is much more common for investigators to interview third parties (even former employees), particularly when those third parties are the only witnesses to crucial events. Indeed, sometimes this is the only way to reach a reasonable conclusion about what has occurred.

CHANGES AT THE END OF THE INVESTIGATION

Consequences of an Inadequate Investigation

More and more, courts find that poor investigations are evidence of substantive liability. For example, in a sexual harassment case from the Eastern District of California, the court found that deliberately excluding pertinent issues from investigation supported a punitive damages claim.[41] In that case, the court found that a psychiatric hospital limited its investigation to the impact of alleged harassment on a patient who witnessed it, but did not examine the complaint of the target of the harassment. The district court found that the hospital's disregard of the complainant created an inference that the hospital was "inconsistent, careless, and reckless concerning sexual harassment."[42] The hospital faced the threat of punitive damages had the case gone to trial.[43]

Several other cases likewise have found that defective investigations, in and of themselves, support discrimination, harassment, and retaliation claims. As mentioned above, the *Mendoza* court found the employer's flawed investigation to be substantive evidence supporting plaintiff's claim for wrongful discharge in violation of public policy. In other cases, inadequate investigations have been found to be evidence of retaliation.[44] An inadequate investigation in a race discrimination case was found to be evidence of pretext.[45] Defective investigations have supported plaintiffs' claims for punitive damages.[46] Also supporting punitive damages awards, a failure to investigate has been found to be evidence of ratification; that is, adoption or approval of a wrongdoing employee's behavior by the employer.

Using Investigations

Investigations can be powerful tools to prevent discrimination and harassment. A positive development in our field is the increasing use of the facts gathered to improve both the workplace as well as future investigations. For example, as part of the *Bouman* consent decree which ended gender discrimination litigation, the Los Angeles County Sheriff's Department instituted an external review of discrimination, harassment, and retaliation complaints. After the decree's term ended, the Department continued to use the review model. As described on the Department's website:

> The Los Angeles County Equity Oversight Panel's mission is to provide timely information, offer expert advice and constructive feedback, and make recommendations regarding equity matters to the Sheriff's Department through reviews, audits, and monitoring to assist the Sheriff's Department with its goal of providing every Department member a workplace free of harassment, discrimination, and retaliation. In its role as reviewers of equity investigations, the Equity Oversight Panel's mission is to make the fairest, most appropriate and accurate findings and recommendations possible for each investigation.[48]

The panel model was considered so successful that the Los Angeles County Board of Supervisors determined in July 2011 that it would be used county-wide. The Board appointed a panel of experts to review equity investigations and provide

recommendations and feedback, a process that is ongoing.[49]

Consent decrees that resolve discrimination cases can require that the defendant employer investigate complaints of discrimination for a defined time period.[50] Investigating as a remedy can accomplish several goals: it helps determine the extent of any problem; it ensures compliance with the decree; and it can prevent violations of law or policy. Employers can and do go beyond these objectives, however, and channel the information learned from investigations back into the workplace. We have seen good results when investigation findings are used to address problem areas in operations, to help identify problem employees, to reveal areas in which employees need training, and to strengthen internal investigations. Paying attention to trends that investigations bring to light can save time and money in the future.

SUMMARY

Through developments in both statutory and case law, courts have made it clear that workplace investigations are required in many circumstances: for example, to respond to harassment, discrimination, and retaliation allegations. As a result, workplace investigations have become increasingly important in employment litigation. The result of this has been an increased scrutiny of workplace investigations.

Fundamentally, the trier of fact must examine whether the required investigation was of a quality sufficient to meet the employer's obligations under the law. The ways investigations have changed over the past decade or so are a direct result of that examination.

ENDNOTES

1. Cal. Gov't Code §§ 12900–96.
2. *See, e.g., Tritchler v. County of Lake,* 358 F.3d 1150, 1155 (9th Cir. 2004); *Trujillo v. North Cnty. Transit Dist.*, 63 Cal. App. 4th 280 (1998).
3. *See Northrop Grumman Corp. v. WCAB*, 103 Cal. App. 4th 1021 (2002); *see also Mathieu v. Norrell Corp.*, 115 Cal. App. 4th 1174 (2004) (applying duty to investigate to harassment and retaliation) (citing *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001) ("The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified.")); *American Airlines, Inc. v. Superior Court*, 114 Cal. App. 4th 881 (2003).
4. *Northrop*, 103 Cal. App. 4th at 1031.
5. 524 U.S. 742 (1998).
6. 524 U.S. 775 (1998).
7. In California, the similar common law avoidable consequences doctrine is not a complete defense, but may limit damages under *State Dept. of Health Servs. v. Superior Court (McGinnis)*, 31 Cal. 4th 1026 (2003).
8. Barbara Lindemann & David D. Kadue, Sexual Harassment in Employment Law 182 (1999 Cumulative Supplement); *see also Hatley v. Hilton Hotels*, 308 F.3d 473 (5th Cir. 2002).
9. 17 Cal. 4th 93 (1998).
10. *See, e.g., Reeves v. Safeway Stores*, 121 Cal. App. 4th 95 (2004) (investigation should be "truly independent"). The EEOC's Guidance can be found at: http://www.eeoc.gov/policy/docs/harassment.html.
11. Ch. 16A (Cal. Continuing Educ. of the Bar (CEB) 2011).
12. Cal. Bus. & Prof. Code § 7522(e).
13. 30 Op. Atty. Gen. 175 (1957).
14. 11 Op. Atty. Gen. 177 (1948); *see* Lindsay E. Harris and Mark L. Tuft, *Attorneys Conducting Workplace Investigations: Avoiding Traps for the Unwary*, Cal. Labor & Employment L. Rev. at 3 (July, 2011).
15. Harris and Tuft, *supra* note 14 at 3.
16. A 2000 attempt to change the law to permit human resource consultants to conduct investigations in certain circumstances was vetoed by Gov. Gray Davis.
17. *See EEOC v. General Motors*, 826 F. Supp. 1122 (N.D. Ill. 1993) (company would investigate, but not if the employee filed a suit).
18. *See Mendoza v. Western Med. Ctr. of Santa Ana*, 222 Cal. App. 4th 1334 (2014).
19. *Id*. at 1344-45; *see also Nazir v. United Airlines*, 178 Cal. App. 4th 243 (2009).
20. *Mendoza*, 222 Cal. App. 4th at 1345 n.14.
21. *Id*. at 1345 n.4 (emphasis added).
22. *See, e.g., EEOC v. Total Sys. Servs.*, 221 F.3d 1171, 1176-77 (11th Cir. 2000).
23. *See Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985); *see also, e.g., Jennings v. Jones*, 587 F.3d 430, 443 (1st Cir. 2009) (upholding finding that witness lacked credibility because video contradicted witness's story).
24. This list draws from many sources, including statutes, case law, EEOC Guidance and scholarly work. *See, e.g.*, Cal. Evid. Code §§ 780, 785–91; *Singh v. Gonzales*, 439 F.3d 1100, 1108 (9th Cir. 2006); Max Mizner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 Cardozo L. Rev. 2557 (May 2008).
25. *See, e.g.*, Max Mizner, Detecting Lies Using Demeanor, Bias, and Context; *see also* James P. Timony, *Demeanor Credibility*, 49 Catholic. U. L. Rev. 903, n.45 (2000).
26. *See* Mizner at 2563.
27. Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar*, The American Pychologist, p. 913 (Sept. 1991).
28. *See, e.g.*, Cal. Evid. Code §§ 780, 785-89; Fed. R. Civ. P. 52(a); *Perry v. New Hampshire*, 132 S. Ct. 716 (2012).

29. *See, e.g.*, *Perminter v. Heckler*, 765 F.2d 870, 872 (9th Cir. 1985) (holding that an ALJ's negative credibility determination based on personal observation could not overcome objective evidence that disability existed).
30. *See, e.g.*, *Artiga Turcios v. INS*, 829 F.2d 720 (9th Cir. 1987) (finding inherent implausibility of witness account a valid reason for adverse credibility finding); *Gen. Teamsters Local No. 162 v. NLRB*, 782 F.2d 839, 842 (9th Cir. 1986).
31. *See, e.g.*, *Singh*, 439 F.3d at 1108 (overturning immigration judge's finding that political asylum applicant's account of torture by Indian police was not credible, where the judge based finding on personal conjecture and speculation about what procedures police in India would have followed in interrogation).
32. *Id.*
33. 358 NLRB No. 93 (2012).
34. 29 U.S.C. §§ 151 *et seq*. The NLRB created some exceptions to this: when confidentiality is necessary to protect witnesses; to avoid spoliation of evidence; to avoid fabrication of testimony; or to prevent a cover-up. Arguably, these circumstances exist in almost every investigation.
35. *See* 134 S. Ct. 2550 (2014); *Banner Health Sys. v. NLRB*, 2014 U.S. App. LEXIS 14882 (D.C. Cir. Aug. 1, 2014 No. 12-1359).
36. Keith Rohman, *Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*, 2009 Cardozo L. Rev. De Novo 96.
37. *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995); *Silva v. Lucky Stores*, 65 Cal. App. 4th 256 (1998).
38. *See, e.g.*, *Mendoza v. Western Med. Ctr. of Santa Ana*, 222 Cal. App. 4th 1334 (2014); *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243 (2009).
39. *See Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93 (2d Cir. 2010) (failure to interview those who were present for the incident or had knowledge of it); *Taybron v. City & Cnty. of San Francisco*, 341 F.3d 957 (9th Cir. 2003) (where the employer's EEO office failed to interview several of the employees and managers involved in the disputes in question).
40. Amy Oppenheimer and Craig Pratt, *Investigating Workplace Harassment* 73 (SHRM 2008).
41. *See EEOC v. California Psychiatric Transitions, Inc.*, 644 F. Supp. 2d 1249, 1284 (E.D. Cal. 2009).
42. *Id.*
43. After the parties' summary judgment motions were granted in part and denied in part, the case settled before trial. *See* 2009 WL 566710 (Oct. 21, 2009, No. 1:06-cv-01251-OWW-GSA).
44. *See, e.g.*, *Taylor v. City of Los Angeles Dept. of Water and Power*, 144 Cal. App. 4th 1216 (2006) (holding that Cal. Gov't Code § 12940(k) creates a separate cause of action for failing to prevent retaliation), *disapproved on other grounds by Jones v. Lodge at Torrey Pines P'ship*, 42 Cal. 4th 1158 (2008); *see also Reeves*, 121 Cal. App. 4th at 116-18 (finding that an investigation which "predetermined" the terminated employee's guilt without sufficient inquiry was evidence of retaliatory discharge).
45. *See, e.g.*, *Nazir v. United Airlines,* 178 Cal. App. 4th at 276 (2009) (stating, in race discrimination case, that the use of an investigator with "an axe to grind" against the terminated employee could be evidence of pretext).
46. *See California Psychiatric Transitions*, 644 F. Supp. 2d 1249 (E.D. Cal. 2009); *see also Bowles v. Osmose Util. Servs.*, 443 F.3d 671 (8th Cir. 2006) (finding support for punitive damages where employer first ignored complaints of racial harassment, then "investigated" by asking the supervisor whether the allegations were true and simply accepting his denials at face value).
47. *See, e.g.*, *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 621 (1989) (sexual harassment context).
48. *See* http://shq.lasdnews.net/Content/uoa/SHB/publications/PublicTrustPolicing.pdf.
49. *See* Description of the County Equity Oversight Panel at: http://bos.lacounty.gov/AboutUs/ExecutiveOfficeoftheBoard/CountyEquityOversightPanel.aspx.
50. *See, e.g.*, Consent Order, *United States of America v. Cracker Barrel Old Country Store, Inc.* (N.D. Ga. 2004, No. 4:04-CV-109-HLM).

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