



**EMPLOYERS AND LAWYERS,  
WORKING TOGETHER**

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## Workplace Investigations

Cedar Valley SHRM - Waterloo, IA

Presented by: Andy Tanick & Brian Moen

August 14, 2018

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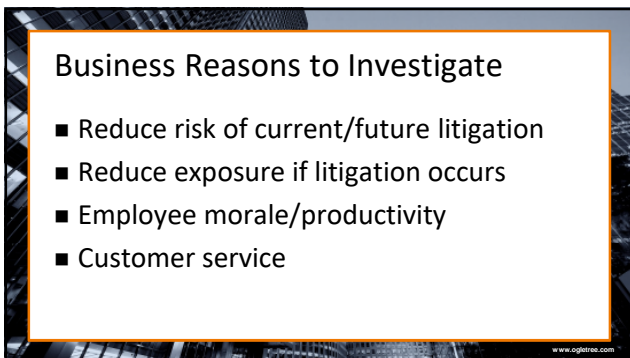
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### Business Reasons to Investigate

- Reduce risk of current/future litigation
- Reduce exposure if litigation occurs
- Employee morale/productivity
- Customer service

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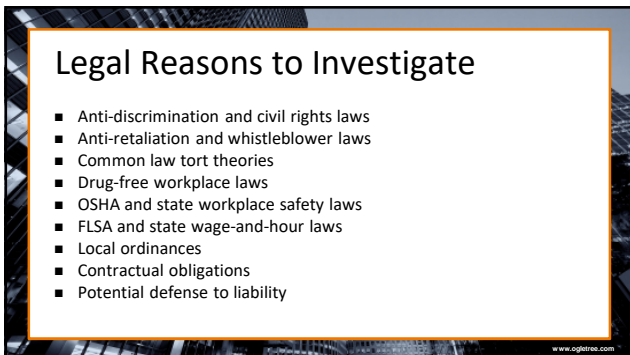
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### Legal Reasons to Investigate

- Anti-discrimination and civil rights laws
- Anti-retaliation and whistleblower laws
- Common law tort theories
- Drug-free workplace laws
- OSHA and state workplace safety laws
- FLSA and state wage-and-hour laws
- Local ordinances
- Contractual obligations
- Potential defense to liability

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### The Complaint

Companies often receive complaints in the following situations:

- At the employee's exit interview
- After a reorganization or other major change
- After receiving training (no good deed goes unpunished)
- New job or new supervisor
- Personal factors not associated with the workplace
- Performance reviews

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### The Pyramid of Bad Behavior™

Unlawful behavior

Violation of internal policy or procedure

Inappropriate, immature, unprofessional behavior or bad management style

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### Laying the Foundation

- Maintain culture that encourages reporting
- Assess intake procedures
- Take all complaints seriously
- Respond quickly
- Use common sense
- Is there a simple solution?

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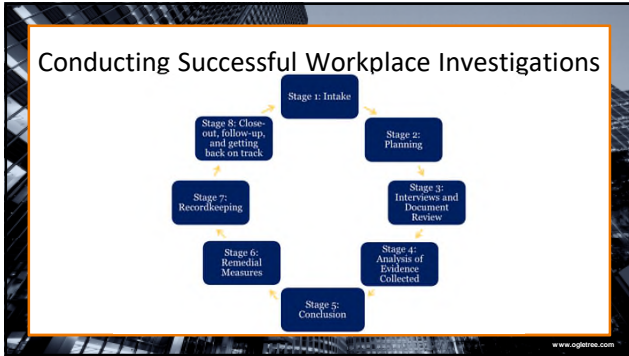
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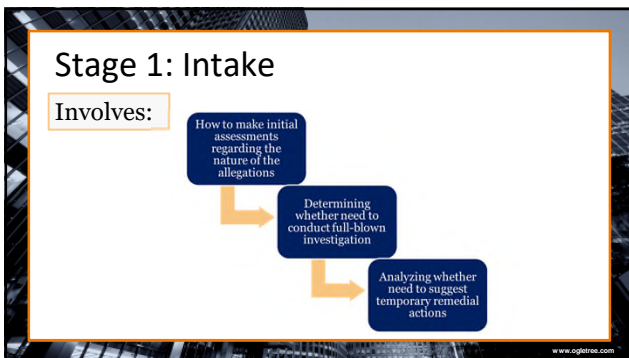
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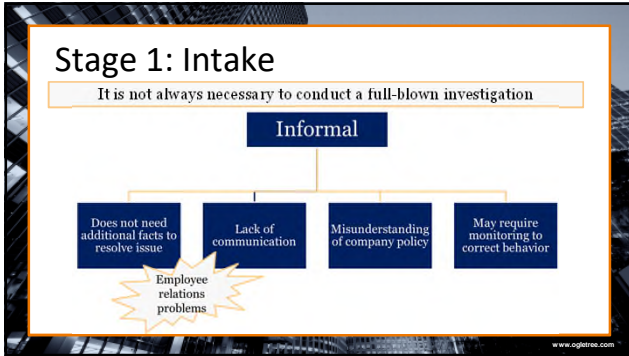
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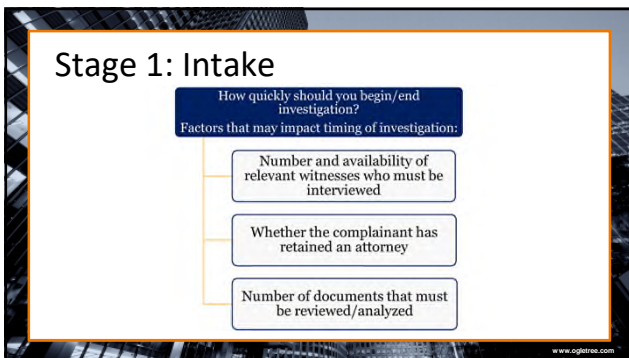
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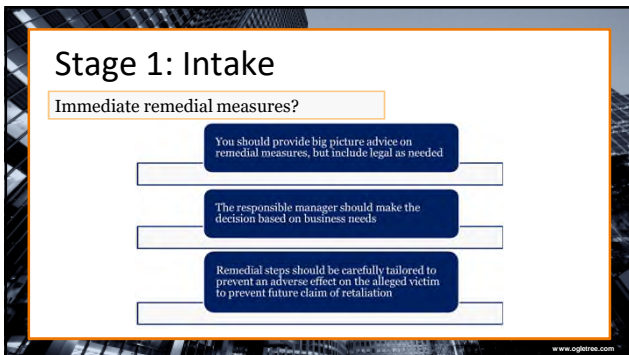
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### Stage 1: Investigator Qualities

- Ability to listen well
- Ability to be objective and not reach conclusions before all information is collected
- Ability to make witnesses feel more comfortable
- Sensitivity to the witnesses' discomfort
- Good analytical skills
- Well versed in company and legal policies
- Ability to anticipate future legal or business issues
- Writing skills (depending on type of investigation)
- Ability to testify persuasively if necessary, including past experience depending on allegations

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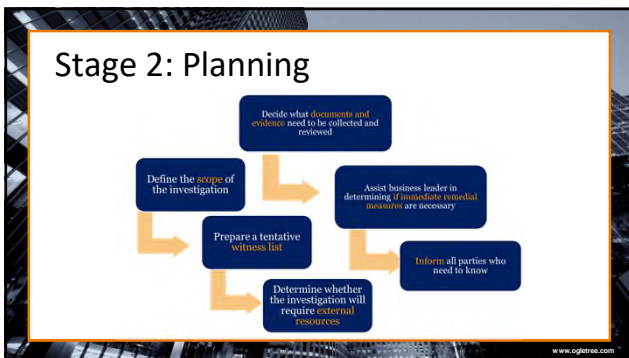
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### Stage 3: Interviews and Documents - Objectivity

Ways in which objectivity becomes an issue:

- Unconscious bias
- Ignoring complaints because you don't believe allegations at the outset
- Steering investigation in a particular direction because you know desired outcome
- Turning the investigation into a witch hunt

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Stage 3: Interviews and Documents - Initial Issues

Best practices for documenting the interview:

- Notes? Handwritten? Typed?
- Audio recording?

Don't lose the documentation

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Stage 3: Interviews and Documents – Interview Order and Number

Complainant, Obvious, Accused, Witnesses, Repeat

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Stage 3: Interviews and Documents - Beginning the Interviews

Starting Points

- Explain the investigation process
- Reiterate importance of honesty, completeness
- Confidentiality issues – yours and theirs
- Remind witness of retaliation prohibition
- Provide necessary information about the scope of your work

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### Stage 3: Interviews and Documents - Create Comfort

General tips for making employee feel comfortable:

- Ask background questions
- Don't promise anonymity
- Don't be rigid
- Okay to go off-topic within reason

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### Stage 3: Interviews and Documents - Techniques

Interview Techniques

- Twice through: general (no notes) specific (notes)
- Funnel method
- There is no "bad" information in an investigation
- Ask open-ended questions: invite a narrative

This is not a cross examination

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### Stage 3: Interviews and Documents - Questions

General tips for interview:

- Ask each witness questions that will establish how much knowledge they may have about allegations
- How much interaction they had with the main parties?
- Where is their work station in relation to the main parties?
- Do they work the same days/shifts?
- These questions will give you an idea of the witness's style and demeanor

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### Stage 3: Interviews and Documents - Questions

General tips for interview:

- Use techniques to refresh a witness's recollection
  - Important for obtaining specifics about dates, times
  - Use calendars, important marker points/events
- Use reflective listening
  - To make sure you accurately record the information provided to you by each witness, repeat back, in your own words, the important point(s) from each interview

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### Stage 3: Interviews and Documents - Notes

When taking notes during an interview:

- Pre-populate introduction, conclusion, and known questions
- Avoid interpretations, but document non-verbals, if in-person
- Write down direct quotes
- Put events in order that makes most sense - chronological or topical
- Write notes to yourself regarding follow-up questions

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### Stage 3: Interviews and Documents - Additional Tips

- "Tell me everything you can remember"
- Ask for clarification - particularly if there are inconsistencies
- Ask for a drawing, if in-person
- Go over notes and summarize before ending interview

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**Stage 3: Interviews and Documents - Complainant Interview**

Interview with the complainant: confidentiality

In addition to general information regarding limits of confidentiality, complainant must understand that in order to conduct a fair investigation, the accused must be informed of the allegations against him/her

The slide features a white background with a black border. At the top, the title 'Stage 3: Interviews and Documents - Complainant Interview' is displayed in bold black text. Below the title, a yellow-bordered box contains the text 'Interview with the complainant: confidentiality'. Underneath this box, a blue rounded rectangle contains the text 'In addition to general information regarding limits of confidentiality, complainant must understand that in order to conduct a fair investigation, the accused must be informed of the allegations against him/her'. A small 'www.ogletree.com' watermark is visible in the bottom right corner.

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**Stage 3: Interviews and Documents - Complainant Interview**

Interview with the complainant: opportunity to follow up

Ask them for documents and names of witnesses, but let them know you will use your judgment in deciding interviewees

Let them know they can contact you if they have other information or find additional documents

Date and take notes of other follow-up questions

The slide features a white background with a black border. At the top, the title 'Stage 3: Interviews and Documents - Complainant Interview' is displayed in bold black text. Below the title, a yellow-bordered box contains the text 'Interview with the complainant: opportunity to follow up'. Underneath this box, a blue rounded rectangle contains the text 'Ask them for documents and names of witnesses, but let them know you will use your judgment in deciding interviewees'. Below this, two light gray rounded rectangles are connected by blue curved arrows. The left box contains the text 'Let them know they can contact you if they have other information or find additional documents'. The right box contains the text 'Date and take notes of other follow-up questions'. A small 'www.ogletree.com' watermark is visible in the bottom right corner.

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**Stage 3: Interviews and Documents - Complainant Interview**

Interview with the complainant: retaliation

Remind them that the company does not tolerate any retaliation

Inform them that they should immediately report any retaliatory conduct

The slide features a white background with a black border. At the top, the title 'Stage 3: Interviews and Documents - Complainant Interview' is displayed in bold black text. Below the title, a yellow-bordered box contains the text 'Interview with the complainant: retaliation'. Underneath this box, two light gray rounded rectangles are connected by blue curved arrows. The left box contains the text 'Remind them that the company does not tolerate any retaliation'. The right box contains the text 'Inform them that they should immediately report any retaliatory conduct'. A small 'www.ogletree.com' watermark is visible in the bottom right corner.

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**Stage 3: Interviews and Documents - Complainant Interview**

**Desired outcome**

Investigators ask the complainant how they want to see the situation resolved

- Complainant might say he/she wants an apology or wants the accused terminated
- This gives you an idea of the complainant's motives
- No guarantee that their desired outcome will be the outcome you choose

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**Stage 3: Interviews and Documents - Complainant Interview**

**Additional tips for creating comfort**

Do not react negatively or indicate you are judging, disbelieving, which may be less of an issue in a telephone interview

Close with reminders: retaliation, might need to follow up, assurances that s/he will be kept apprised of process/timing – see interview template

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**Stage 3: Interviews and Documents - Accused Interview**

**Opportunity to present their side of the story**

Provide accused with enough details about the allegations to allow them to present their side of the story and defend themselves

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**Stage 3: Interviews and Documents**  
**- Accused Interview**

**Do not accuse**

- Do not ask questions/ make remarks about your personal beliefs and feelings
- Do not make judgments about actions/behavior
- Explain that they should tell you everything they know

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**Stage 3: Interviews and Documents**  
**- Accused Interview**

**Full cooperation**

- Company expects him/her to cooperate
- He/she must be honest and open
- Make sure he/she understands company policies and procedures
- Review any training received covering relevant policies

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**Stage 3: Interviews and Documents**  
**- Accused Interview**

**Complainant's motive**

If accused denies some or all of the allegations:

- Ask what they believe is motivating the complainant to say these things
- Ask whether something they said/ did may have been misinterpreted/ misconstrued by the complainant

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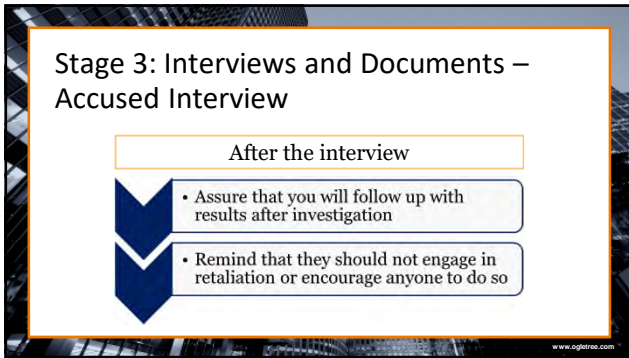
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### Stage 3: Interviews and Documents – Accused Interview

After the interview

- Assure that you will follow up with results after investigation
- Remind that they should not engage in retaliation or encourage anyone to do so



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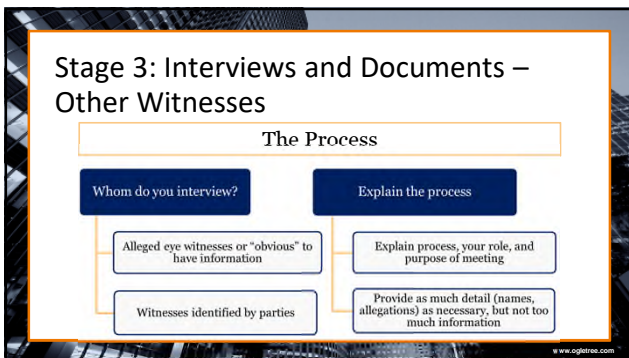
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### Stage 3: Interviews and Documents – Other Witnesses

The Process

- Whom do you interview?
  - Alleged eye witnesses or "obvious" to have information
  - Witnesses identified by parties
- Explain the process
  - Explain process, your role, and purpose of meeting
  - Provide as much detail (names, allegations) as necessary, but not too much information



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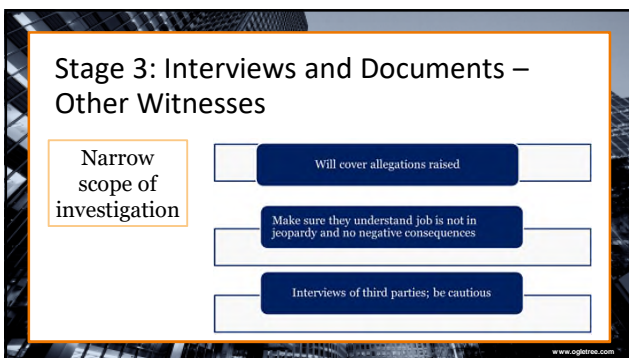
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### Stage 3: Interviews and Documents – Other Witnesses

Narrow scope of investigation

- Will cover allegations raised
- Make sure they understand job is not in jeopardy and no negative consequences
- Interviews of third parties; be cautious



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### Stage 3: Interviews and Documents – Other Witnesses

First-hand knowledge

Consider limiting questions to those involving witnesses' first hand knowledge (rather than rumor)

Talk to witnesses who may have seen the complainant immediately after the alleged incident or to whom reported the bad acts

They may be helpful in your assessment of credibility

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### Stage 3: Interviews and Documents – Special Witnesses

Enlisting help from IT, security, contractors, vendors, clients, former employees

Unique considerations

Briefly explain that an investigation is being conducted

Provide only necessary information

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### Stage 3: Interviews and Documents - Additional Work

Visiting the workplace/site of incident when key to the investigation

Enlist local support for on-site visit if important

Site visit may be critical to determine whether the various versions of the stories you hear are credible (if that is an issue in the investigation)

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### Stage 4: Analysis and Conclusions

Common mistakes:

- Failure to reach a conclusion
- Reaching a legal conclusion

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### Stage 4: Analysis and Conclusions

- Make determinations as to credibility and motive
- Focus on objective evidence

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### Stage 4: Analysis

- Is the story inherently believable?
- What did others say about the witnesses?
- Is there corroboration to the story?
- Are there contradictions to the story?
- Has the witness lied in other areas of the interview?
- Does the witness have a history of this type of behavior?
- What does the documentary evidence say?

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### Stage 4: Analysis: Motive

- Does this person have a reason or incentive to lie?
- Do the individuals involved have some type of history?
- Look at timing of the complaint and the level of cooperation from the complainant and the accused

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### Stage 4: Be and Stay Objective

Even if the employee had made prior complaints

Do not form opinions before the investigation is complete

Do not place judgment on personal feelings or prior dealings

Never make assumptions unless you have facts to back you up

Remain open and flexible until the end

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### Stage 5: Report the Findings

- Who is your audience?
- Be precise, but provide enough detail to support the conclusion reached

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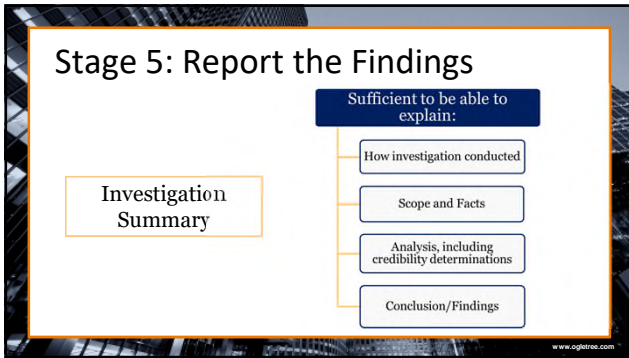
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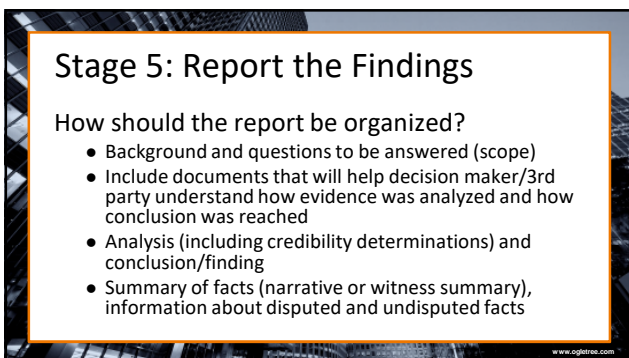
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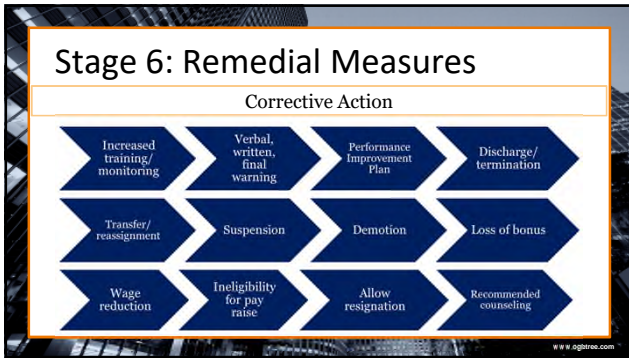
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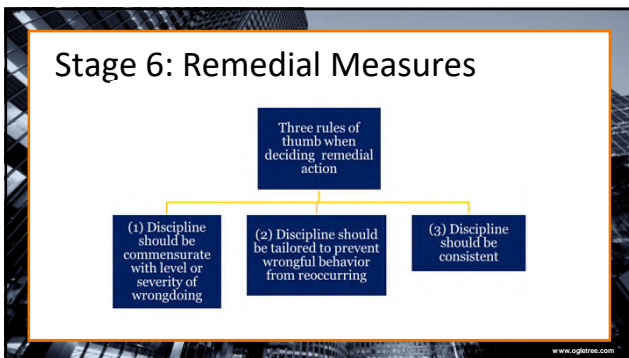
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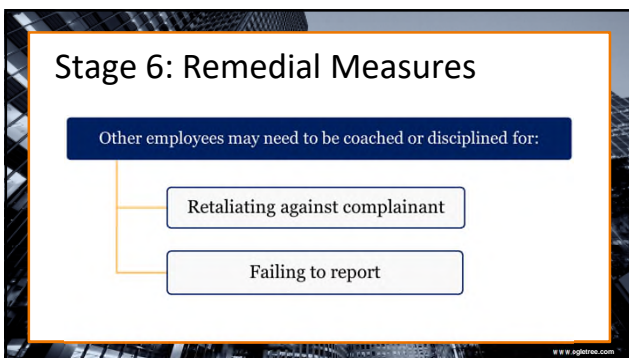
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### Stage 6: Remedial Measures

Compensating the victim

- Workplace mediation
- Setting fair performance expectations and providing resources
- Review personnel file to determine whether any documents related to wrongdoing need to be reassessed or removed
- Reinstatement of position, pay, benefits
- Apology from wrongdoer
- Restore any lost time (leave, vacation, sick time)

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### Stage 7: Recordkeeping

- Keep all documents relevant to an investigation in a separate confidential file
- File should include intake documents, written complaints, notes, emails, letters, texts, telephone records, documents provided by witnesses
- These documents should not go into the complainant's personnel files; only disciplinary documents go into personnel file
- Files may be discoverable if the matter should proceed to charge or litigation

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### Stage 8: Close-out

Most common mistakes:

- Failure to provide information about the investigation to complainant and accused
- Failure to monitor workplace, provide resources to get things back to normal

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**Stage 8: Close-out, Follow-up, and Getting Back on Track**

**Follow-up:**

- Monitor the situation
- Immediate and periodic check-ins
- Particularly key if reassignment

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**Stage 8: Close-out, Follow-up, and Getting Back on Track**

- Document all your meetings, but keep it simple
- If you find retaliation, correct and discipline immediately
- Remember that retaliation can be overt or subtle
- Remember retaliation possible even after employee leaves the company

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**Stage 8: Close-out, Follow-up, and Getting Back on Track**

**Examples of retaliation:**

- A supervisor giving the complainant different or worse assignments
- Co-workers who shun the complainant

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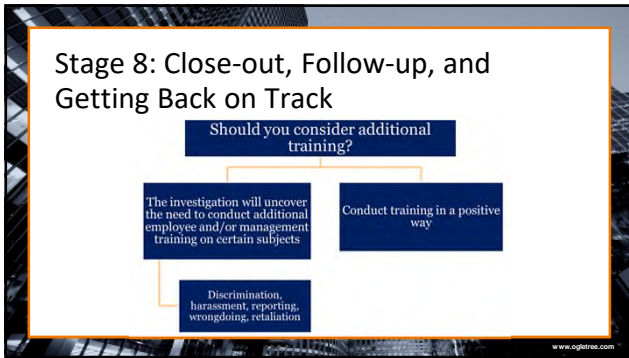
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- ### 20 Investigation Rules
1. Develop effective complaint mechanisms
  2. Take all complaints seriously
  3. Take temporary actions if needed
  4. Decide on investigator
  5. Plan investigation order, witnesses, questions
  6. Ask questions twice –general, specific
  7. Utilize funnel technique
  8. Remain objective or find someone else
  9. Avoid jumping to a conclusion too soon
  10. Consistent introduction and conclusion

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- ### 20 Investigations Rules (cont.)
11. Speak to all witnesses identified
  12. Consider interviewing outsiders
  13. Have and remind witnesses of retaliation policy
  14. Take notes
  15. Make a decision/recommendation
  16. Tell key people of the result
  17. Document conclusion
  18. Avoid legal conclusions – “harassment”
  19. Follow-up after implementation, especially with the victim
  20. Look for process improvement opportunities

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**FAQ's**

1. What if someone refuses to participate?
2. How can we avoid using conclusory terms like "harassment" and "discrimination?"
3. How do we address a witness who is being untruthful?
4. What if someone admits they were not truthful?
5. What if a witness (or the accused) wants an attorney present?
6. When do we suspend an employee as part of the investigation? Paid or unpaid?
7. Do we like to see witnesses, including the complainant, prepare their own statement? Risks?
8. Should you accept documents provided by a witness? What if the documents are contradictory to your findings?
9. Does it matter if we use typed or handwritten notes?

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**Thank You!**

<b>Andy Tanick</b> Shareholder Ogletree Deakins Phone: (612) 336-6871 <a href="mailto:andrew.tanick@ogletree.com">andrew.tanick@ogletree.com</a>	<b>Brian Moen</b> Law Clerk Ogletree Deakins Phone: (612) 336-6850 <a href="mailto:brian.moen@ogletree.com">brian.moen@ogletree.com</a>
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