

## Employer Tips For Investigating Racial Bias Complaints

By **Daphne Bishop** (September 17, 2020, 5:37 PM EDT)

The unrest and anger following the police killing of George Floyd in Minnesota and shooting of Jacob Blake in Wisconsin has spilled over into workplaces across the nation. Increased awareness of societal racial injustices has led to increased numbers of employees voicing concerns about workplace inequities. Now, more than ever, it is crucial to take these concerns seriously and investigate them properly.

Some of the challenges and trickiest issues that arise when investigating concerns about racial discrimination and racial harassment in today's workplace are discussed below.



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### Building Trust With Employees and Other Witnesses

Without trust, employees will not feel comfortable enough to bring their concerns to their employers. The first step of building that trust with employees is ensuring that you have clear anti-harassment and anti-discrimination policies.

These policies must be in writing and accessible to all employees. Employees at every level of employment should be trained and retrained on these policies at regular intervals. It is essential that these policies set forth complaint-handling procedures that give employees multiple avenues for lodging complaints.

Nowadays, it is not enough to simply say you must report your complaint to your supervisor or even to human resources. Employees are often too afraid to bring their concerns to their supervisors or HR, especially if they are complaining about their supervisors or if they do not have a comfort level with their HR representatives, and sometimes employees want to submit their complaints anonymously. As such, it is advisable to give employees a hotline, suggestion box or similar online method to submit concerns.

Once you have received a complaint that warrants investigation, your selection of an investigator can greatly impact the level of trust with employees and other witnesses. When deciding who is going to investigate a race-related complaint, race matters.

For instance, a Black person making a race discrimination complaint might feel more comfortable

sharing their concerns with someone who looks like them — particularly if senior management and HR are predominantly white. Moreover, having an investigation conducted by someone of the same racial background may help to lend credibility to the investigation and help the complaining employee to feel that their concerns were taken seriously even if their allegations are not ultimately substantiated.

However, the race of the investigator should not be the only consideration. Whomever you select to investigate a race-related complaint must be trained and experienced in conducting neutral workplace investigations.

Another factor to consider when selecting an investigator for a race-related complaint is whether to use an internal or external investigator. More and more often, employees of color who feel they have been wronged say they don't trust HR because HR is perceived as supporting the status quo or they think HR is biased in favor of company management. Whether these characterizations are fair or not, using an outside investigator helps to alleviate these concerns, build trust between the investigator and witness, and lend overall credibility to the investigation.

Once an investigator has been selected, it is important that they build trust every step of the way with witnesses. Whether investigators realize it or not, they are being evaluated by witnesses from their first point of contact with a witness, and how they comport themselves can make or break an investigation. If there is no rapport between an investigator and witness, it is unlikely the investigator will get the type of detailed information needed to conduct a thorough investigation.

Investigators should be friendly, approachable and professional and make efforts to accommodate witnesses' schedules. Investigators should spend the first few minutes of any witness interview explaining the investigation process to the witness, including their role as a neutral investigator, how confidential information will be handled, and the prohibition on retaliation against employees for participating in an investigation. Investigators should invite witnesses to ask any questions they might have about the process, and be prepared to answer questions about their credentials, experience and history of substantiating or not substantiating complaints.

Finally, investigators who investigate race-related complaints should be sensitive to cultural shifts regarding race. Employees are increasingly expecting their employers to be "woke" — which means having an awareness of social and political issues, especially racial and social justice.

One of the easiest ways for an investigator to lose credibility with some witnesses is to use outdated language or concepts. There are a plethora of online resources with which investigators should familiarize themselves to help avoid missteps.

On the other hand, investigators should be sensitive to the fact that not everyone is familiar and comfortable with the changing cultural landscape, and some employees may respond to these cultural changes with fear and defensiveness. To that end, investigators should be adept at having difficult conversations and able to approach these topics with an appropriate level of empathy and curiosity.

### **Investigating Microaggressions**

As the workforce becomes more aware of racial issues, employers should expect employees to raise complaints about issues they may not have previously complained about. This increased awareness will mean that allies, often white co-workers, will report conduct they believe is discriminatory or harassing directed at their colleagues of color.

These complaints do not typically involve egregious acts of overt racial discrimination or harassment. Rather, these complaints are increasingly about minor acts that may not have seemed like such a big deal a few years ago, and sometimes they do not even appear to be related to race. However, in these changing times, it is very important to take these matters very seriously.

According to Ijeoma Oluo, author of "So You Want to Talk About Race," microaggressions are "small daily insults and indignities perpetrated against marginalized or oppressed people because of their affiliation with that marginalized or oppressed group." Microaggressions can be unspoken, and are often perpetrated without awareness of the perpetrator. Indeed, the perpetrator does not even have to have acted with bad or malicious intent.

One of the worst things that employers can do is to ignore microaggressions. As a basic matter, microaggressions can rise to the level of unlawful discrimination or harassment. Furthermore, microaggressions are bad for employee morale and studies have even shown an association between microaggressions and the mental and physical symptoms of depression.

Investigators should not try to guess or make assumptions about whether specific actions were taken or comments were made due to racial bias. Rather, allegations of microaggressions should be methodically and thoroughly investigated like every other complaint of race discrimination or harassment.

Comparative evidence is critical in these investigations: Are there similarly situated employees of a different race than the complaining party? How are they treated? Demographic data can also be important in these investigations: What is the racial composition of the workforce? Does it appear more or less diverse in certain departments? These are the types of questions that investigators should ask to ensure thorough analysis of alleged microaggressions.

### **Assessing Overall Organizational Culture Regarding Race-Related Issues**

Finally, it might be necessary to assess the overall racial culture at the workplace, for instance, if you receive an anonymous complaint alleging race discrimination or harassment. In those cases, it is advisable to conduct a climate survey of current and former employees.

The investigator's methodology for selecting witnesses to interview should be based on the particular facts of the complaint and the workplace. For example, if the complaint arose from a specific department, the investigator may want to review a sample of current and former employees from that department.

The size of the sample also depends on several factors including the nature and severity of the complaint, as well as business considerations. While a climate assessment may be a costly endeavor, it may be helpful in improving employee morale, staving off negative publicity, and identifying areas for positive change.

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