



When HR Gets It Wrong: Avoiding a Bungled Investigation

By Dana Wilkie | Jul 18, 2017

This is the second in a four-part series of articles—"When HR Gets It Wrong"—that explores the challenges HR faces when confronted with allegations of misconduct, inequity and other problems at an organization.

Imagine you are the chief human resources officer at a large university. You've heard the rumblings for months: Faculty members are upset that there aren't more instructors of color or more diverse curricula, so they're talking about a walkout. The black members of your football team are talking about boycotting games. Minority students are discussing staging high-profile protests.

Soon, you fear, this is going to hit the news, and your university stands a good chance of losing talented faculty members, top job applicants, and its good reputation.

This is not unlike what happened in the University of Missouri System in 2015. Following complaints that they failed to address racial discrimination against students and to hire more minority instructors, System President Tim Wolfe and Chancellor R. Bowen Loftin resigned.

The HR professional whose organization is confronted with charges of discrimination or a lack of diversity can, depending on the caliber of his leaders, find himself in a tough spot: If he does his job ethically—which means conducting an impartial investigation into the allegations—he risks running afoul of higher-ups with whom he has probably worked closely and with whom he may be friendly. These are people who, because of their position, might make life uncomfortable for him.

What can he do? What *should* he do?

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The Internal Investigation

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ost of the experts interviewed for this article agreed that, ideally, investigations involving alleged discrimination, a lack of diversity or harassment at an organization should be handled internally—if it is likely that the investigators conducting the probe can do so without bias.

"It's important for HR professionals to evaluate their own ability to objectively investigate the matter," said Karen Kruse, an employment law attorney in Seattle. "Even if the HR professional is confident that she can objectively do so, she should consider whether personally investigating the matter is likely to undermine the investigation's credibility with the accuser or with third parties who may be called upon to review the matter, such as an anti-discrimination agency or a jury. If objectivity and credibility are at risk, the HR professional should share this concern with management to seek ways to mitigate or eliminate the issue."

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And instead of reacting to conflict-of-interest concerns after someone raises them, employers should think through this potential issue before complaints bubble up.

Key questions to consider, she said, include:

- What can be done to make the fact-gathering part of the investigation as fair and bias-free as possible? For instance, is there an alternative investigator with fewer ties to the accused? Could the employer form an investigation team that includes people from outside HR?
- Should the employer rely on different people for the fact-finding part of the investigation, the analysis of the results and any remedial action? This can be particularly important in cases where HR might be perceived as being biased in favor of the accused.
- Should precautions be taken so that post-investigation, the accused will not retaliate against or show favoritism to the HR investigator?
- If an accused executive is the CEO or another member of the C-suite, should the investigation involve the board of directors or a board committee?

"In higher education, as in the University of Missouri System, [investigators should include] the top academic and administrative professionals as well as trustees. HR cannot address these issues effectively without that support," said Stephen Paskoff, president and CEO of ELI, an Atlanta-based company that helps organizations address bad behavior in the workplace.

The university system's chief spokesman, Christian Basi, said that while academic departments often have their own channels for recruiting instructors, those departments and Mizzou's HR staff "regularly collaborate when hiring faculty." HR, he said, helps to write job descriptions, to set salary requirements, and to filter faculty applications before presenting them to deans and department heads, and recruiters in HR reach out to passive faculty candidates in some instances. In addition, anyone responsible for hiring, including those in HR, must go through regular diversity and inclusion training to ensure "the hiring and retention of diverse faculty and staff," he said.

"HR and all of the campus has consistently been advocating that we needed more diverse faculty members," he said. "I think we have struggled over the years to attract diverse candidates ... and have always tried to figure out why. That's not for lack of trying. We have devoted hundreds of thousands of dollars to recruiting faculty members, specifically those that bring diversity to their particular field. Diversity obviously means a lot of different things; it's not just about race."

After the 2015 resignations, Basi said, the university conducted an audit of all diversity and inclusion practices, which led to a \$1 million investment in recruiting diverse postdoctoral faculty.

As early as a year before the resignations, he said, administrators held three forums where students and faculty could voice concerns about lack of diversity on campus, among other things.

And about two months before the resignations, Basi said, the university created a Division of Diversity, Inclusion and Equity to address concerns about a lack of diversity among staff and faculty. Most of the people for this new division were hired after the 2015 resignations, he said.

Outside Help in Investigations

Sometimes an internal probe may not be the wisest course: HR staff members may feel they lack objectivity because they have close ties to higher-ups who might be investigated; they may feel intimidated because the person whose actions need to be investigated hired people in HR or writes HR's performance reviews; they may fear that employees may not respect the results of the investigation because they perceive collusion between HR and upper management; or they may feel out of their depth—that they lack the investigative skills and experience to conduct a thorough probe.

In his employment law practice, Glen Kraemer has conducted outside investigations of several CEOs and other C-suite leaders regarding sexual harassment concerns.

"In each case, the [chief human resources officer] readily understood that if she conducted the investigation, any finding that was not squarely in line with the complainant's allegations would immediately be suspect due to perceived cronyism," said Kraemer, a partner with Hirschfeld Kraemer in Santa Monica, Calif. "Regardless of whether [HR feels] completely confident in personally conducting the investigation, the risks associated with the findings being deemed by the workforce and the public as less than credible were too great."

Fran Sepler is president of Minneapolis-based Sepler & Associates. She has a contract with the federal government to design workplace training to help prevent uncivil, rude, abusive, discriminatory or harassing behavior.

In her training on workplace investigations, she uses a formula to help employers calculate if it's better to conduct a probe internally or use outside help. The formula weighs several factors: the rank of the accused, the complexity of the complaint, the nature of the alleged misconduct and the experience level of the internal person who would be the investigator.

"The higher the rank and complexity, the more severe the behavior, and the less experienced the investigator, the more points get awarded" in this formula, Sepler said. "The higher the points, the more you need an outside investigator."

Uber Engineer's Claims Led to Outside Investigation

The scandal-plagued ride-hailing company Uber did seek outside help following the publication of a blog post in February by former Uber engineer Susan Fowler. In her blog, Fowler made allegations of discrimination, sexism and retaliation at the Uber office where she worked in the San Francisco Bay Area. Fowler, who now works for technology company Stripe, wrote that her manager propositioned her for sex her very first day at Uber, that HR managers told her they couldn't do much because the offender was a top performer, and that HR ignored her complaints when her previously stellar performance review was doctored with negative remarks in apparent retaliation after she went to HR.

The allegations rocked Silicon Valley and convinced Uber CEO Travis Kalanick to launch an investigation with the assistance of Uber board member Arianna Huffington and former U.S. Attorney General Eric Holder, who is not employed by the company. Uber fired more than 20 employees (<https://www.nytimes.com/2017/06/06/technology/uber-fired.html>) after the investigation and Kalanick resigned as CEO under pressure from major shareholders, though he remains on the company's board of directors.

Uber's media relations office did not reply to a request for a comment or an interview.

"Uber has been an example of what not to do in many ways, but bringing in an outside attorney to investigate was the right decision," said Alisa Shorago, an attorney and owner of San Diego-based Shorago Training Services, which provides anti-harassment training. "Ideally, the outside investigator should be someone whose report will carry weight with senior management or the board, which often means using an outside attorney or law firm. Using an external investigator removes not only actual conflict but the appearance of conflict."

Pushback from Higher-Ups

Whether a probe is internal or external, investigators should be prepared for higher-ups who push back: Perhaps they aren't forthcoming with documents or other evidence, maybe they make themselves unavailable for interviews, perhaps they are dismissive of the allegations or they may even suggest that their rank excuses them from partaking in the investigation.

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"Some leaders feel like the rules don't apply to them," Shorago said. "It always surprises me that investors pour their money into companies where the CEO has a reputation for having this 'above it all' attitude or for being highly abrasive and disrespectful. That kind of behavior just won't cut it anymore."

Some ways for HR to deal with pushback, experts suggest, are to:

- Invoke cautionary tales—such as what happened at Uber—and explain that the company can pay now for an investigation or it can pay much more later in reputational damage and lawsuits. Explain the process of litigation, discovery and depositions under penalty of perjury.
- Find the most persuadable senior leader and try to make him or her an ally in the investigation. That may be a senior attorney, for instance. "This will be a complex situation, but the key is for the issue to be presented in the context of protecting the institution's credibility and values," Paskoff said. Said Kraemer: "In general, employment law attorneys understand their fiduciary obligation is to protect the organization, not an individual leader."
- Consider going to the Equal Employment Opportunity Commission (EEOC) or to a state agency with jurisdiction over workplace misconduct, anonymously if necessary, if the allegations appear to be actionable (i.e., an employee has grounds for a lawsuit). This step may need to be taken if going over the heads of senior leaders—such as to a board of directors—doesn't prove fruitful. It "may seem like a pretty drastic option from HR's perspective, but it's there," Shorago said.

Last Recourses

Ramona Paetzold, a management professor at Texas A&M University's Mays Business School, said an HR professional who feels helpless to resolve a claim should inform the accuser of what has happened with the investigation and support that person.

In instances that call for it, she said, it's the HR professional's job to inform the accuser that she or he can file charges with the EEOC. If no resolution is determined to be possible, she said, the EEOC may issue the accuser a "right to sue" letter. After that, she said, the HR professional would be a key person providing evidence and testimony at a trial, if one occurs.

Despite their best efforts, HR professionals who conduct investigations may not be able to persuade leaders to cooperate or may find their efforts otherwise thwarted. In such cases, said Kraemer, an HR professional should "do the right thing and must answer to his or her conscience and ethical responsibilities."

"Such an organization would not be a place of long-term employment for competent personnel professionals," he also suggested.

Tomorrow: The third (www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/HR-Gets-it-Wrong-2-.aspx) in a four-part series of articles—"When HR Gets It Wrong"—explores why training to prevent workplace misconduct, inequity and other problems doesn't always work, and what types of training can help. See the first article in the series here (www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/HR-Gets-it-Wrong-1.aspx).

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