

# CONDUCTING EFFECTIVE WORKPLACE INVESTIGATIONS

*By Sarah O. Wang, Esq.*

PRESENTATION FOR THE NINTH ANNUAL  
HAWAII MUNICIPAL LAW CONFERENCE  
AUGUST 24, 2016

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Disclaimer

These materials are intended to provide general guidelines for conducting investigations. The materials are not intended to address specific situations and they do not constitute legal advice.



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Seven Tests of Just Cause

- Notice of rule / consequences
- Reasonable rule or order
- Investigate prior to discipline
- Fair investigation
- Substantial evidence of guilt
- Equal treatment
- Penalty fit the crime? (How serious? Mitigating factors?)



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

### General Principles

- **Purpose:** Find out what really happened, NOT get a confession
- **Question (with an open mind), don't interrogate / don't assume**
- **Prompt investigation**
- **Enforce procedural requirements?**
- **Select suitable investigator / team**

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

### Selecting an Investigator

Try to select someone who is ...

- **Neutral and appears neutral**
- **Trained**
- **Careful, organized, detail-oriented**
- **Calm, non-judgmental, thoughtful and logical**
- **Familiar with the subject matter**
- **Available**
- **A good witness (e.g., articulate, self-confident)**
- **Legal counsel?**

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---


---

---

---

### General Principles (cont'd)

- **Know the rules – substantive and procedural (including CBA if applicable)**
- **Confidentiality with a caveat**
  - You can't provide absolute confidentiality
- **Be sensitive to feelings / concerns**
- **Thorough yet on-point**
- **Plan...but plan to be flexible**



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## How Formal an Investigation?

- How serious -- allegations / incident?
- Potential legal (not just policy) violation?
- Is legal action likely/already instituted?
  - Letter from attorney
  - Administrative charge
  - Union grievance
- Insurer put on notice?
- Disputed issues?

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Besides Interviews...

- Set up a chronology
- Site visit / assess the scene
- Video footage available?
- Take photographs?
- Preservation issues



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Besides Interviews...

- Review relevant documents
  - Provide background
  - May be more accurate
  - What are some examples?
    - Acknowledgments
    - Time records
    - Social media, text messages, e-mails
    - Review prior discipline / accusations / complaints? If so, when?
  - Request documents from witnesses



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Interviewing: Preliminary Steps

- **Understand your role**
  - Identify applicable policies
  - Find the facts
  - Find policy violations?
  - Recommend a course of action?
- **Typically someone else makes the decisions, based on the investigative findings**



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Interviewing: Preliminary Steps

- **What are you investigating?**
  - Frame the issue(s)
  - What if new issues arise?
- **Who should be interviewed?**
  - Typical examples?
  - Hint: Focus on issue(s) being investigated
- **In what order?**



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Interviewing: Preliminary Steps

- **Review statements (if any) and identify known areas to cover with witnesses**
- **Re-interviews are OK**
- **Revise preliminary investigation plan as necessary**



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Interview Disclosures

- **Key preliminary points**
  - Purpose of interview, relevant policies
  - Union representation
  - Expect truthful information
  - Confidentiality instruction
  - No retaliation
  - Possibility of discipline?
  - Participation is voluntary?
- **Have witness sign (what if witness refuses?)**

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

---

---

## Interview Techniques

- **Focus on FACTS / actual knowledge**
  - “You can’t trust her”
  - “She told me she finished the assignment, but then I overheard her ask a co-worker to help her complete it”
  - “He is always rude”
  - “All three times I said ‘hi’ to him last week, he did not respond other than to grunt and he did not even look at me”
  - “I heard the commotion”
  - “I heard about the commotion”
  - “Do you know...” “Yes.” Really?

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

---

---

## Interview Techniques (cont’d)

- **Ask follow-up questions to get to the facts**
  - “She used a bad word”
  - “He was really intimidating”
  - “I could tell John was mad at Wayne, but I didn’t think he’d call him out like that”
  - “She stole the file”
  - “Everyone knows he did it, that’s just how he is”

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

---

---

### Interview Techniques (cont'd)

- Have an outline, not a “script”
- Keep information organized (e.g., chronological blocks of time?)
- Ask one question at a time
- Broad questions followed by specific
- Follow up on statements
- Save hard questions for the end, but ask them

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

### Interview Techniques (cont'd)

- Ask for other sources of information, including witnesses
- Confirm your understanding
- Confirm witness has nothing to add
- Contact number if new information
- Maintain neutrality

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

### Interview Techniques (cont'd)

- Do not share too much information about the investigation
  - “Are you going to interview Keoni?”
  - “When will the investigation be finished?”
  - “Don’t you think Malia should be fired?”
  - “What’s going to happen to Malia?”
  - “How does it look for me so far?”

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Special Issues: Complainant / Alleged Victim

- Confidentiality -- particular concern?
- Comfortable with investigator?
- Details of each alleged incident
- Timing of complaint
- Interactions with accused
- Desired outcome (no promises)
- Able to work with accused?



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Special Issues: Accused

- Union employee?
  - Right to representation – by whom?
  - Additional rights per CBA?
  - Role of representative; handling disruptive representative
  - Beware of “new” accused
- Non-union employee
  - Current law: no representative



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Special Issues: Accused (cont'd)

- Awareness of policy/rule
- Response to EACH allegation
  - Don't necessarily disclose WHO
- Ask for alibis, corroboration, motive for false accusation
- Who should be interviewed?
  - Have to interview everyone?
- What documents to review?
- Provide final opportunity to respond?

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Documenting the Interview

- Plan method ahead
- Team interview – 1 note taker
- Tape record?
- “Verbatim” vs. rewritten
- When to prepare the documentation (now vs. later)



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Documenting the Interview (cont'd)

- Separate document for each interview
- Note the date, time, place, who was present
- Purpose:
  - What was said by witness
  - What happened during interview (e.g., union rep instructed not to answer)
  - Not your impressions, conclusions, etc.

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Documenting the Interview (cont'd)

- Witness should review and make corrections
- Witness should sign
- Changes may impact credibility (consider notifying witness at outset of interview)



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---



## Credibility Assessments

- **Is there a basis to conclude the witness is credible (believable) or not credible?**
  - Sometimes there is
  - Not always
  - Credibility can break a “tie”
- **Not “character” assessment**
  - Decisions must be based on evidence of current incident, not “character”
  - Usually not relevant



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Credibility Assessments

- **Document on a separate page**
- **When do you make the assessment?**
- **EEOC’s factors to consider**
  - Inherent plausibility
  - Demeanor
  - Motive to falsify
  - Corroboration
  - Past record



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Credibility Assessments

- **Other factors to consider**
  - Source of information
  - Level of detail
  - Notable omissions
  - Internal consistency
- **No factor is necessarily dispositive**
- **Are you comfortable with the assessment?**



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Investigation File

- **Typical contents**
  - Complaint
  - Chronology
  - Relevant policies
  - Witness disclosures / statements
  - Supporting documents, physical evidence
- **Separate from personnel file, except**
  - Notices to employees (e.g., at outset, of outcome)
  - Disciplinary action/counseling
  - Acknowledgment of reissued policy



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

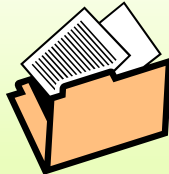
---

---

---

## Investigation File (cont'd)

- **Investigation conducted under direction of counsel?**
  - If so, investigation may be privileged
  - Clearly indicate on files/documents so that privilege is not waived



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Investigation Report

- **Summarizes investigation**
  - Issue(s) being investigated
  - What was done?
  - Resolve disputed issues
  - Clear basis for conclusions
  - No legal conclusions
  - **MUST** reflect the evidence
  - Attach key documents as exhibits, including e-mails, photos, etc.



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---


---

---

---

## Investigation Report

- **Sample Outline**
  - General statement of nature of investigation
  - Summary of what was done
  - Documents reviewed
  - Witnesses interviewed (with summary, credibility assessments)
  - Each issue investigated, with findings made and basis for findings



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---


---

---

---

## Investigation Report (cont'd)

- **Assume others will read it**
  - Clear and self-explanatory
  - Thorough
  - Neutral terms
  - Factual not speculative
  - Avoid absolute statements or characterizations
  - Reasonable, well-supported conclusions



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

---

---

## Investigation Report: Findings and Recommendations

- **Finding the facts**
  - Standard
  - Can / cannot substantiate
- **Finding a policy/rule violation**
- **Recommending or deciding on a course of action**
  - Remedial / disciplinary
  - Proactive / preventive

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

---

---

## Investigation Report Examples

- **Factual, neutral language with a clear basis for conclusions**
  - “Mike dumped the contents of Tom’s desk drawer on the floor, without any justifiable cause.”
  - “Based on the statements of three eye-witnesses and Tom, as well as the physical evidence of the contents of Tom’s desk drawer on the floor, this investigator concludes that Mike did pull out Tom’s desk drawer and turn it upside-down, spilling the contents.”

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Investigation Report Examples

- **Conclusions should be explicitly supported by investigative steps**
  - **Summary of Investigation**
    - Gina says Ella told her “let’s take it outside”
    - Ella denies that she said it
    - I interviewed two other employees
  - **Findings**
    - Ella should be disciplined for threatening Gina
  - **Sufficient?**

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Investigation Report Examples

- **Policy violations, not legal violations**
  - “Jane sexually harassed Joe by kissing him.”
  - “Jane and Joe agree that Jane spontaneously gave Joe a brief peck on the cheek on New Year’s Eve, while she said ‘Happy New Year!’ Joe stated that the kiss made him uncomfortable. As such, it violated the Department’s harassment policy.”

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Avoid Common Pitfalls

- Focus on the issue(s) being investigated
- Get the **FACTS**
- Don't be afraid to re-interview
- Make credibility assessments if you can
- No legal conclusions (policy violations)
- Clearly describe the basis for any conclusions
- Use neutral language

MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Courts: Positive Factors

- Trained, neutral investigator
- Prompt contact with complainant
- “We take the complaint seriously”
- Opportunity for accused to respond
- Protecting relevant documents



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Courts: Positive Factors

- Gathering facts, not opinion
- Seeking corroboration of both sides' stories
- Using “relevant, open-ended, nonleading questions”
- Interviewing former employees, if relevant
- Allowing clarification / correction of statement



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Courts: Positive Factors

- Giving the accused a final opportunity to respond
- Reaching a reasoned conclusion based on substantial evidence
- Investigator maintains confidentiality
- Taking appropriate action
- Informing parties of outcome



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---

## Any Questions?



MARR JONES & WANG  
A LIMITED LIABILITY LAW FIRM  
Labor and Employment Law

---

---

---

---

---

---

---

---