
Webinar – June 11, 2013 – 1:00 p.m. (ET)

PROGRAM SUMMARY

Speakers: Loretta Attardo, Esq., Carolina Avellaneda, Esq., Nina T. Pirrotti, Esq.

The process of fact-finding is most frequently encountered in a workplace (employment) environment. This is a voluntary and consensual process involving a neutral third party investigator. The ability for a neutral party to review the facts, interview witnesses, and prepare reports makes it a very beneficial process in resolving issues in the workplace. The webinar will cover the best practices for these types of investigations.

AGENDA

1:00 p.m. Welcome and Introduction of Speakers (5 minutes)
1:05 p.m. Goals for the Session (5 minutes)
1:10 p.m. Importance of a Proper Investigation (70 minutes)

Deciding Who Should Conduct the Investigation

Establishing the Relationship – The Retention Letter

Establish the Mechanics of the Investigation

Confidentiality

Communicating the Results of the Investigation

Five Red Flags a Plaintiff’s Lawyer Will Look For

2:20 p.m. Conclusion and Questions (10 minutes)
2:30 p.m. Evaluation (5 minutes)
2:35 p.m. Adjourn
BIOGRAPHY OF LORETTA T. ATTARDO

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Loretta T. Attardo is a frequent speaker on national and regional employment law panels. For nearly thirty years her law practice concentrated in labor and employment matters, representing individual plaintiffs as well as counseling business corporations, and serving as arbitrator or mediator in employment disputes. Since 2007 she has concentrated her practice on mediation, arbitration, fact finding investigations and case evaluation primarily in employment and labor related matters.

In 1992 she established her private law practice after more than a dozen years as an attorney in the Legal Departments of the New England Telephone Company, NYNEX Information Resources Company, and at the Boston law firm of Nutter, McClennen and Fish. She has been a member of the Massachusetts Bar Association and the American Bar Association Labor and Employment Section’s governing Council. She has served as co chair of the ABA Labor Section's CLE Committee, Annual Meeting Co-Chair and Program Co-Chair of the Employee Rights and Responsibilities Committee. She is a member of the American Arbitration Association’s Panels of Arbitrators and Mediators for commercial, employment and labor disputes, the AAA's Northeast Regional Advisory Committee on Employment Dispute Resolution, and an active member of the Massachusetts Bar Association and the American Bar Association’s Labor, Employment and Alternative Dispute Resolution sections. In 1998 she was inducted as a Fellow into the National College of Labor and Employment Lawyers.

Attorney Attardo earned her JD and Masters in Slavic languages and literature at the University of Michigan in Ann Arbor, and her BA, cum laude, from Brandeis University. She maintains offices in Boston and Marblehead, Massachusetts.
Ms. Avellaneda protects clients’ assets, including trade secrets, intellectual property, customer base and human capital. She litigates complex commercial disputes in lawsuits involving non-competition agreements, claims for breach of fiduciary duty, business torts, trade secret violations and fraud, among others. Ms. Avellaneda is often called upon to act as outside general counsel for her clients. She assists clients with business negotiations and helps them craft strategies that increase the likelihood of success in litigation or avoid it.

Representative matters include:

- Successfully represented an insurance brokerage firm in litigation against an international competitor over employees’ non-competition covenant obligations.
- Managed wage and hour investigation by New Jersey Department of Labor against national retailer, avoiding penalties or consent decree.
- Defended retailer in nationwide investigation launched by EEOC involving hiring practices.
- Assisted an international corporation with the design and implementation of its North American employment restructuring plan.

Ms. Avellaneda has a specialty in employment law and provides advice on wage and hour compliance, ADA and FMLA, Workers’ Compensation Act, development of personnel policies and procedures, negotiation of employment and severance agreements, employee counseling, preventive training, and investigation of internal workplace matters among other issues. Ms. Avellaneda also handles international business disputes and has a personal network of international litigation and employment counsel to provide assistance worldwide.

Ms. Avellaneda has provided over 170 hours of interactive training on employment issues including harassment prevention and employee management.

Ms. Avellaneda was born in Buenos Aires, Argentina and is a native Spanish speaker.

**REPRESENTATIVE MATTERS**

Successfully represented an insurance brokerage firm in litigation against an international competitor over employees’ non-competition covenant obligations.

Managed wage and hour investigation by New Jersey Department of Labor against national retailer, avoiding penalties or consent decree.

Defended retailer in nationwide investigation launched by EEOC involving hiring practices.

Assisted an international corporation with the design and implementation of its North American employment restructuring plan.

Obtained $2 million judgment from a panel of three judges in an arbitration against the Department of Revenue on dispute regarding domicile.
Defended and prosecuted dozens of non-competition, non-solicitation agreements and trade secret cases

Defended State and Federal Agencies in Massachusetts, Ohio, Connecticut and North Carolina
Successfully defended claims from state and federal agencies in Massachusetts, Ohio, Connecticut and North Carolina, among others, in cases involving claims of age, gender and race discrimination, harassment and retaliation.

Obtained dismissal with prejudice of all claims brought against the individual members of the City of Chelsea Board of Health by Coastal Oil of New England, Inc.

Effective use of mediation and other litigation tools to obtain dismissal and favorable settlement of a series of related employment cases filed against a large non-profit organization.
Nina T. Pirrotti, Partner

Nina Pirrotti represents individuals in employment litigation and negotiation. The president of the Connecticut Employment Lawyers Association (CELA), she is well versed in all aspects of employment law, including discrimination (on the basis of race, sex, age, disability, sexual orientation, religious creed, marital status, pregnancy, or national origin), sexual harassment, wrongful termination, retaliation, contract disputes (including those involving restrictive covenant agreements), FMLA and related leave of absence issues, unpaid wages, severance agreements, and whistleblower claims. In 2010, she was named by the *Connecticut Law Tribune* as one of its Women in the Law – High Achievers.

Even before Nina decided in 2005 to represent employees exclusively, she had already devoted almost 15 years to civil rights and public service. At the Queens County District Attorney’s Office, she was appointed to the Career Criminal Major Crimes Bureau, prosecuting homicides, bank robberies, kidnappings, and pattern crimes. And as an Assistant Corporation Counsel at the Law Department for the City of New York, she received the Association of the Bar of the City of New York’s Municipal Affairs Award for outstanding achievement.

Nina is an experienced trial advocate, having served as lead counsel in approximately 25 jury trials and 50 bench trials. She taught Trial Advocacy at the New York Prosecutor’s Training Institute, the Queens County District Attorney’s Office, and the New York City Law Department, and trial practice at Quinnipiac Law School as an adjunct professor.

In addition to her duties as president of CELA, Nina is also the Co-Chair of the National Employment Lawyers Association (NELA) Affiliate Relations Committee, as well as its Second Circuit representative. She routinely lectures nationally on employment related topics.

Nina received her undergraduate degree from Wesleyan University, where she majored in Theater. She received her law degree from Yale Law School, where she was a member of the Journal of Law and Feminism and participated in the Barrister’s Union, a competitive mock trial organization. Nina began her legal career as an associate at commercial litigation firms and devoted significant time to pro bono matters, including employment discrimination and First Amendment/whistleblower cases.

**Representative Matters**

Successfully represented hedge fund manager in a complex arbitration brought by his former employer alleging violation of the employer’s restrictive covenant. Despite the employer’s demand of millions of dollars in damages, the arbitration panel awarded only nominal damages of $2.

Represented former employee of start-up technology company who failed to pay wages due her for months. After she quit her job and filed a wage claim with the Department of Labor, her former employer sued her for breach of contract, alleging that she left her employment prior to
the contract’s expiration. Obtained dismissal of the breach of contract action and brought successful arbitration against the company for, among other claims, retaliation and violation of wage and hour laws.

Co-tried age discrimination and retaliation case in federal court brought by veteran police officer against town for failing to promote him in favor of a much younger, less experienced candidate and then retaliating against him when he complained about it. The case resulted in a large damages award in favor of the plaintiff.

Representative Speaking Engagements


Executive Behavior Run Amok: Strategic Considerations for Workplace Investigations, American Bar Association Labor & Employment Annual Conference, Atlanta, GA (October 2012)

Retaliation in the Post-Employment Context – The Former Employer’s Parting Shot, National Employment Lawyers Association Annual Conference, San Diego, CA (June 2012)

Retaliation in the Post Employment Context: Not a Time to Let Your Guard Down, American Bar Association Labor & Employment Annual Conference, Seattle, WA (November 2011)

Transforming Weaknesses into Strength at Trial, National Employment Lawyers Association Annual Conference, Washington, DC (June 2010)

Pregnancy and Family Responsibility Discrimination – Romantic Paternalism is Alive and Well, Connecticut Women’s Education & Legal Fund, New Haven, CT (June 2010)

Investigating and Bringing a Claim – The Employee’s Lawyer’s Perspective, Worker’s Compensation Trust, Wallingford, CT (April 2010)

Survey of Employee Friendly State Laws, National Employment Lawyers Association Annual Conference, Palm Springs, CA (June 2009)

Defending Depositions, National Employment Lawyers Association Conference, Denver, CO (March 2009)

Trial Themes, National Employment Lawyers Association Regional Conference, Boston, MA (May 2008)

Punitive Damages in the Wake of Philip Morris USA v. Williams, Connecticut Bar Association, Hartford, CT (June 2007)
I have devoted a good part of my legal career to either conducting investigations or scrutinizing them. As a prosecutor, I investigated hundreds of cases, ranging from kidnappings to homicides. As an employment lawyer, I still investigate cases, now on behalf of employers. Far more frequently, however, I evaluate the investigations conducted by employers in the course of my representation of a client who has complained about discrimination and/or harassment in the workplace. Not only do I view such investigations as an opportunity to place my client’s accusations in fuller context; I scrutinize them both procedurally and substantively to determine whether the investigations themselves are a product of further discrimination and/or retaliatory treatment by the employer. Below are the top five red flags I look for in evaluating an employer’s investigation.

1. **Incomplete/Delayed Investigations**

   I have come across too many investigations where the investigator simply fails to complete the task. One often overlooked yet obvious step is to ensure that all witnesses are interviewed. For example, I have an age discrimination case in which my client complained to Human Resources (“HR”) that his supervisor made ageist comments at two department meetings and provided to HR the names of all the employees who attended those meetings. After the investigator spoke to just one attendee, who happened to deny the comments were made, the investigator apparently did not see any need to talk to the others. You can be sure the
employer’s disinterest in learning the truth will play a pivotal role in my case, from discovery through trial.

Investigators who fail to explore all reasonable leads also provide tremendous fodder for the plaintiff’s employment lawyer. My firm has a wrongful discharge case which alleges that our client was terminated after he complained about employees who were working “off the clock.” To support our allegation that the employer privately condoned such conduct and wished it to continue without our client’s interference, we pointed to another employee who reported to HR that a co-worker was working on his own time without getting paid. The employee even provided the time of day in which the co-worker was engaging in this conduct. But instead of checking the videotapes in the vicinity of the co-worker’s office to confirm or refute the report, the investigator’s only “investigation” was to ask the co-worker whether he was indeed working “off the clock.” The co-worker denied the conduct — had he admitted it, he would have been subject to discipline — and the investigation ended there. The employer undertook other similar non-investigations into employees working “off the clock,” allowing us to credibly label its approach to such investigations as: “Ask but Don’t Tell.” We look forward to weaving this theme throughout trial.

An employer’s failure to adequately investigate an employee’s harassment claim is potentially fatal to its defense of such a claim. See Malik v. Carrier Corp., 202 F.3d 97, 105-06 (2d Cir. 2000); See also Hatley v. Hilton Hotels Corp., 308 F.3d 473, 475-76 (5th Cir. 2002)

An employer who does not investigate a harassment claim promptly, once it is on notice of the alleged unlawful conduct, will be similarly compromised in defending against such a claim. See EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050
2. Failure to Make Credibility Assessments

I continue to be surprised by the number of investigations which reach an inconclusive finding on the ground that there is no “corroborating” evidence simply because the investigator faced a “he said/she said” scenario. For example, I represented two principals who had accused their superintendent of schools of sexual harassment. After his investigation, the investigator knew, among other facts, the following: First, these two principals did not know each other before they complained about the conduct. Second, the conduct each complained of was strikingly similar: with no witnesses present, the superintendent hugged each woman, put his hand on her buttocks, and kissed her on the mouth. And third, witnesses who observed these principals both before and after their private interactions with the superintendent all noted the marked change in their demeanors. Nonetheless, the investigator stated that, since no one had actually witnessed the offensive conduct (other than the victims themselves), he had no choice but to render an inconclusive finding.

It is increasingly rare for a harassment or discrimination claim to be substantiated with eyewitness or documentary evidence. These days, the perpetrator is usually savvy enough to ensure that he or she commits such conduct privately. Yet judges, jurors, arbitrators, mediators, and lawyers make credibility assessments in such situations every day. Investigators should consider the EEOC’s guidance on this issue and follow suit. EEOC Policy Guidance, supra. (“The Commission recognizes that sexual conduct may be private and unacknowledged, with no eyewitnesses. . . . In appropriate cases, the Commission may make a finding of harassment based solely on the credibility of the victim’s allegation.”)
3. Use of Flawed Investigatory Techniques

Even an otherwise unbiased investigator can compromise an investigation if she fails to use neutral interrogation tactics. An investigator’s questions should be in the manner of a direct examination at a deposition: open-ended, general questions followed by more pointed questions as information is provided. The investigator should avoid leading questions that suggest the answer, as well as confrontational, accusatory questions that intimidate the witness. The investigator should also ensure that each witness feels free to leave and that there is no real or perceived impediment to doing so.

An investigator should also avoid the possibility of tainting a witness’s version of the events by first informing her what other witnesses have said or by showing her documents or audio or visual material before she recounts her version of the events. While a good investigator will tailor her approach to each witness, these general precepts should be consistently followed with all witnesses to avoid any perception that some witnesses are being treated more favorably than others.

One of the most common investigatory techniques vulnerable to criticism occurs where an investigator “spoon feeds” the information to witnesses, resulting in witness statements that are virtually identical in significant respects or have the same “voice.” Juries are particularly sensitive to such suggestive tactics and are inclined to view the employer engaged in them as being far more concerned about defending itself than about learning the truth.

4. Failure to Preserve Records

A failure to preserve documents reviewed or generated during the course of an investigation bolsters the ultimate finding of discrimination. See Byrnie v. Town of Cromwell, 243 F.3d 93, 110-11 (2d Cir. 2001) (“[W]hile the foregoing additional evidence might not have
been sufficient in itself to defeat summary judgment, it does when coupled with the allowable inference of spoliation.”). Of course, the destruction of such documents may also give rise to an adverse inference at trial which would permit the factfinder to conclude that the evidence destroyed would have been “unfavorable to the party responsible for its destruction.” *Id.* at 107 (quotation marks omitted).

5. Biased Investigators

The employer who uses an investigator who has a stake in the outcome or a personal relationship with any of the witnesses involved in the investigation does so at its peril. I have urged clients who have had reason to believe that an investigator was biased to make a record of their objections in writing to the employer, requesting a recusal of the investigator and delineating the reasons for that request. Such a record can be powerful evidence in support of an employee’s discrimination or harassment claim.

Investigations conducted by biased investigators may compromise an employer’s defense even more than no investigation at all. They convey a loud and clear message to the fact finder: the investigation was orchestrated by the employer to justify a preordained decision. Indeed, a failure to conduct a thorough, unbiased investigation may be further evidence of the employer’s discrimination and/or retaliatory intent. *See Sassaman v. Gamache*, 566 F.3d 307, 314-15 (2d Cir. 2009); *Raymond v. IBM Corp.*, 148 F.3d 63, 67 (2d Cir. 1998) (finding support for employee’s pretext argument because “IBM official who conducted the investigation of [the] alleged misconduct was biased as a result of complaints previously lodged against him by plaintiff”).

My firm has found that biased investigators often commit a multitude of sins in the manner in which they conduct their investigations. For example, in a recent case one of my
partners tried, his client alleged she was subjected to disability discrimination, culminating in her
termination, purportedly for the manner in which she handled an incident with a customer. The
individual who was tasked with conducting the investigation into our client’s handling of the
incident was the same individual who had made it clear that he did not believe she was
legitimately disabled. Not surprisingly, the investigation was comprised in myriad ways. The
investigator failed to watch a videotape that captured the incident in question; he failed to
scrutinize the testimony of two employees who were dating each other and whose stories were
precisely (and improbably) aligned; he allowed another employee who had provided inconsistent
versions of the event to view the videotape and change her story while not allowing our client to
do the same; and he capped the investigation off by destroying the notes of his interview of our
client. On summation, my partner had a field day with each aspect of this biased, highly flawed
“investigation.”

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The moral of this story is that it behooves employers in every way to conduct prompt,
 thorough, and neutral investigations into all complaints of discrimination or harassment in the
workplace.