

Workplace Investigations



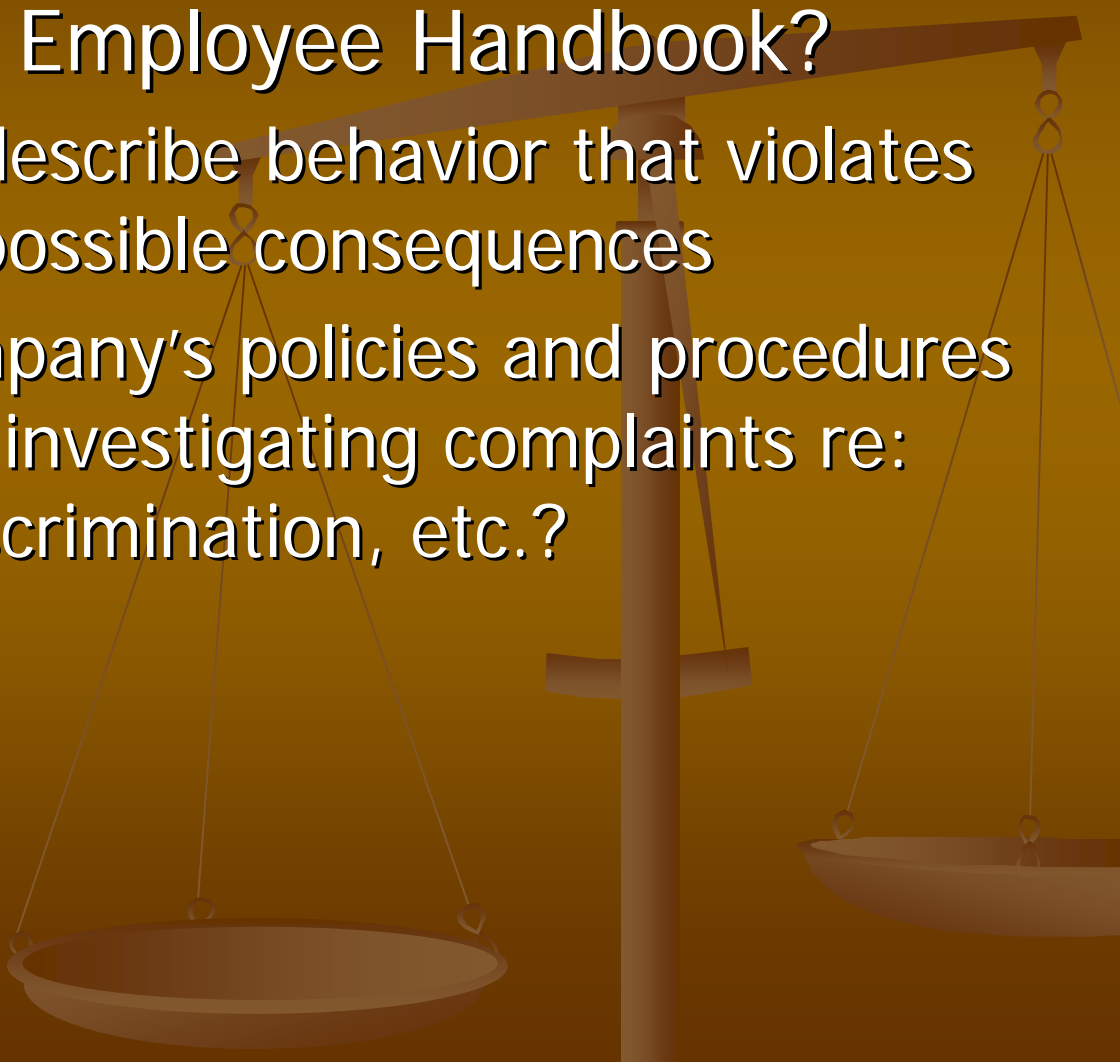
The Do's and Don'ts

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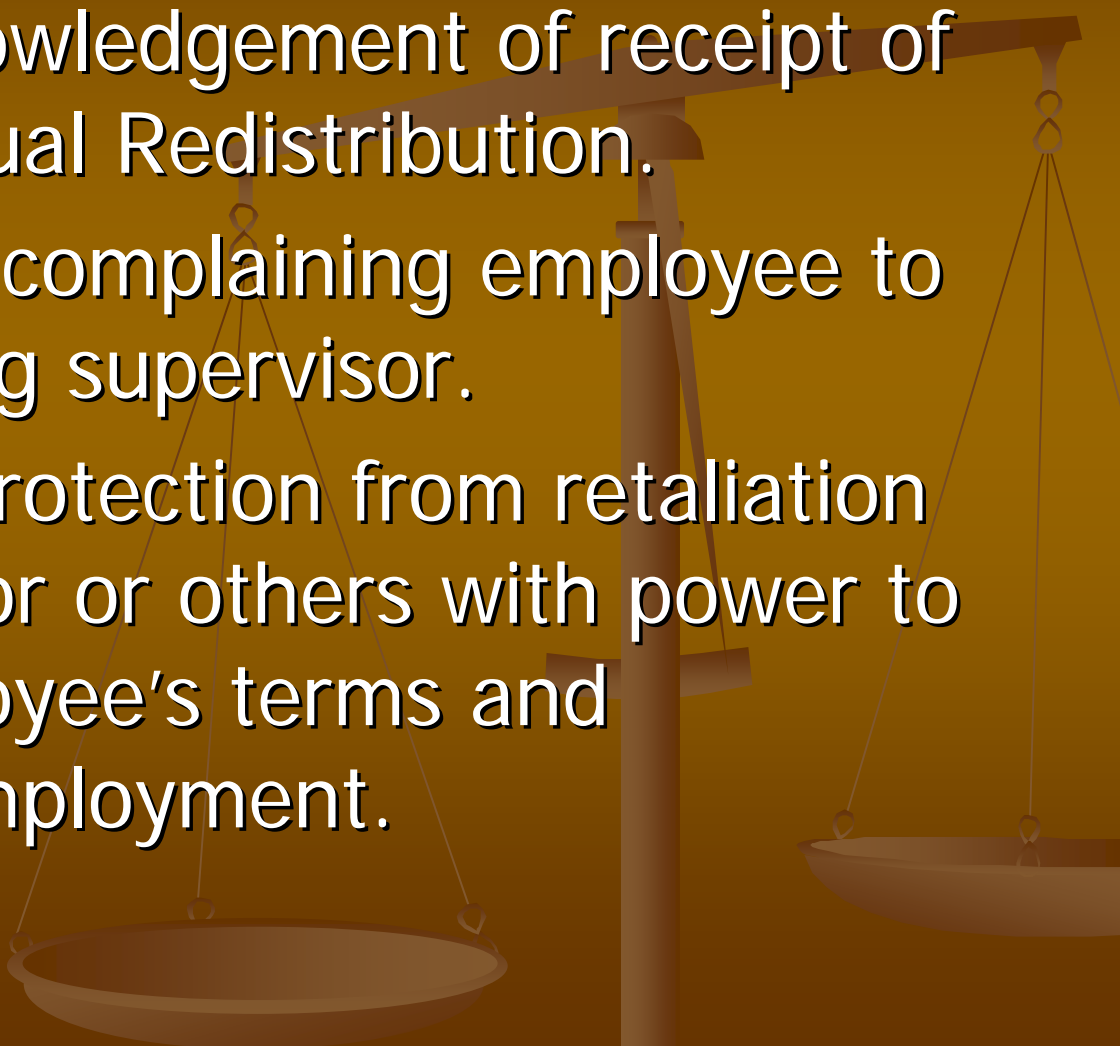
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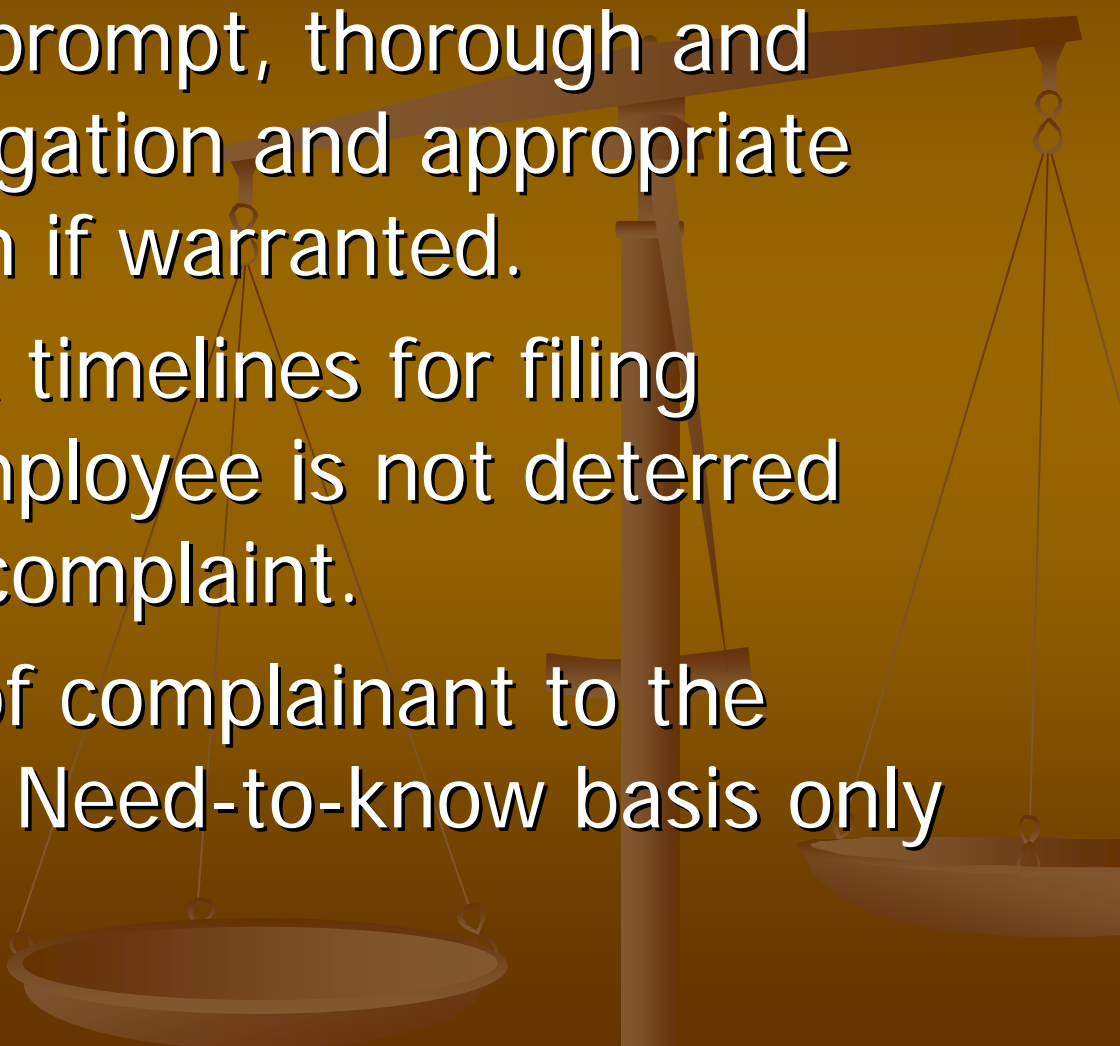
Things to Consider Before A Complaint is Made

- Do you have an Employee Handbook?
 - Does it clearly describe behavior that violates policy and the possible consequences
 - what is the company's policies and procedures for making and investigating complaints re: harassment, discrimination, etc.?
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Things to Consider Before A Complaint is Made

- Employee acknowledgement of receipt of procedure. Annual Redistribution.
 - Opportunity for complaining employee to bypass harassing supervisor.
 - Assurances of protection from retaliation by the supervisor or others with power to effect the employee's terms and conditions of employment.
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Things to Consider Before A Complaint is Made

- Assurance of a prompt, thorough and impartial investigation and appropriate corrective action if warranted.
 - EEOC and FEHA timelines for filing complaint so employee is not deterred from making a complaint.
 - Confidentiality of complainant to the extent possible. Need-to-know basis only
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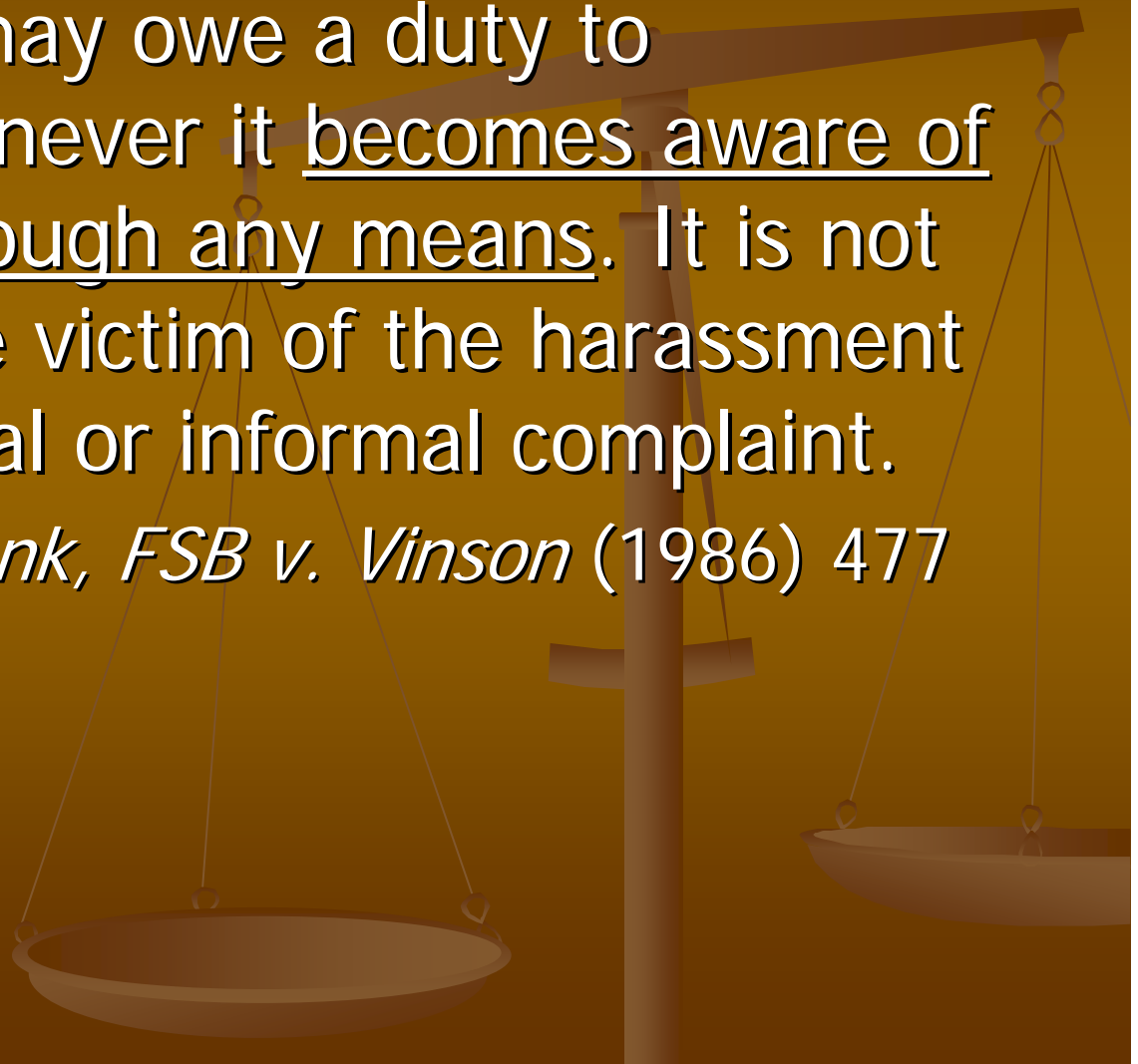
Workplace Privacy Policies

Do They Protect Your Rights to Investigate?

- Employee must be clearly notified that e-mails and all internet and computer information is the property of the company and is not confidential. The employee has no right of privacy to information sent or received over the internet or through company intranet. All messages are subject to scrutiny and review by management.
- Clear policy that sets forth employees right to privacy in their office or workspace, if any. Offices, desks, lockers are subject to search at any time.
- Handbook contains employee acknowledgement of privacy policies and a consent to search

How do you know there is a complaint?

- The employer may owe a duty to investigate whenever it becomes aware of harassment through any means. It is not essential for the victim of the harassment to lodge a formal or informal complaint.
 - *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 72



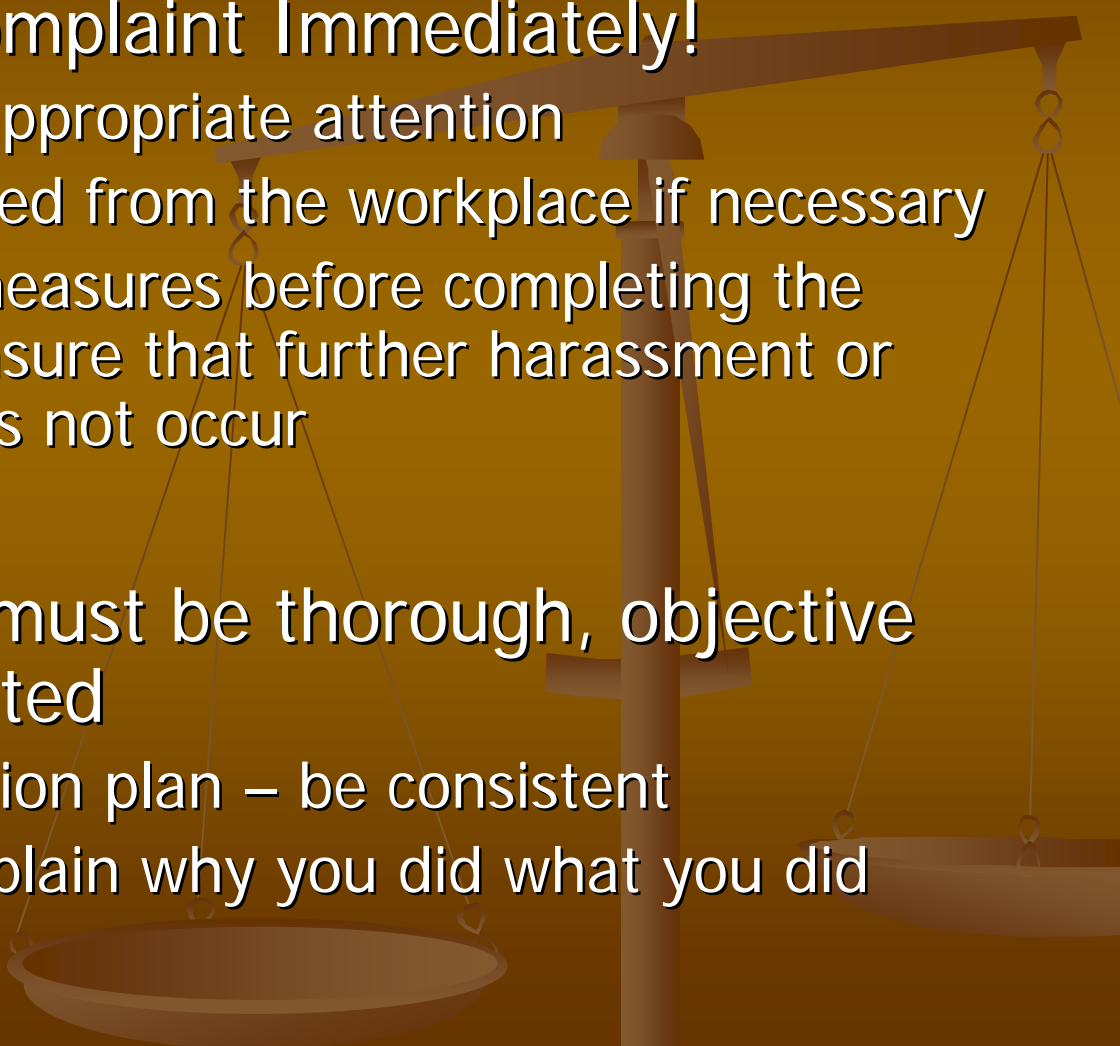
Duty to Investigate



- Duty to Investigate required by law
 - 2 Cal. Code Regs § 7287.6(b)(3)
 - Government Code § 12940(j)(1), (k)
- Why?
 - Determine whether harassment or discrimination occurred
 - May absolve employer of liability for harassment by co-employee or nonemployee
 - Prevent future harassment

Complaint Has Been Made

What do you do now?

- Investigate the Complaint Immediately!
 - Give the accuser appropriate attention
 - Remove the accused from the workplace if necessary
 - Take immediate measures before completing the investigation to ensure that further harassment or discrimination does not occur
 - The investigation must be thorough, objective and well-documented
 - Develop investigation plan – be consistent
 - Be prepared to explain why you did what you did
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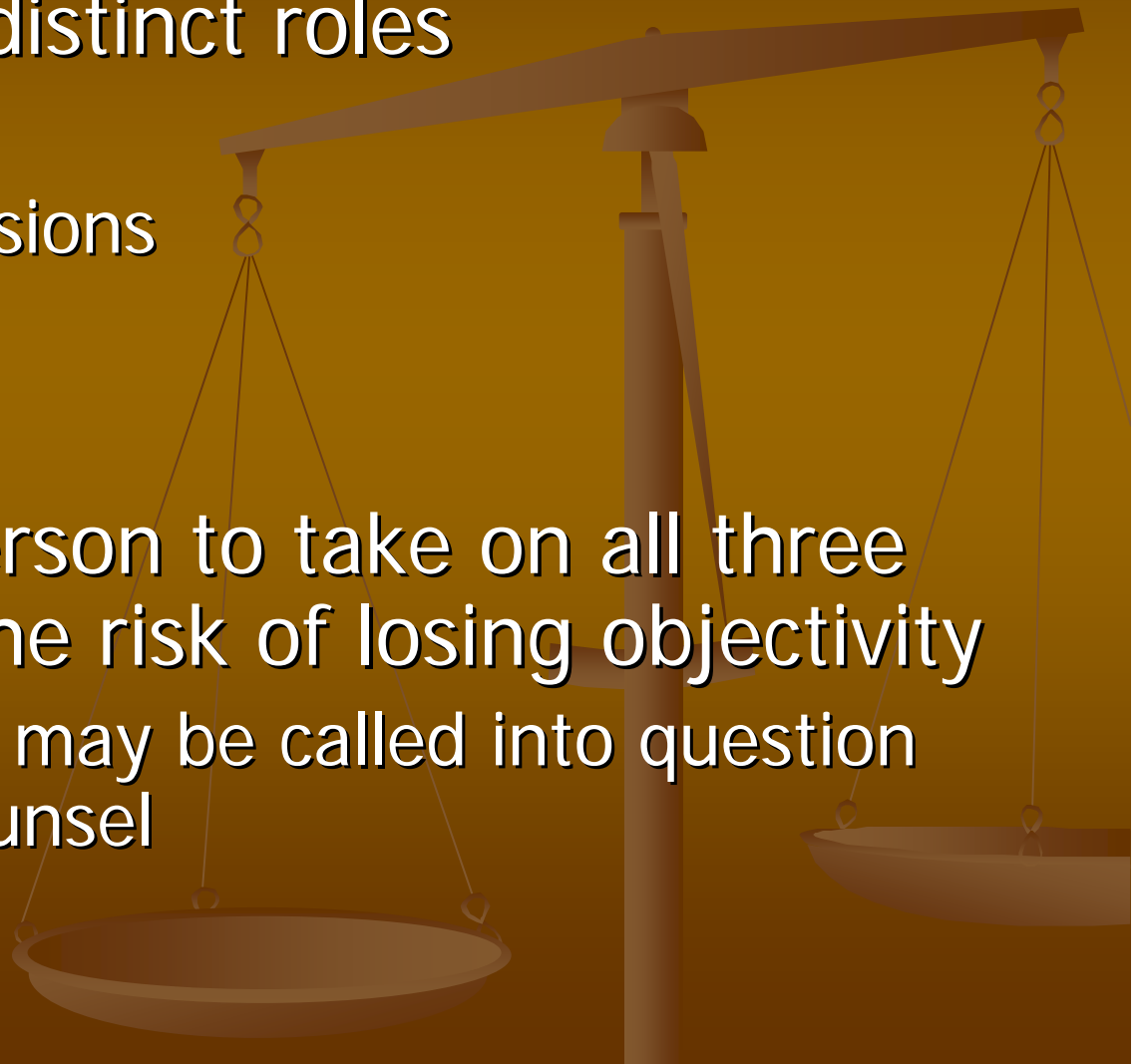
The Investigation Plan



- Who will conduct the investigation?
 - Will it be done in-house
 - Per the EEOC, the neutral, third party will objectively gather and consider the relevant facts
 - Should be qualified in interviewing witnesses and evaluating credibility
 - Outside investigator
 - Size and costs are considerations
 - Political considerations
 - Where integrity of internal investigation may be attacked

The Investigation Plan

- Consider three distinct roles
 - Fact-finding
 - Drawing conclusions
 - Discipline
- Allowing one person to take on all three roles, you run the risk of losing objectivity
 - HR's objectivity may be called into question by plaintiff's counsel



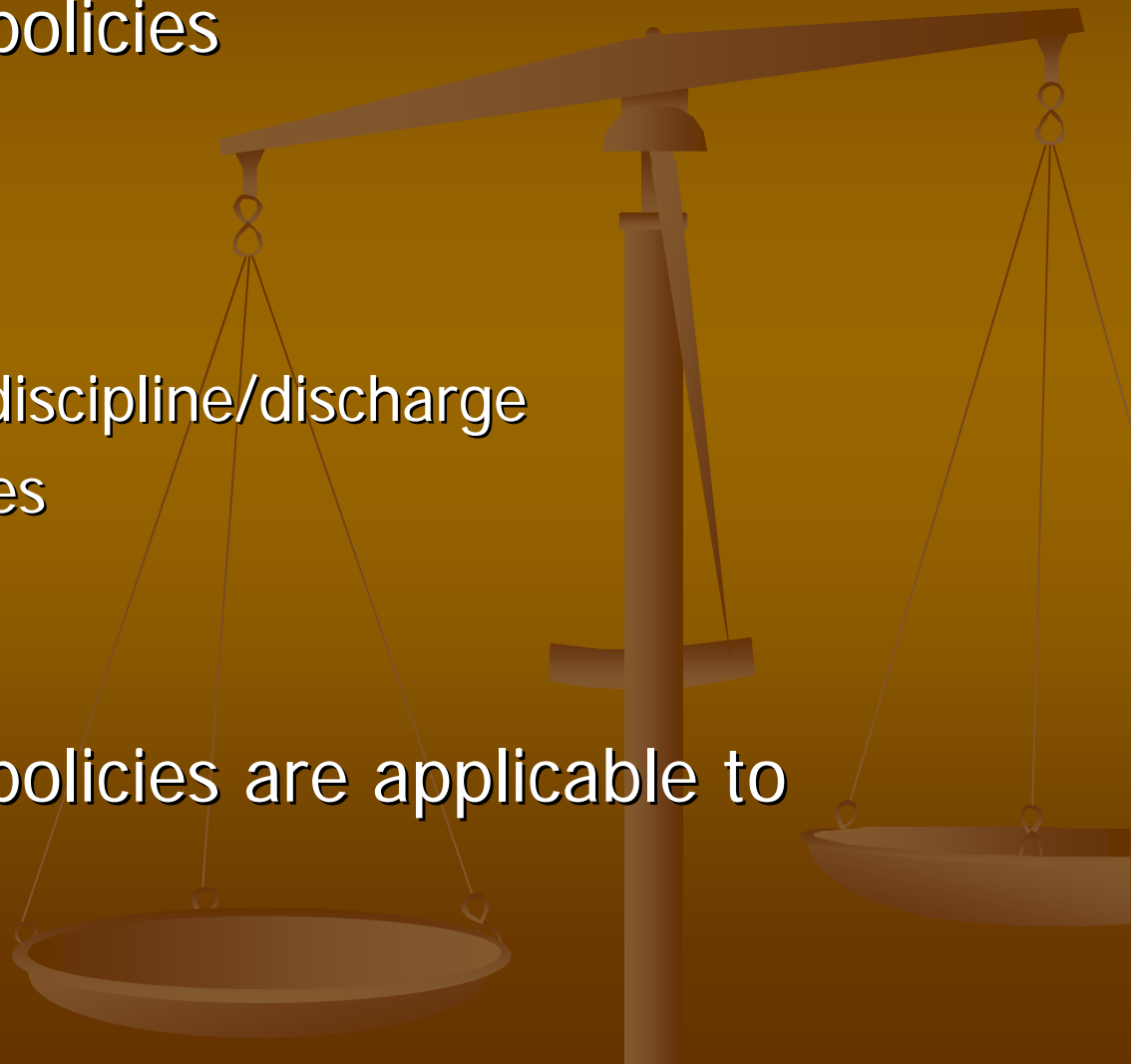
The Investigation Plan



- Special considerations when attorneys are the investigators
 - Attorney-client privilege and work product
 - Waiver if adequacy of investigation is raised as an affirmative defense. (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110; *Harding v. Dana Transport, Inc.* (D.NJ 1996) 914 F.Supp. 1084)

The Investigation Plan

- Review company policies
 - Harassment
 - Discrimination
 - Privacy
 - Code of Conduct/discipline/discharge
 - Workplace searches
 - Violence
 - Technology
- Determine which policies are applicable to complaint



The Investigation Plan

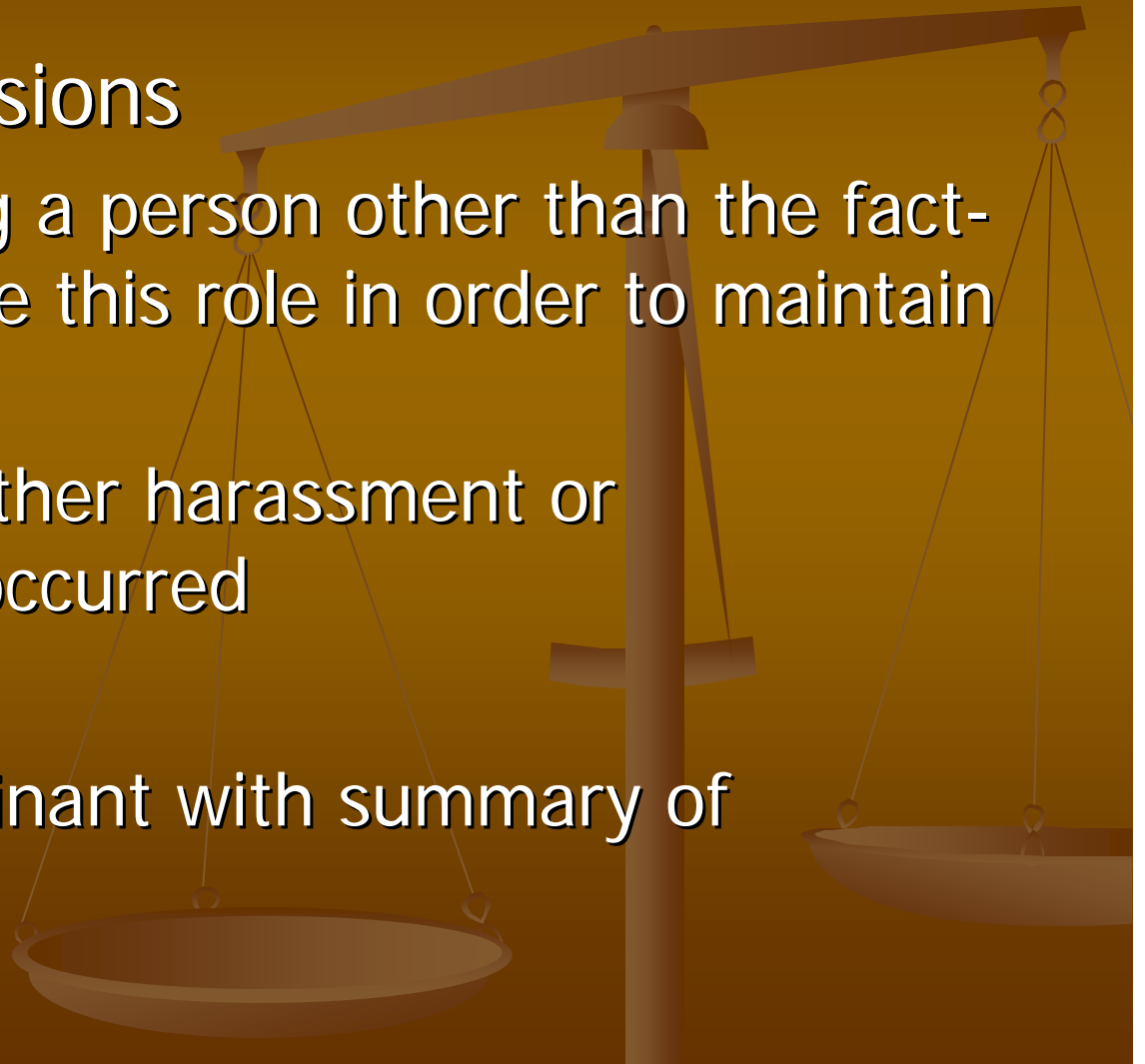


- Fact-Finding
 - Interview the accuser, accused and all witnesses
 - Ask general questions
 - Where did the alleged harassment or discrimination occur?
 - On site
 - Employer-sponsored event
 - Informal gathering
 - When did it occur?
 - During business hours
 - At lunch
 - After hours
 - The uncooperative witness...
 - Summarize interviews immediately
 - Collect and review any documentary or other evidence
 - Follow up with witnesses as needed
 - Provide complainant with progress of investigation
 - Prepare report summarizing investigation

The Investigation Plan

■ Drawing Conclusions

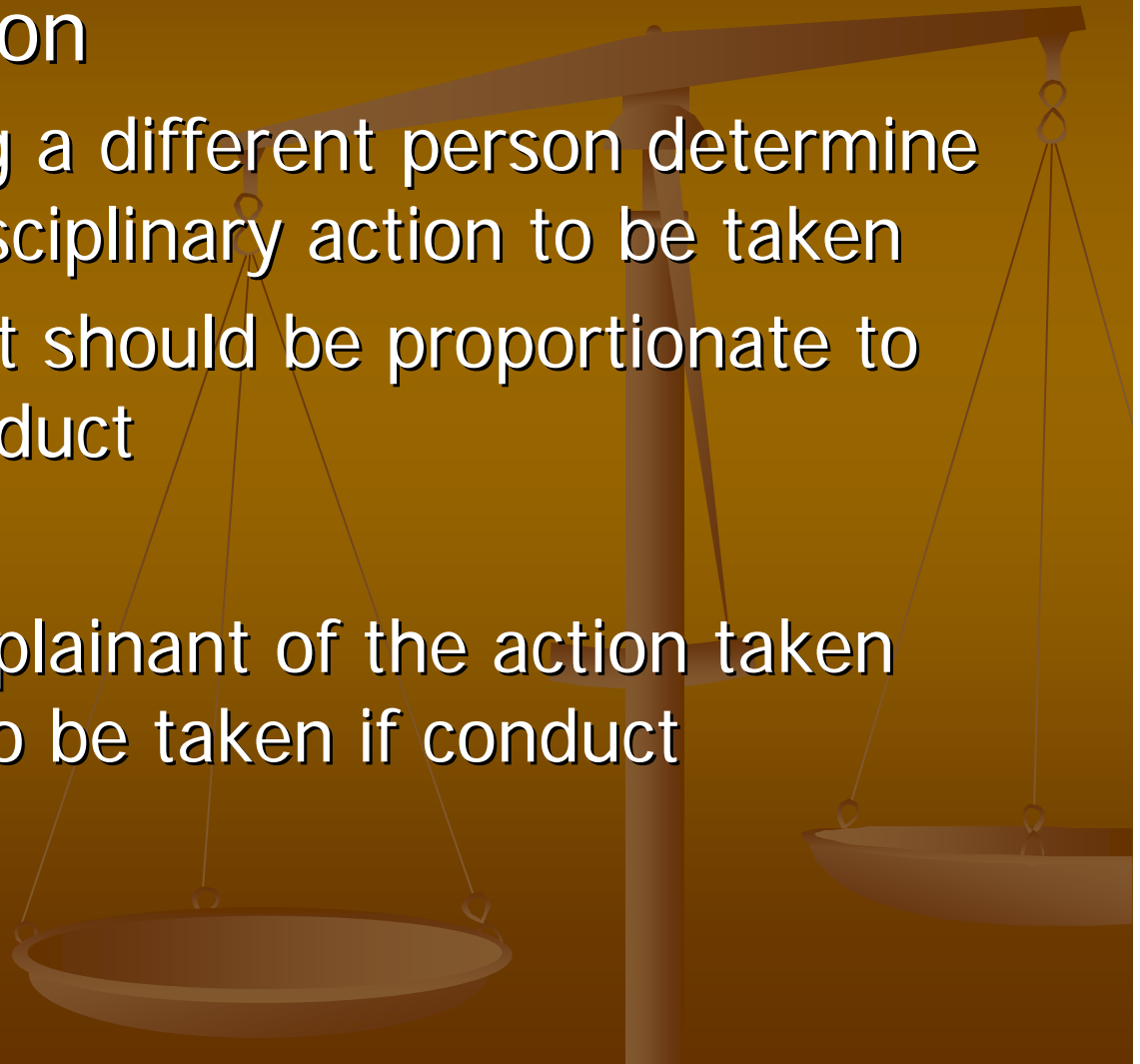
- Consider having a person other than the fact-finder undertake this role in order to maintain objectivity
- Determine whether harassment or discrimination occurred
- Be consistent
- Provide complainant with summary of conclusions



The Investigation Plan

■ Disciplinary Action

- Consider having a different person determine the requisite disciplinary action to be taken
- The punishment should be proportionate to the level of conduct
- Be consistent
- Advise the complainant of the action taken and proposed to be taken if conduct continues



Examples



■ Adequate Investigations

- *Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal.App.4th 101 – “textbook” example of response to sexual harassment claim
- *Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1 – supervisory employee tasked with factual investigations and reporting sexual harassment claims without determining the veracity of the claim is reasonable
- *Silva v. Lucky Stores* (1998) 65 Cal.App.4th 256
- *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184 – Postal Service adequately responded to harassment complaint even though investigation took 3 months

Examples

- Inadequate Investigations
 - *Tayborn v. City & County of San Francisco* (9th Cir. 2003) 341 F.3d 957 – Title VII sexual harassment case where employer failed to interview several of the employees and managers involved in the dispute and allowed harassment to continue

