

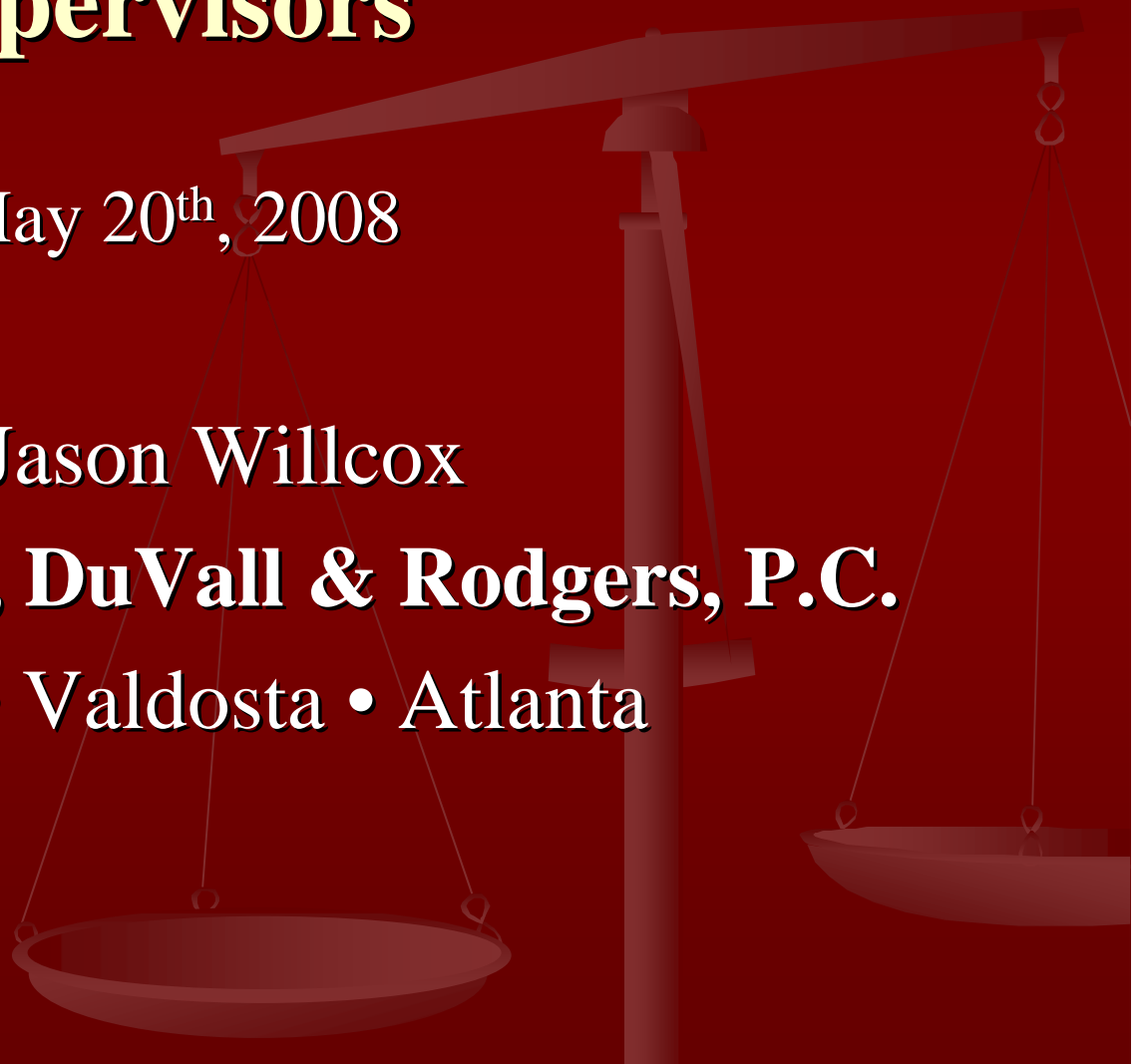
# **“Boot Camp for Experienced Supervisors”**

May 20<sup>th</sup>, 2008

C. Jason Willcox

**Moore, Clarke, DuVall & Rodgers, P.C.**

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# **Investigating Workplace Discrimination Issues and Claims**

# Areas of Review

- I. Why?
- II. When?
- III. Investigating Claims of Discrimination.
- IV. Documentation of Investigation.
- V. What next?



# For Every 10,000 Lawsuits, Few Losses, but High Cost

The maneuvering companies engage in to avoid wrongful-termination lawsuits is out of proportion to the risk of actually losing in court. One big reason: the high cost of litigating claims, even the ones that end up with the company winning.

Out of 10,000 employment suits	Stage of lawsuit	Cumulative cost for a company to defend a single lawsuit
<b>FILING</b>		
<b>7,000</b>	Settle (most settlements are for nuisance value)	<b>\$10,000</b>
<b>SUMMARY JUDGMENT</b>		
<b>2,400</b>	Get resolved by summary judgment and other pretrial rulings	<b>\$100,000</b>
<b>START OF TRIAL</b>		
<b>600</b>	Go to trial	<b>\$175,000</b>
<b>END OF TRIAL</b>		
<b>186</b>	Trials are won by plaintiffs	<b>\$250,000*</b>
<b>APPEAL</b>		
<b>13**</b>	Plaintiff victories survive appeal	<b>\$300,000</b>

Sources: Cornell Law School; Hofstra Labor & Employment Law Journal; BW reporting

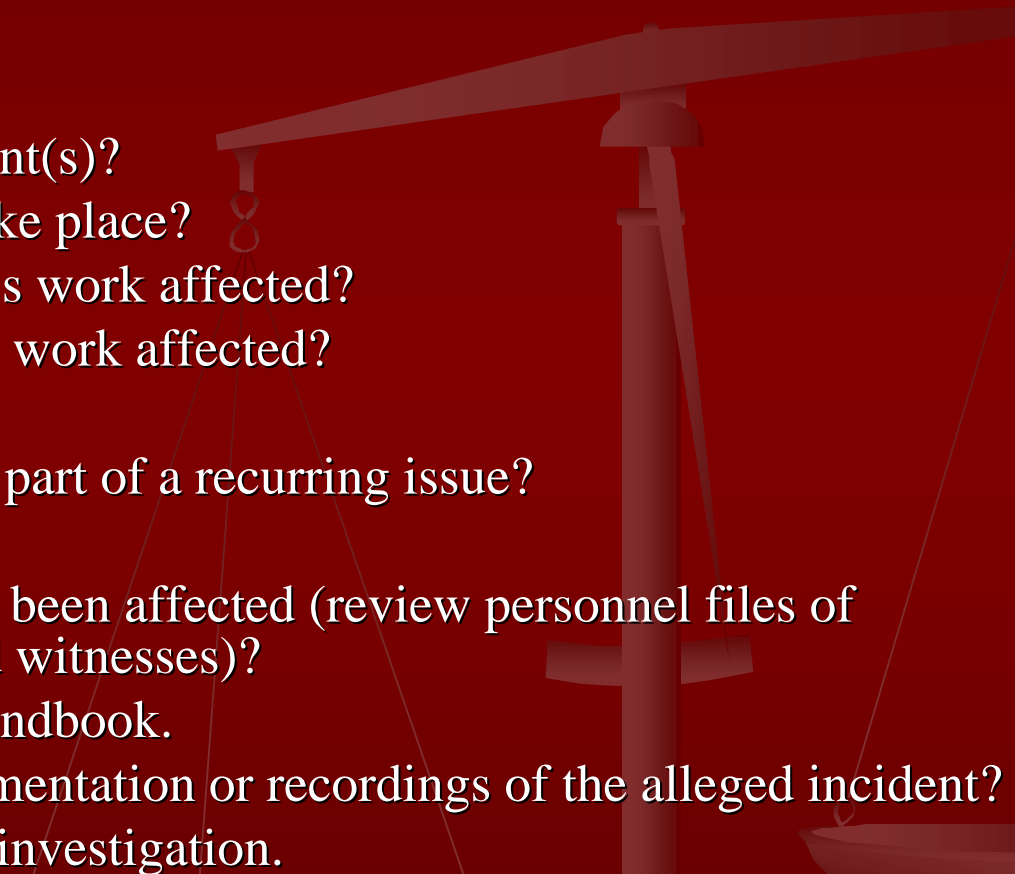
\*Assumes a five-day trial

\*\*Out of 22 trial losses typically appealed by companies

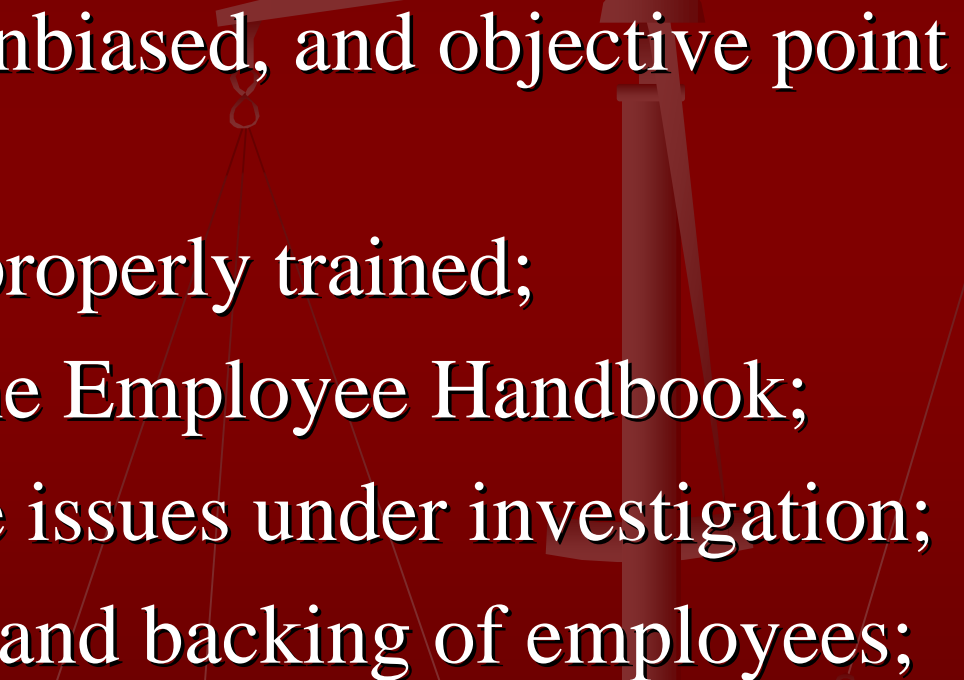
# **III. Investigating Claims of Discrimination**



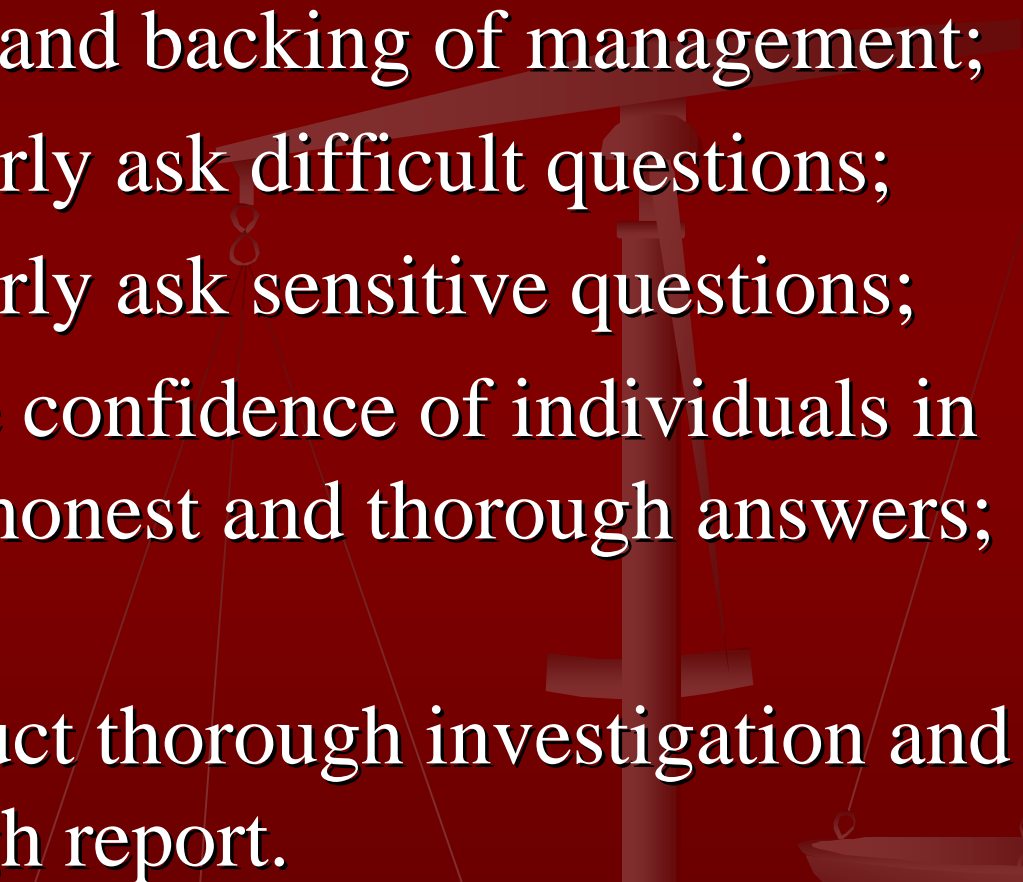
# Determining Preliminary Details & Documentation

1. What happened?
  2. Who is/are the accused?
  3. Who is/are the complainant(s)?
  4. Where did the incident take place?
  5. When is the complainant's work affected?
  6. How is the complainant's work affected?
  7. Who are the witnesses?
  8. Is the incident isolated or part of a recurring issue?
  9. Who are the supervisors?
  10. How the complainant has been affected (review personnel files of complainant, accused and witnesses)?
  11. Review the Employee Handbook.
  12. Is there any written documentation or recordings of the alleged incident?
  13. Set the parameters of the investigation.
- 

# Choosing the Right Investigator and/or Investigative Team

- 
- a. Has a neutral, unbiased, and objective point of view;
  - b. Is capable and properly trained;
  - c. Familiar with the Employee Handbook;
  - d. Understands the issues under investigation;
  - e. Has the respect and backing of employees;

## Choosing the Right Investigator and/or Investigative Team (Cont'd)

- f. Has the respect and backing of management;
  - g. Ability to properly ask difficult questions;
  - h. Ability to properly ask sensitive questions;
  - i. Able to earn the confidence of individuals in order to obtain honest and thorough answers; and,
  - j. Ability to conduct thorough investigation and provide thorough report.
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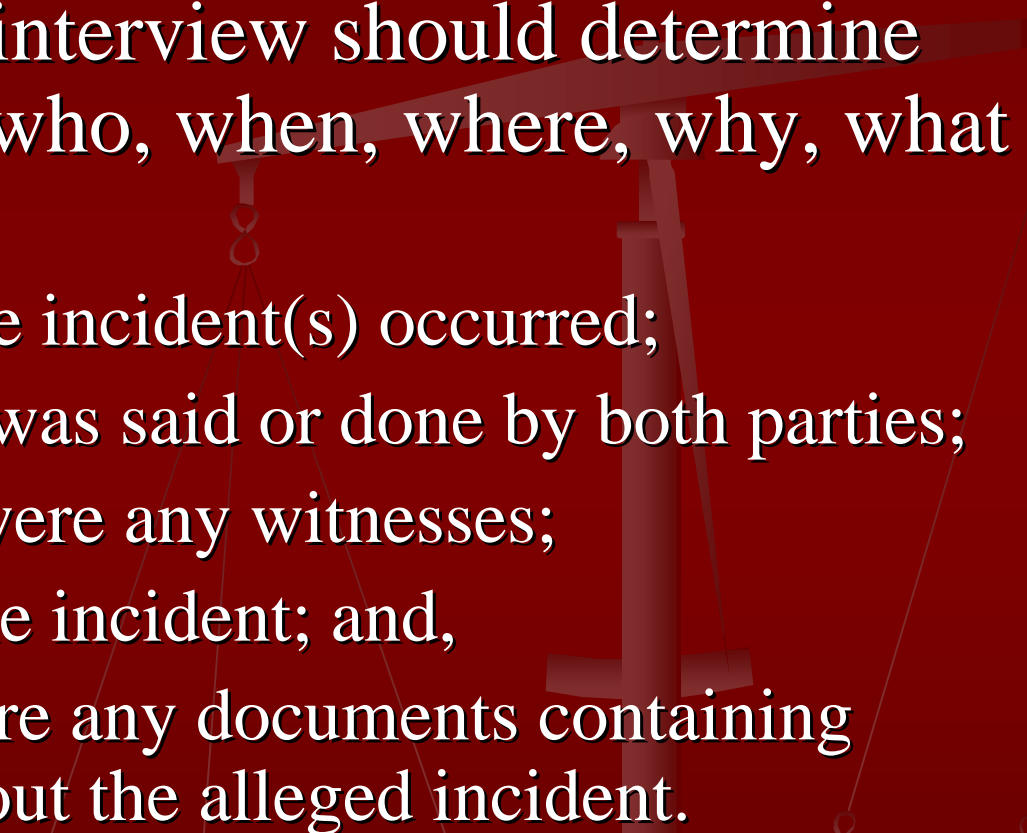


# Interview Preparation

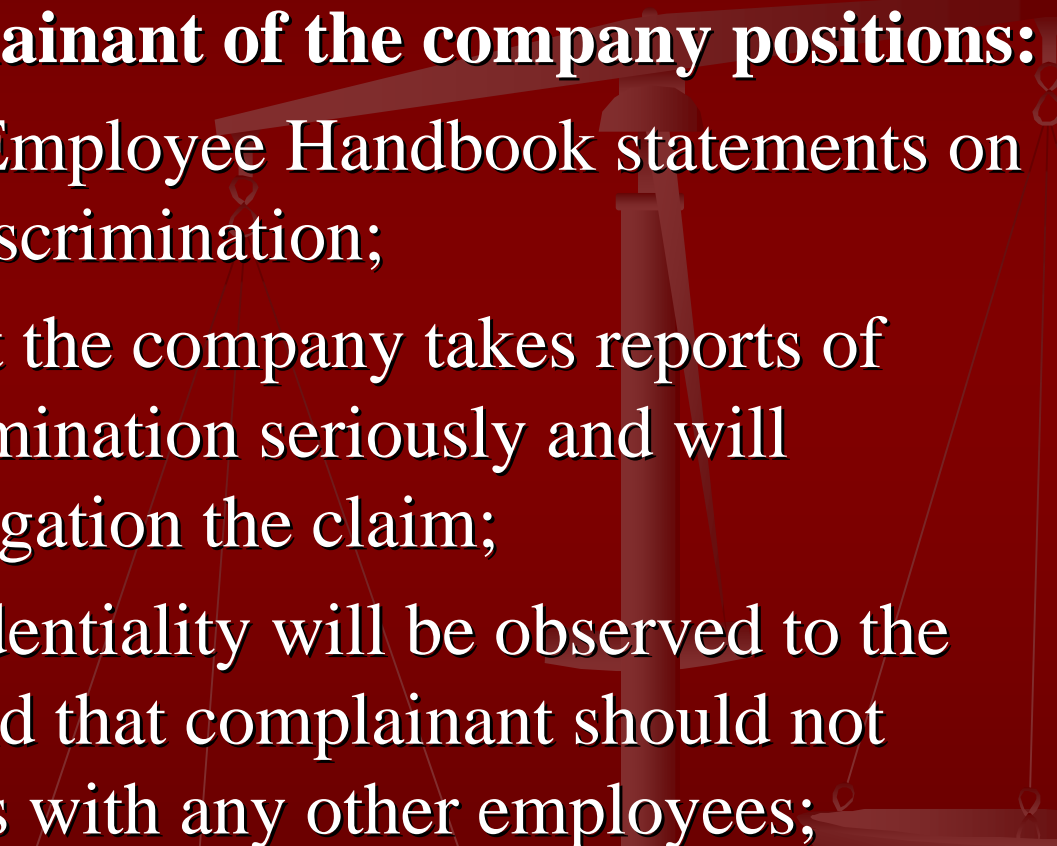


1. Review the personnel files of the complainant, the alleged accused, and witnesses;
2. Review all documents and notes of the supervisor who took the complaint;
3. Determine the order of interviews;
4. Make outline of interview questions;
5. Select location for interviews; and,
6. Select a management witness to participate in the interviews.

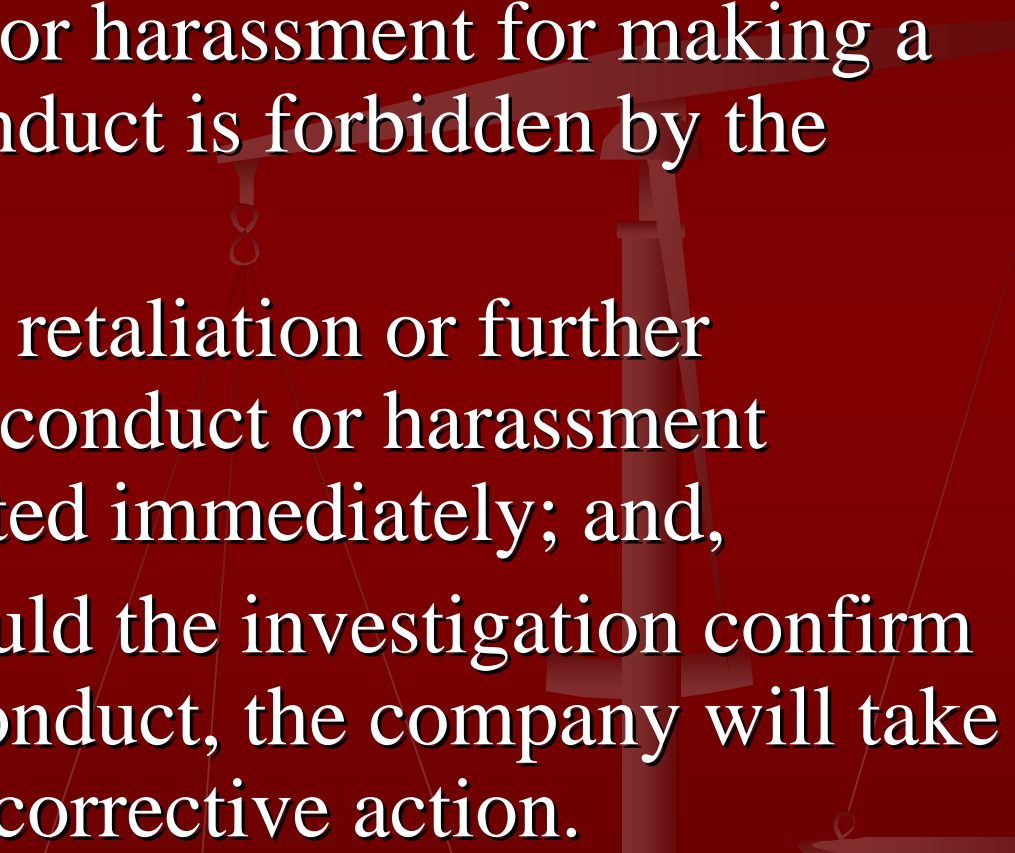
# Interview with Complainant

- a. GOAL - Initial interview should determine all basic facts: who, when, where, why, what and how;
1. when and where incident(s) occurred;
  2. what precisely was said or done by both parties;
  3. whether there were any witnesses;
  4. the effects of the incident; and,
  5. whether there are any documents containing information about the alleged incident.
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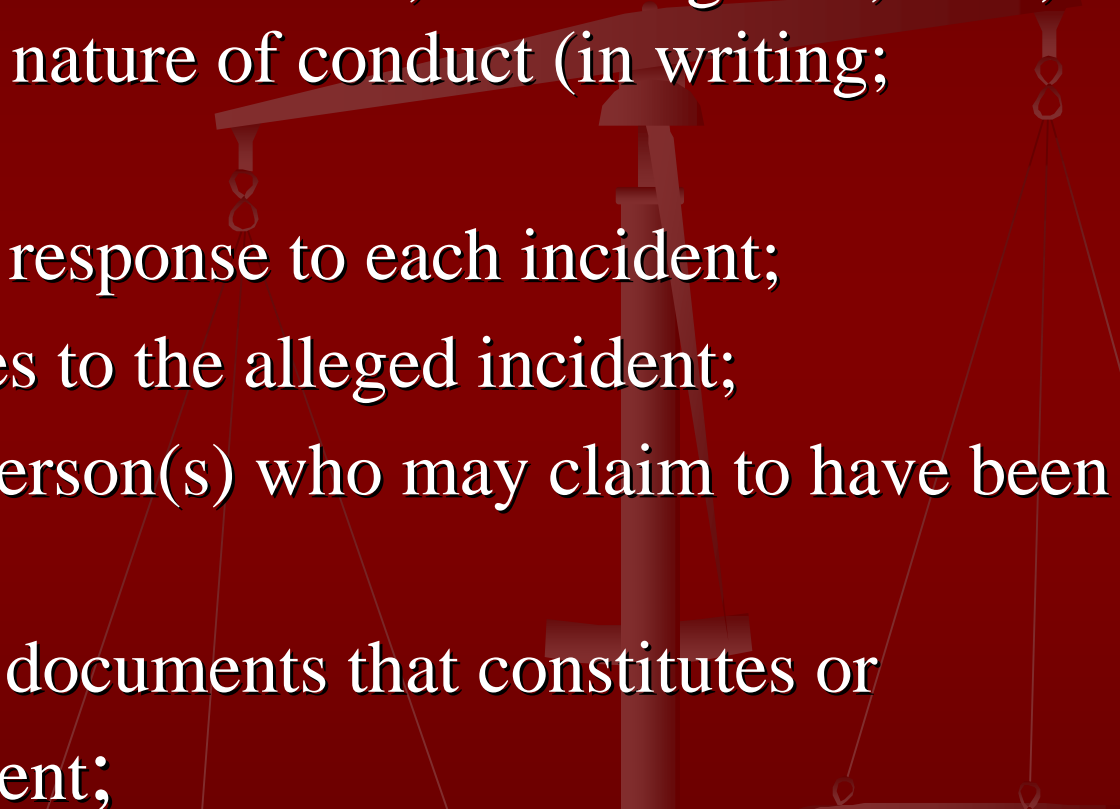
# Interview with Complainant (continued)

- b. **Advise the complainant of the company positions:**
1. Verbalize the Employee Handbook statements on harassment and discrimination;
  2. Emphasize that the company takes reports of harassment/discrimination seriously and will thoroughly investigate the claim;
  3. Confirm confidentiality will be observed to the extent practical and that complainant should not discuss allegations with any other employees;
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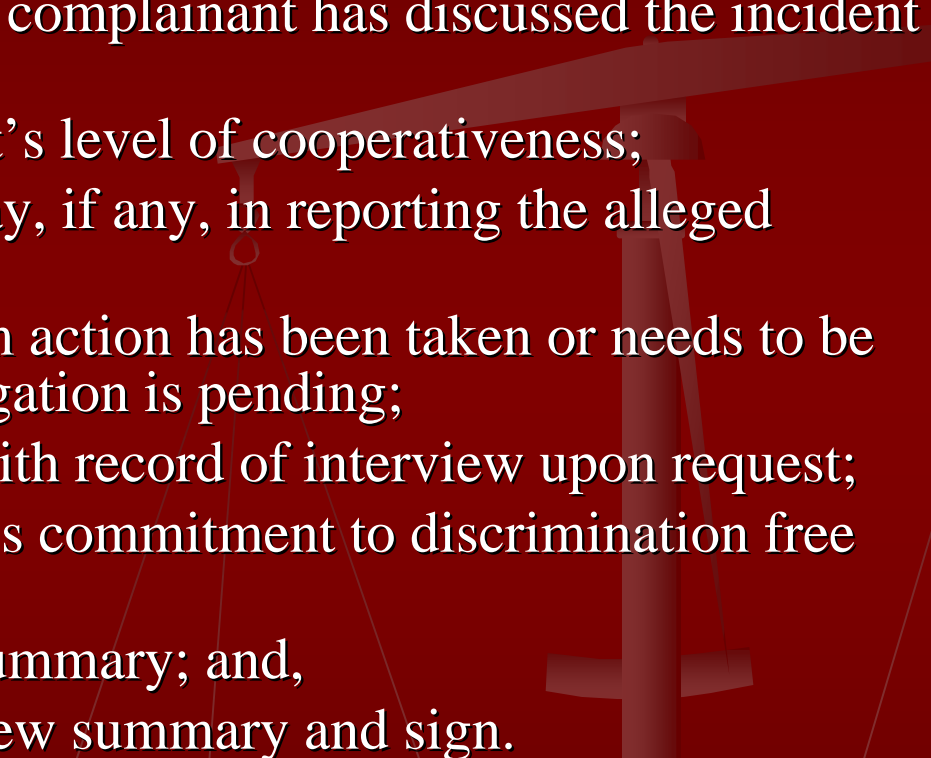
# Interview with Complainant (continued)

4. That retaliation or harassment for making a report of misconduct is forbidden by the company;
  5. Any perceived retaliation or further incidents of misconduct or harassment should be reported immediately; and,
  6. Advise that should the investigation confirm inappropriate conduct, the company will take the appropriate corrective action.
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## Interview with Complainant (continued)

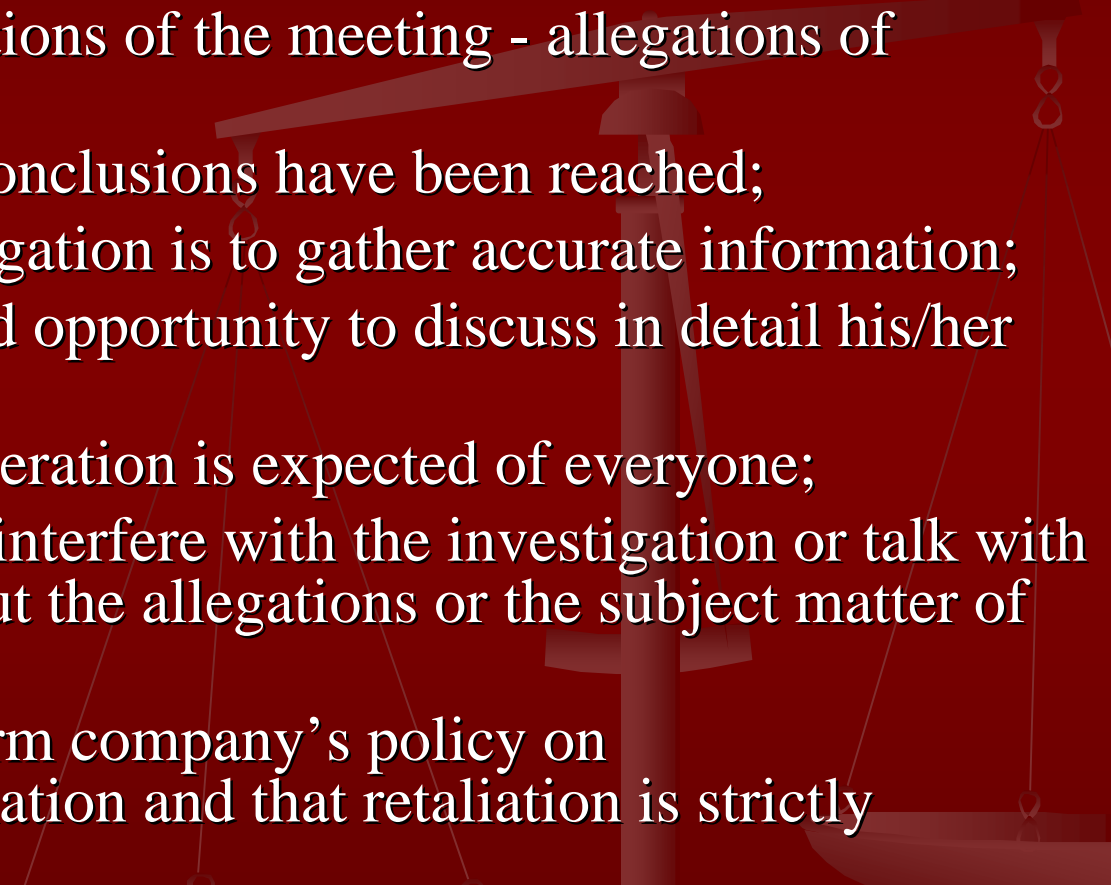
- c. Thoroughly discuss each incident, including date, time, place, and the exact nature of conduct (in writing; review verbally);
  - d. Note complainant's response to each incident;
  - e. Identify all witnesses to the alleged incident;
  - f. Identify any other person(s) who may claim to have been harassed;
  - g. Identify any and all documents that constitutes or records the harassment;
- 

# Interview with Complainant (continued)

- h. Identify all persons the complainant has discussed the incident with;
  - i. Document complainant's level of cooperativeness;
  - j. Identify reason for delay, if any, in reporting the alleged harassment;
  - k. Determine what interim action has been taken or needs to be taken while the investigation is pending;
  - l. Provide complainant with record of interview upon request;
  - m. Reaffirm the company's commitment to discrimination free workplace;
  - n. Immediately prepare summary; and,
  - o. Have complainant review summary and sign.
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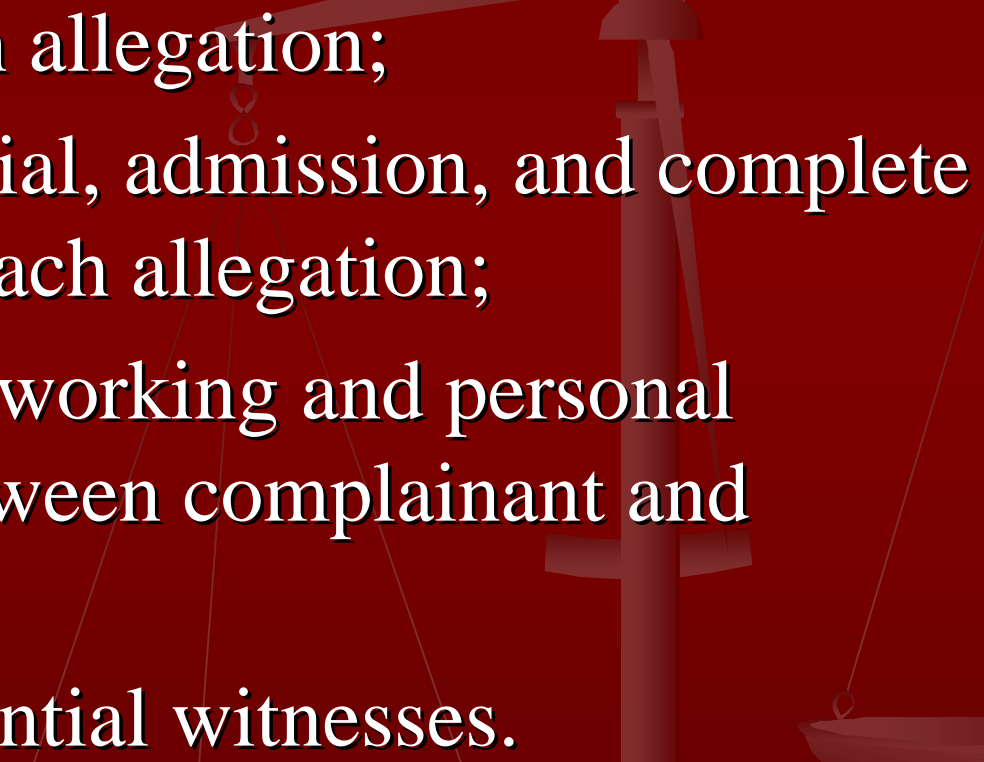
# Interview with Accused

**a. Advise accused:**

1. Identify the objections of the meeting - allegations of workplace conduct;
  2. Confirm that no conclusions have been reached;
  3. Purpose of investigation is to gather accurate information;
  4. This is the accused opportunity to discuss in detail his/her story;
  5. Full, truthful cooperation is expected of everyone;
  6. Accused is not to interfere with the investigation or talk with other employees about the allegations or the subject matter of the complaint; and,
  7. Review and confirm company's policy on harassment/discrimination and that retaliation is strictly forbidden.
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# Interview with Accused (continued)

## b. Interview

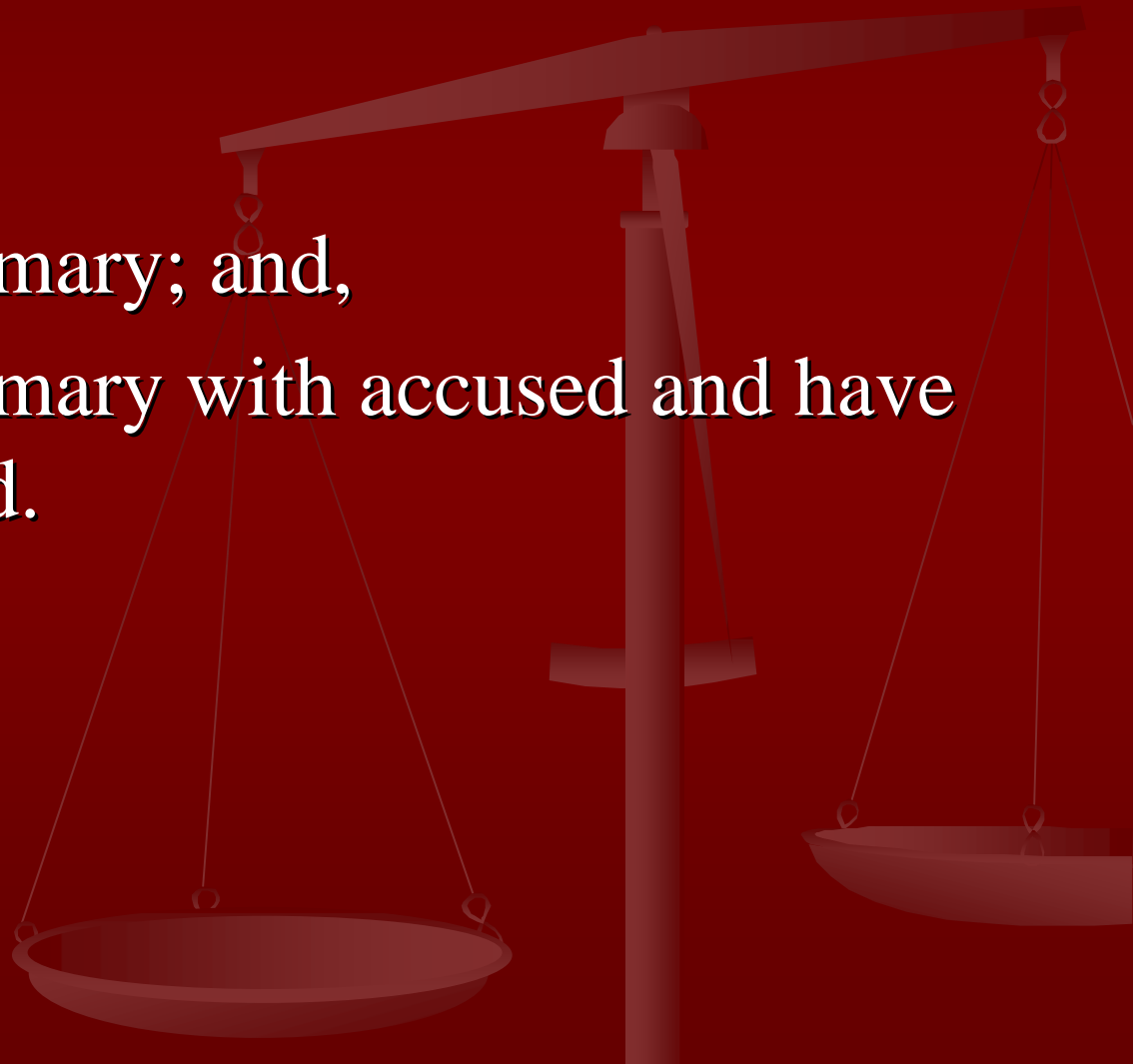
1. Identify each allegation;
  2. Obtain a denial, admission, and complete response as to each allegation;
  3. Explore any working and personal relationship between complainant and accused; and,
  4. Identify potential witnesses.
- 



# Interview with Accused (continued)

## c. Post Interview

1. Prepare summary; and,
2. Review summary with accused and have summary signed.



# Witness Interviews



- A. Explain objectives of the interview – to thoroughly investigate a complaint
- B. Review the Employee Handbook statements on harassment and discrimination;
- C. Emphasize that the company takes reports of harassment/discrimination seriously and will thoroughly investigate the claim;
- D. Confirm confidentiality will be observed to the extent practical and that complainant should not discuss allegations with any other employees;

# Witness Interviews



- E. Assert the complete and honest responses are expected of everyone;
- F. Confirm the company will not tolerate retaliation for participating in the investigation;
- G. Witness has a right and duty to report any perceived retaliation; and,
- H. Company has a duty to thoroughly investigate all complaints.

# Witness Interviews

## A. Interview

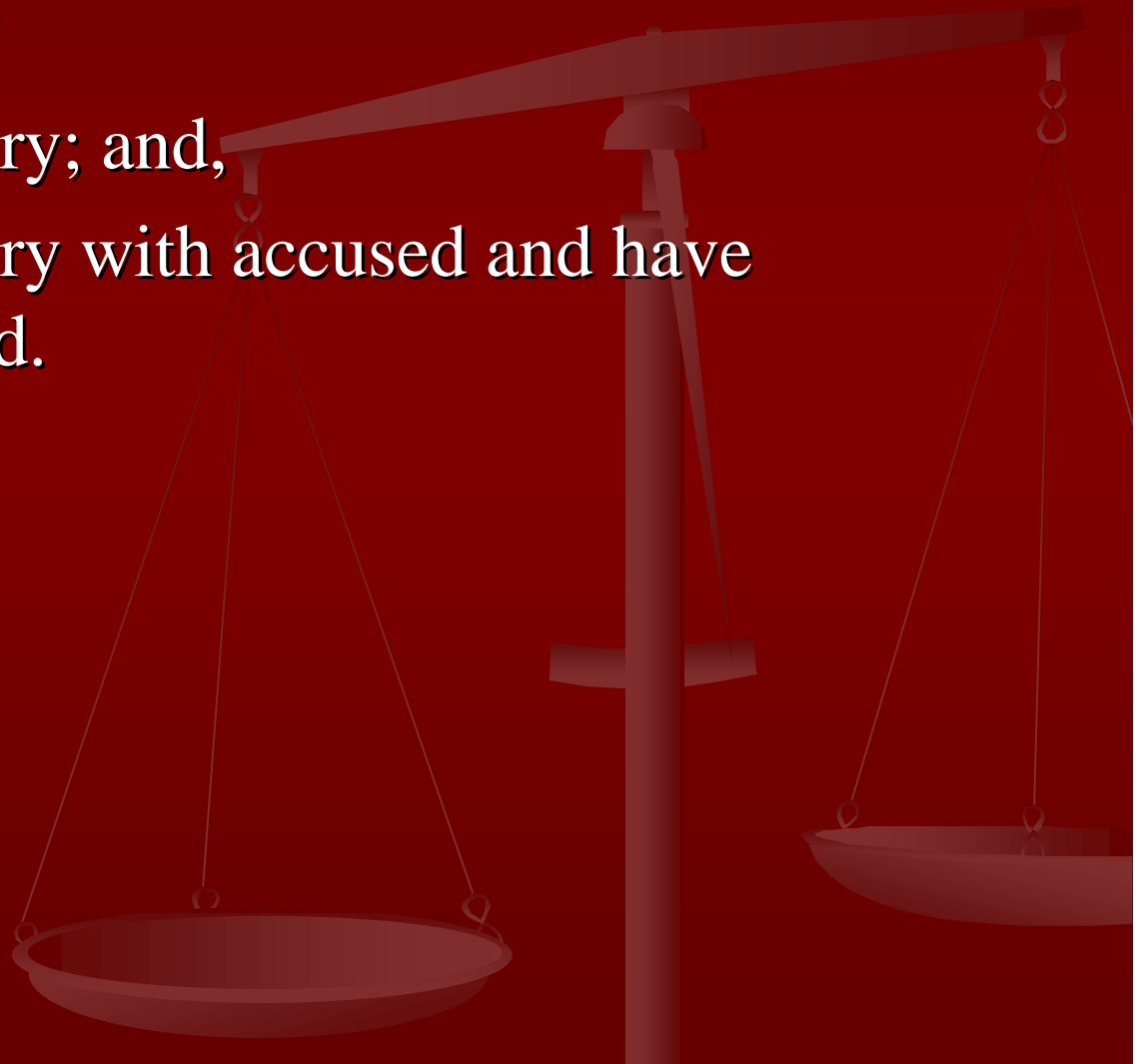
1. Avoid providing unnecessary information to the witness;
2. Ask open ended questions;
3. Specific detail on incident and locations;
4. Determine what is personally known and what is hearsay;
5. Identify all witness(es) to the alleged incident;
6. Have witness write down exactly what they saw.

\*Never tell a witness "this is off the record".\*

# Witness Interviews

## B. Post Interview

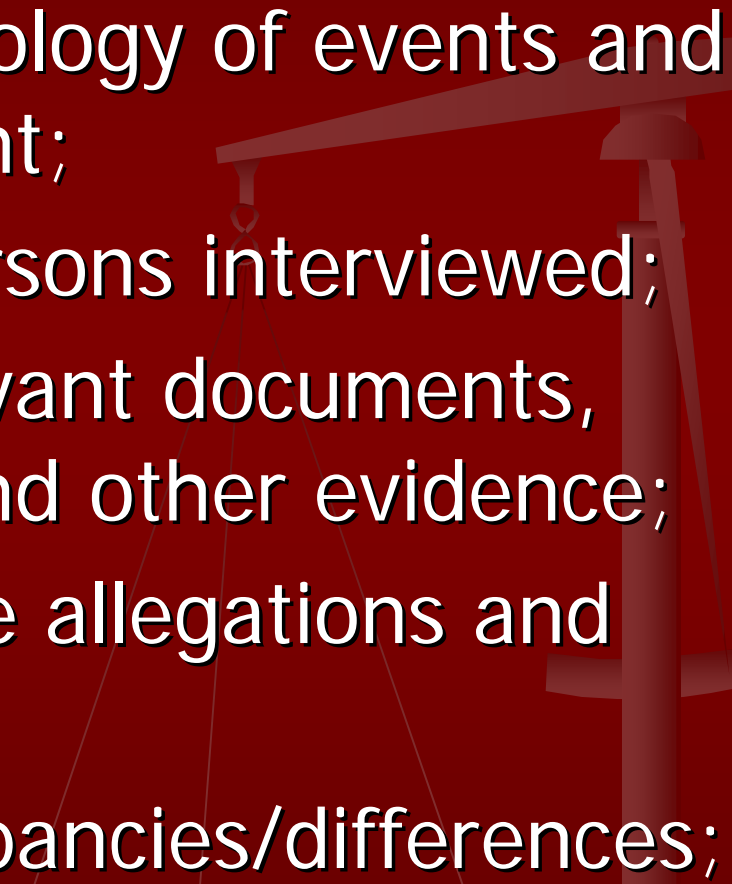
1. Prepare summary; and,
2. Review summary with accused and have summary signed.



# **IV. Documentation of Investigation**



# Investigation Documentation

- A. Prepare chronology of events and alleged incident;
  - B. Identify all persons interviewed;
  - C. Attach all relevant documents, statements, and other evidence;
  - D. Summarize the allegations and responses;
  - E. Outline discrepancies/differences;
- 

# Investigation Documentation (cont'd)

- F. Have notes and summaries signed by investigator/team;
- G. Summary of findings regarding each allegation; and,
- H. Overall conclusions.

\*Do NOT keep reports in personnel files\*

