

Conducting an Internal Investigation

Pittsburgh Employment Law Conference

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October 2, 2014

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TOPICS TO BE COVERED

- Recognizing the need for an investigation
- Reasons for conducting investigations
- Preparing for an investigation
- Conducting an effective interview
- Uncooperative witnesses
- Tape recording/witness statements
- Confidentiality
- Common mistakes made during witness interviews
- Decision-making based on the results of an investigation
- Documentation of investigation

HYPOTHETICAL #1: THE COMPLAINT

Sue tells her supervisor that Jim, a co-worker, has been making inappropriate, sexually-oriented comments to her. When the supervisor asks for details, Sue says that she does not want to get Jim in trouble and that she did not want to make a “formal complaint.” The supervisor calls you. What should you do?

- A. Do not investigate; you can ignore Sue’s statement because she did not make a formal complaint**
- B. Talk to Sue and see if she wants to make a formal complaint; investigate only if she decides to make a formal complaint**
- C. Investigate**

RECOGNIZING THE NEED FOR AN INVESTIGATION

An employer may need to conduct an investigation even if:

- No one requests that an investigation be conducted
- The person complaining requests that no investigation be conducted
- The person complaining states that he or she is speaking “off the record”
- The employer’s policy requires that complaints be in writing, and no written complaint has been filed
- The relevant facts appear to be incontrovertible

OBJECTIVES IN CONDUCTING INVESTIGATIONS

- Gather facts and relevant evidence, so that appropriate employment action can be taken
- Obtain information that may assist the employer in defending against employment claims
- Act of investigating may assist the employer in avoiding liability
- Afford a wrongdoer the opportunity to lie
- Pin witnesses to facts, before there is an opportunity to collaborate or to conform their stories to the evidence
- Demonstrate the employer's seriousness in addressing issues of possible misconduct
- Demonstrate the employer's fairness in addressing issues of possible misconduct

PREPARING FOR THE INVESTIGATION

- Investigate promptly
- Determine who should participate in the investigation
- Don't "wing it"
- Review the allegations
- Review relevant policies
- Review relevant personnel files
- Create a consistent opening statement for use with witnesses
- Prepare an outline of questions to be asked
- Select a private and quiet interview location

OPENING STATEMENT FOR WITNESS INTERVIEWS

- Attempt to put the witness at ease.
- Explain the reason for interview.
- Explain the importance of truthful and complete information.
- Explain the confidentiality rules that apply.
- Explain the employer's rules against retaliating and the procedure for reporting retaliation.

ORDER OF INTERVIEWS

1. The Complainant
2. Witnesses identified by the Complainant or known to the employer

Review tangible evidence relevant to the information that you have obtained (e.g. – time cards; emails; surveillance tapes).

3. The Accused
4. Rebuttal witnesses identified by the Accused
5. The Complainant

INTERVIEWING THE COMPLAINANT

- Ask specific questions designed to elicit specific details
- Ask for identification of witnesses or other persons with knowledge
- Inquire into possible biases or motives to lie
- Ask if there is anything that the Complainant wishes to add
- Ask the Complainant to report any additional relevant information that he/she subsequently remembers
- Advise the Complainant that the employer will inform him/her of the results of the investigation
- Ask the Complainant to report any retaliation immediately

INTERVIEWING THE ACCUSED

- Start with open-ended questions
- Proceed to specific questions, based on the information already obtained
- Ask about motives for the Complainant to lie
- Ask if there is anything that the Accused wishes to add
- Ask the Accused to report any additional relevant information that he/she subsequently remembers
- Instruct the Accused not to discuss the investigation with others
- Repeat the admonition against retaliation

HYPOTHETICAL #2: I DON'T WANT TO BE INTERVIEWED

You have identified Tom as a possible witness in the investigation of the sexual harassment allegations against Jim. Tom and Jim are buddies. You call Tom in for an interview. Tom tells you that he is not a “snitch,” and Tom refuses to answer your questions. What should you do?

- A. You can insist that Tom answer your questions, and discipline him if he continues to refuse**

- B. You can't force Tom to cooperate**

DEALING WITH AN UNCOOPERATIVE WITNESS

- Ask the employee why he or she is refusing to cooperate
- Attempt to alleviate the employee's concerns
- Advise the employee of the consequences of continued non-cooperation
- Instruct the employee to cooperate

HYPOTHETICAL #3: WHEN THE ACCUSED IS UNCOOPERATIVE

You bring Jim in for an interview. He is aware that you are investigating sexual harassment allegations against him. He says that he hasn't done anything wrong, but that he doesn't believe that he will get a "fair shake" in the investigation, because employers "always believe the woman when a man is accused of harassment." He tells you that he has decided to invoke his Fifth Amendment privilege not to speak. He also says that he wants to have his attorney present before you speak with him further. What should you do?

- A. Do not allow Jim to assert his Fifth Amendment privilege, and do not allow him to have his attorney present**
- B. Allow Jim to assert his Fifth Amendment privilege, but do not allow him to have his attorney present**
- C. Do not allow Jim to assert his Fifth Amendment privilege, but allow him to have his attorney present**
- D. Allow Jim to assert his Fifth Amendment privilege, and allow him to have his attorney present**

LEGAL RIGHTS OF THE ACCUSED

- No Fifth Amendment privilege against self-incrimination
- No right to legal representation
- No Miranda rights
- Weingarten right to representation by union or fellow employee, if the employer is unionized

INTERVIEWING THE UNCOOPERATIVE ACCUSED

- If the Accused invokes the Fifth Amendment:
 - Advise him/her that the Fifth Amendment prohibits only the government from compelling testimony
 - Advise him/her that an employer may discipline or discharge employees for refusing to provide information
- If the Accused demands legal representation:
 - Advise him/her that there is no right to legal representation
 - Do not grant the request for legal representation
- If the Accused refuses to answer or is evasive:
 - Tell the accused that it is in his/her best interest to cooperate, as a failure to do so will leave the allegations un rebutted
 - Warn the Accused that he/she could be subject to discipline or discharge, for insubordination, for refusing to cooperate

SHOULD YOU TAPE RECORD THE INTERVIEW?

- Advantages:
 - Preserves the witness' statement, in his/her own words
 - Minimizes the likelihood of allegations that the witness' statement was coerced
 - Helpful to law enforcement, if criminal charges are filed
- Disadvantages:
 - May cause the witness to be less forthcoming
 - Requires the witness' consent, in many jurisdictions
 - May result in the recording of unrelated information that the employer may not wish to record

SHOULD YOU OBTAIN WRITTEN STATEMENTS?

- Advantages:
 - Preserves the information provided by the witness
 - Assists with further interviews
- Disadvantages:
 - Witness may be less forthcoming, if asked to put facts in writing
 - Can slow down the investigation
 - Creates discoverable record of potentially harmful evidence

CONFIDENTIALITY

- When interviewing, always ask the witness to maintain the confidentiality of the information discussed during the interview
- Explain why confidentiality is important
- Do not promise that the employer will maintain the confidentiality of the investigation
- Explain that the employer will attempt to maintain confidentiality, but that the employer may need to reveal certain information in order to conduct a proper investigation
- Reveal information to witnesses only to the extent necessary to obtain information from them
- Reveal information to management only on a need-to-know basis

COMMON MISTAKES DURING INVESTIGATORY INTERVIEWS

- Doing the interview alone
- Approaching the interview with a closed mind
- Disclosing the evidence before questioning the witness
- Making admissions harmful to the employer
- Promising confidentiality
- Demonstrating bias
- Failing to document the interview

HYPOTHETICAL #4: SEARCHES

Based on information that you have obtained during witness interviews, you suspect that Jim has pornography in his desk. You also believe that there are e-mails on the Company's email system that corroborate that he has made sexually-inappropriate comments. Jim keeps his desk locked and has the only key. The Company informs employees that their emails may be monitored, but Jim has changed the password on his computer so that you cannot access his e-mail. What should you do?

- A. You may not search Jim's desk or examine his emails, because he has an expectation that the contents of his desk and his emails are private**
- B. You may search his desk, but not examine his emails**
- C. You may not search his desk, but you may examine his emails**
- D. You may search his desk and examine his emails**

WORKPLACE SEARCHES

- Put employees on written notice that personal property may be searched
- Advise employees that they should not expect privacy with regard to items in their lockers, desks, purses, backpacks, and briefcases
- Maintain a written policy advising employees that the Company will search Company property and personal belongings, where appropriate in furtherance of Company investigations
- Search only when there is a compelling business reason to do so
- Conduct the search in the least intrusive manner possible

THE ELECTRONIC WORKPLACE

- Investigating computer activity is often essential
- Factors in determining whether an employee has a reasonable expectation of privacy regarding his/her work computer
 - Whether the employer maintains a policy banning objectionable use
 - Whether the employer has placed the employee on notice that the employer monitors employees' computer usage, or the employee was otherwise aware of the monitoring policies
 - Whether the employer actually monitors employees' computer usage
 - Whether the Company's IT Department or outside vendors have the right of access to the employee's computer
 - Whether the employee has consented to the inspection of his/her computer, either through a signed acknowledgment or notification

THE DETERMINATION

- Review all of the evidence
- Consider the type and quality of the evidence (e.g.- personal observations v. mere rumor or gossip)
- Consider the quantity of the evidence
- Assess witness credibility
- Consider biases and motives of the witnesses
- Proof to an absolute certainty or beyond a reasonable doubt is not required
- Make the best judgment that you can based on the information obtained and on your own experience and intuition

REMEDIES

- Determine what, if any, corrective action or remedial measures are necessary
- Be consistent in the application of policies and practices
- If issuing discipline, remember that the purpose of disciplinary action is to:
 - Deter the employee and others from engaging in similar conduct in the future
 - Establish a basis for more severe discipline, if the employee engages in further misconduct
 - Communicate to employees that certain types of conduct are unacceptable
 - Help the employer avoid liability, if the employee should engage in further misconduct

DOCUMENTATION OF THE INVESTIGATION

- Maintain legible notes of any interviews conducted
- Maintain any witness statements obtained
- Document communications made during the investigation regarding confidentiality and non-retaliation
- Document any corrective or other remedial action that was taken
- Document the report that was made back to the Complainant
- Consider possible preparation of a final investigatory report
- Maintain documents, other than disciplinary documents, relating to the investigation in a file separate from personnel files

INVESTIGATORY REPORTS

- Should a report be prepared in all cases?
- Should the report be written or oral?
- Should the report include only facts and conclusions, or should it also include recommendations?

PREPARING THE REPORT

- The person preparing the report should be mindful of the fact that the report could be used by or against the Company in litigation
- The report should contain:
 - Background information
 - An explanation of the situation prompting the investigation
 - An explanation of actions that were taken to investigate
 - Identification of the witnesses interviewed
 - Identification of the documents reviewed
 - Significant, relevant documents should be attached

PREPARING THE REPORT CONTINUED...

- The report should identify the date and author of the report
- The report should be prepared in a manner that would educate a person who has little familiarity with the Company or with the employees involved in the investigation
- The report should not include admissions
- The person preparing the report should consider attorney-client privilege issues

Thank You

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Note: This document is not intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.

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