

EVERYTHING HR NEEDS TO KNOW ABOUT CONDUCTING INTERNAL INVESTIGATIONS

Mario R. Bordogna

(412) 394-2487

mbordogna@clarkhill.com

Andrew J. Ruxton

(412) 394-2573

aruxton@clarkhill.com

CLARK HILL

INVESTIGATION ROADMAP

- Do I have to?
- The Investigator
- Timing of the Investigation
- Warming up
- Interviewing
- Investigation findings
- After the Investigation
- BONUS: Top Investigation Questions

DO I HAVE TO?



CLARK HILL

DO I HAVE TO?

Common causes for investigations:

- Harassment
 - Potential defense (*Burlington Industries, Inc. v. Ellerth*; *Faragher v. City of Boca Raton*)
- Theft
- Workplace accident/injury
- discrimination/retaliation
- general workplace rule violations

DO I HAVE TO?

If not done (or done right):

- Four year employee attacked by co-worker. Both terminated immediately without investigation. Police report concludes employee was “complete victim,” but employer doesn’t do anything further or share that report with employee, and ignores employee’s pleas for explanation and re-hire.
- Wrongful termination lawsuit = \$2.4 million in damages + \$5 million punitive damages (2016)

DO I HAVE TO?

If not done (or done right):

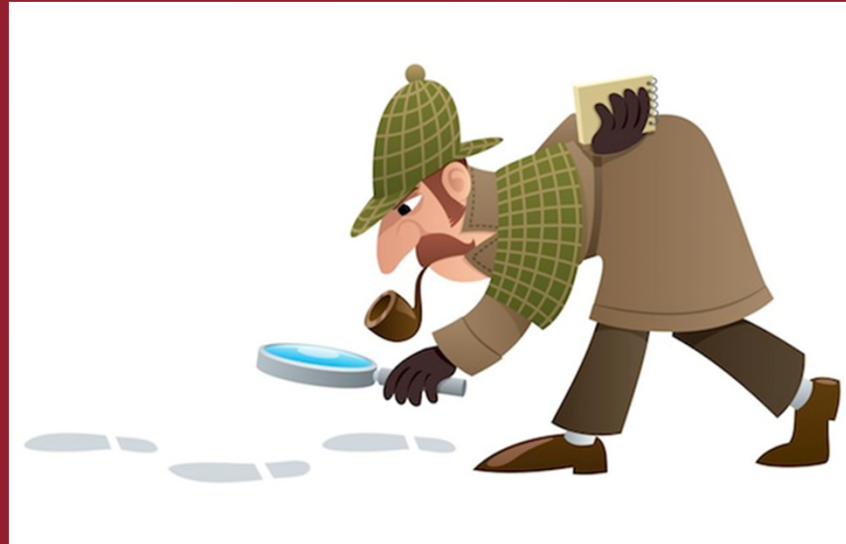
- 14-year employee threatened repeatedly by co-workers, including graffiti around employee's workstation & puncturing his tires. Employee initially complained and was offered a different parking area. After he complained again, a meeting was held reviewing the company's harassment policy. When he complained again and gave names of 19 people responsible, none were interviewed.
- Hostile Work environment lawsuit = Nearly \$1 million in damages + \$4 million punitive damages (2012)

DO I HAVE TO?

If not done (or done right):

- Plaintiff claimed manager harassed her, including pinching and lewd comments, and it escalated to him trapping her in a storeroom, holding her down, and masturbating over her. She called a company hotline to report this but was never contacted, but no investigation was undertaken and no action was taken against the manager. The company claims the hotline complaint was “vague.”
- Harassment lawsuit = \$15 million in damages + \$80 million punitive damages (2011)

THE INVESTIGATOR



CLARK HILL

THE INVESTIGATOR

Who should it be?

- Supervisors/Managers
- HR
- Third parties
- Counsel (inside or outside)

May not be the same each time

THE INVESTIGATOR

Considerations:

- Credibility
- Experience
- Impartiality
- People skills
- Legal action

Think ahead to testimony about the investigation!

THE INVESTIGATOR

To use or not use counsel?

- Use of counsel may shield some, but not all, of the investigation
 - Legal advice shielded
 - What about notes?
 - If you intend on making defenses...
- Counsel may become a witness

Define scope of role at outset!

TIMING OF THE INVESTIGATION



CLARK HILL

TIMING OF THE INVESTIGATION

When it starts & how long it takes:

- Investigations must be prompt
 - Days, not weeks
- Length of investigation depends on scope and varying factors, including response received
- No one size fits all, but the later to start & the longer it takes, the riskier it becomes

WARMING UP



CLARK HILL

WARMING UP

Preparing for the investigation:

- Most important thing you can do: **BE ORGANIZED!**
- Identify anything you need in advance
- Review relevant documents, including policies, personnel files, etc.
- Determine witnesses to interview and order
- Assess confidentiality/sensitivities involved
- Remember your role

INTERVIEWING



CLARK HILL

INTERVIEWING

Witness rights:

- No Retaliation
- Potentially applicable rules (*Upjohn*)
- NLRB implications
 - *Johnnie's Poultry* guidelines (ULP investigations)
 - *Weingarten* rights (investigatory interview of union employee who reasonably believes discipline could result; right to request union representation)

INTERVIEWING

Confidentiality:

- Maintain confidentiality to extent possible, but complete confidentiality of complaint or identity of complainant should not be guaranteed, and that needs to be made clear up front

INTERVIEWING

Confidentiality:

- Asking any witness in an investigation to maintain confidentiality could violate Section 7 of the NLRA unless it can be demonstrated that there was a need to protect witnesses, prevent evidence destruction, avoid fabrication of testimony, or prevent a cover up (NLRB: *Banner Estrella Medical Ctr*, 2015)

INTERVIEWING

The set up:

- Two people for employer, if possible
- Face-to-face > phone
- Individual > group
- Your “opening”
 - Nature of investigation & process
 - Obligation to conduct (& participate?)
 - No retaliation

INTERVIEWING

Techniques:

- Open-ended questions, then specific follow-up until subject exhaustion or you close the loop
- Leading is for lawyers
- Balancing tone with objectivity
- Recordings
- Providing a written account
- Did you say polygraph?

INTERVIEWING

Nuts and bolts:

- Ask for supporting sources or information, or the identity of others who may have information
- Assess real/potential bias
- Do not encourage withdrawal of complaint, or express anything regarding impact of investigation on company
- Devil is in the details

INTERVIEWING

Interview documentation:

- Notes – be sure they are dated
- Formal prepared summary
- Just the facts ma'am
- Conclusions/impressions/theories kept separately
- If you reviewed any written information provided by the witness, note you did

INTERVIEWING

Special considerations for complainant and the accused:

- Timing (first and last?)
- Revealing identities
- Follow-up with complainant
- Handling emotions
- Remedies
- Interim redress

INVESTIGATION FINDINGS



CLARK HILL

INVESTIGATION FINDINGS

Conclusions/Report:

- Prepared by interviewer
- Remember investigation purpose (facts)
- Summarize complaint
- Describe applicable policies
- State what you did and found
- Explain findings
 - Why? (including credibility)
- Include any remedial action to be taken
- Drafts of the report
- Reviewed by counsel

INVESTIGATION FINDINGS

Communication:

- Communicate result directly to the Complainant
- Other relevant parties
 - Need to know
- Retaliation reminders

AFTER THE INVESTIGATION



CLARK HILL

AFTER THE INVESTIGATION

Responsibilities:

- Follow-up/monitoring remedial action
 - Check-up's
 - Training/evaluation
- Maintain investigative materials in separate, secure file

BONUS: TOP INVESTIGATION QUESTIONS



CLARK HILL

BONUS: TOP INVESTIGATION QUESTIONS

- How do I handle the failure of a witness to cooperate?
- Do I have to go through all these steps for every single complaint I get no matter how trivial it is?
- What if the results of my investigation are inconclusive?

QUESTIONS?



Mario R. Bordogna

(412) 394-2487

mbordogna@clarkhill.com

@EmpLawCounsel



Andrew J. Ruxton

(412) 394-2573

aruxton@clarkhill.com

THANK YOU

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

CLARK HILL