



Conducting Effective Investigations

ADAM SLOUSTCHER

Partner, San Diego/San Francisco

Email: asloustcher@fisherphillips.com

Phone: 858.597.9620

STEPHANIE REYNOLDS

Partner, San Diego/Los Angeles

Email: sreynolds@fisherphillips.com

Phone: 858.597.9624

Fisher Phillips Sports Industry Team

Fisher
Phillips



Adam Sloustcher

Partner, San Diego/San Francisco

asloustcher@fisherphillips.com

(858) 597-9620

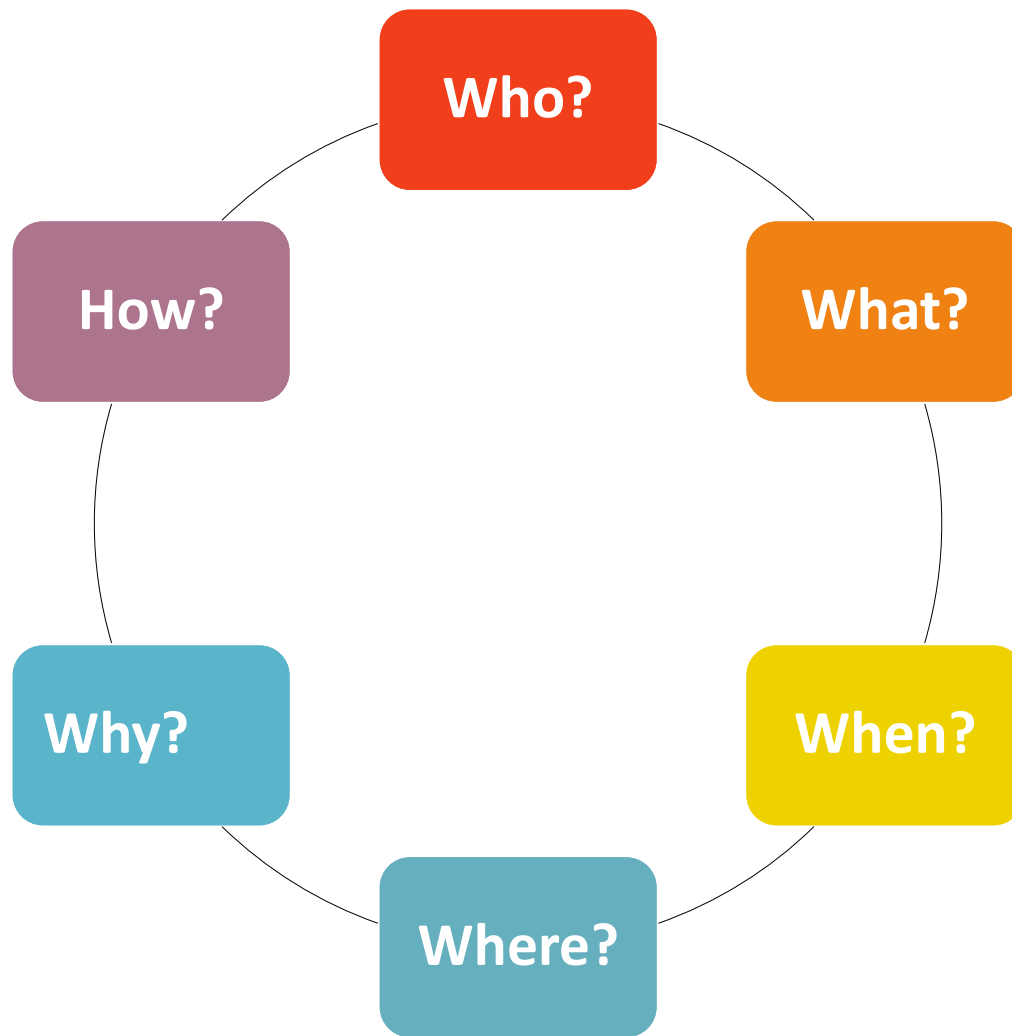


Stephanie Reynolds

Partner, San Diego/Los Angeles

sreynolds@fisherphillips.com

(858) 597-9624



Why?



Avoid or Minimize
Legal Liability



Improve Morale



Improve Factual
Basis for Decisions

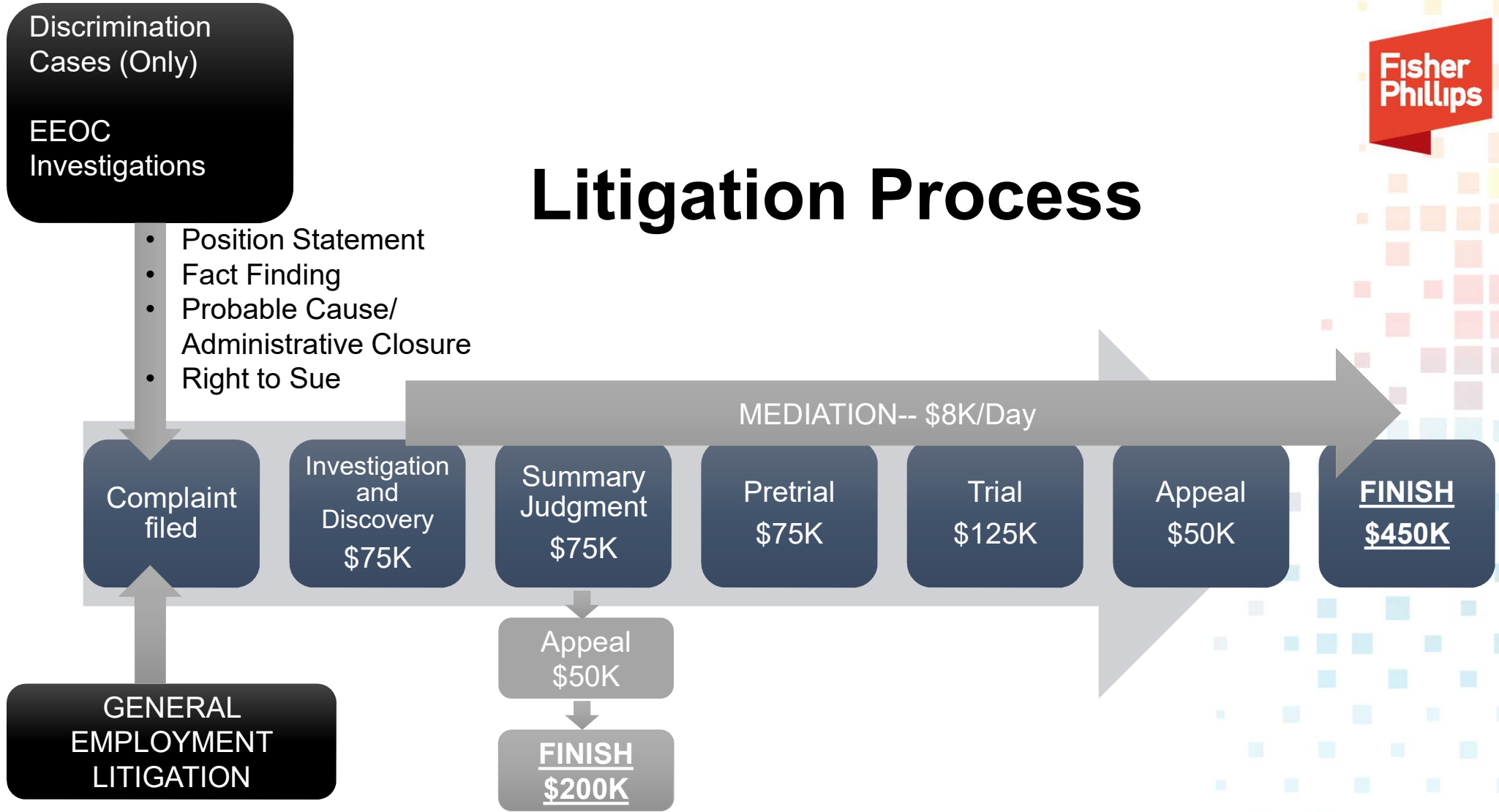


Set an Example



Demonstrate Company
Commitment to
Enforce Policies

Litigation Process



Avoid or Minimize Legal Liability



- Prompt and thorough investigation of a claim of discrimination and/or harassment can be a defense to liability.
- Automatically puts the investigation at issue.
- Person who conducted the investigation will be a witness –
 - you need to be prepared to explain why you did what you did.

A poor investigation can be costly

Former CORP vice president awarded \$4.1 million by federal judge after jury found 61-year old wrongly terminated because of age.

Judge harshly criticized CORP's handling of the investigation as one-sided and refused to allow CORP to submit it into evidence.

Judge wrote that he suspected the purpose of investigation was more to exonerate CORP than to determine if the employee was treated unlawfully.



10 Common Investigation Mistakes



1. **Failing to plan**
2. **Ignoring complaints, including “informal” complaints**
3. **Delaying investigations**
4. **Losing objectivity**
5. **Being distracted during interviews**
6. **Using overly aggressive interview tactics**
7. **Not conducting a thorough investigation**
8. **Failing to reach a conclusion**
9. **Failing to create a written report**
10. **Failing to follow up with those involved**

8 Steps For Effective Investigations

1. • Make a plan
2. • Collect relevant information
3. • Interview the reporting party and get a written statement
4. • Interview the individual against whom report was made (“subject”)
5. • Interview relevant witnesses
6. • Follow-up with reporting party and subject
7. • Reach a conclusion, prepare report, make recommendation/decision on corrective action
8. • Communicate findings to subject and reporting party

Step 1: Plan the Process



WHO will conduct the investigation

- Human Resources?
- Outside consultants/counsel?
- The manager of the department who already may have pre-determined opinions of those involved?
- Executives at the company who may be looking at things from an operational perspective as opposed to a risk management perspective?
- The manager who has future decision-making responsibilities over any discipline and termination of the complaining party?

Step 1: Plan the Process (cont.)

WHAT will be investigated?

- prepare detailed outlines of key issues, questions, and an opening statement in writing

WHAT evidence needs to be collected?

WHO will be interviewed?

- knowledge of matter being investigated

WHERE will interviews be conducted?

- confidential, safe, secure, private
- remote considerations



Step 1: Plan the Process (cont.)



HOW will the investigation be conducted?

- will the fact gatherer will make recommendations or provide a factual recitation to someone else?
- in what order will witnesses be interviewed?
- how and when will witnesses be informed of interviews ?
- are you likely to have uncooperative witnesses and how will they be handled?

Step 1: Plan the Process (cont.)

- Anticipate questions that interviewees are likely to ask
- Examples:
 - Why are you interviewing me?
 - Am I in trouble?
 - May I have my attorney/friend/family member with me?
 - Do I need an attorney?
 - Will I get into trouble by giving you this information?
 - I am afraid to tell you about Mr./Ms. X. He/she could hurt me.
 - Can we discuss something “off the record”?
 - Can you guarantee that no one will retaliate against me?
 - Haven’t you already made your decision?



Step 2: Collect Relevant Documentation

Examples:

- Relevant policies
- Personnel files
- Performance reviews
- Compensation data
- Prior complaints
- Emails, IMs, text messages
- Security footage



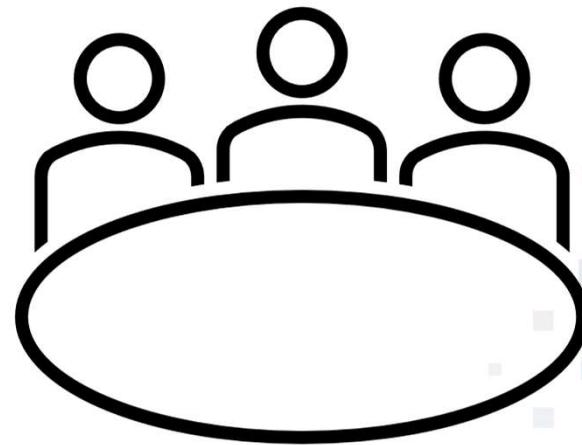
Step 3: Interviewing the Reporting Party



- Remain OBJECTIVE and set the tone for the investigation.
- Have the individual draft a written statement or sign a statement you prepare.
- Ask the 6 QUESTIONS.
- Determine if the incident was isolated or a part of a series of events.
- Get SPECIFICS!
- Identify witnesses.

Step 3: Interviewing the Reporting Party (cont.)

- Discuss confidentiality of process.
- Discuss anti-retaliation provision and provide copy of such policy if necessary.
- Never agree to forego or limit an investigation even if requested by reporting party.
- Discuss what reporting party seeks out of investigation, but don't give opinions of it.
- Remain OBJECTIVE.



Step 4: Interviewing the Subject of the Complaint

- Remain OBJECTIVE.
 - “Who has information/what documents do you believe exist that would support what you are telling me today?”
 - Not recommended: “What do you have that we could show that the complaining party is lying to us?”
- Ask the 6 questions.
- Provide an opportunity to explain.
- Obtain a written statement.



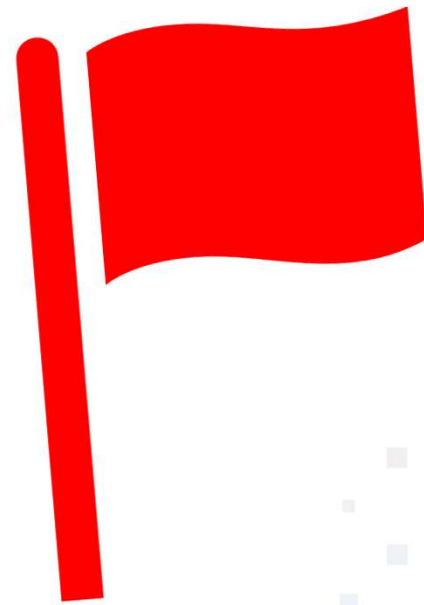
Step 5: Interviewing Witnesses



- If witness is a current or former employee, review personnel file prior to interview.
- Inform witness interview is confidential and that breach of confidentiality could impact the company's ability to successfully investigate the matter.
- Be alert to privacy rights of both the reporting party and the subject of the complaint.
- Remain OBJECTIVE.
- Provide details of the complaint only if necessary to obtain relevant information.

Step 5: Interviewing Witnesses (cont.)

- Phrase questions so as not to give unnecessary information.
- Do not automatically limit investigation to witnesses currently in the workforce.
 - interview former employees, clients, etc., if necessary.
- Employer's failure to keep investigation confidential can lead to defamation or invasion of privacy claims.



Interviewing Guidelines



Fisher
Phillips

Opening and closing statements.

- “I’m here to look into some allegations that have been made.”
- “I want to understand what you have seen or heard.”
- Limited confidentiality (need to know for purposes of conducting investigation and taking corrective action, if necessary).
- Anti-retaliation.

Treat interviewee with dignity.

Interviewing Guidelines (cont.)



- Questions
 - Open-ended and broad, not leading
 - Chronological
 - Tough or embarrassing questions
 - Then, go to specifics
- Behavior
 - Allow silence
 - Look for contradictions
 - Evaluate body language
 - Consider the interviewee's motives
 - Be curious
 - Leave no questions unanswered

Interviewing Guidelines (cont.)

- Review notes and documentation issues.
- Consider collecting a statement from the witness and/or confirming your summary with the witness.
- Provide adequate time.
- Ask witnesses about other witnesses.
- Take notes.
 - *Documentation is everything... but consider everything to be discoverable.*



Interviewing Guidelines (cont.)



Closing Statement

- Anything else I should know?
- Any other documents I should review?
- Anyone else I should speak with?

Determining Witness Credibility: “He said, she said.”

- **EEOC** recommends using the following factors:
 - **Plausibility:** Is the witness’s version of the facts believable? Does it make sense?
 - **Demeanor:** Does the witness seem to be telling the truth?
 - **Motive:** Does the person have a reason to lie?
 - **Corroboration:** Are there documents or other witnesses that support the witness’s version of events?
 - **Past record:** Does the subject of the complaint have a past record of inappropriate behavior?

Step 6: Circle Back with Main Players



- Important not to have reached decision at this point, nor give “initial findings” to parties.
- Your opportunity to ask follow-up questions and provide both individuals opportunity to provide additional information.
 - Possibly confirm in writing.

Step 7: Reach a Conclusion, Prepare Report, Make Recommendation/Decision on Corrective Action, If Any



• What to consider:

- Evidence
- Credibility
- Previous behavior
- Logic and consistency
- Applicable policies
- Compare notes
- Testimony of multiple interviewees
- “Cannot conclude infraction/violation occurred” as a conclusion



Step 7: Reach a Conclusion, Prepare Report, Make Recommendation/Decision on Corrective Action, If Any (cont.)

Caution

- Never reach legal conclusions.
- Be factual and try to weigh evidence impartially, reasonably and with some skepticism.

Do

- Consider corrective action.
- Consider all possible options.
 - No discipline.
 - Written discipline up to and including termination.
 - Training.
 - Demotion, suspension and changes in rates of pay.

Step 7: Reach a Conclusion, Prepare Report, Make Recommendation/Decision on Corrective Action, If Any (cont.)



- Risk Management Considerations
 - What have we done in the past (e.g. prior violations of policy)?
 - What risk factors/protected categories do the parties belong to?
 - What operational considerations do we need to be mindful of (e.g. transfers, culture)?

Step 7: Reach a Conclusion, Prepare Report, Make Recommendation/Decision on Corrective Action, If Any (cont.)

- Every report should include:
 1. Incident being investigated with dates.
 2. Individuals involved.
 3. Key factual findings and credibility determinations.
 4. Applicable employer policies or guidelines.
 5. Summaries of witness statements.
 6. Specific conclusions.
 7. Issues that could not be resolved.
 8. Employer actions taken.
 9. Name of person making final decision on any corrective action.



Step 8: Communicate Action Taken

- Letters to reporting party and subject of the complaint.
 - Summarize basis for complaint.
 - Discuss policies in handbook and that our policy and procedure is to conduct fair and prompt investigation.
 - Go into very high level about what complaint was about.
 - Review that witnesses were interviewed and documents reviewed.
 - To reporting party, if applicable, state “corrective action has been taken,” but be more specific with the subject of the complaint.
 - Discuss anti-retaliation, confidentiality and open door policies.

Slam dunk! Tip #1



- Ensure that one individual is the primary “owner” of an investigation
- The lack of a clear “owner” of an investigation, including individual aspects of an investigation, can lead to an investigation conducted in a manner that is neither expeditious or thorough, as well as other undesirable consequences.

Hole in one! Tip #2

- Consider how what you write and do not write (including electronically) would look published on the front page of the New York Times or on You Tube – or as a TRIAL EXHIBIT!



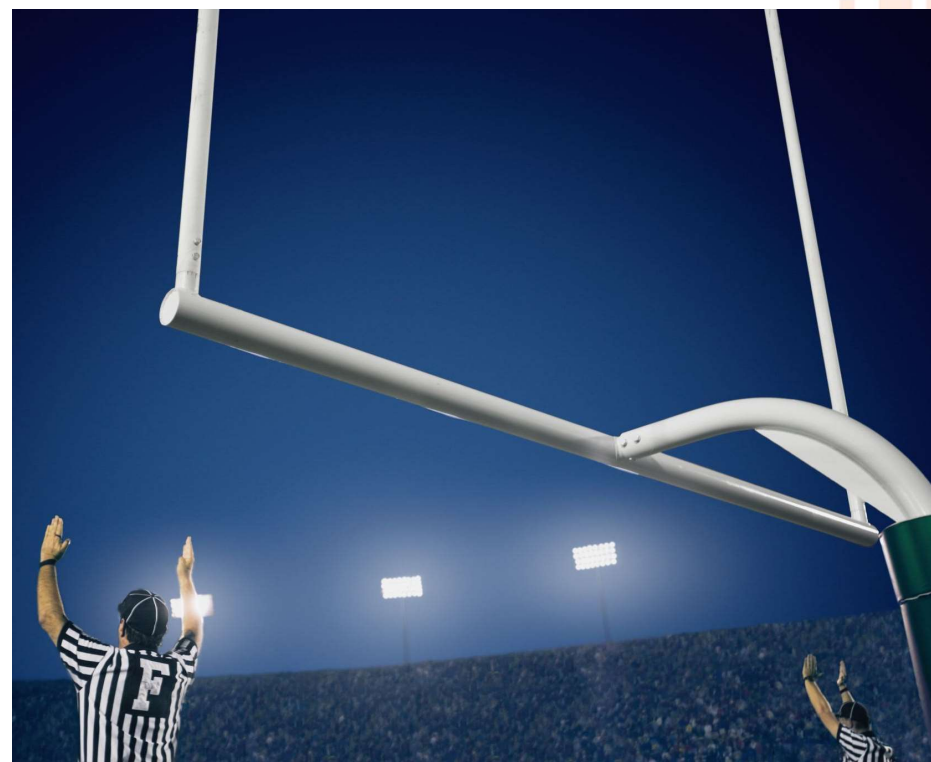
Goal! Tip #3



- Do not play the role of an undercover officer.
 - Resist inclination to try to “catch someone in the act.”
 - Surveillance or monitoring of employees may be prohibited.

Touchdown! Tip #4

- Ensure everyone involved in or aware of the investigation understands Company's policy against retaliation of anyone who brings a complaint in good faith or participates in an investigation.



Home Run! Tip #5



- Consistently document and manage performance issues to avoid retaliation claims.
 - Before acting on a performance issue, ensure that the action being taken is consistent with how others with similar performance issues (who have not lodged complaints) have been treated.
 - It is essential to consistently document communications with employees regarding performance issues **IN WRITING TO ADDRESSED TO THE EMPLOYEE.**

Stoppage Time

- The following hypotheticals involve real scenarios with real consequences



Question 1:

- Juan Rodriguez approaches Erin Fisher, an HR representative, in the hallway and says, “My supervisor, Chris Smith, wrote me up and threatened to terminate me for being late again after I told him I needed to go to the doctor. I told him my doctor put me on a new medication with a bunch of side effects and that we’re trying to get the dosage right to cut down on the side effects, but he said that wasn’t his problem. Mike Jones is always late and never gets written up.”
 - How should Erin respond to Juan?
 - Is this a “complaint” that needs to be investigated?
 - If so, what are the potential areas to investigate?

Question 2:

- What should Erin do next?



Question 3:

- What documents should Erin collect, and which witnesses should she interview as part of the investigation?



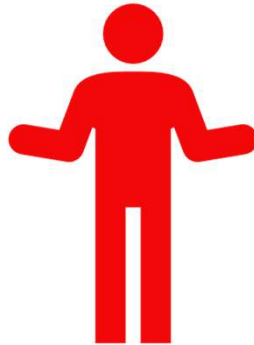
Question 4:

- Erin is prepared to interview Juan. When Juan arrives for his interview, he has his girlfriend, Lori Greene, with him. Lori insists on being present for the interview because she claims that Juan has had trouble concentrating since he started taking his new medication.
 - How should Erin handle the situation?
 - Would the response be different if Juan brought his lawyer?



Question 5:

- While Erin is interviewing Juan, he mentions that Chris and Mike are very friendly outside of work, and he believes Chris lets Mike “get away” with “a lot” because of their friendship.
 - Does this change the nature or scope of the investigation?
 - If so, how?



Question 6:

- At the end of the interview, Erin asks Juan if there are any additional documents she should review. Juan says, “I am Facebook friends with Chris, and you need to look at his Facebook page. He posts videos making fun of disabled people and supports building the wall ‘to keep the criminals out.’”
 - What should Erin do?



Question 7:

- Erin is set to interview Chris but he arrives with a recording device. Chris insists that he will not proceed unless his interview is recorded.
 - How should Erin proceed?



Question 8:

- Chris admits that he and Mike are friends outside of work but denies giving Mike any special treatment. Chris says Mike asked for and received special approval to come in late 2 days because he has to take his kids to school. Chris denies Juan told him he needed to come in late because of a doctor appointment and that if he had, Chris would have approved it. Chris denies saying “that’s not my problem.” Chris also states that Juan’s tardiness has been a problem for months and he had finally “had it.” He thinks Juan is making up the doctor appointment to try to avoid disciplinary action.
 - What follow-up questions should Erin ask Chris and Juan?
 - What additional documentation should Erin request or review, if any?

Question 9:

- Based upon her review of additional documents, Erin learns that Juan has been late 12 times in the last 3 months. Erin also learns that Juan did, in fact, have a doctor's appointment on most recent morning he was late. Erin's review of additional documents also reveals that Mike has been late twice a week every week from September through December. There is no written request from Mike or approval from Chris for Mike to come in late. Finally, Erin found videos Chris posted on his Facebook page making fun of people with disabilities.
 - What facts will shape Erin's credibility determination?

Question 10:

- In the investigation report, Erin makes findings that Chris has a bias against individuals with disabilities and treated Juan differently than Mike because of that bias. Erin also concludes that Chris did not discriminate against Juan based upon his race. Erin then goes on to recommend that Chris receive a written warning and that Juan be given a disability accommodation to come in late as necessary for doctor appointments.
 - Did Erin make any errors in her report?





Questions?

ADAM SLOUSTCHER

Partner, San Diego/San Francisco

Email: asloustcher@fisherphillips.com

Phone: 858.597.9620

STEPHANIE REYNOLDS

Partner, San Diego/Los Angeles

Email: sreynolds@fisherphillips.com

Phone: 858.597.9624

www.fisherphillips.com



Thank You.

ADAM SLOUSTCHER

Partner, San Diego/San Francisco

Email: asloustcher@fisherphillips.com

Phone: 858.597.9620

STEPHANIE REYNOLDS

Partner, San Diego/Los Angeles

Email: sreynolds@fisherphillips.com

Phone: 858.597.9624