

Inside the Investigator's Studio: Behind the Scenes of Workplace Investigations

JENNIFER MARTINEZ, HANSON BRIDGETT LLP, PARTNER | CHIEF DEI OFFICER

SETH SIAS, SENIOR DIRECTOR OF LITIGATION, DOORDASH

ALFONSO ESTRADA, HANSON BRIDGETT LLP, PARTNER

Zenitram AI, Inc. – An AI for the Public Good

- Unique angle to AI – gears their product to public sector clients and users in public agencies
- “Values-driven” Company – takes seriously its connection to government service, likes to be conscious of public/political perception
- Recently completed Series B; already eyeing a Series C or potential acquisition
- Unfortunately, got a “techbro” reputation from its early days
- Seth is hired at the insistence of investors during Zenitram’s first financing round; he was previously a corporate transactional attorney at a big law firm
- The Company has a wild annual party, called “Dartmouth Days,” which is held over a week in August, to commemorate a famous conference where artificial intelligence was first coined

ZENITRAM

An AI for the Public Good.

The “Complaint” (?)

- New Associate General Counsel is out for drinks with the Chief Engineer and Assistant Head of People (Graham), where she learns about some questionable behavior at this year’s Dartmouth Days
- Several engineers and founders joking about being on the autism spectrum and/or having ADHD, and how this leads to awkward interactions with coworkers, especially Lilith and Roman
- Roman – only gay employee on Engineering team; is also Cuban
 - An engineer asked him whether he is “a bear or an otter”
- Lilith – only woman on Engineering team; only Zenitram employee over 40
 - An engineer commented she is “a double risk when it comes to driving”
 - A founder has told her she should “smile more”

The “Complaint” (?)

- Lessons and Key Points
 - Obligation to take action in response to potential harassment based on a constructive knowledge standard in California
 - California deviates from federal law (Title VII) in that there is no exception for “stray remarks” – even one remark can constitute a hostile work environment under the FEHA
 - When a complaint involves an attorney or HR personnel, whether as a witness to the conduct or as the recipient of the complaint, need to take special care with various issues from the start (e.g., privilege, appearances or political concerns)

Initiating the Investigation

- Seth sends the Head of People to talk informally with Lilith and Roman, to get a sense of the full range of issues and better understand how to investigate, if at all
- Lilith
 - Reports that she is told to “smile more” almost every day by coworkers
 - One founder “joked” that he would double her bonus if she smiled enough that no one had to remind her to smile for a week
- Roman
 - Confirms reported comments about whether he is “a bear or an otter”
 - Several team members have also asked about the mechanics of his sexual relationships
 - Assistant Head of People, Graham, has apparently been present for several of these comments, though they happened 2 years ago

Initiating the Investigation

- Lessons and Key Points
 - Defining the scope of the investigation is key
 - Consider which incidents to investigate (current only vs. prior incidents that have surfaced after complaint)
 - Consider appropriate time frame to investigate
 - Be thoughtful about investigation parameters
 - Whether to use an internal vs. external investigator
 - Whether to have an oral report, a written report, or both/some combination at the investigation conclusion
 - Plan for privilege or control-group issues *at the start* of the investigation – risks of written report; involvement of attorneys, HR personnel, executives/founders
 - Determine early on whether there is risk of a quid pro quo harassment claim

The Magic Kingdom (of California), Part 1

- Head of People confronts Graham about the prior comments; Graham confirms that he was present but did not think to report because Roman did not seem offended
 - In response to one coworker, who is Mexican, Roman said he was annoyed but didn't consider the comment a big deal because he "knows Mexicans aren't as progressive as Cubans when it comes to these things"
 - In another incident, the coworker prefaced his comment by saying "I am on the spectrum so sorry if I'm unaware this question is too intrusive"
- Graham also discloses that he and Roman have "hooked up a few times," though not in the last 6 months

The Magic Kingdom (of California), Part 1

- Lessons and Key Points
 - California is a jurisdiction that requires broad awareness of social, political, and cultural issues – cannot manage employment-related risk without this nuance
 - Harassment/discrimination might be more subtle
 - Employees might be more sensitive to certain language
 - California law interprets the employer's obligation to initiate the interactive process for accommodating disabilities differently than federal law
 - No special language to initiate
 - Very low bar for what counts as notice triggering the obligation to interact
 - Employer obligation is proactive, not reactive
 - But remember: duty to accommodate does not require excusing policy violations

The Magic Kingdom (of California), Part 2

- At an all-hands meeting, another male employee of Zenitram (who is straight) tells the room that he is uncomfortable with the rumors he's heard and can't believe he works with people that have such views
 - Not present for any of the comments at issue
 - Not involved in the investigation in any way
- Lilith calls him "a Karen" and tells him to mind his own business
- The employee files an HR complaint about Lilith relating to the "Karen" comment

The Magic Kingdom (of California), Part 2

- Lessons and Key Points
 - Beware of veiled, coded, or “proxy” language
 - Special concerns arise when the victim of one incident becomes the accused harasser in another incident, particularly where investigation into the first incident is still pending
 - Should determine at the outset of the investigation whether the investigator is investigating violations of law (and if so, which laws), violations of policy, or both

The Union Curveball

- Because of Zenitram's client base, they are especially attuned to the issues of public sector workplaces
- Before this year's Dartmouth Days, several employees got together and discussed forming their own Union
 - Roman heavily involved in these efforts
- The employees have had a few meetings, and they reached out to an existing local union for tech workers with some questions
- Just before his investigatory interview, Roman presents Seth with official union election documents

The Union Curveball

- Lessons and Key Points
 - Whether the workforce is unionized (or whether people involved in an investigation are union members) will significantly affect how an investigation proceeds
 - “*Skelly* rights” are only applicable to public sector unions; triggered when a government employer proposes significant disciplinary action that affects an employee's job, e.g., termination, demotion, suspension, reduction in pay
 - “*Weingarten* rights” are applicable to private and public sector unions in California; grant union employees the right to have a union representative present during an investigatory interview that they reasonably believe may result in disciplinary action
 - Imposing discipline must follow the “just cause” standard and procedural fairness – investigation, notification of charges, opportunity to present own side, union representation

The Counter-Complaint

- Seth and the Head of People have been debating terminating the Assistant, Graham
- Graham is reported as saying to others in the office "I know I'm on the chopping block, especially after Roman started that Union organizing"
- Graham approaches the outside investigator and requests a meeting – discloses his affair with Roman and hints that he "felt pressured" to hook up with Roman

The Counter-Complaint

- Lessons and Key Points
 - Need to be very careful in how a mid-investigation counter-complaint is handled – balance need to address potential harassment with credibility issues
 - Assessing credibility
 - Makes *investigator* seem more credible
 - Should later issues arise, can be a preventative measure for litigation liability
 - Managing a potentially unreliable complainant
 - Triage complaints – not every complaint deserves the same type of investigation; new complaint may be barometer of credibility for prior one
 - Assess motives for complaint – pending discipline (or termination), retaliation

Workplace Violence Risk

- Some employees report to the investigator that they have had odd interactions with Graham over the years
- Seth is worried that Graham accessed the investigator's notes without authorization
- Graham's behavior and appearance deteriorates
 - Comes to work looking disheveled and like he hasn't slept
 - Staring menacingly at certain employees
 - Heard joking that "snitches get stitches" and "Marsha P. isn't the only one who knows how to throw a brick"
- Roman reports seeing Graham outside his apartment building

Workplace Violence Risk

- Lessons and Key Points
 - California has special rules for employer Workplace Violence Prevention Plans, training on those plans, and the required response to a threat of violence
 - Specific red flags identified for assessing threat: threats, aggressive or hostile behavior that creates a reasonable fear of injury, menacing gestures or verbal intimidation, references to weapons, and emotional escalation or deterioration
 - Document all threats and escalate to a WVPP Coordinator
 - Engage the safety team; take tangible steps to guard against threat being carried out
 - Update employee WVPP training based on threat or violence incident
 - Maintain required records of workplace violence incidents, including investigation notes, corrective actions, and training logs

Concluding the Investigation

- The investigator concludes the investigation and presents a written report to Seth and the founders; some allegations sustained and others not sustained
- Roman is given a verbal warning, which is documented in his personnel file
- Chief Engineer wants to review the investigation report so he can manage the dynamics on his team
 - He's especially worried about Lilith, as he's aware of other incidents that weren't surfaced in the investigation
- Chief Engineer wants to give Lilith a "special bonus" in exchange for a release
- Founders pressure Seth to get releases from *everyone*, since the acquisition is now going forward next month

Concluding the Investigation

- Lessons and Key Points
 - California Constitution provides for a right to privacy, which includes the right to privacy in employee personnel records
 - Silenced No More Act (SB 331) prohibits employers from including provisions in release agreements that restrict an employee's ability to disclose information about unlawful acts in the workplace, e.g., discrimination, harassment, retaliation
 - Labor Code 432.6 prohibits employers from conditioning continuing employment on the execution of a release of Labor Code or FEHA claims
 - California expands the requirements of the federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act – *the entire case* cannot be compelled to arbitration if any sexual harassment claims alleged
 - Especially where there is risk of ongoing issues or continuing violations, err on the side of over-disclosing potential claims in financing or acquisition documents

Wrapping Up The Studio

