



curiale hirschfeld kraemer LLP

Conducting Corporate Investigations

ACC Europe's 17th Annual Conference
June 1, 2010
Vienna, Austria

Presented by:

Stephen J. Hirschfeld

233 Wilshire Boulevard
Suite 600
Santa Monica, CA 90401
(310) 255-0705

727 Sansome Street
San Francisco, CA 94111
(415) 835-9000
www.cdhlaw.com

5450 Longley Lane
Reno, NV 89511
(775) 826-7100

Curiale Hirschfeld Kraemer LLP

CURIALE HIRSCHFELD KRAEMER LLP advises and assists private and public employers of all sizes on issues and claims arising out of the employer-employee relationship and on union-related matters. Its attorneys regularly handle litigation involving wrongful termination, discrimination and sexual harassment, and counsel universities and companies on discipline and discharge, workplace privacy, drug abuse and testing, safety, personnel policies, wage and hour matters, and other employment-related issues. As part of their “preventive” practice, the firm's attorneys present training seminars on how to manage within the law and avoid claims that can lead to costly litigation.

STEPHEN J. HIRSCHFELD is a founding partner in the San Francisco office of Curiale Hirschfeld Kraemer LLP. He is also the founder and Chief Executive Officer of the Employment Law Alliance, the world's largest network of labor and employment lawyers. Mr. Hirschfeld practices in the areas of labor and employment law and related litigation. He has substantial experience in wrongful termination and discrimination litigation, employment law counseling, collective bargaining, labor arbitrations, union organizing issues, and training management to minimize litigation and human resource problems. Mr. Hirschfeld is a member of the Bar Association of San Francisco, the State Bar of California (Labor and Employment Law Section), the Missouri Bar and the National Association of College and University Attorneys, and a Fellow of The College of Labor and Employment Lawyers, Inc. Mr. Hirschfeld is the author of *Stopping Sexual Harassment In The Workplace: An Employer's Guide* and *Conducting An Effective Internal Investigation*. He is the author or co-author of numerous publications including Office Romance: Are the rules changing?; Policymakers, Take Note: The Force Is With Workplace Bloggers; Stopping Sexual Harassment: An Employer's Guide; Workplace Bullying: The Next Legal Frontier? and Workers Behaving Badly. He was a contributing author for *The CEO Contract: Creating a Winning Partnership* and *How ADR Works*. Mr. Hirschfeld was named by *Who's Who Legal – Management Labor and Employment Law, Human Resource Executive* and *Lawdragon, The Expert Guide* and *AsiaLaw* as one of the top labor and employment lawyers in the United States. He is listed in *Northern California Super Lawyers 2007* and *2008*. He is regularly quoted and featured in publications such as *The San Francisco Chronicle, The New York Times, Wall Street Journal, Los Angeles Times, Washington Post, Chicago Tribune, San Jose Mercury News* and the *Chronicle of Higher Education* as well as contributing to national and local television and radio programs regarding labor and employment law issues. He received his B.A., *summa cum laude*, from St. Lawrence University (Phi Beta Kappa) and his J.D. from The George Washington University Law School.

PROPER INVESTIGATIVE TECHNIQUES

I. Introduction And Overview

The Importance of Developing Effective Investigation Skills

As an employer, you strive to treat your employees fairly. For example, you always make employment decisions without regard to race, color, religion, sex, sexual orientation, national origin, ancestry, marital status, medical condition, pregnancy, age, physical or mental disability, or veteran status. Fair treatment is an essential statement of your company's values.

But no matter how hard you try to treat people fairly, there are going to be times when someone feels he or she was treated unfairly. When an employee feels his or her rights have been trampled on or that company policies or guidelines have not been applied fairly, the company must be prepared to conduct a comprehensive, objective, and professional investigation. An investigation may involve many employees: the human resources department, in-house legal staff, internal auditors, environmental safety and health officers, and ombudspersons. The investigative process permits your company to monitor itself – to ensure that its managers, supervisors, and employees comply with both the letter and the spirit of federal and state laws, as well as internal policies and guidelines.

Conducting an objective and thorough investigation minimizes the risk that an employee will be disciplined or terminated for something he or she did not do. Perhaps things are not as they initially seemed, and the institution can avoid making an incorrect, devastating, and costly decision.

The purpose of an investigation is to gather facts so that the investigator can make a credible determination as to what happened in a given situation. If someone is thought to have violated a policy, guideline, or procedure, conducting an effective investigation helps reach a conclusion that is based on the best facts available. Having accurate facts leads to a sound conclusion.

Conducting an effective investigation is an *acquired* skill. People who conduct investigations with skill know how to ask questions; they know how to extract information from people who are reluctant to communicate. Sorting relevant from irrelevant details and being comfortable making credibility resolutions are also skills that can be developed. People who conduct investigations with skill rest secure in the knowledge that the people involved were treated objectively and fairly, i.e., the way the person conducting the investigation would want to be treated in the same situation.

DEVELOPING EFFECTIVE INVESTIGATION SKILLS

A. An Employer's Burden of Proving Misconduct as Part of an Internal Investigation

1. Proof of Misconduct

For most employers faced with the decision of whether to terminate an employee for alleged misconduct, “proving” in the judicial sense of the word (i.e., by establishing “beyond a reasonable doubt” or with a “preponderance of the evidence”) that the misconduct actually occurred is neither practical nor plausible. Employers conducting internal investigations generally do not have the resources, time, or experience to conduct the kind of extended discovery that occurs in court litigation. Fortunately, the majority of courts recognize that imposing judicial-like burdens of proof on employers making decisions in the workplace is not legally required. The same courts agree, however, that an employer’s investigation and decision must be judged by some standard to ensure that its actions are not arbitrary, capricious, or illegal.

The standard that has been adopted by most jurisdictions for judging an employer’s decision to terminate an employee for alleged misconduct is one that derives from the notion of “good cause.”¹ The standard can be paraphrased as follows: in order for an employer to terminate an individual for alleged misconduct, the employer must make a *good faith* determination that sufficient cause existed based on *reasonable* grounds.

The rationale behind this standard is best explained by the California Supreme Court’s decision in *Cotran v. Rollins Hudig Hall International, Inc.*² The plaintiff Ralph Cotran was employed by Rollins Hudig Hall International, Inc., an insurance brokerage firm, as a senior vice president in charge of its West Coast operations. In 1993, the firm received reports that Cotran was sexually harassing two female employees. The company’s director of human resources investigated the reports. In separate interviews, that they subsequently reduced to written statements, both women related a number of similar incidents, including allegations that

¹ See, *Pugh v. See’s Candies, Inc.*, 203 Cal. App. 3d 743 (1988). In a wrongful discharge action by an employee based on breach of contract, good cause for termination means a fair and honest cause or reason regulated by the good faith of the employer; *Crozier v. United Parcel Service, Inc.*, 150 Cal. App. 3d 1132 (1983). The good cause determination needs to balance management discretion against the interest of the employee in maintaining employment.

² 17 Cal. 4th 93; 69 Cal. Rptr. 2d 900 (1998)

DEVELOPING EFFECTIVE INVESTIGATION SKILLS

Cotran had made obscene phone calls to them at home and work, exposed himself to them while in the office, and masturbated when he was alone with them in his car.

The president of the company later met with Cotran to discuss the allegations. He explained that an investigation would be made and that its outcome would turn on credibility. Cotran denied the accusations. He said nothing during the meeting about having had consensual affairs with the two women and could not explain the basis for the complaints. Following the meeting, Cotran was suspended pending further investigation.³

The company's internal investigation lasted approximately two weeks. During this time, the employer interviewed more than 20 witnesses, including five that Cotran suggested. The company concluded that the two women appeared credible. Although no other employees accused Cotran of harassing them while at Rollins, two female employees stated that they had also received strange phone calls from Cotran. The two women who had brought the complaints signed affidavits repeating the details in their original, unsigned statements. Based on the information gathered during the investigation, and the company's credibility resolutions, the company concluded that it was "more likely than not" that the harassment had occurred, and terminated Cotran.⁴

Cotran sued Rollins for wrongful discharge. He claimed that the company had impliedly agreed to discharge him only for just cause, and that cause for discharge did not exist since he said he did not harass anyone. Cotran claimed that he had consensual sexual relationships with the two accusers. He said that he had not disclosed this during the company's internal investigation because he felt "ambushed." The trial court rejected Rollins' defense that its decision was lawful because it had been reached honestly and in good faith. The court instructed the jury, "What is at issue here is whether the claimed acts took place. The issue for the jury to determine is whether the acts are in fact true. Those are issues that the jury has to determine."⁵ The jury found that Cotran had not engaged in any of the behavior on which his termination was based, and awarded him \$1.78 million in damages.⁶

3 *Ibid.*, at 903.

4 *Ibid.*

5 *Ibid.*, at 904.

6 *Ibid.*

DEVELOPING EFFECTIVE INVESTIGATION SKILLS

On appeal, Rollins Hudig Hall argued that the jury verdict was improper because the jury should have been instructed that an employer who terminates an employee for misconduct need not prove the misconduct in fact occurred. Rather, the firm argued, an employer need only reasonably and in good faith believe that the employee engaged in conduct that was inappropriate in the workplace. The California Supreme Court agreed and overturned the jury verdict. Relying on decisions from California and other states that define “just cause,” the court ruled that “good cause” for termination does not depend on a jury finding that the fired employee actually engaged in the misconduct, but merely requires that the employer act with “a fair and honest cause or reason, regulated by good faith.” To require the employer to be correct about the facts would interfere with the wide latitude an employer needs to make decisions involving high-ranking employees. The court stated:

The decision to terminate an employee for misconduct is one that not uncommonly implicates organizational judgment and may turn on intractable factual uncertainties, even where the grounds for dismissal are specific. If an employer is required to have in hand a signed confession or an eyewitness account for the alleged misconduct before it can act, the workplace will be transformed into an adjudicatory arena and effective decisionmaking will be thwarted. . . .

The proper inquiry for the jury . . . is not, “Did the employee in fact commit the act leading to dismissal?” It is “Was the factual basis on which the employer concluded a dischargeable offense had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual.”⁷

Other wrongful termination cases prior to *Cotran* have articulated similar standards for judging an employer’s decision to terminate an employee for misconduct.⁸

⁷ *Ibid.*, at 909.

⁸ See *Southwest Gas v. Vargas*, 111 Nev. 1064 (1995) [“allowing the jury to trump the factual findings of an employer that an employee has engaged in misconduct rising to the level of ‘good cause’ for discharge, made in good faith and in pursuit of legitimate business objectives, is a highly undesirable prospect.”]; *Maietta v. United Parcel Service, Inc.*, 749 F. Supp. 1344, 1363 (D. N.J. 1990), in which a United Parcel Service employee was terminated for allegedly falsifying and directing other employees to falsify production records; *Crimm v. Missouri Pacific R. Co.*, 750 F.2d 703 (8th Cir. 1984); *Rulon-Miller v. International Business Machine*, 162 Cal. App. 3d 241, 253 (1984), in which the court held that “probable cause” would have been some reasonable basis for assuming that a significant company interest was at stake; *Kestenbaum v. Pennzoil*, 108 N.M. 20, 27 (1988), in which the New Mexico Supreme Court foreshadowed the ruling in *Cotran*, and upheld the termination of a

(Footnote continued on next page)

DEVELOPING EFFECTIVE INVESTIGATION SKILLS

The only apparent distinction in the standards articulated by these cases is semantic. That is to say, some capture the objective arm of the standard with a phrase different from “reasonable grounds.” For example, in one case, a district court uses the phrases “substantial evidence,” and “credible support,” and in another, the court uses the phrase “reasonable basis.”⁹ All these cases agree that whether the employer was *certain* that the misconduct occurred is not determinative.

2. What Constitutes “Reasonable Grounds”?

As noted in *Cotran*, the “reasonable grounds” standard is an objective one. Furthermore, based on the body of cases as a whole, the standard is one for which there is no set formula for evaluation. That is, whether the employer’s determination was based on “reasonable grounds” must be evaluated on a case-by-case basis.

In evaluating whether an employer had reasonable grounds for terminating an employee for misconduct, the primary focus will be on the *quality* of the employer’s investigation of the allegations. Based on the New Mexico Supreme Court’s early decision in *Kestenbaum v. Pennzoil*,¹⁰ it is clear that merely initiating and carrying out an internal investigation is not enough. Pennzoil investigated the charges of sexual harassment against Kestenbaum by interviewing past and present female employees and giving him an opportunity to rebut the allegations.

The court determined, however, that the investigation and the standards of the investigators could not support a finding that Pennzoil acted on reasonable grounds in

(Footnote continued from previous page)

manager for sexual harassment because the employer “had reasonable grounds to believe that sufficient cause existed to justify the defendants’ actions in discharging the plaintiff”; and *Simpson v. Western Graphics Corporation*, 293 Or. 96, 643 P.2d 1276 (1982), in which employees were terminated for allegedly threatening violence against another employee.

While there are some cases that appear to impose merely the good faith standard (*Benishek v. Cody*, 441 N.W.2d 399, 401 [Iowa, 1989]) or a standard based on mere suspicion (*Caldor Inc. v. Bowden*, 330 Md. 632, 646, 625 A.2d 959 [Md. 1993]), only one case was found endorsing a higher standard than “good faith based on reasonable grounds.” In *Scherer v. Rockwell Int’l.*, 975 F.2d 356, 359-360 (7th Cir. 1992), the employee’s contract stated the company could terminate him only if he was found *guilty* of gross default or misconduct, thus the court refused to apply the good faith based on reasonable grounds standard. The court implied, however, that absent the employment contract provision providing for proof of actual guilt, the good faith based on reasonable grounds standard would have applied.

⁹ *Maietta*, 749 F.Supp. at 1363; *Crimm*, 750 F.2d at 713.

¹⁰ 108 N.M. 20 (1988).

DEVELOPING EFFECTIVE INVESTIGATION SKILLS

dismissing Kestenbaum for alleged sexual harassment. First, the court found the results of the investigation were deficient because they failed to “differentiate between firsthand knowledge, attributed hearsay, or mere gossip or rumor.”¹¹ Furthermore, the court found Pennzoil’s investigators did not observe the standards of good investigative practice and that Pennzoil made no efforts to evaluate how the investigation was handled.¹² Thus, in conducting an internal investigation, employers must adhere to a policy of good investigative practices as well as taking the time to adequately review the credibility and weight that ought to be given to the evidence gathered.

An example of a successful internal investigation is illustrated by *Maietta v. United Parcel Services Inc.* [UPS].¹³ The plaintiff in *Maietta* was one of 15 employees terminated for integrity violations, including allegedly falsifying and directing other employees to falsify production records. The terminations were a direct result of a district-wide investigation initiated by UPS. The internal UPS investigators interviewed over 70 UPS management- and supervisory-level employees over a one-month period. Employees were interviewed separately at an off-site location to ensure confidentiality. Employees also were asked to sign written statements based on their interviews.¹⁴ The investigation file developed on the plaintiff contained allegations from a number of sources implicating him in wrongdoing and signed statements from two employees directly implicating him in integrity violations. The plaintiff was interviewed and confronted with the allegations, which he denied. After reviewing his investigation file, interview statement, and the statements of the two employees, the district manager decided to terminate him. The court found that UPS’s investigation supported “a good faith determination that good cause existed to discharge Maietta as a matter of law.”¹⁵

11 *Kestenbaum*, 108 N.M. at 28.

12 *Ibid.*

13 *Maietta*, 749 F.Supp. 1344 (D.N.J. 1990).

14 *Ibid.*, at 1353.

15 *Ibid.*, at 1364. See also *Crimm*, *supra* at 713. Missouri Pacific presented substantial evidence that appellant was discharged for good cause because they conducted a rather detailed investigation, prepared a formal investigation report and sought advice from legal counsel.

DEVELOPING EFFECTIVE INVESTIGATION SKILLS

3. Negligent Investigation Claims

As noted earlier, when an employee challenges an employer's decision to terminate for alleged misconduct under a contract or statutory theory, the quality of the employer's investigation into the alleged misconduct becomes the key issue. Note that there is also a growing number of cases by employees terminated for alleged misconduct that actually assert negligent investigation as a distinct cause of action against employers.¹⁶ The case law on such claims is not well developed, but it appears that such claims are potentially viable. For example, in *Chase v. Weight, et al.*, the district court denied the defendant's motion to dismiss a claim of negligent investigation for failure to state a claim on which relief can be granted.¹⁷ Just months earlier, in a more lengthy discussion, an Arizona federal court reasoned that the public policy underlying the prohibition against sexual harassment in the workplace and the requirement that an employer investigate allegations of sexual harassment promptly, should be read to create an obligation that protects both the complainant and the accused.¹⁸ Furthermore, the court stated the duty to investigate could also be implied from the common law duty to use care to avoid or prevent injury to individuals. The court went on to state *in dicta* that an employer's incorrect conclusion that an employee engaged in sexual harassment does not necessitate the conclusion that the employer's investigation was inadequate.¹⁹ Thus, even if an employee can prove successfully that an employer incorrectly determined he or she engaged in misconduct, the employee will need to show something more to sustain a negligent investigation claim.

4. Defamation Claims

Defamation is another often pleaded claim by employees terminated for alleged misconduct. Specifically, they claim to have been defamed by the employer's false accusations of misconduct. Most jurisdictions maintain that an employer has a *qualified* privilege to make statements about employees in the workplace if the statements are made: (1) in good faith; (2) on a subject in which the party communicating the information has an interest; and (3) to

¹⁶ See, *Chase v. Weight, et al.*, 1989 U.S. Dist. LEXIS 9877, *11 (D. Or. 1989); *Ashway v. Ferrellgas, Inc.*, 1989 U.S. Dist. LEXIS 18317, *5, 59 Fair Empl. Prac. Cas. (BNA) 375 (1989); *Vackar v. Package Machinery Co.*, 841 F. Supp. 310 (N.D. Ca. 1993).

¹⁷ 1989 U.S. Dist. LEXIS 9877, *11 (D. Or. 1989).

¹⁸ *Ashway v. Ferrellgas, Inc.*, 1989 U.S. Dist. LEXIS 18317, *5, 59 Fair Empl. Prac. Cas. (BNA) 375 (1989).

¹⁹ *Ibid.*, at *7. See also, *Lawson v. Boeing Co.*, 58 Wash. App. 261, 265 (1990), in which the court was willing to assume that Boeing owed a duty to conduct a reasonable investigation, but rejected the employee's negligence claim for lack of "evidence establishing the standard of reasonable investigation [sic] or to show a breach thereof."

DEVELOPING EFFECTIVE INVESTIGATION SKILLS

individuals having a corresponding interest.²⁰ If these elements are established, the employee cannot prevail merely by showing that the statements were actually false; rather, the employee must show that the employer or investigating employees made the statements regarding the misconduct *with malice* – knowledge or reckless disregard as to the truth or falsity of the statements. While the malice standard uses different terminology from the good faith reasonable grounds standard, it essentially holds an employer to the same level of scrutiny. That is to say, employers *need not prove* that the allegations of misconduct are true. An employer can prevail by showing good faith in making the communication. This good faith is established by showing the allegations were investigated adequately and expressed an opinion based on the investigation.²¹ Certainly the best way to avoid these claims is to limit disclosure of allegations made and evidence gathered during the investigation strictly to those individuals with a *legitimate need to know* that information.

B. Conclusion

The majority of the cases surveyed indicate that, in order to justifiably terminate an employee for misconduct, an employer need not prove that an employee actually engaged in the misconduct. Rather, the employer need only make a good faith determination that good cause existed based on reasonable grounds. Reasonable grounds is analogous to a “reasonable basis,” and/or a “reasonable investigation” and must be supported by “credible support” or “substantial evidence.”

An institution that wants to ensure that its investigations are carried out in good faith and that all determinations are supported by objectively reasonable grounds should at minimum:

1. *Develop* and implement thorough investigation procedures;
2. *Identify* and train all individuals who may carry out an internal investigation;
3. *Require* thorough and complete documentation of the investigative process; and

²⁰ See, *Clements v. Ryan*, 382 So. 2d 279 (La. 1980); *Benishek v. Cody*, 441 N.W.2d 399, 402 (Iowa 1989); *Lawson v. Boeing Co.*, 58 Wash. App. 261, 267 (1990).

²¹ See, *Lawson*, 58 Wash. App. at 267 and *Benishek*, 441 N.W. 2d at 401.

DEVELOPING EFFECTIVE INVESTIGATION SKILLS

4. *Ensure* that the investigation contains:
 - a. Thorough interviews of the complainant, accused, and necessary witnesses;
 - b. Analysis of all relevant evidence;
 - c. Assessment of the credibility of the witnesses and strength of the evidence; and
 - d. Rational and defensible conclusion.

DEVELOPING EFFECTIVE INVESTIGATION SKILLS

Legal Standards of Proof

Legal Standards Of Proof

- ❖ Beyond a reasonable doubt
- ❖ Clear and convincing evidence
- ❖ Preponderance of the evidence
- ❖ *Good faith investigation / reasonable conclusion*

THE INITIAL MEETING

Purpose & Objective

Initial Meeting: Purpose & Objective

- ◆ Identifying all issues
- ◆ Gathering all material facts
- ◆ Determining if formal or informal investigation is needed
- ◆ Instilling confidence in the system and you

When an employee initiates a discussion with you regarding an issue he or she is concerned about, it is critical that you respond properly. After ascertaining the general nature of the issue, **MAKE SURE THE EMPLOYEE FEELS COMFORTABLE THAT YOU CAN BE OBJECTIVE IN ADDRESSING THE ISSUE.**

Is the person raising the issue comfortable that you will handle any investigation fairly and objectively?

Before proceeding, you should confirm with the employee that he or she feels comfortable that you can reach an impartial resolution. Make sure that the employee articulates this comfort level to you. Ask the employee:

“Is there any reason why you feel I cannot be fair and objective?”

Given that the employee chose to come to you, it should be possible to establish this comfort level.

Establishing the employee's comfort level early on will help avoid problems when you reach the point of resolution. Sometimes, if an employee does not agree with the outcome of an investigation, he or she will say that the person conducting the investigation was biased. Establishing a comfort level at the beginning makes this less likely to happen at the end.

NOTE: There will also be situations when an employee does not come forward and specifically raise an issue, but HR becomes aware of an issue that needs attention. An internal investigation can result from these situations as well.

THE INITIAL MEETING

Gathering the Evidence

Gathering The Evidence

At this point, you are ready to begin your initial interview with the person raising the issue. This interview is very important. It will help you determine whether the issue can be resolved informally or whether an internal investigation will be necessary. The most important objective of this initial interview is to **GET THE FACTS!** Proceed as your journalism teacher taught you - get the **WHO, WHAT, WHERE, WHEN** and **WHY**.

- ◆ What happened?
- ◆ When did it happen?
- ◆ Where did it happen?
- ◆ How did it make you feel?
- ◆ Who was there? What did they see? What have they told? What would you have told them?
- ◆ Has it ever happened before? When? What? Where?
- ◆ Who have you told this to? What did you say?
- ◆ Are there any written documents relevant to the issue that the employee knows about?
- ◆ Has the employee kept any written records or diaries that are relevant to the issue? Any expense reports, personnel file memos, other notes?
- ◆ Who has similar concerns? What are those concerns?
- ◆ Are there any other issues this employee wants to discuss?
- ◆ What other information/facts may be important for me to know?

THE INITIAL MEETING

What should you do *before* concluding the interview?

- ◆ Thank the person raising the issue for doing so.
- ◆ Inform the person raising the issue that the company does not permit any retaliation or reprisal due to a legitimate issue having been raised.
- ◆ Advise the employee that in the event there is a need to undertake an investigation, he or she will be apprised of this fact and will be told who will be conducting the investigation.
- ◆ Tell the employee that you will limit the disclosure of information to those people having a **legitimate need to know**.
- ◆ **Instruct the employee to do the same.** Inform the employee that he or she, as well as all individuals involved in an investigation, have a strict duty to keep investigation information confidential.
- ◆ Tell the employee that the person conducting the investigation will be getting back to him or her from time to time during the investigation and that his or her continued cooperation in the investigation will be necessary to reach a resolution.
- ◆ Ask the employee for suggestions on how he or she thinks the matter could best be resolved. Does the employee have any suggestions or preferred resolutions?
- ◆ Let the employee know the company will make any final determination regarding the best way to resolve the issue; however the employee's input is valuable and will be considered seriously.
- ◆ Thank the employee again for raising the issue and express your commitment to resolving the matter in a timely manner.

ORGANIZING AND PLANNING THE INVESTIGATION

Organizing and planning your thoughts *before* you begin to conduct witness interviews is one of the most important phases of conducting an effective internal investigation.

Before interviewing anyone, there are several things you need to review:

What Policies, Guidelines Or Practices Apply To This Situation?

- ❖ Personnel Policy and Procedures Manual
- ❖ Ethics Brochures
- ❖ Finance Manuals
- ❖ Security Guidelines
- ❖ Benefits Books
- ❖ Collective Bargaining Agreements

What Relevant Documents Can You Obtain That May Assist You In Conducting Your Investigation?

- ❖ Employee's Master Personnel File
- ❖ Employee's Performance Appraisals
- ❖ Expense reports
- ❖ Documents from internal interviews
- ❖ Information from prior investigations

ORGANIZING AND PLANNING THE INVESTIGATION

Choosing An Appropriate Investigator

Who Should Conduct The Investigation?

Determining *who* should conduct the investigation is a critical part of the planning process. Before you decide to conduct the investigation, you should ask yourself:

- ❖ **ARE YOU** the right one to handle this particular investigation?
- ❖ **DO YOU** have the experience *and* expertise to conduct this particular kind of investigation (in light of the “good faith” and “reasonable conclusion” standard)?
- ❖ **CAN YOU** be objective with regard to the parties involved and/or the issues raised?
- ❖ **DO YOU** have any bias that will prejudice the integrity of the investigation if you are the one who handles it?

ORGANIZING AND PLANNING THE INVESTIGATION

Planning the Interviews

Deciding Who Should Be Interviewed

- ❖ The employee filing the complaint
- ❖ The employee who is the subject of the complaint
- ❖ Percipient witnesses
- ❖ Anyone with relevant information
- ❖ Authors of relevant documents
- ❖ People who the **accuser** has asked you to interview
- ❖ People who the **accused** has asked you to interview

Deciding The Order Of Your Interviewees

- ❖ Is there any benefit to be gained by “ordering” your interviews?
- ❖ Whom should you interview first?
- ❖ Do you *really* need to interview that person?

The Benefit Of Limiting The Number Of Interviewees

- ❖ Helps you stay on track with the issue raised
- ❖ Ensures effective use of time and energy
- ❖ Leads more clearly to a determination

INTERIM ACTIONS

Key Considerations

After completing your initial interview with the person raising the issue, determine if any interim actions must be taken **before** you initiate an investigation. For example, consider whether steps are needed to protect the health and safety of other employees, or to protect company property, or to protect the integrity of the company's policies or guidelines.

The most common interim actions involve removing the accused from the workplace and placing him/her on administrative leave pending the outcome of the investigation. This is not done for disciplinary purposes, but to help facilitate the investigation, protect the investigation's integrity and minimize possible complaints of retaliation.

Issues Which May Give Rise To Interim Actions Pending The Outcome Of An Internal Investigation

- ❖ Allegations of violence or sexual harassment involving physical touching, battery or rape
- ❖ Allegations of criminal misconduct such as theft of equipment or trade secrets/company assets, e.g., money
- ❖ Whistleblowing claims
- ❖ Other serious incidents

Key Points Of Consideration

- ❖ Will administrative leave take place before or after you confront the accused?
- ❖ Will administrative leave make things better or worse?
- ❖ Who should you consult with beforehand? HR? Legal? Security? Is a risk assessment needed?
- ❖ How will you respond to the accused when asked why administrative leave is necessary?
- ❖ What, if anything, should co-workers, customers and vendors be told about the employee's departure?
- ❖ What are the terms of the administrative leave? With pay? Who should he or she contact? What should he or she do during that time?

PREPARING FOR AND CONDUCTING AN INVESTIGATION

Laying the Groundwork

After completing your initial interview with the person raising the issue and after planning your investigation, you are ready to begin interviewing other witnesses.

Just as the effectiveness of your initial interview with the person raising the issue depended on your ability to gather facts, the success of your investigation will depend on how proficient you are at gathering facts from other people. Once you have the facts, you must sift through facts to determine which ones are relevant and which ones are not. Not all of the facts you gather will be utilized in reaching a resolution. Not all of the facts will be relevant. **Only those facts that are relevant to the issue at hand should be considered.**

Meeting With Witnesses

There is no substitute for thorough preparation. Before you begin your interviews, anticipate the questions you are likely to be asked. Be ready with logical, coherent and reasonable responses.

Key Considerations

- Contracting for expectations
- Showing sensitivity toward interviewee
- Putting interviewee at ease
- Stressing that no conclusions have been reached
- Minimizing risk of retaliation
- Protecting the investigation's integrity

MEETING WITH THE ACCUSED

Be Sensitive To The Fact That Being Interviewed As Part Of An Investigation Can Be Quite Stressful For The Interviewee

Generally, the person conducting the investigation is aware of the big picture. You know what it is you are investigating. You have access to all of the information that the investigation uncovers. You know the part that each interviewee is playing in the investigation. You know *why* the interviewee is being interviewed.

Usually, the interviewee does not know any of these things. He or she, therefore, may be uncomfortable and may ask or say:

- ❖ Am I being investigated?
- ❖ What are you really investigating?
- ❖ How will you use the information you are given?
- ❖ Is it confidential?
- ❖ Will I get into trouble by giving you this information?
- ❖ I don't want to cooperate.
- ❖ I want my lawyer present during the interview.
- ❖ I want my union representative present during the interview.

MEETING WITH THE ACCUSED

Outlining Your Approach

- ❖ **Outline your issues** - carefully analyze all issues raised.
- ❖ **List the facts** that relate to each issue.
- ❖ **Leave room** underneath each fact to write in the interviewee's answers.
- ❖ **Note-taking is critical** - do the best you can to get down the facts during the interviews and complete your notes **immediately** after the interview while the information is still fresh.

Explain The Issue To The Person Who Is The Focus Of The Investigation

It is difficult for someone to respond to broad-based allegations of wrong-doing or abstract notions of policy or guideline violations. Therefore give the person who is the subject of the investigation as detailed an explanation of the issue as practicable.

Get A Detailed Account Of The Events Surrounding The Issue From The Person Who Is The Focus Of The Investigation

Explain to the person who is the focus of the investigation that you want as much information from him or her as possible. Emphasize the importance of providing you with any facts or information that will help get to the bottom of the issue.

If the employee refuses to cooperate, explain that you have an obligation to resolve the issue. Explain that if he or she refuses to provide relevant information, you will have to base your decision on other information gathered in the investigation and that his or her unwillingness to cooperate will be considered as a factor in your decision.

MEETING WITH THE ACCUSED

Effective Questioning

Knowing *how* to ask questions is the heart of doing an effective investigation.

Knowing how to ask questions can be learned. Keep these points in mind:

- ❖ Effective questioning begins *before* your first interview.
- ❖ Before you formulate your questions, be sure you understand the policy or guideline that forms the basis of the issue or that will be critical in reaching a resolution of the issue.
- ❖ Understand what facts are necessary for you to reach any conclusion or make any resolution.

Determine what written documents will probably be available to assist you in reaching a conclusion or at least in shedding light on certain facts.

Broad to Narrow Questions

- ❖ Start off with broad questions like:

“What is he/she like to work with?”

“Does it surprise you that she’s complained about you?”

“What did happen?”

- ❖ Use open ended questions.
- ❖ Then, move to more narrow, pointed questions to follow-up:
 - Listen carefully to the answers.
 - Be flexible in your questioning.

MEETING WITH THE ACCUSED

Effective Questioning

Leading Questions

- ❖ Avoid leading questions, for example, “Is it true that you asked Sally out for a date yesterday?”
- ❖ Leading questions send the wrong message – they are too confrontational and communicate that you have already made up your mind.

Tough Questions

- ❖ Don’t start with them – develop rapport first.
- ❖ Don’t avoid them – they are critical but should be asked at the right time when the proper atmosphere and chemistry exists.

Follow-Up Questions

- ❖ Listen carefully to the answers.
- ❖ Use the 5 W’s – who, what, where, when, why.

Avoid Compound Questions

- ❖ They are confusing – ask one question at a time.
- ❖ Break the questions down into smaller parts.

Committing Interviewee To A Story/Chronology

- ❖ Force the person to tell you the order in which things occurred.
- ❖ Use timelines to help ensure you’ve got the story and chronology straight.
- ❖ Doing so helps assess credibility and resolves conflicts.
- ❖ Ask yourself: Does the story/chronology make sense? Could it logically have happened that way?

MEETING WITH THE ACCUSED

What If The Accused Denies Wrongdoing?

If the person who is the focus of the investigation claims that the person raising the issue is “lying,” ask why he or she thinks someone would do this. Did something happen between them that might explain why someone would file a meritless complaint or would want to injure another person's reputation or job?

Explore possible ill-motives

❖ Ask:

“Do you have any idea why she/he would make this up?”

❖ Ask:

“Have you had any conflicts or problems with her/him?”

Before Concluding The Interview

Before concluding the interview, encourage the employee to come to you with any additional information. Let the employee know that if he or she has forgotten to tell you anything, he or she is welcome to get back to you at any time, but preferably before you complete the investigation.

Give The Employee A Time Frame

Try to give the employee a general time frame within which you expect to complete your investigation. This will encourage the employee to get back to you with any additional information within a relatively short period of time and will also relieve some of the stress the employee may feel with respect to the probable outcome.

ASSESSING CREDIBILITY

Classifying Witnesses

- ❖ **The “reluctant” witness**
- ❖ **The witness who loves limelight**
- ❖ **The witness with an ax to grind**

It is only natural that people who are not being investigated will feel less anxious than the person who is being investigated. However, just because someone is not the subject of an investigation does not necessarily mean that the individual will give his or her full cooperation. Some individuals may feel uncomfortable giving you information. Most people do not like to get someone else in trouble. Others feel that by “getting involved,” they may become the focus of the next investigation.

On the other hand, some people enjoy being part of the investigatory process. They enjoy what they perceive as “being in the limelight.” They feel empowered by having information that someone else wants. Your calling them in for an interview makes them feel important.

Still others may have “an ax to grind.” They may view the interview as an opportunity to retaliate against the person who is being investigated because of either a real or imagined injury that was done to them in the past.

Remembering these traits – i.e., “where the interviewee was coming from” – is an important part of credibility resolution.

ASSESSING CREDIBILITY

Assessing A Person's Credibility

As soon as the interviewee leaves the room, make some notes that will help you assess his or her credibility later on. Factors that may help assess credibility are quickly forgotten. Run through the following checklist as soon after the interview as possible:

Demeanor

- ❖ What was the interviewee's demeanor/"body language" (e.g., nervous, obviously uncomfortable, sweating, uneasy tone of voice)?
- ❖ How did he or she react to the allegations (e.g., argumentative, defensive, hostile)?
- ❖ Does this person inspire confidence in the listener – i.e., does he or she make an overall credible impression?
- ❖ You need a **baseline** for comparison. How does the interviewee's demeanor compare to the way he/she "normally" acts?

Logic/ Consistency Of Story

- ❖ Did the person's chronology of events differ greatly from the chronology of any other interviewees?
- ❖ Does the person's version make sense? Is it plausible or far-fetched?
- ❖ Don't throw common sense out the window.
- ❖ Did the person give you a plausible explanation of why an issue may have been raised?
- ❖ Was the person forthcoming or did you have to "pull" information from him or her?

ASSESSING CREDIBILITY

Corroborating Evidence

- ❖ Did the interviewee make any admissions during the interview? For example, “the only reason why I did it was to help her.”
- ❖ Did the person specifically deny anything?
- ❖ Are there supporting *percipient* witnesses? Were they credible?
- ❖ Was the person’s version of the facts different from anyone else’s version?
- ❖ Did the person’s statements conflict with any written information collected?
- ❖ Are there any diaries, calendars, other writings or photos that help substantiate the person’s story?

Circumstantial Evidence

- ❖ Are there things that the accused has said or done in *other* situations that make it more likely than not that the fact(s) in dispute actually happened?

REACHING A CONCLUSION

**IN DETERMINING WHAT ACTUALLY HAPPENED, EXAMINE
THE OBJECTIVE FACTS IN ORDER TO REACH A LOGICAL CONCLUSION**

Timeliness

- ❖ Did the person raising the issue raise it in a timely manner? If not, why not?
- ❖ Why was the issue raised now?

Pattern and Practice

- ❖ Did similar things happen in the past that were not raised? Why?

Motivation

- ❖ What motivation would the person raising the issue have to fabricate facts?

Truthfulness

- ❖ What motivation would the person who is the subject of the investigation have for denying the incident(s)?
- ❖ Did either the person raising the issue or the person being investigated say anything at any point that you subsequently found to be untrue?

MAKING A RECOMMENDATION

Issues to Review

Issues To Review

After analyzing the facts you have gathered during your investigation and after reaching a conclusion as to what happened, you should be prepared to make a recommendation to your manager or to the appropriate line manager regarding the actions that should be taken. In formulating a recommendation, consider the following:

Notice

- ❖ Were any of the company's policies, guidelines or practices violated?
- ❖ If so, would you consider the violation to constitute a serious offense?

Consistency

- ❖ What has the company done in the past with regard to similar violations?

Investigation

- ❖ Are you confident that you have gotten the accused's side of the story?

Progressive Discipline

- ❖ How long has the employee who violated your policy been employed at the company?
- ❖ Has the employee ever violated any other policies in the past?
- ❖ What is the employee's performance history at the company?
- ❖ Are there any other circumstances that could affect your recommendation, i.e., any "mitigating" circumstances?

ATTORNEY-CLIENT PRIVILEGE

Why use the Attorney-Client Privilege?

In gathering the facts and documentation during an investigation, keep in mind that such information may ultimately have to be disclosed to the public and, thus, could come into the hands of business competitors or opponents in future litigation. Any kind of relevant documentation may be legally required to be produced as evidence in a case from Post-It™ Notes to scribbled notes of meetings and conversations at the water fountain. In the normal course of business, an employer discards and shreds information, files are purged, drafts are thrown away, and old information is discarded. However, an employer does not have the option of destroying information to prevent its being disclosed once the employer is aware a formal charge or lawsuit has been, or may be, filed. So, when deciding what to write and what to save in an investigation, consider the impact if it were to be made public or introduced as evidence.

To ensure a thorough investigation while minimizing the risk of required disclosure and protecting the confidentiality of communications, the Attorney-Client Privilege may be used. This privilege exists to encourage employers to communicate openly about, and address problems and solutions with, their attorneys without having these communications used against the employer in a subsequent lawsuit. However, in order for this privilege to apply, certain guidelines must be followed. If these guidelines are not followed, the privilege may be lost, and the material may be required to be disclosed.

The attorney-client privilege protects only communication between attorney and clients not the underlying facts. In other words, you cannot “vaccinate” facts against disclosure by putting them in a memo to an attorney. The privilege also may not protect communications between business people when no attorney is present.

ATTORNEY-CLIENT PRIVILEGE

When should the Attorney-Client Privilege be used?

The Attorney-Client Privilege should be used when a problem involves very serious concerns (including potential criminal claims), develops into a lawsuit, involves a large number of employees, potential safety hazards/concerns, potential monetary risk, or potential public relations impact.

How to Use the Attorney-Client Privilege

Consult your legal counsel. He or she will advise you, when appropriate, as to how to protect the investigation information under Attorney-Client Privilege. Based on the circumstances, the attorney's instructions will vary. However, general guidelines on how to use the Attorney-Client Privilege include:

- Address written communication to the attorney.
- Label the top of the communication:
*“Privileged and Confidential
Not Subject to Discovery”*
- Copy only a limited number of people who have a legitimate business need to know the information. Do not copy or share the document with others or the privilege may be lost.
- Do not communicate the information discussed with the attorney with others, unless you have discussed and agreed with the attorney that you will do so, and the manner in which it will be done. For example, the attorney may say that it would be permissible to share the information with your manager or the line manager, who may need to know the status of the investigation.