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Interviews, Trials and Tribulations: The Do's and Don'ts in HR Investigations

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Prologue

After 30 years of conducting investigations and interviews, I find there are several proven methods used to conduct workplace investigations. None of the methods are “one-size fits-all”. Nevertheless, when asked to present on this topic I felt effort expended to collapse the currently and readily available resources on the topic into one source as beneficial for TxPELRA and TMHRA members. Therefore, William and I prepared this single paper as a single resource to accompany my presentation in an effort to combine and document the relative sources as a means to serve Human Resource professionals by providing a “go-to” summary that they could rely on as a means to explore considerations for their workplace investigations.

There are always alternatives to accomplish a particular task, especially one such as this. So, please do not consider any of the concepts as requirements as they are presented, and if you

would like to brainstorm and collaborate on any project just let us know and we are pleased to help. As you read this survey of publicly available data, ask yourself: “How would we do it where I work and what would we need to consider and address before adopting that rule, policy or practice? Enjoy!

Workplace Investigation Guidance Survey

Conducting a properly conducted workplace investigation can have significant advantages to employers and employees alike. These investigations will enhance a company’s¹ standing in their community, foster better relations between employers and employees, and (better) insulate an employer from potential liability for claims related to their termination. The opposite is true for a poorly conducted workplace investigation. Such investigations will decrease a company’s standing within the community in which they are located, breed resentment and distrust between an employer and employee, and will open an employer up to the possibility of tort liability. This paper and the corresponding presentation will seek to show an employer: (1) the steps that should be taken to determine whether a workplace investigation is needed; (2) once it is determined that an investigation is necessary, what are the preliminary steps that should be taken in such an investigation; (3) the duties that the investigator has to the employer; (4) the steps or procedures that should be taken when conducting an investigation, and (5) once an investigation has been completed, what are the post-investigation steps that should be taken.

¹ This paper will make reference to a “company” performing an investigation, however, the same analysis will apply for a municipality that has been confronted with a workplace complaint by an employee. Where the two industries diverge this paper will indicate any discrepancies.

Assessing a workplace complaint

When a complaint is made regarding a violation of company policies and procedures, the initial step that must be taken by management will be to decide whether a complete investigation is warranted. The Equal Employment Opportunity Commission (EEOC) takes the position that Title VII of the Civil Rights Act of 1964 imposes a duty on employers to investigate harassment allegations that are made: “When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace...the employer is obligated to investigate the allegation...promptly and thoroughly.”^{2 3} While every complaint will have unique facts and circumstances that will drive the company’s decision of whether to investigate or not, from the time a company received a complaint, they should operate under the assumption that all their decisions will be reviewed by a court of law at a later time. Operating under this assumption will ensure management thoroughly assesses and understands the complaint that has been made. If a company decides not to investigate a complaint, this decision should be formally documented and preserved, particularly with emphasis being made on why the company has elected not to investigate.⁴ The benefit to a company for properly documenting such a decision not to investigate a complaint will come should a company need to provide an affirmative defense against a claim of workplace discrimination.⁵ Generally speaking, there are four main claims that are brought against an employer based on a failure to investigate a workplace violation or the mishandling of a workplace complaint: (1) Invasion of Privacy Through False Light Publication, (2) Defamation, (3) Negligent Retention, or (4) Wrongful Discharge. Employers, however, should take comfort in

² EEOC, Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050 (Mar. 19, 1990).

³ It is important to remember that “Not all employers are covered by the laws we (EEOC) enforce, and not all employees are protected. This can vary depending on the type of employer, the number of employees it has, and the type of discrimination alleged.” <https://www.eeoc.gov/employers/>.

⁴ How to Conduct a Workplace Investigation: Step-by-Step, <https://i-sight.com>.

⁵ Gerard Morales, Workplace Disciplinary Investigations and Confidentiality: Striking the Right Balance, *Prac. Law.* 25, 26 (2004).

knowing the Texas Supreme Court has held that an employer cannot be sued for a negligent investigation by the employee who has made allegations of harassment or misconduct.⁶ Additionally, there are defenses available to employers who appropriately investigate and respond to an employee's claim that the employee is being harassed because of the employee's race, religion, national origin, disability, age, sex, or genetic information.⁷ While a company's decision not to investigate a workplace complaint is not the concern of this paper, it is a relevant point to address.

Understanding the scope of the investigation and conducting preliminary research

When there has been a complaint by an employee of a workplace infraction by a co-worker, a supervisor, or some affiliated third party, and the company decides that further investigation into the complaint is needed, the initial step that should be taken by management should be to consult an investigator. Including an investigator once the initial complaint has been made will allow the investigator to assess the claims that have been made, ensure company policies and procedures are followed, determine if immediate action needs to be taken on behalf of the company, and provide the company with a degree of protection from the complaining employee should a lawsuit arise based on the incident. In cases involving allegations of harassment, the United States Supreme Court has emphasized that an employer can avoid liability for harassment if it promptly and adequately responds to such accusations.⁸ For an employer to be able to assert this defense: (1) the employer must exercise reasonable care in preventing harassment and must promptly rectify any harassing behavior, and (2) the employee cannot unreasonably fail to take advantage of the

⁶ *Texas Farm Bureau Mutual Insurance Companies v. Sears*, 84 S.W.3d 603 (Tex. 2002) (holding that an employer does not owe an at-will employee a duty of care when it investigates an allegation of misconduct against the employee.

⁷ *Workplace Investigations*, Connie Cornell & Betsy Chestney p. 1.

⁸ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

corrective procedures provided by the employer.⁹ The Supreme Court explicitly said employers are not required to create such programs, however, the existence of reasonable programs is evidence of meeting the first element of the defense.¹⁰ Additionally, the Eighth Circuit has held, “[p]rompt remedial action shields an employer from liability when the harassing conduct is committed by a co-worker rather than by a supervisor.”¹¹ In order to conduct these investigations, some employers will choose to consult an in-house investigator while others will elect to have a third-party investigate the claims that have been made. Both options present specific advantages and disadvantages to an employer: an in-house investigation (ordinarily a member of the Human Resources Department) will provide a level of familiarity to the employee, that breeds a more congenial investigation. However, an in-house investigator’s objectivity will be called into question and they do not possess the same skills a third-party investigator will provide. A third-party investigator has made a career out of responding to these types of situations and they are able to bring claim assessment skills an in-house investigator does not possess or is not able to use on a fellow co-worker.

Once the decision has been made to include an investigator in assessing a claim, it will be important to review the employer’s policies for handling workplace violations. While an employer is not legally required to have procedures in place for conducting investigations, the benefit to an employer for having policies and procedures in place comes by being able to defend a discrimination claim should one arise.¹² A thorough review and understanding of the procedures that are in place will benefit the company by: (1) preventing and detecting misconduct and other violations, (2) ensuring that company activities comply with applicable laws and regulations, and

⁹ *Faragher* at 807-09; *Burlington* at 764-65.

¹⁰ *Id.*

¹¹ *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 994 (8th Cir. 2003).

¹² *Guide to Conducting Workplace Investigations*, Maric Group Block, 2008.

(3) identifying areas of improvement for internal business operations.¹³ As i-sight.com writes, “the investigation is all about bettering the company, so be sure to use the data gathered to better the company.”¹⁴ When the investigator has a good understanding for the company’s policies, it will be necessary for the investigator to develop a plan for conducting the investigation. The first step will be for the investigator to become familiar with the person a report is made in reference to (the “Subject”), and the person who brings a matter to the company’s attention (the “Reporter”).¹⁵ It is important to know a little bit about both of these individuals as it could steer the direction of the investigation. Knowing a little about the Subject and the Reporter will inform the investigator about: (1) whether the Subject has been the topic of other complaints, both at the company and at any previous employer, (2) whether it is a common occurrence for the Reporter to issue complaints to the company, and (3) whether these parties have a history together that will be relevant to the investigation. After the investigator is familiar with the Subject and the Reporter, he or she will need to review the allegations made by the Reporter against the Subject (the “Report”). An investigation is only as strong as the results it brings forward. Once an investigator is familiar with the topic of the investigation, he or she should make every effort to make clear to the company the scope of the investigation and define roles, duties, and obligations to those involved. An investigation will fail to bring results forward if there is not a clear understanding of the obligations and duties that are owed to each party.

Duties and Responsibilities owed by the Investigator

An investigator, who has been retained by a company to conduct a workplace investigation will owe duties to: the company, the Subject and Reporter, and to other employees. When an

¹³ *Id.*

¹⁴ How to Conduct a Workplace Investigation: Step-by-Step, <https://i-sight.com>.

¹⁵ Guide to Conducting Workplace Investigations, Maric Group Block, 2008.

investigator reviews the Report, the most important aspect of an investigation an investigator must keep in mind is independence and confidentiality. It will be crucial for an investigator to never give an appearance of actual or apparent bias or conflict.¹⁶ An investigator who is unable to be independent, and who subsequently intimates they are leaning one way in an investigation will destroy all credibility with a witness as the witness will not believe the investigator is fair and impartial. Even worse, an investigator could open a company up to potential legal questions of whether the company provided a fair investigation into a workplace complaint. Similarly, an employer *must* protect the confidentiality of the employee’s claim to the best of its ability. Some of the information will need to be disclosed to the accused and potential witnesses, but that information will be shared only on a “need to know” basis.¹⁷ The need for confidentiality begins when the Report is received; all matters related to the investigation must remain confidential (this includes being careful about using the details of the investigation at a later date if the details could identify the person or business department involved).¹⁸ The Report and the factual findings that result from an investigation must remain confidential in order to protect not only the Subject and Reporter but also the company and any affiliated employees.

Prior to the investigation beginning, it is important for the investigator to understand to whom they owe a legal and ethical duty. If the company elects to hire an outside investigator, the investigator should know the duty they owe is to the company. This is not intended to mean they should twist facts in the company’s favor, however, when evaluating an investigation, the investigator must balance the employee’s interest against the employer’s legitimate business interest.¹⁹ It will also be important for the investigator to make this point known to any party who

¹⁶ 5 Key Steps for a Proper Workplace Investigation, McInnes Cooper, Ryan Baxter and Ryan McCarville, May 19, 2017.

¹⁷ HR Tools and Tech: How to Conduct an Investigation – SHRM Staff, September 4, 2012.

¹⁸ Guide to Conducting Workplace Investigations, Maric Group Block, 2008.

¹⁹ 5 Key Steps for a Proper Workplace Investigation, McInnes Cooper, Ryan Baxter and Ryan McCarville, May 19, 2017.

is investigated. There may be some confusion when an in-house investigator conducts an investigation because the person, they are investigating will not know the in-house investigator is not working on their behalf. In any case, the investigator should make it clear from the outset of the investigation: (1) they have been brought in not to assign fault but to determine facts, (2) all matters related to the investigation should be kept confidential, and (3) the investigator owes a duty to the company that has engaged their services.

Executing a Proper Investigation

Now that the investigator is armed with background information concerning the basis of the Report, the company's policies and procedures, and the Reporter and the Subject, it will be necessary for the investigator to develop a plan for how the investigation is going to be conducted. This plan will include knowing: who is to be interviewed, what documents will be necessary to review and whether there are undiscovered documents outstanding, what remaining evidence needs to be collected, and in what order does all of this need to take place.²⁰

Witnesses

One of the most important aspects of a workplace investigation will be the information that comes from interviewing the witnesses to the events that took place. It is not realistic for an investigator to expect that every person who will be interviewed will be cooperative or helpful during the investigation and an important distinction to keep in mind will be the difference between *interview* versus *interrogation*.²¹ An *interview* will involve a willing witness while an *interrogation* involves an unwilling witness. There are a few points Maric Group Block emphasizes should be shared with the witness prior to an investigation: (1) the witness should be

²⁰ How to Conduct a Workplace Investigation, Dori Meinhert, December 1, 2014.

²¹ Guide to Conducting Workplace Investigations, Maric Group Block, 2008.

given a brief explanation of why the witness is being interviewed and why they have been included as a witness, (2) the witness should not feel like they are being forced to cooperate with an investigation, they are free to leave the investigation if they wish, (3) if the witness asks whether they will be subject to discipline as a result of the investigation it is best to be honest and inform them that at the outset of the investigation the investigation team is still gathering facts, and (4) if the witness requests to have a lawyer present, they should be permitted to have one (provided there is not a company policy that prohibits employees from have a lawyer present).²²

While everyone will have a different opinion as to the order in which witnesses are interviewed generally speaking, witnesses should be interviewed in the following order: the Reporter, the Subject, witnesses who observed a relevant incident, anyone who has relevant information about the incident, any authors of relevant documents, the supervisor of the Subject, those individuals the Reporter mentions may possess relevant facts, those individuals the Subject mentions may possess relevant facts, and finally the Subject may be interviewed a second time at the end.²³ During the interviews, the investigator will not be responsible for determining fault and in all circumstances the investigator should avoid drawing legal conclusions; instead, the investigator will be responsible for determining the factual events that led to the Report as well as assessing the credibility of the witnesses that come forward. The EEOC has recommended using the following factors to assess witness credibility: (1) Plausibility: Is the witness' version of the facts believable? Does it make sense? (2) Demeanor: Does the witness seem to be telling the truth? (3) Motive: Does the witness have a reason to lie? (4) Corroboration: Are there documents or other witnesses that support the witness' version of the events? (5) Past Record: Does the alleged

²² Guide to Conducting Workplace Investigations, Maric Group Block, 2008.

²³ Guide to Conducting Workplace Investigations, Maric Group Block, 2008.

wrongdoer have a past record of inappropriate conduct?²⁴ As indicated earlier, an investigator will be determining the facts of what actually took place and then passing that information along to management. In the end, it will be important for an investigator to be able to know who, what, when, where, why, and how all of the events took place. An investigator must continue to persevere until all the anomalies are resolved and the fact pattern is thoroughly understood.²⁵

An investigator's goal in order to have a successful interview will be to maintain control of the interview at all times. "Control" has been defined as the ability to get a witness to respond to your questioning.²⁶ Control does not mean the investigator should be responsible for doing most of the talking during the interview, quite the opposite in fact. The most effective manner an investigator can utilize to get the most from an interview is to let the person who is being investigated do most of the talking. In order to accomplish this, it will be important for an investigator to remember the 80/20 rule, which provides the witness should do 80% of the talking during the interview and the interviewer should be responsible for 20% of the talking.²⁷ Another useful tool investigators may use is the power of silence during an interview. Human beings are naturally uncomfortable when there is silence in a tense environment, an experienced investigator can use silence to their advantage by not immediately responding when a witness has finished answering a question. The silence could have the effect of having the witness continue to talk and say more to an investigator than they intended. Whether an investigator chooses to use the PEACE interview model, the REID technique, or cognitive interviewing the end result will be for the

²⁴ How to Conduct a Workplace Investigation – Dori Meinhert, December 1, 2014.

²⁵ Guide to Conducting Workplace Investigations, Maric Group Block, 2008.

²⁶ Guide to Conducting Workplace Investigations, Maric Group Block, 2008.

²⁷ Guide to Conducting Workplace Investigations, Maric Group Block, 2008.

investigator to leave an interview with a solid basis of the facts that took place, so they are prepared to make a formal recommendation to management once the investigation is completed.

Evidence

During the interview process, this is the second time when an investigator will be supplied with evidence, and it is important for an investigator to ensure the evidence that is brought to him or her: (1) has been accounted for in a chain of custody²⁸, and (2) making sure evidence is properly logged, stored, and utilized in an effective manner. Interviews can take several days or weeks to complete depending on the size of the company and the incident involved. As the interviews are ongoing, it will be necessary for the investigator to compile evidence that is brought to him by those he is interviewing if they have relevant material. Also, it will be important for an investigator to know with sufficient detail what is in the evidence that is brought to him so he can utilize any of the material that is provided to him in subsequent interviews.

Once all of the interviews have been completed, the investigator should have a good understanding of the events that have taken place and he or she should prepare an Interview Memorandum to summarize who was interviewed, what was said, and what evidence was received during the interview. Once an investigator has a sufficient basis of factual knowledge about the events, the investigator's work of compiling all of the information begins, and the investigator will begin to prepare their final report.

Post Interview Procedures

After all of the evidence has been gathered, all of the witnesses have been interviewed, and the investigator has a good understanding of the Report it will be time to amalgamate all of the

1. ²⁸ How to Conduct a Workplace Investigation: Step-by-Step, <https://i-sight.com>.

information into a written summary of the investigative results (the “Final Report”). The Final Report will not offer any recommendations for how an employee should be disciplined, whether the company should compensate someone, nor will it be a chronology of events that took place; instead, the Final Report will be a summary of the facts gathered and will state whether the Report is *substantiated* or *unsubstantiated*. Maric Group Block recommends including the following information in a Final Report: the nature of the Report and how it was brought to the company’s attention, a summary of the facts, the people who have been interviewed and the documents that have been gathered, a brief discussion of any credibility assessments that have been reached, any specific conclusions reached on key issues, identification of any issues that could not be resolved during the investigation, a brief discussion of how company guidelines or policies apply to the situation, whether a breakdown of internal controls were followed to prevent other problems or reduce the impact, and how the company has responded to the Report.²⁹

Once the Final Report has been prepared by the investigator and submitted to company management, it will be the decision of the company to make a decision on: (1) whether company action needs to take place, (2) whether, if any, corrective action needs to take place, and (3) whether company policies and procedures for responding to similar scenarios need to be altered. The company should make this conclusion based on all of the evidence it is more likely than not the alleged facts actually happened, a “balance of probabilities”.³⁰ There are three typical outcomes for the company to come to once they have reviewed the Final Report: (1) the Report was substantiated (the preponderance of the evidence substantiates the conduct or the Reporter’s allegations; (2) not substantiated (the preponderance of evidence supports the view that the conduct

²⁹ Guide to Conducting Workplace Investigations, Maric Group Block, 2008.

³⁰ 5 Key Steps for a Proper Workplace Investigation, McInnes Cooper, Ryan Baxter and Ryan McCarville, May 19, 2017.

of the Reporter's allegations could not have happened and/or is without a reasonable basis; (3) inconclusive (the conduct or allegations may have happened but the preponderance of evidence fails to prove they occurred).³¹ After the investigator has submitted the Final Report to management, it will be good for an investigator to follow up with the Reporter and make sure they have not been harassed or suffered any retaliation as a result of the Report and that they are making an adjustment back to their normal work routine.

This paper began with discussing the effect a properly conducted workplace investigation could have on a company. While there is no one correct way for a company to conduct a workplace investigation, there are fundamental concepts a company should follow when a Report has been made. Exploring each step presented in this paper and consideration of the corresponding presentation to design a process that is the most workable for your organization, considering the type, kind, size and culture of the employer will protect a company from potential legal claims and will also protect a company's public relations image by showing employees how serious the company considers these types of complaints.

³¹ [5 Key Steps for a Proper Workplace Investigation](#), McInnes Cooper, Ryan Baxter and Ryan McCarville, May 19, 2017.