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Conducting Effective Internal Investigations *in response to* Complaints of Harassment, Discrimination or Other Workplace Misconduct

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Why Investigate?



Why Investigate?

- ◆ Because you must:
 - ◆ Most employers have written policies which state they will investigate all such complaints
 - ◆ SOX requires investigations into certain such complaints
 - ◆ Title VII (Faragher/Ellerth decisions) essentially make such investigations mandatory



Why Investigate?

- ◆ If not, employer loses:
 - ◆ Little v. Windermere Relocation Services, (9th Cir. 2001)
 - ◆ Employer's willful refusal to investigate (combined with other facts) meant employer "ratified" third-party rape of employee



Why Investigate?

- ◆ Good investigation *plus* appropriate response means employer wins:
 - ◆ Example:
 - ◆ Supervisor discovers topless photo in workplace that looks strikingly like a female supervisor;
 - ◆ HR and management immediately conducts full-scale search and investigation to find and destroy copies and determine who introduced them to the workplace;
 - ◆ HR and management identify nine employees responsible for the photo; all are disciplined and required to attend sexual harassment training;
 - ◆ Supervisor is embarrassed and files sexual harassment lawsuit; but court says employer fulfilled its duty by taking prompt corrective action.



Why Investigate?

- ◆ Avoid mistakes, make better judgments
- ◆ Resolve problems early
- ◆ Signal that management stands behind policies
- ◆ Discourage employees from seeking recourse outside company
- ◆ If there is a lawsuit, minimize liability and damages



To Investigate or Not To . . .

- ◆ Investigate *every* complaint of harassment or discrimination or unethical / illegal conduct whether it is:
 - ◆ Anonymous
 - ◆ Second-hand: Reports or rumors from someone other than person aggrieved
 - ◆ Direct complaint by aggrieved employee
 - ◆ By known idiot



Investigation Objectives



Investigation Objectives

- ◆ Identify problems
- ◆ Demonstrate commitment to policies, fairness, compliance with the law
- ◆ Send the message: You won't get away with it
- ◆ Establish credibility
- ◆ Establish written record
- ◆ Solve problems and limit liability
- ◆ Practice makes perfect!



Investigation Basics



Key to Conducting Effective Investigations

- ◆ Be prompt (to be thorough; to show respect; to demonstrate commitment)
- ◆ But don't rush (be thoughtful and deliberate)
- ◆ Select the right investigator (depending on the circumstances)
- ◆ Be thorough (resist the temptation to jump to conclusions; don't finish until you're finished)
- ◆ Be fair and impartial (and convey your objectivity in everything you do)
- ◆ Document, document, document
- ◆ Take appropriate action commensurate with the results



Know the Law That Governs Your Investigation

- ◆ Company policy and/or the CBA is the law:
 - ◆ Investigators must know and follow company policy
 - ◆ Investigators must know the company policies regarding the *violation* they are investigating
 - ◆ Investigators must know the company policies regarding the *investigation process*
 - ◆ Investigators should assume the adequacy and objectivity of their investigation will be challenged, and must be prepared to defend their knowledge and adherence to policy in subsequent litigation



Conducting the Investigation



Step 1: Understand the Complaint

- ◆ A failure to fully understand the complaint (what it includes and what it does not) can result in:
 - ◆ Failure to investigate
 - ◆ Failure to investigate the right thing
 - ◆ Failure to talk to the right people
 - ◆ Failure to reach the right conclusion
 - ◆ Over-reaction/under-reaction

- ◆ Talk to the complainant; review documents; get to the details; do whatever it takes



Step 2: Decide Who Should Investigate

- ◆ Legal counsel?
- ◆ Internal vs. external?
- ◆ Internal audit? Compliance? Joint investigation?
- ◆ Investigator must be objective *in fact* and *in appearance*
 - ◆ *Because your investigation may be a critical component of your legal defense, your choice of investigator must be able to withstand scrutiny*



Step 3: Create An Investigation File

- ◆ What documents do you need?
 - ◆ Relevant policies and guidelines
 - ◆ HR file of complainant and alleged wrongdoer
 - ◆ Documents re relevant past complaints or investigations
 - ◆ Supervisor notes or files about relevant events
 - ◆ Documents describing complaint (memos or notes of complaining party)
 - ◆ Demographic information



Step 3: Create An Investigation File

- ◆ What documents do you need?
 - ◆ Documents identified by complainant and other witnesses during investigation
 - ◆ Relevant business records
 - ◆ Communications between complainant and alleged wrongdoer
 - ◆ Others – fact dependent (time records, credit card records, building access records)



Step 4: Develop a Plan

- ◆ How best to resolve issues raised by the complaint?
- ◆ What are relevant policies, practices etc?
- ◆ Who should you interview?
- ◆ In what order should you interview witnesses?
- ◆ Where best to conduct interviews, etc?
- ◆ What is preliminary scope of investigation?



Step 4: Develop a Plan

- ◆ Consider whether and how best to:
 - ◆ Remove complainant from the workplace
 - ◆ Remove accused from the workplace



Step 5: Conducting Interviews

- ◆ Prepare for each interview
 - ◆ Gather *intelligence* on the witness
 - ◆ Consult with counsel or experts (?)
 - ◆ Decide what issues to explore
 - ◆ Make list of questions
 - ◆ Include information from others that witness may be able to corroborate or refute
 - ◆ Understand *the law* (including CBAs and/or company policy), relevant documents, other facts, and the complaint
 - ◆ Remain flexible
 - ◆ Re-assess after each interview



Step 5: Conducting Interviews

- ◆ First Interview: The complainant
 - ◆ First, to understand the complaint
 - ◆ Again, as necessary to understand the complaint
 - ◆ Explain how the investigation will proceed
 - ◆ Explain interim actions, if appropriate



Step 5: Conducting Interviews

- ◆ Tips for effective interviewing:
 - ◆ Start with easy questions
 - ◆ Keep questions simple
 - ◆ Start with open-ended questions; then drill down on the details (funnel method)
 - ◆ Listen:
 - ◆ For inconsistencies
 - ◆ Other clues re credibility
 - ◆ Remain objective
 - ◆ Do not discuss other interviews (or, at least, be very cautious about doing so)



Step 5: Conducting Interviews

- ◆ *Always* ask about:
 - ◆ Other potential witnesses
 - ◆ Potentially relevant documents (e-mails, etc.)
 - ◆ Relevant information you haven't covered (Is there anything else I should know?)

- ◆ Discuss confidentiality
 - ◆ Limit your promises
 - ◆ Request interviewee confidentiality (but don't demand it)



Step 5: Conducting Interviews

- ◆ Don't say any more than you have to



Step 5: Conducting Interviews

- ◆ DOCUMENT DOCUMENT DOCUMENT
- ◆ During the interview:
 - ◆ Note name, date and time of interview
 - ◆ Make sure the witness sees you taking the notes
 - ◆ Take your time
 - ◆ Be careful about notes that may suggest you are not being objective (limit in-interview notes to what was said)
 - ◆ Pros and cons of having witness read and sign statements



Step 5: Conducting Interviews

- ◆ Common witness questions
 - ◆ Can we talk off the record?
 - ◆ Who else do you plan to talk to?
 - ◆ Can I record this?
 - ◆ Could the accused wrongdoer lose his/her job over this?
 - ◆ Do I have to talk to you?
 - ◆ I want my lawyer present.
 - ◆ Can I talk to others about this?
 - ◆ Will this affect my job?



Step 5: Conducting Interviews

- ◆ After the interview:
 - ◆ Pause to consider
 - ◆ Make credibility assessments
 - ◆ He said/she said situations with no witnesses
 - ◆ Demeanor
 - ◆ Logic and consistency
 - ◆ Clarity of recollection
 - ◆ Bias



Step 5: Conducting Interviews

- ◆ After the interview:
 - ◆ Add comments to your notes (but remember these notes may be discoverable unless pursuant to attorney instructions or in collaboration with attorney, and *only if in anticipation of litigation*)
 - ◆ As an alternative, make investigation reports to counsel
 - ◆ Consider: Is a course correction required?



If The Investigation Is Lengthy

- ◆ Consider checking in periodically with:
 - ◆ Complainant/victim
 - ◆ Accused



Step 6: Periodically Evaluate The Investigation

- ◆ Did you complete the plan?
- ◆ Did you follow company policy to the letter?
- ◆ Did you get everything you need?
- ◆ Did you accomplish your investigation objectives?
- ◆ Should you re-interview witnesses?
- ◆ Are there other sources of information?
- ◆ Are there gaps and how can they be closed?
- ◆ Is a new plan required or adjustments to the original one?



Step 7: Reaching a Conclusion

- ◆ Factors:
 - ◆ Prior history?
 - ◆ Seriousness?
 - ◆ Credibility?
 - ◆ Independent corroboration?
 - ◆ Precedent?
 - ◆ Policies?
 - ◆ Corrective action v. punishment?
 - ◆ Thorough, objective investigation?



Step 7: Reaching a Conclusion

- ◆ Produce an investigation summary:
 - ◆ Conclusions
 - ◆ Basis for conclusions
 - ◆ Actual and/or recommended corrective actions
 - ◆ Recommended preventive measures
- ◆ File the investigation report



Step 8: Taking Appropriate Action

- ◆ The investigation is worthless (or worse) unless it is followed by appropriate action
- ◆ Even if nothing happened, look for opportunities to educate, demonstrate commitment, establish credibility
- ◆ Don't retaliate
- ◆ Take steps to prevent retaliation by others



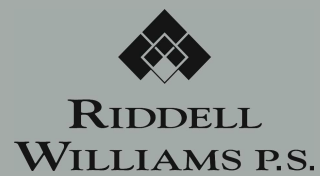
Top Mistakes

1. Knee-jerk support of manager
2. Delay/procrastination
3. Jumping to conclusions (ignoring or pre-judging complaint from known idiot)
4. Documenting too little
5. Failing to be thorough
6. Failing to assess credibility (or being afraid to)



Top Eleven Mistakes

7. Making overbroad promises about confidentiality and then breaking those promises
8. Talking rather than listening
9. Retaliation (or failing to prevent it)
10. Failing to preserve attorney/client privilege; making overreaching assertions about privilege
11. Failing to take effective corrective action



Questions?

Please contact us any time with additional questions.

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