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# ***Advanced Workplace Investigation Seminar: Insights and Advice for the Experienced Workplace Investigator***

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# Course Objectives

- ◆ Enhance understanding of when and why to investigate
- ◆ Discuss best practices for conducting investigations
- ◆ Review common pitfalls and mistakes
- ◆ Discuss how to reach and use investigative findings



# Investigation Preliminaries



# What is an Investigation?

- ◆ Any inquiry into any employee concern
- ◆ Defined broadly



# When to Investigate

- ◆ When should you investigate?
  - ◆ Workplace complaints
  - ◆ Significant disciplinary actions
  - ◆ Compliance issues
  - ◆ Responding to agency complaints
  - ◆ Threatened or actual litigation
  
- ◆ ***The form of the complaint doesn't matter: A complaint does not have to be "formal," "written," or in a particular form to require investigation***



## To Investigate or Not To . . .

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



## To Investigate or Not To, cont.

- ◆ Do not investigate:
  - ◆ Purely personal matters that are not related to work performance
  - ◆ Rumors about an employee's health not related to work



# Why Good Investigations Matter

- ◆ Why it is important to conduct effective investigations
  - ◆ Encourages employees with concerns to come forward
  - ◆ Enables organization to better identify and address problems internally
  - ◆ Assists company in disciplining problem employees and in training supervisors and managers
  - ◆ Limits liability



## Why Good Investigations Matter, cont.

- ◆ *Faragher/Ellerth* defense to sexual harassment
- ◆ Washington defense to sexual harassment
  - ◆ *Kohler v. Inter-Tel Technologies*, 244 F.3d 1167 (9th Cir. 2007) – Investigation a “paradigm” of the efforts employers should take in response to harassment. Employer hired third party investigator, wrote to plaintiff offering her job back and back-pay, and conducted company-wide harassment training when investigator concluded there had been offensive behavior, but no harassment.



# Key Indicators of an Effective Investigation

- ◆ Prompt
- ◆ Thorough
- ◆ Fair
- ◆ Objective and fact-based
- ◆ Well documented
- ◆ Includes communication and follow-up plan



# **Attorney Client Privilege and Work Product Doctrine**



## Privilege Is Limited

- ◆ The general rule: Each side in litigation is entitled to force the other side to disclose all relevant facts.
- ◆ Discovery is proper if it is “reasonably calculated to lead to the discovery of admissible evidence.”
- ◆ Exceptions to these disclosure obligations (i.e., privileges) are narrowly construed to preserve the public policy interest in fair resolution of disputes.



# Attorney/Client Privilege and Work Product Doctrine

- ◆ Attorney/client communications are protected from disclosure except:
  - ◆ Where the privilege is waived by the client
  - ◆ Where the communications relate to plans to engage in illegal conduct



## Attorney/Client Privilege and Work Product Doctrine, cont.

- ◆ Attorney mental impressions and/or attorney-directed investigation findings, records of interviews and notes are generally protected from disclosure except:
  - ◆ Where the privilege is waived by counsel
  - ◆ When the information is not otherwise available and is necessary to fair resolution of the dispute



## Attorney Client Privilege: Who Is The Client?

- ◆ *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981)
- ◆ Court refused to draft set of rules but rejected “control group” test
- ◆ Court protected communications between attorney and any employee:
  - ◆ regarding matters within employees’ scope of duties
  - ◆ when information needed to render legal advice, and
  - ◆ where employees aware that they were being questioned for company to obtain legal advice



## Work Product Doctrine – What Is Protected?

- ◆ Documents and tangible things otherwise discoverable – *this requirement is flexible*
- ◆ Prepared in anticipation of litigation – *routine investigations often excluded from protection*
- ◆ Attorney involved or directing investigation – *generally required for protection.*
  
- ◆ *Keep in mind that you may want to waive this protection if the investigation results are in your favor*



# Privilege and Credibility

- ◆ Employer credibility is critical
- ◆ Loss of credibility is difficult to overcome
- ◆ Credibility and blanket assertion of privilege



# Waiver of Privilege

- ◆ Privilege can be waived intentionally or inadvertently
- ◆ Privilege is waived by sharing privileged information with people outside the scope of privilege:
  - ◆ *Sending privileged communications to ANYONE outside the scope of privilege*
  - ◆ *Discussing privileged communications with ANYONE outside the scope of privilege*



## Tips on Maintaining the Privilege

- ◆ Remind every interviewee and investigator that investigation is confidential
- ◆ Do not rely extensively on the privilege – on sensitive points keep written communication to a minimum
- ◆ Watch the distribution and carbon copy lists on your e-mails
- ◆ Label privileged documents



# **Conducting the Investigation: Best Practices**



# There is No Cookie Cutter

- ◆ Every investigation is *different*:
  - ◆ Depth of investigation
  - ◆ The best person to investigate
  - ◆ Degree of documentation
  - ◆ Formality of investigation
  - ◆ Number of witnesses to be interviewed
  - ◆ The amount of resources to be devoted to the investigation
  - ◆ Etc.
- ◆ *But these differences should be by design, not accident*



## Step 1: Understand the Complaint

- ◆ Spot the issues - *Know what you are investigating*
- ◆ 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
  - ◆ Selection of the wrong investigator
  - ◆ Failure to talk to the right people
  - ◆ Failure to reach the right conclusion
  - ◆ Over-reaction/under-reaction



# Common Mistakes in Issue Spotting

- ◆ Not listening carefully
- ◆ Ignoring an issue because you jump to conclusions
- ◆ Head in the sand: don't ask, don't tell
- ◆ Looking for magic words: “but she never told me she was claiming ‘discrimination’”
- ◆ The complainant who loosely uses legal jargon
- ◆ Kitchen sink complaints
- ◆ Boy who cries wolf syndrome



## Step 2: Review All Relevant Policies

- ◆ Investigators must know company policies regarding the *violation* or *issue* they are investigating
- ◆ Investigators must know company policies regarding the *investigation process*
- ◆ Investigators should assume the adequacy and objectivity of their investigation will be challenged in litigation:
  - ◆ You must be prepared to defend your knowledge, your processes, your objectivity and your adherence to policy
  - ◆ You do not want to start your deposition by being forced to admit that you did not review, were not familiar with, or did not follow applicable company policy



## Step 3: Decide Who Should Investigate

- ◆ Human resources staff?
- ◆ Legal counsel (or at the direction of counsel)?
- ◆ Internal vs. external?
- ◆ Investigator must be objective *in fact* and *in appearance*
- ◆ Consider whether investigator has the *requisite skill* set based on the subject matter of the investigation
- ◆ Consider whether the investigator has the *positional power* to ask the right questions and demand correct answers
  - ◆ *Because your investigation may be a critical component of your legal defense, your choice of investigator must be able to withstand scrutiny*



# Working with Outside Investigators

- ◆ When to hire an outside investigator
- ◆ How to choose an outside investigator
- ◆ Preserving the privilege – what does this mean practically?
- ◆ When to ask for a final report



## Step 4: Collect and Review Relevant Documents

- ◆ Relevant policies and guidelines?
- ◆ HR files or medical chart?
- ◆ Past complaints, incidents or investigations?
- ◆ Supervisor notes or files about relevant events?
- ◆ Documents describing complaint (memos or notes of complaining party)?
- ◆ Demographic information?
- ◆ Documents identified by complainant/witnesses during investigation?
- ◆ Relevant business records - electronic records?
- ◆ Communications between parties?
- ◆ Others: time records, credit card records, building access records, etc.



## Step 5: Develop a Plan

- ◆ Plan the investigation
  - ◆ Who should you interview?
  - ◆ In what order should you interview witnesses?
  - ◆ Where best to conduct interviews, etc?
  - ◆ What is preliminary scope of investigation?
  - ◆ What assistance will you need?
  - ◆ Confer with counsel?



# Developing the Plan

- ◆ Consider whether and how best to:
  - ◆ Remove complainant from the workplace
  - ◆ Remove accused from the workplace
  - ◆ Options: different building, telecommuting, paid leave
  - ◆ Communicate in a consistent, appropriate and credible manner about these decisions to alleged wrongdoer and coworkers
  - ◆ *Remember your audiences: judge, jury, accused, accuser, your entire employee population*



## Step 6: Conducting Interviews

- ◆ Prepare for each interview
  - ◆ *Know* your witnesses
  - ◆ 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 periodic review of applicable policy), relevant documents, other facts, and the complaint
  - ◆ Remain flexible
  - ◆ Re-assess after each interview



# Conducting Interviews

- ◆ Tips for effective interviewing:
  - ◆ Start by talking: Explain why you are here, why the interviewee is here, your investigation objectives, your interview objectives, confidentiality requirements
  - ◆ First questions should be easy ones
  - ◆ 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; your questions and statements should consistently convey your interest in objectively gathering facts



# Conducting Interviews

- ◆ *Always* ask about:
  - ◆ Other potential witnesses or individuals with knowledge
  - ◆ Potentially relevant documents (e-mails, etc.)
  - ◆ Relevant information you haven't covered (is there anything else I should know?)
- ◆ Discuss confidentiality
  - ◆ Limit your promises
  - ◆ Discuss their confidentiality obligations
  - ◆ Do not discuss other interviews
- ◆ Say as little as possible
  - ◆ Your job is to ask questions and acquire information
  - ◆ Again, limit your promises



# Conducting Interviews

- ◆ DOCUMENT DOCUMENT DOCUMENT
- ◆ During the interview:
  - ◆ Note name, date, time, place, duration of interview
  - ◆ Notes are a transcript of what is said, not impressions or opinions
  - ◆ Take your time
  - ◆ Your notes may be discoverable: Be careful about notes that may suggest you are not being objective (limit interview notes to what was said)
  - ◆ Pros and cons of having witness read and sign statements



# 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?
  - ◆ This is confidential, right?



# Conducting Interviews

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



# Conducting Interviews

- ◆ After each interview:
  - ◆ Clarify and/or add comments to your notes
  - ◆ Be careful what you write because your investigation notes and communications will NOT be privileged unless:
    - ◆ You are being directed by counsel specifically because litigation is anticipated in the matter you are investigating
  - ◆ Consider: Is a course correction required?



## If the Investigation Is Lengthy

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



## Step 7: 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?
- ◆ Are there new issues to be investigated?
- ◆ Are you still the right investigator for this job?



## Step 8: Reaching a Conclusion

- ◆ Generally, the assignment is to figure out what happened
  - ◆ What happened?
  - ◆ Based on what facts?
  - ◆ How confident are you?
  - ◆ If less than confident, why? What would increase your confidence?
  - ◆ It's okay to weigh credibility



# Reaching a Conclusion

- ◆ Consider whether to produce an investigation summary/report:
  - ◆ What you did
  - ◆ What you heard/found
  - ◆ Your factual conclusions
- ◆ DO NOT use that report to:
  - ◆ Recommend corrective actions
  - ◆ Recommend preventive measures
  - ◆ Offer policy advice
  - ◆ Address issues not within the scope of the investigation



## Step 9: Taking Appropriate Action

- ◆ If complaint is substantiated, company should:
  - ◆ Consider disciplinary action
  - ◆ Consider training
  - ◆ Consider counseling for complainant / accused
- ◆ *Francom v. Costco*, 98 Wn. App. 845 (2000).  
Costco moved accused from Spokane to Billings, MT warehouse. “[F]act that the conduct never occurred again ... is proof that Costco’s response was reasonable as a matter of law.”



# Taking Appropriate Action

- ◆ If complaint is not substantiated:
  - ◆ Consider training anyway
  - ◆ Follow up with complainant
  - ◆ Consider any other action that might be appropriate, like separating complainant and accused



## Step 10: Preventing Retaliation

- ◆ Whether or not complaint is substantiated, advise accused and others about retaliation
- ◆ Inform complainant what to do if he believes there has been retaliation
- ◆ Follow up with complainant regularly to determine if there has been or there is a risk of retaliation
- ◆ Take immediate action if any hint of retaliatory behavior
- ◆ *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 129 S.Ct 846 (2009)



## Step 11: Follow Up

- ◆ Follow up with managers where appropriate
- ◆ Follow up with complainant
- ◆ Where appropriate calendar time to check in several months after investigation is concluded



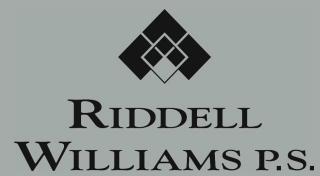
# Top Mistakes

1. Knee-jerk support of manager/accused/accuser
2. Failing to be thorough/jumping to conclusions
3. Refusing to provide accused with a fair opportunity to defend him/herself
4. Focusing on reputation (etc.) instead of objective, verifiable (and verified) facts: dates, witnesses, specific comments, etc.
5. Delay/procrastination
6. Poor or inadequate documentation



## Top Mistakes

7. Failing to assess credibility
8. Making inappropriate promises about confidentiality
9. Talking rather than listening
10. Retaliation (or failing to prevent it)
11. Failing to preserve attorney/client privilege; making overreaching assertions about privilege
12. Failing to take effective appropriate corrective action



# Questions?

Please contact us any time with additional questions.

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