

Effective Workplace Investigations

SABRINA PRESNELL ROCKOFF

(828) 254-8800

SROCKOFF@MWBLAWYERS.COM



McGUIRE WOOD & BISSETTE
LAW FIRM

Overview

- Planning for the Investigation
- Conducting the Investigation
 - Witnesses
 - Interview Techniques
 - Other Considerations
- Drawing Conclusions



Planning the Investigation

- What are the purposes of the investigation?
 - Why are you conducting the investigation at all?
 - Legal liability concerns
 - Human Resources concerns
- Are you going to have to make a credibility determination?
- Do potential or perceived conflicts play a role at all?
 - Who is accused?
 - Who is complaining?
 - What are the ramifications if the allegations are true or not true?

Planning the Investigation

- Who should conduct the investigation?
 - Internal vs. external
 - Private investigator license in NC
 - Privilege opportunities
 - Grievance/Appeal Processes
- Actions to take prior to investigation
 - Putting employees on administrative leave
 - Preservation of evidence employees may have (texts, videos, social media)
 - Preservation of evidence employer may have (video cameras)



Planning the Investigation

- Role of Those Conducting the Investigation
 - Note taker (Be a supportive note taker)
 - Questioner
- Documenting What Was Said
 - Do you want recordings?
 - Would you rather have notes? (Privilege)
 - Will you ask for signed statements?
 - Prepare summaries for your attorney?



Conducting the Investigation

- Prepare the pre-question script
- What are you going to say to each employee about:
 - Who is conducting – if legal is involved is an Upjohn Warning required?
 - Is Garrity Warning necessary?
 - Obligation to tell the truth
 - Obligation to keep confidentiality during investigation
 - Policy against retaliation
- Why are you interviewing witnesses?
 - What questions do you need answered to determine the proper course of action for the Company?
 - How will you know what actually happened or who is telling the truth?



Conducting the Investigation

- How do you determine credibility?
- EEOC Guidance
- Inherent Plausibility:
 - Is the testimony believable on its face?
 - Does it make sense?
- Demeanor:
 - Did the person seem to be telling the truth or lying?

Conducting the Investigation

- Demeanor
 - Generally, we are bad at telling whether or not people are telling the truth
 - We watch instead of listen
 - We rely on indicators that are not scientifically proven to matter:
 - Blink rate?
 - Looking up at the right?
 - Not making eye contact?
 - Fidgeting?
 - We equate nervousness with lying
 - People in workplace investigations are often nervous

Conducting the Investigation

- Demeanor
 - Studies have shown that:
 - Liars give fewer details
 - Liars give shorter answers
 - Truthtellers give more detailed accounts with more random details
 - Truthtellers can give more specific information (drawing maps)
 - Truthtellers more easily keep the facts straight when telling the story from different points
- Notetaker needs to be listening for these cues as well

Conducting the Investigation

- Motive to Falsify:
 - Does the person have a reason to lie?
- Corroboration:
 - Eye Witness Testimony
 - Saw the event
 - Corroborating Witness Testimony
 - Was told about the event close in time
 - Documentary Evidence
- Past record:
 - Did the alleged harasser have a history of similar behavior in the past?



First Interview with Complainant

- Be a Journalist
- “Tell me everything that happened”
- “Tell me why we are here today”
- Let the witness talk for as long as they want to talk
- Make notes to yourself about other questions you have so you don’t interrupt
- Who – Who saw it?
- When – When did it happen?

First Interview with Complainant

- Where – Where did it happen?
- Can they draw it for you?
 - Where was the Complainant standing?
 - Where was the Accused?
- How – Describe how it happened
- Ask sensory related questions –
 - Hearing, Smelling, etc.
- Documents/Evidence that it happened
- Repeat for each allegation
- Consider going in reverse for credibility concerns



First Interview with Complainant

- Ask the complainant to give you a list of who else you should interview and why
 - Be aware of first hand vs. corroborating witnesses
 - For corroborating witnesses, ask how quickly they were told about the incident
- Ask the complainant for any evidence they believe exists that supports their accusations
- Set specific times/dates for them to provide to you



Questioning Other Witnesses

- Determine order of witnesses
- Interview eye witnesses named by Complainant next
- Consider whether you can access any documentary evidence prior to talking with eye witnesses
- If no eye witnesses, talk to one or two second hand witnesses prior to talking with Accused.

Questioning Other Witnesses

- Skeptical Journalist, Remember Credibility
- Start with All Witness Script
- Establish Rapport
- Ask Basic Background Questions
 - How long have you been with the Company?
 - Prior roles?
 - Prior experiences?



Questioning Other Witnesses

- Move to the accusations
- Organize outline by topic
 - Chronological
 - Easiest to most difficult
 - By person (if multiple accused)
- For each topic, give enough information about the accusation so that the witness understands your question
- “Do you remember a time when you and Bob were in the breakroom?”
- “Have you ever heard Bob say something to another employee that you thought was inappropriate?”

Questioning Other Witnesses

- If the witness is not providing with you anything with more general prompts, you can be more specific...
- “Do you ever recall hearing Bob say that...?”
- May even choose to tell person they have been listed as a witness by a particular employee depending upon the circumstances
- May use documentary evidence to prompt the witness here as well
- Ask the witness to describe as many details about each incident as possible

Questioning Other Witnesses

- General Rule: Let the Witness Talk
- Then follow up to be sure you've asked all of the journalist questions:
 - What happened?
 - Who else was there?
 - Did the witness tell anyone about the incident right after witnessing incident?



Questioning Other Witnesses

- When did it happen?
- Where did it happen?
 - Consider asking for drawings especially if have from Complainant
- How did it happen?
 - Remember sensory questions
- Other evidence?
- Why did it happen?



Questioning Other Witnesses

- Follow up with unique details offered from other interviews, looking for whether you can get corroboration
 - May be a good way to follow-up on sensory questions
- Depending on the type of investigation, may also want to ask the witness about their personal experiences
- “Is there anything I haven’t asked you that you think I ought to know?”
- Follow up, follow up, follow up

Questioning the Accused

- Treat the Accused like other witnesses
- Skeptical Journalist
- Know the universe of the documentary evidence prior to interview
- Group questions around specific allegations
- Begin with, “Do you have any idea why you are here?”
- Or “Do you have any idea of why you would have been accused of...?”



Questioning the Accused

- Depending on what you know going in, your interview with the Accused may be very important or not at all
- Still need for Accused to have opportunity to tell story prior to decision being made
- For each accusation, start with open ended question, and funnel down
- Make sure you get answers for each of the journalist questions
- Focus on unique details, drawings or sensory details you have gotten from Complainant and eye witnesses
- Ask Accused for witnesses as well as evidence

Following up with Complainant

- After interviewing witnesses and Accused, may need to follow back up with Complainant
- Ask for clarification on issues in conflict
- If didn't ask for drawings or use reverse technique in first interview may want to do so here
- Ask again for any other witnesses and evidence
- May not interview every witness given depending on circumstances

Making Determination

- Revisit your investigation planning
 - What questions do you need to answer to protect the Company?
- Can you determine what happened?
- If yes, then you need to determine how you respond to the accused to maintain Company culture and protect the Company from liability
- If no, then you weigh credibility based on the EEOC's factors and your interview results.
- If still unclear, weigh risk to culture and legal liability of each decision
- Consider clear evidence of other policy violations
- Document determination and corrective action, if any
- Remind supervisors of retaliation prohibitions

Questions?

Sabrina Presnell Rockoff

McGuire, Wood & Bissette, P.A.

srockoff@mwblawyers.com

(828) 254-8800

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