



SATISFACTION GUARANTEED

Devising an Internal Investigation
That Will Satisfy Everyone From the
Business Unit to the Jury

PRESENTERS

- Zahra Karinshak, Esq. – Krevolin & Horst, LLC
(Atlanta, GA)
- Kelli Kennaday, Esq. – Wilke, Fleury, Hoffelt,
Gould & Birney, LLP (Sacramento, CA)
- Steve Pynes, Esq. – Ferris & Britton, A
Professional Corporation (San Diego, CA)
- Jim Reed, Esq. – YKK Corporation of America
(Atlanta, GA)

OVERVIEW

- Choosing the right investigator
- Avoiding legal and ethical traps during the investigation
- Making appropriate findings
- Attorney-client and work product issues
- Avoiding disruption and controlling costs
- Implementing solutions
- Defending the investigation

FACTS

- Super salesman Bob works with receptionist Rita.
- Receptionist Rita begins dating maintenance man Marty.
- One day, Marty drags Rita into Human Resources and states that she wants to make a complaint of sexual harassment against Bob.
- Marty claims that Bob has been sending Rita suggestive texts and making sexual comments to her.

FACTS

- HR manager Betty asks Rita if this is true; Rita agrees that it is but states she does not want to get Bob into trouble.
- Marty demands that Bob be fired.
- Betty asks Rita to make a written complaint and gives her a form to fill out.
- Rita fills out the form, indicating that Bob has been making sexual comments and sending suggestive texts – Marty shows some of them to Betty.

FACTS

- Rita asks Betty what the next steps will be.
- Betty tells Rita the company will conduct an investigation. Betty cautions Rita that the investigation is completely confidential and that Rita cannot speak to anyone about her complaint or the investigation; if she does she is subject to discipline.

FACTS

- Betty calls the company's in-house counsel, who tells her to ask Bob's manager, Mike, to conduct the investigation.
- Mike reviews Rita's complaint form and a printout of the text messages from Bob.
- Mike interviews Bob and asks if Rita's allegations are true.
- Bob admits they are but claims that he and Rita have had an on-again, off-again romantic relationship for the past two years, a fact of which Marty is unaware.

FACTS

- Bob shows Mike his own cell phone, which belongs to the company and which contains numerous sexual messages to and from Rita. Some of the texts from Rita include nude pictures. Bob also volunteers to bring in pictures of he and Rita on vacation in Disneyland.
- Bob also claims during the interview that Marty has been making racist comments to him and has a large racist tattoo on his back.

FACTS

- Mike interviews Marty. During the interview, he asks if Marty is aware of the relationship between Bob and Rita. Marty admits he is not.
- Mike also asks Marty if he has a racist tattoo on his back. Marty denies having a tattoo. Mike asks Marty to take off his shirt so he can see his back. Marty asks if he has to; Mike says yes. Marty takes off his shirt, revealing a tattoo-less back.

FACTS

- Mike determines that Bob has not engaged in sexual harassment since he and Rita have had a consensual relationship.
- Mike determines that Marty has not engaged in racial harassment since he has no tattoo on his back.
- Mike determines that, since Rita sent Bob inappropriate pictures on company property and company time, she should be disciplined.

HOW MANY MISTAKES WERE MADE?



WHAT WERE THE MISTAKES?

- The investigator
- The admonitions
- Interviewing the witnesses
- Confidentiality and privacy violations
- The findings

THE RIGHT INVESTIGATOR

Outside

- Independent, Licensed Private Investigator
- Human Resources Professional
- Independent Counsel
- Regular Counsel

THE RIGHT INVESTIGATOR

Inside

- Counsel
- Human Resources Personnel
- Manager from Another Department
- Manager from the Same Department
- Lead Worker

CONDUCTING THE INVESTIGATION

- The admonitions
 - Confidentiality
 - No retaliation
 - Upjohn (Upjohn Co v. United States, 449 U.S. 338 (1981))

What about Banner?

(Banner Health System, 358 NLRB No. 93 (2012))

INTERVIEWING THE WITNESSES

- All pertinent witnesses should be identified and interviewed.
 - Mike didn't ask about other witnesses.
 - Mike didn't interview Rita, the complainant!

CONFIDENTIALITY AND PRIVACY

- Information gathered in the course of the investigation should be kept confidential to the extent possible.
 - Information obtained from one witness should not be shared with another unless necessary.
- Employees have a reasonable expectation of privacy in their person and personal possessions.
 - Forcing Marty to take off his shirt to inspect his back may violate his right to privacy.

FINDINGS

- Factual findings vs. legal findings
- Findings based on preponderance of evidence
 - Must have sufficient evidence to support conclusion.
- Recommended personnel actions
 - What is the scope of the investigation?

THE TWO PRIVILEGES

Attorney-Client and Attorney Work Product

Once an employer raises the fact that it conducted a thorough, timely investigation and fashioned appropriate remedies in response to the investigation as a defense in litigation, it WAIVES the attorney client or work product privileges.

- Courts are split about whether the underlying notes of the investigation also become discoverable.

THE TWO PRIVILEGES

Attorney-Client and Attorney Work Product

A company has two options for investigation documentation:

1) Apply privilege and defend the case other than by relying on the investigation and findings;

OR

2) Waive the privilege and turn over some or all of the investigation documents.

It is best to plan to apply the privileges during the investigation process to allow litigation attorneys the later choice as to whether to waive the privileges should the case go to trial.

Thus, investigators should understand and implement steps to preserve both privileges.

ATTORNEY–CLIENT PRIVILEGE

To preserve attorney-client privilege:

- 1) The investigator must be acting as an attorney in a capacity which will lead to legal advice (as compared to management or business advice);
- 2) The communication must be between an attorney-investigator and client; and
- 3) The communication must be made and maintained in confidence.

ATTORNEY WORK PRODUCT DOCTRINE

- Applies to keep confidential any information obtained for, or prepared by, an attorney in anticipation of litigation.
- Two types –
 - Opinion work product – absolutely protected from discovery during litigation unless waived.
 - Factual or qualified work product – plaintiff can become entitled to it if s/he can demonstrate substantial need for the material and an inability to get the information through other channels.

ATTORNEY WORK PRODUCT DOCTRINE

- Opinion work product includes the conclusions, impression, or legal theories of an attorney.
- Thus, to preserve the privilege, the attorney writing the investigation report should focus on his or her legal conclusions as to company liability and the bases therefore.

MINIMIZING DISRUPTIONS

- For Senior Management
 - Provide clear, concise and regular communication
 - Be sympathetic to the business
- For Operations
 - Move quickly/Act quickly
 - Be targeted
 - Pre-determine options
 - Address employees afterward

CONTAINING COSTS

- Set budgets (money and time) for
 - Surveillance
 - Security
 - Investigators
- Shop
 - Name brands can be expensive
 - Attorneys
 - Forensic Accountants
 - Investigators
- Do what you can in-house (but do let the professionals do their job)

IMPLEMENTING SOLUTIONS

- Quickly remove the immediate problem (no matter how disruptive)
- Perform root cause analysis
- Initiate combinations of solutions
 - Training (help employees understand how misconduct impacts them personally)
 - Procedural Improvements (segregation of duties, procurement, etc.)
 - Facility Improvements (security, raw materials and scrap management, ingress and egress)
 - System Improvements (SAP, remote monitoring, centralized credit cards)

DEFENDING THE INVESTIGATION

Experience

- Investigative Training
 - Prior/Current
- Number of Investigations
 - Of this Type
 - For this Client
- Result of Prior Investigations
 - Resolution
 - Litigation

DEFENDING THE INVESTIGATION

Bias

- Relationships
 - Management
 - Witnesses
- Interest in Outcome
 - Company
 - Department
- Personal Bias (life experience)
- Prior Conclusions

DEFENDING THE INVESTIGATION

Conduct of this Investigation

- Relevant Standards
 - Statutes
 - Regulations
 - Court Standards
- Analysis/Plan of Investigation
- Report of Findings and Conclusions
 - Credibility Issues

INVESTIGATION CHECKLIST

- ✓ Determine whether an investigation is necessary.
- ✓ Determine who should conduct the investigation.
- ✓ Determine the scope of the investigation.
- ✓ Identify the pertinent documents and witnesses.
- ✓ Safeguard confidentiality, privacy and privilege.
- ✓ Appropriately document the investigation.
- ✓ Ensure conclusions are reasoned and defensible.
- ✓ Advise the complainant and accused of results.

Zahra Karinshak, Esq.

Krevolin & Horst, LLC

1201 West Peachtree St.
One Atlantic Center, Suite 3250
Atlanta, GA 30309
Tel: 404-888-9700

www.khlawfirm.com



KREVOLIN | HORST LLC

Steve Pynes, Esq.

Ferris & Britton, A Professional Corporation

401 West A St.
Suite 2550
San Diego, CA 92101
Tel: 619-233-3131

www.ferrisbritton.com

**FERRIS
& BRITTON**

Kelli Kennaday, Esq.

Wilke, Fleury, Hoffelt, Gould & Birney, LLP

400 Capitol Mall
Twenty-Second Floor
Sacramento, CA 95814
Tel: 916-441-2430

www.wilkefleury.com

wf | Wilke Fleury

Jim Reed, Esq.

YKK Corporation of America

1850 Parkway Place, Suite 300
Marietta, GA 30067

www.ykk-usa.com

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