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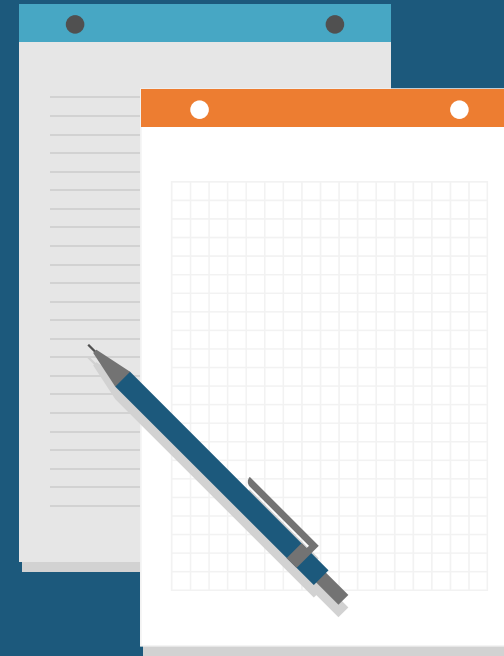
WORKPLACE INVESTIGATION TRAINING

JANUARY 2024

NORTH RISK WEBINARS | 2024

AGENDA

- The Fundamentals
- Evidence Collection and Documentation
- Interview Techniques
- Navigating Legal and Compliance Issues
- Managing Sensitive Cases
- Strategic Communicating and Reporting



PRESENTER



Janell Stanton

HR Attorney

WAGNER, FALCONER & JUDD, LTD.

INVESTIGATION FUNDAMENTALS

- Why investigate?
 - Addressing complaints or suspected instances of misconduct in the workplace is crucial as it aids employers in:
 - Assessing the validity of allegations regarding misconduct.
 - Identifying individuals implicated in the misconduct.
 - Determining appropriate disciplinary or corrective actions against alleged wrongdoers to prevent reoccurrence and mitigate employer liability.
 - Implementing preventative measures to avert future occurrences of similar incidents.
 - Conducting these investigations can contribute to enhancing employee morale, boosting productivity, minimizing turnover, and enhancing the overall recruitment process.



INVESTIGATION FUNDAMENTALS

- Why investigate?
 - Thorough internal inquiries are crucial for employers in building a robust defense against or preventing potential liability.
 - The Faragher-Ellerth defense becomes applicable if the employer can demonstrate the following:
 - No concrete adverse employment actions were initiated against the plaintiff.
 - The employer took reasonable measures to prevent and promptly address any instances of harassing behavior.
 - The plaintiff employee unreasonably neglected to utilize preventive or corrective opportunities provided by the employer or failed to take other steps to avoid harm.



INVESTIGATION FUNDAMENTALS

**Brittany Hudson, Plaintiff-Appellant,
v.
Lincare, Incorporated, Defendant-Appellee.**

[No. 22-50149.](#)

United States Court of Appeals, Fifth Circuit.

January 18, 2023.

Appeal from the United States District Court for the Western District of Texas
USDC No. 1:20-cv-00000

Before Smith, Barboza, and Haynes, Circuit Judges.

JERRY E. SMITH, Circuit Judge.

Brittany Hudson is a Black woman who worked for Lincare, Incorporated. She sued her former employer under Title VII, claiming that she suffered from a racially hostile work environment and that Lincare both failed to address the situation and retaliated against her when she complained.

Although the parties disagree about the nature and frequency of Hudson's harassment, there is no genuine dispute that Lincare's response was prompt, reasonable, and effective. Nor could a reasonable jury find that Lincare retaliated against Hudson based on her complaints. We therefore affirm the summary judgment in favor of Lincare.



INVESTIGATION FUNDAMENTALS

- Develop a systematic and consistent approach to investigations
 - Who will conduct the investigation?
 - Internal v. external investigator
 - Attorney v. non-attorney investigator
 - The right investigator will:
 - Have expertise in conducting investigations.
 - Be unbiased.
 - Be knowledgeable about state and federal employment laws.
 - Be committed to upholding the privacy rights of employees and others.
 - Be discreet.



INVESTIGATION FUNDAMENTALS

- Most commonly investigators are:
 - Human resources (HR) or employee relations personnel.
 - In-house counsel.
 - An outside investigator.
 - Outside counsel.

INVESTIGATION FUNDAMENTALS

- Timing of the investigation
 - Typically, conducting the investigation ASAP is best
 - Fraud/embezzlement suspicion may warrant a more methodical approach
- What to do with alleged perpetrator and alleged victim pending investigation?
 - Paid/unpaid suspension, transfer, modify supervisory relationships
 - What for retaliation regarding the alleged victim



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EVIDENCE COLLECTION AND DOCUMENTATION

- Employer and/or investigator should take steps to preserve all evidence, including electronic evidence like text messages, Teams/Slack chat, etc.
- Investigator should review personnel files, employee handbooks/relevant policies, complaint forms, any other relevant documentation prior to conducting interviews

INTERVIEWING TECHNIQUES

Planning the Interviews

- Who should be interviewed?
- What will be the sequence of the interviews?
- How will you document the interviews?
- What will be asked during the interview?



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INTERVIEWING TECHNIQUES

DO ASK:

- Who
- What
- When
- Where
- Why
- How

DON'T:

- Accuse
- Become angry/emotional
- Use legal jargon
- Use conclusory statements
- Reveal the source of ?s
- Make predictions

INTERVIEWING TECHNIQUES

- Who was present?
- What was said?
- What documents relate to this situation (corroborating or contrary)?
 - Are the documents in your possession? If not, do you have access to them?
- What other evidence do you have or know of?
- What other witnesses know about this situation?
- Did the complainant report the issue? If so:
 - to whom;
 - when; and
 - what was said?
- Did the complainant prepare contemporaneous notes?
- Did the complainant prepare notes or another written summary after the fact?

INTERVIEWING TECHNIQUES

- What Should Each Witness Be Told?
 - When dealing with each witness, it is important to pre-plan the details that should be revealed regarding the allegations and investigation.
 - Given that witnesses are prone to asking questions, it is advisable to anticipate and address their inquiries ahead of time.
 - Limit the information shared to only what is necessary for the witness to convey their own perspective.

INTERVIEWING TECHNIQUES

- Introductory comments:
 - Explain the process
 - Do not promise confidentiality
 - Request full cooperation and their best judgment and discretion
 - Truth and candor required
 - No retaliation

INTERVIEWING TECHNIQUES

- Interviewing sticky wickets
 - Employee refuses to be interviewed
 - Employee wants to record the interview
 - Employee wants to bring a friend or attorney
 - Witness raises new/different claims
 - What if the employee becomes emotional/volatile

NAVIGATING LEGAL AND COMPLIANCE ISSUES

- Stay abreast of relevant employment law
- Understand the potential litigation risks associated with interviews:
 - Privacy concerns
 - Defamation
 - Retaliation
 - Tort claim concerns
 - Union/CBA considerations

MANAGING HIGH-PROFILE AND SENSITIVE CASES

Develop a media plan

- Appoint a media point person, develop talking points for consistency, consider outside investigators

Consider a different investigation strategy when investigating senior executives/C-suite/high-profile employees

- These investigations likely require additional planning and may be best conducted by outside investigators

Balance transparency with confidentiality in sensitive cases

- Recognize and address cultural nuances
- Ensure fairness and impartiality
- Promote a culture of inclusion throughout the investigation process



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STRATEGIC COMMUNICATION AND REPORTING

- Many times, investigations involve “he said, she said,” “he said, he said,” “she said, she said” allegations
- Making credibility determinations requires consideration of biases, predispositions, and an individual’s stake in the outcome
 - Look for nervousness, insincerity, inconsistencies
- Make any necessary factual determinations

STRATEGIC COMMUNICATION AND REPORTING

- The report needs to include details on:
 - The incident that triggered the investigation.
 - A comprehensive account of the witnesses interviewed, including a brief overview of the information gathered from each interview.
 - An overview of all pertinent evidence examined, accompanied by a summary for each piece of evidence.
 - Identification and explanation of any existing evidence that was not scrutinized and the reasons behind this decision.
- Conduct an evaluation of the credibility of each witness and piece of evidence, elucidating the rationale for each assessment.
- Present the factual findings and relate their relevance to the investigated issue.



STRATEGIC COMMUNICATION AND REPORTING

- Determine appropriate response:
 - Allegations corroborated
 - Consider appropriate disciplinary measures
 - Allegations not corroborated
 - Be careful disciplining an employee unless the employer can determine bad faith
 - Unable to reach definitive conclusion
 - Suggest ongoing monitoring
 - Workplace training
 - Change reporting relationship



STRATEGIC COMMUNICATION AND REPORTING

- Communicating the outcome
 - Different messages for complaining employee and accused
- Other witnesses need to know relatively little
- When communicating with company officials about the outcome, copies of the report should not be shared to the extent possible

QUESTIONS?



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