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EMPLOYMENT PRACTICES LIABILITY CONSULTANT

Investigations That Work

By Don Phin, Esq.

"It is quite a three pipe problem…."

—Sherlock Holmes in Sir Arthur Conan Doyle's "The Red Headed League"[1]

Trying to run a business in today's turbulent economy is difficult enough, even without having to keep unscrupulous, illegal, disloyal, unethical, and otherwise disastrous employees and managers at bay! Bad employees can be especially expensive. Published estimates of employee theft range from $40 to $120 billion annually. Since government studies show that three out of five people who use illegal drugs have a job, it is not surprising that the damage caused by drug users at work is estimated to be more than $120 billion annually. And then there are the financial costs and overall grief associated with sexual harassment, discrimination, and other irresponsible behavior for which an employer may be held liable. Bad actors not only steal property, they also injure clients and other employees, file frivolous lawsuits, generate legitimate lawsuits, create bad press, contribute to employee turnover, and, ultimately, can cause business failure.

Disastrous employees are not just limited to the rank and file. To the contrary, there are plenty of "million-dollar" executives, who are not designated as such because of how much money they make. Rather, it is because of the magnitude of the damage they cause. In fact, there are studies indicating that the cost of *corporate crime* in America exceeds manyfold the cost of what might be considered "common" or *garden-variety crimes*. Case in point: the banking industry likely loses much more money to embezzlement than it does to robbery.

When things go wrong at a business, an investigation must necessarily follow. Importantly, how well (or how poorly) a claim or serious problem is investigated greatly affects your company's exposure to loss arising from that problem. Recognize, too, that it is not just third-party liabilities that should concern management. Companies must also be cognizant of the effects that the circumstances

[1]In Sir Arthur Conan Doyle's "The Red Headed League," Sherlock Holmes refers to a mystery so complicated that he needs a significant period of time—the time required for him to smoke three pipefuls of tobacco—to solve it.

giving rise to the need for an investigation can have on the culture within your organization. For example, employment litigation engenders mistrust, lowers morale, and reduces productivity. In addition, it generates high legal fees and claim settlements, increased insurance costs, and exorbitant jury verdicts. Given such high stakes, management not only has the job of gathering facts, documents, and witnesses. In addition, those who lead corporations must also deal with questions such as the following.

- "Am I doing everything necessary to maintain the level of trust within this company?"
- "Am I respecting an employee's right to privacy in this process?"

Given such challenges, this article will discuss what to investigate, who should do the investigation, elements of a proper investigation, and how to prepare a report of the investigation's findings and recommendations. Before we go further, here is a story you should know.

The *Cotran* Case

The court opinion in *Cotran v. Rollins Hudig Hall Internat., Inc.,* 17 Cal. 4th 93 (1998), shows that, in 1993, the Rollins Hudig Hall International, Inc. (Rollins), human resources director received a report alleging that Ralph Cotran, a senior vice president and western regional international manager at the company, was sexually harassing two female employees. The two women confirmed the alleged harassment in written statements. After a discussion among high-level executives at Rollins, Mr. Cotran was informed that an investigation would be conducted and was confronted with the two statements. Pending completion of the investigation, Rollins suspended Mr. Cotran. According to the court opinion, during the next 2 weeks, the company's manager for equal employment opportunity (EEO) compliance conducted interviews with 21 people, including 5 that Mr. Cotran had asked her to interview. The investigation concluded that the women who accused Mr. Cotran of harassment appeared credible, although the investigation failed to turn up anyone else accusing Mr. Cotran of harassing them. The investigation confirmed that Mr. Cotran had telephoned both of the women at their homes and concluded it was "more likely than not" that harassment had occurred. After reviewing the investigative report, complete with attached affidavits, Mr. Cotran's supervisor at Rollins terminated him, the court opinion shows.

Subsequently, Mr. Cotran brought a lawsuit claiming that his firing violated the company's obligation to terminate him only for "good cause." Mr. Cotran stated that his relationships with the two women were consensual and that their statements were nothing more than vindictive attempts to get back at him.

The jury returned a "special verdict." Asked whether Mr. Cotran "… engaged in any of the behavior on which [Rollins] based its decision to terminate [his] employment …," the jury answered "no." The jury then proceeded to award Mr. Cotran more than $1,780,000! Rollins immediately appealed the case. The issues before the appellate court were (1) whether the jury gets to decide if the alleged conduct that led to the decision to terminate *in fact* actually happened or (2) whether it is better to ask if the employer *had reasonable grounds for believing that* the alleged conduct occurred and otherwise acted fairly. The appeals court noted that many of the courts in California and across the country are divided on this crucial question. After an extensive analysis of the arguments on both sides, the court stated that the proper inquiry is not, "Did the employee in fact commit the act leading to dismissal?" Rather, it is, "Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?" (*Cotran v. Rollins Hudig Hall Internat., Inc.,* 17 Cal. 4th 93 (1998))

As is also the case with regard to the business-judgment rule (which governs the liability of corporate directors and officers), the

court preferred to focus on the *employer's response* to the alleged misconduct rather than the *actual truth* of the alleged misconduct. Accordingly, the court ordered a retrial of the case, which produced a reversal of Mr. Cotran's $1.78 million verdict. So, even if you are located in a jurisdiction that still requires you to be factually correct, regardless of your good-faith efforts, performing a thorough investigation is all that you can do.

Investigate Promptly and Thoroughly

In *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), the importance of conducting a *prompt* and *thorough* investigation was reemphasized by the U.S. Supreme Court. It held that employers may better defend against employee claims of sexual harassment when they have a written corporate policy regarding sexual harassment, investigate complaints thoroughly and promptly, and respond appropriately.

Failing to take the approach suggested by the *Cotran* and *Faragher* decisions made headlines in 1997 when the Miller Brewing Company was hit with a $26.6 million verdict for allegedly failing to conduct a thorough investigation into an allegation of sexual harassment. As in the *Cotran* case, the employee accused of sexual harassment brought the suit! Court records show Miller had terminated the employee for discussing an episode of *Seinfeld* that his female coemployee found offensive. When she complained, Miller allegedly made a "knee-jerk" termination without conducting a thorough investigation of the claim. The termination was viewed as both draconian and slanderous under the circumstances, resulting in an enormous verdict. Although an appeal was also filed in the *Miller* case, it is apparent that the *Miller* case posed a much greater exposure to the employer than did *Cotran,* given the allegedly arbitrary manner in which Miller responded to the female employee's allegation of sexual harassment.

Companies that fire, discipline, or reprimand employees who are accused of wrongful conduct—including sexual harassment, discrimination, or theft—can usually minimize their exposure to a lawsuit and additional losses (e.g., damage to morale, productivity disruption, loss of trust within the organization) if they conduct a prompt and thorough investigation that evidences a "good-faith" belief in any actions it eventually takes as a consequence of the investigation's findings and recommendations. In fact, the Equal Employment Opportunity Commission (EEOC) has issued sexual harassment investigation guidelines. These parameters notwithstanding, there is no "perfect" investigation formula. Rather, every investigation must be planned and then conducted on a case-by-case basis. What I hope to do in the following pages is to identify a number of key investigatory steps that businesses should consider, based on agency regulations, leading court opinions, and personal experience.

What Should You Investigate?

This question is not as simple as it may at first appear. Sometimes, law requires you to conduct a prompt and thorough investigation, such as when an employee complains to anyone in management about conduct that violates a statute or regulation. Complaints about sexual harassment, discrimination, and violation of the Americans with Disabilities Act are classic examples. Yet, in other circumstances, investigations should be conducted at the employer's discretion. These include investigations relating to drug and alcohol use, theft and misconduct, business fraud, and customer complaints. To further complicate the question of whether you must conduct an investigation is the fact that, at times, you must do so because you received a complaint from an agency or attorney. In that event, you are compelled to undergo the process to help defend against the claim now being made against you.

Yet another reason to investigate is the need to maintain the integrity of your company's human resources systems. As you may

already know, I suggest use of an Employee Compliance Survey (e-mail me and I'll send you a copy), which takes a proactive approach to addressing compliance obligations. The survey asks whether the company has sufficiently educated its employees regarding compliance concerns and whether they know of any violations. If their answer to the second question is anything other than unequivocal "no," then it is time to investigate.

There have been circumstances where an employer was glad it investigated a matter, based on the belief that "where there is smoke, there may be fire." A proactive employer will pay attention to these smoke signals and rumors. Bottom line: the question of what to investigate is a risk management issue, one directly related to your company's tolerance for and desire to eliminate the risks facing your organization. In other words, unlike many of the circumstances already discussed, in which there is a legal obligation to investigate, there are some circumstances under which the question of whether to investigate is largely subjective.

One of the greatest mistakes I have seen over the years is a company's tendency to *ignore, bury,* or *deny* conduct that should be promptly and thoroughly investigated, a response that is essentially a reflection of human nature. None of us wants to deal with bad news. So, we will ignore a matter hoping it will go away ("I'll just pretend Johnny didn't do that"), bury the matter hoping it will not resurface ("I can't believe he did that, but I won't tell on him"), or deny its existence altogether ("Johnny would never do something like that"). All of this happens even in the face of objective evidence! That is one reason why it is so important to have a process in place for investigating situations and occurrences, including one that trains managers in the investigation process.

Who Should Investigate?

As to who will conduct an investigation, you have four basic choices: go it alone, hire an attorney, engage a human resources consultant, or contract with a private investigator.

An effective investigator must have well-developed questioning skills, writing ability, sound judgment, and a thick skin. Many things can go haywire in an investigation, and fast. There will be cover-ups, fabrication, destruction of evidence, intimidation and additional harassment, retaliation, lies, and counterclaims. Amid all of this turmoil and deception, the investigator must remain neutral, confidential, confident, and in control. It is not a job for either the meek or the inexperienced.

Investigating an issue on your own has the advantage of being less expensive and perhaps more expedient but comes with the disadvantage of not affording you the benefit of professional advice. Professional investigators and lawyers are trained at viewing matters objectively. Unlike company employees, they have no direct stake in the outcome of any action, a fact that might otherwise "filter" their inquiries or limit their ability to obtain and dispassionately analyze information. Nevertheless, if the company has in-house counsel, there is good reason to believe that with the proper tools it can conduct an excellent investigation.

If you decide to conduct the investigation yourself, be careful to make sure any investigation is not compromised by personal relationships, undue influence, past experiences with the involved individuals, or their possible role as a witness to the underlying facts. Given these circumstances, the primary benefit of using outside help is their independent expertise in ferreting out information that might otherwise remain buried by an in-house investigation.

If you hire a private investigator, make sure the individual is properly licensed. If not, both you and the investigator may violate state statutes and regulations. One benefit of an outside investigator is that any professional accreditations or certifications he or she has earned will add to his or her credibility if called to testify in any possible hearing. You should also inquire as to whether the individual you are considering has experience investigating similar cases.

Should your attorney handle the investigation? You must weigh the risk versus the benefits of having your regular employment law firm conduct an investigation. If the firm does, it may be prevented from representing you in any lawsuit. Odds are, if the firm conducts a thorough investigation and the human resources staff follows up accordingly, then no further action will be taken by the employee. And even if the employee does pursue a claim, it is unlikely that it will ever go to trial. On the other hand, many law firms will decline the request to investigate and prefer to work with a third-party investigator.

Sometimes, an attorney is used "behind the scenes," helping to direct an investigation conducted by company personnel or a third party. This way, your attorney's client and work product privileges can be maintained, yet he or she can still represent you in the event of litigation. Understand, though, that in spite of the attorney-client and work product privileges, any time the company intends to rely on the strength of its investigation it still waives much of its right to those privileges.

Conducting the Investigation

When investigating claims, there is no substitute for thinking in terms of who, what, when, why, where, and how.

- **Who.** You should investigate anyone who either the accuser or the accused suggests. We also recommend interviewing anyone who had the ability to see, hear, or know of the alleged conduct. Do not skimp on the depth of the investigation. Remember, in the *Cotran* case, 21 employees were interviewed before the investigator reached a "good-faith" decision. In fact, some of the most dangerous trial witnesses I have encountered during the more than 30 years I have been practicing employment law were witnesses who were *not* interviewed during the investigation. Develop a game plan as to whom you intend to interview, beginning with the accuser(s) and their witnesses, along with the accused and their witnesses. Have a final interview with the accuser(s). And never hesitate to go back to a witness to obtain additional input, in light of newly discovered facts or sharply conflicting witness statements.

  A final note: one of the riskiest witnesses is a former employee with an ax to grind. Since he or she no longer works for the company, there is literally nothing to lose when he or she is called to testify. This is perhaps the key reason to be thorough when you investigate. Do not limit the investigation to current employees.

- **What.** You want to pointedly ask if the witness knows of any *facts, documents, witnesses,* or *other evidence* that may corroborate the allegations. While I suggest you work from an investigation checklist, an investigator must engage in "active listening." This allows for more effective follow-up questioning concerning statements made by witnesses. Documents to be considered as part of the investigation include any personnel policies and procedures, personnel files, previous investigations or complaint notes, internal memos, e-mails, cell phone records, calendars, photos, video recordings, and other communications.

- **When.** Begin immediately after you map out your investigation game plan. When conducting a sexual harassment-type investigation, obtain the accuser's side of the story first.

- **Why.** The primary reason for asking "why" questions is to understand the motivations of people and to test their credibility. An employee may engage in theft because he or she feels underpaid. An employee may make a claim of sexual harassment because he or she does not like the aggressive style of a new manager. Asking these kinds of "why" questions may uncover evidence of "system failures," underlying

motives, or the existence of other mitigating factors.

- **Where.** You should allow a witness to be interviewed anywhere, as long as the location affords privacy and comfort. On the other hand, recognize that conducting the investigation in an executive office or conference room may feel threatening to the witness and thereby limit the scope and candor of his or her answers. A suggested phrase when setting up an interview location is to ask, "Where would you like to talk about this?"

- **How.** As scientist David Bohm wrote, "Truth does not emerge from opinions…." So to maintain the neutrality that is crucial for investigations, you do not start an investigation with the belief that you are there to protect your company or that you already know who is right and who is wrong. Rather, it means you begin with an objective mind-set and pose open-ended questions, followed by clarifying questions, until you are left with *specific details rather than opinions.* Be sure to distinguish between firsthand knowledge, hearsay, and mere gossip. Explore any illogical accusations, along with the credibility of witnesses.

  A final, crucial point with regard to the "how" of an investigation is to make sure to *allow any accused employee to review the evidence against him or her* and *allow the accused to provide his or her side of the facts.* Juries will perceive an investigation as being unfair when the accused employee was not given the opportunity to defend himself or herself.

Watch for Coercion and Accusations

An investigation gathers facts, documents, witnesses, and possible motivation—and nothing more. Companies can be sued for disseminating rather than gathering information as part of an investigation. Do not threaten disciplinary action or civil or criminal legal action during the investigation process. Coerced testimony lacks credibility and only leads to a larger set of problems.

Note: Federal law limits the use of recording equipment to tape confidential conversations but allows for recording confidential conversations when only one of the parties has given prior consent (18 U.S.C., Section 2511). California and other states are more restrictive and only allow a recording when both parties consent.

It should go without saying that anyone conducting an interview, whether tape-recorded or written, must be careful about making *accusatory statements.* One company spent more than $50,000 defending a claim brought by a black bank teller accused of petty theft when the interrogator made an unnecessary and racially insensitive remark. In that case, which the employer eventually "won," the employee accused the company of false imprisonment, intentional infliction of emotional distress, and racial discrimination. It is therefore imperative to ensure that during an investigation you do not comment on any statements made by the employee, or offer any gratuitous statements unrelated to the investigation. *Simply gather the facts.*

Union Employees Have the Right To Have a Coworker Present at an Investigatory Meeting

Forty years ago, the United States Supreme Court, in *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975), afforded union members the right to have a coworker present (e.g., a union shop steward) at an investigatory interview, which the employee reasonably believes might result in disciplinary action.

On July 10, 2000, in a split decision, the National Labor Relations Board (NLRB) extended this right to nonunion employees in *Epilepsy Foundation of Northeast Ohio and Arnis Borgs and Ashraful Hasan,* 331 NLRB No. 676. The decision was subsequently upheld on appeal and caused much consternation

for employers. But, fortunately, the NLRB flip-flopped on this issue and in a June 2004 opinion in *IBM Corp.,* 341 NLRB No. 148, changed its mind in a 3–2 vote. The current board is considering reinstatement of the rule.

What the *Weingarten* decision means for you as an employer:

1. Nothing if you are in a nonunion setting, at least not for now.
2. You are not required to notify the employee of his or her *Weingarten* right.
3. If an employee requests a coworker to be present, you must accommodate that request or cancel the interview. Alternatively, you can request his or her consent in writing to the interview without representation.
4. The right of representation would apply in an investigatory setting related to sexual harassment and discrimination claims, substance abuse, theft, unethical conduct, violations of policies and procedures, and insubordination.
5. Remember, this *Weingarten* right applies to "investigations" only.
6. The right of an employee to have a coworker present during an investigation does not allow the employee to bring in an outside attorney or union official.
7. This right does not extend to management-level employees.

You can learn more about *Weingarten* obligations by going to the NLRB website.

Get It in Writing

Memorialize statements made by the accused, accuser, and witnesses you interview by drafting a declaration for them to sign under the penalty of perjury. The necessity of taking a formal, written statement is that often employees who are witnesses to an event will change their stories on an after-the-fact basis. This is especially true if (and as already mentioned) the employee no longer works for the company. Use standard complaint and witness forms to take these statements.

Make sure you keep excellent notes of your witness interviews. Remember, you may have to rely on them many years down the road, when your memory will be much fuzzier about events that may have transpired a decade earlier. Maintain any notes or documents related to the investigation that are separate and apart from the employee's personnel file and limit access to the material. Mark it "Confidential."

Employee Suspension and Time Off

If the alleged offense is significant, consider suspending the accused without pay while completing an investigation. You can also provide the accuser with time off under these circumstances. This allows for a "cooling off period" during the investigation and postpones the need to make any termination decisions. Such an approach can remove barriers to an investigation because it eliminates the need to act in undue haste, which will also reduce your exposure to wrongful termination litigation. In the event the accused is found to be innocent of wrongdoing, provide the individual with pay for the days missed. Bottom line: even though you need to do a "prompt and thorough investigation," make sure you obtain all the relevant facts before taking action.

Concerns about Company Policy and Confidentiality

The January 29, 2013, NLRB Advice Memorandum concerned an investigation policy set forth by Verso Paper. The policy said:

> Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent

a cover-up. To assist Verso in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

The NLRB found the policy overbroad and concluded that it infringed on employee free speech rights in section 7 of the National Labor Relations Act, claiming such confidentiality is not required in every situation. In a sexual harassment case, the claimant may want to talk to other women who may have been involved in the unfair conduct. This differs from a case involving theft, or perhaps drug use, where there is a legitimate and substantial business concern to keep the matter confidential, a situation that outweighs section 7 rights.

The NLRB suggested the policy be rewritten as follows (italics added to highlight the suggested revision):

> Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. *Verso may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If Verso reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.*

Concerns about Employees' Privacy

The investigation of any activity involves the inherent conflict of the employer's rights versus those of the employee. Indeed, there is always a fine line, on one hand, as to what constitutes a relevant inquiry and who may have knowledge of any information that has been obtained from the inquiry and, on the other hand, the violation of an employee's rights of privacy. Accordingly, investigators must be able to maintain confidences and yet know when they cannot always demand equal discretion from others.

A Note about Detention

Courts have ruled that reasonable attempts to investigate employee theft, including employee interrogation, are a normal part of the employment relationship and cannot result in a lawsuit being filed outside of the workers compensation system. However, the courts have also stated that employer conduct rising to the level of "involuntary detainment" is "always outside the scope of the compensation bargain" and can establish a common law action by the employee against his or her employer for false imprisonment, intentional infliction of emotional distress, and other causes of action.

Nevertheless, an employer does have the right to "reasonably detain an employee suspected of theft" but may not engage in "unreasonable confinement." You must therefore be careful not to force the detainment, either expressly or by implication, recognizing that undue confinement can occur by words, gestures, or other acts that cause a person reasonable apprehension. While it is appropriate to state that a person may not leave the room when conducting an investigation, neither should the investigator say, "You're not leaving this office until I get some answers." Rather, use forced detention only when you have *probable cause* to believe the employee is in wrongful possession of company property. This is known as the "shopkeeper's privilege." However, if you detain a person to obtain a confession or restitution, your company will not be protected by the shopkeeper's privilege.

A Note about Using Polygraphs

In his fascinating book, *The Truth Machine* (published by Ballantine Books, copyright 1996, 1997), author James L. Halperin builds a story around a device that can detect honesty with

100 percent accuracy. In the book, the Truth Machine profoundly impacted the legal system, and its existence had a chilling effect on wrongful conduct. Nevertheless, it is important to note that because the "truth machines" we use today—notably, the polygraph—cannot detect honesty with 100 percent precision, their use is severely restricted by law.

Despite such restrictions, the federal Employee Polygraph Protection Act (EPPA) admits polygraph evidence under limited circumstances. Thus, the use of polygraphs is prohibited in 28 states but is allowed in 18 states, if both sides agree. Moreover, polygraphs can only be used with employees holding highly sensitive positions such as military and police force personnel, security guards, and those with direct access to controlled substances. They may be part of an ongoing investigation for economic loss, but the involved employee must have had access to the stolen information or materials. Lastly, most statutes require a business to provide the employee with a statement to sign, indicating that taking the polygraph examination is a voluntary exercise and giving the employee the right to stop the examination at any time.

The American Psychological Association states in "The Truth About Lie Detectors," published on the association's website August 5, 2004, "Most psychologists agree that there is little evidence that polygraph tests can accurately detect lies." In light of the many restrictions on their use, I strongly discourage using polygraphs, except under unique circumstances and with professional assistance.

The Report of Findings

The report of an investigation's findings should be an unbiased interpretation of the facts, documents, and witness statements that the investigation has gathered and compiled. Should there ever be a lawsuit or agency investigation, you can expect to have the report dissected, analyzed, second-guessed, and cross-examined during the process. So make sure it is accurate and written in a style that can be easily understood by a layperson. Remember, the report should not be a document written by one lawyer to another.

Present the report in a chronological fashion. Interpretations of any facts should be supported by objective evidence, including attached affidavits and documents. When drafting the report, do not provide specific witness names. This will help to protect against the possibility of retaliation. Shred and dispose of any drafts of your report, but keep all of your supporting notes. Remember, the report is a summary document and should be no longer than a few pages in length.

To prevent claims such as those in the *Cotran* and *Miller Brewing Co.* cases, I suggest you provide the accused with a copy of the report. Give that person an opportunity to once again respond to the facts in the report before moving on to any form of corrective or remedial action.

Concluding Thoughts: The Next Steps

This is the point at which the investigation ends and concrete action must be taken. Depending on the circumstances, you may also be tasked with this obligation. Whether your responsibilities conclude with writing and presenting the report of an investigation or personally executing its recommendations, it is a really good idea to discuss the investigation's findings with an attorney, in the event you are being called on to carry out the recommended discipline and remedy any wrongful conduct. *EPLiC*

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