



910 Internal Investigations of Your Senior Executives

Robert J. Bohner
Second Vice President & Senior Counsel
Lincoln Financial Group

Philip S. Deming
Principal
Philip S. Deming & Associates

Kristine Grady Derewicz
Shareholder
Littler Mendelson PC

Eric A. Tilles
Assistant General Counsel
Arkema Inc.

Faculty Biographies

Robert J. Bohner

Robert J. Bohner, Jr. is a second vice president and senior counsel for Lincoln Financial Group in Philadelphia. He is responsible for advising senior executives, human resources personnel, supervisors, and managers on all aspects of labor and employment law. He also handles Equal Employment Opportunity Commission (EEOC) and other agency charges and investigations, conducts supervisor training, and manages employment-related litigation.

Prior to joining Lincoln, Mr. Bohner was associate general counsel in the office of the general counsel of the University of Pennsylvania and the University of Pennsylvania Health System, where he handled all aspects of labor and employment law and related litigation, as well as higher education and healthcare law matters.

He received his B.A. from the University of Pennsylvania and he is a graduate of Villanova University School of Law.

Philip S. Deming

Philip S. Deming, CPP, CFE, SPHR, is the principal of a human resources consulting firm in King of Prussia, Pennsylvania. His responsibilities have included consulting and expert testimony in negligent hiring, negligent retention, internal investigations (i.e., defalcation, fraud, sexual harassment, and workplace violence), and wrongful terminations. He currently serves as the interim senior vice president of administration for Trans Health in Sparks, Maryland and is responsible for human resources management, labor relations liaison, risk management, and operations administration.

Mr. Deming has over 25 years of experience in consulting on human resources and risk management issues. He has developed human resources policies and procedures, conducted corporate investigations, provided corporate training programs, and performed terminations of "high risk" employees. Prior to his consulting practice, Mr. Deming was a special agent with the United States Treasury Department.

He has published a number of articles on human resources matters. Mr. Deming is an instructor on the certification program for ASIS International and one of his topic areas is investigations.

Mr. Deming received his B.S. from Northeastern University, with honors, and has two Master's from Villanova University.

Kristine Grady Derewicz

Kristine Grady Derewicz is a shareholder of Littler Mendelson PC in Philadelphia. She represents management clients in all aspects of labor and employment law, ranging from proactive counseling to litigation in both union and non-union settings.

Her experience has included employment discrimination litigation and counseling, drafting employment and severance agreements, drafting and litigating covenants not to compete, and labor-management relations. Ms. Derewicz has experience in traditional union matters including arbitrations, collective bargaining negotiations, and unfair labor practice proceedings. She has tried numerous cases to juries in state and federal courts in Pennsylvania and New Jersey. Ms. Derewicz has experience in the following industries: health care, higher education, media, telecommunications, trash hauling, manufacturing, retail, franchise operations, consulting, and temporary personnel services.

Eric A. Tilles

Eric A. Tilles is assistant general counsel at Arkema Inc., where he is responsible for providing legal advice concerning all aspects of ethics and compliance, employment, labor, employee benefits, executive compensation, and immigration law, and for the day-to-day management of the company's ethics and compliance program. He is also a lecturer-at-law at the University of Pennsylvania Law School where he teaches employment discrimination law.

Prior to working at Arkema, Mr. Tilles was an associate general counsel at the University of Pennsylvania and an associate at the law firm of Morgan, Lewis and Bockius. He clerked for Chief Judge A. Leon Higginbotham and for Senior Judge James L. Latchum.

Mr. Tilles received his B.S. from the New York State School of Industrial and Labor Relations at Cornell University and his J.D. from the University of Pennsylvania Law School.

*ACC's 2005 Annual Meeting
Legal Underdog to Corporate Superhero:
Using Compliance for a Competitive Advantage*

Session 910: Internal Investigations of Your Senior Executives

Robert J. Bohner Jr., Esquire
Philip A. Deming, SPHR, CFE
Kristine Grady Derewicz, Esquire
Eric A. Tilles, Esquire

Prompt investigation of allegations of inappropriate or illegal conduct in the workplace is crucial. An employer's indecisive action, or failure to exercise leadership in this context, will serve neither to correct unlawful behavior nor to establish the level of responsiveness and care that are required to defend against the myriad of claims that may follow in the wake of a whistleblowing event. Complaints are often obvious complaints of sexual harassment and the like, but they can also take the form of allegations of inappropriate business practices, kickbacks, false reporting, etc.

An effective investigation includes planning and coordination with key constituencies in the organization, from the audit committee to human resources. Experience teaches that when the employer takes the concerns raised seriously, investigates complaints promptly, and communicates the investigation plan and the policy (including no retaliation) to the complaining employee, the complainant is reassured and risks of further claims and eventual liability are reduced.

Finally, thorough, accurate and factual documentation is a key factor in accomplishing the best possible outcome. Because such investigations require outstanding interrogation, listening and communication skills, as well as scrutiny and interpretations of complex human interactions, only well-trained managers or third parties should be charged with this responsibility. Incomplete, inaccurate or biased investigations can actually serve to deepen the problem and increase the employer's potential liability.

Guidelines for Investigating Complaints:

1. Determine if an investigation is warranted. Assemble investigation team and plan investigation.
2. Give the complainant the opportunity to put the complaint in writing.
3. Identify and preserve evidence.
4. Interview the relevant people. Conduct clarification interviews, as necessary.
5. Take appropriate interim action.
6. Discuss findings with management and legal staff.
7. Determine and implement corrective action.
8. Inform the complainant of the resolution.
9. Implement any other closure or actions required.
10. Close and retain the investigation file.

Detailed Investigation Checklist:

Step One – Planning

- What is the purpose of the investigation?
- What is the triggering event?
- Who will be the person with overall responsibility for the investigation?
- Will the investigation be subject to the attorney-client privilege?
- Will law enforcement have to be involved at any stage?
- Is later civil litigation likely?

Step Two – Preserving Evidence

- Have key documents been safeguarded?
- Has key electronic data been safeguarded?
- If electronic data has been erased, can it be restored?
- Has physical evidence been stored properly to avoid deterioration?

Step Three – Selecting Investigative Tools

- Review of company records
- Review of personnel files
- Searches, as necessary
- Electronic data: voicemail, email, computer files
- Surveillance
- Undercover investigations
- Employee testing
- Accessing criminal records
- Using outside investigators
- Using the attorney-client privilege

Step Four – Interviewing Witnesses

- Decide upon the order in which investigation interviews will be conducted.
 - Complainant
 - Alleged harasser
 - Coworkers and other witnesses
 - Supervisors of the complainant and alleged harasser
 - Second interviews, as necessary.
- Interview each witness separately in an office or room where the discussion will not be overheard by other witnesses, the alleged harasser, or any other unauthorized persons.
- Use two managers in the interviews; one to ask questions and one to take notes.
- Create a written record of each interview.
- At the outset of the interview:
 - Explain the purpose of the interview by referring generally to recent complaints. Do not taint the witness' recollection of the events by framing the interview in terms of a "harassment" or "discrimination" investigation.

- Explain to the witness that confidentiality is necessary to protect the integrity of the investigation.
- Emphasize that the Company takes these charges very seriously and that the Company is investigating the charges by interviewing all potential witnesses, in compliance with Company policy.
- Explain that upon completion of the investigation, the Company will attempt to determine what occurred, and will take appropriate action based on its determination.
- Instruct each witness not to discuss the matters covered during the interview with any co-employee or the alleged harasser.
- Explain to all witnesses that retaliation will not be tolerated.
- During the Interview:
 - Ask open-ended, nonjudgmental questions.
 - Avoid leading questions.
 - Avoid myths and stereotypes.
 - Avoid the appearance of favoritism.
 - Observe and record not only the spoken words of the witness, but also physical and verbal reactions.
 - Do not record conclusions regarding credibility.

Step Five – Reaching a Decision

- Review all evidence collected.
- Consider credibility determinations. Factors include: memory, perception, truthfulness, corroboration or lack of it, bias of witnesses, consistency and plausibility of accounts, and prior misconduct.
- Take appropriate disciplinary action against the wrongdoer. Consider a verbal warning, written warning, denial of bonus or pay raise, suspension, demotion, termination, or some combination, as is appropriate according to Company policy and the nature of the act.
- Determine the appropriate remedy for the complaining employee.

Step Six – Communicating the Results

- Consider whether, or to what extent, the results of the investigation should be communicated to the complaining employee.
- Communicate results of investigations to the employee affected, if different than the complainant.
- Take steps to ensure communication of information only to those who have a “need to know.”

Step Seven – Follow Up

- Maintain separate records of the investigation
- Take steps to ensure that no retaliation is taken against the complaining employee.
- Audit internal operations which allowed the event to take place.
- Revise operational and personnel procedures and policies, as appropriate.
- Evaluate the effectiveness of the investigation itself.

SELECTED FEDERAL CASES ON THE IMPORTANCE OF INVESTIGATIONS

In *Malik v. Carrier Corp.*, 202 F.3d 97 (2d Cir. 2000), the Second Circuit Court of Appeals said:

- “An employer’s investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer’s failure to investigate may allow a jury to impose liability on the employer.” *Id.* at 105.
- “Nor is the company’s duty to investigate subordinated by the victim’s desire to let the matter drop. Prudent employers will compel harassing employees to cease all such conduct and will not, even at a victim’s request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment.” *Id.* at 106.
- “Denials by an accused cannot of themselves bring the matter to an end.” *Id.*
- “An employer’s conduct of an investigation and determination of its scope must be viewed ex ante and take into account that, from the employer’s viewpoint, worst-case scenarios must govern its conduct.” *Id.* at 107.

In *Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001), the Ninth Circuit Court of Appeals discussed an employer’s duty, upon notice of harassing conduct. The court stated that:

- “This obligation actually has two parts. The first consists of the temporary steps the employer takes to deal with the situation while it determines whether the complaint is justified. The second consists of the permanent remedial steps the employer takes once it has completed its investigation.” *Id.* at 1192.
- “The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified. An investigation is a key step in the employer’s response...and can itself be a powerful factor in deterring future harassment. By opening a sexual harassment investigation, the employer puts all employees on notice that it takes such allegations seriously and will not tolerate harassment in the workplace. An investigation is a warning, not by words, but by action. We have held, however, that the ‘fact of investigation alone’ is not enough. An investigation that is rigged to reach a pre-determined conclusion or otherwise conducted in bad faith will not satisfy the employer’s remedial obligation.” *Id.* at 1193.

In *Knabe v. The Boury Corp.*, 114 F.3d 407 (3d Cir. 1997), the Court of Appeals for the Third Circuit provided a reminder that the purpose of the investigation is to determine what happened and to determine the appropriate remedy, not to conduct the investigation for its own sake. The court stated that:

- “The law does not require that investigations into sexual harassment complaints be perfect. Rather, to determine whether the remedial action was adequate, we must consider whether the action was ‘reasonably calculated to prevent further harassment.’” *Id.* at 412.
- “[I]t is also clear that there may be cases in which an employer’s investigation is so flawed that it could not be said that the remedial action was adequate. For

example, the investigation might be carried out in a way that prevents the discovery of serious and significant harassment by an employee such that the remedy chosen by the employer could not be held to be reasonably calculated to prevent the harassment." *Id.* at 414.

- "An investigation must be undertaken... and an employer can be held liable if a faulty investigation renders its subsequent remedial action inadequate, i.e., not reasonably calculated to prevent further harassment." *Id.*

In *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995), there were "serious deficiencies in the investigation which give the appearance of bias against the plaintiff" where the investigators:

- Failed to promptly interview the accused;
 - Warned the accused of the claims so that he was able to prepare extensive documentation in his defense;
 - Accepted the accused's version of the story without taking reasonable steps to corroborate the story;
 - Did not check the accused's phone records where he had been accused of making repeated harassing phone calls to the plaintiff;
 - Did not ask the accused for a second explanation after he admitted to lying;
 - Failed to interview a percipient witness favorable to plaintiff; and
 - Failed to reprimand or discipline the accused.
- The court said, "the fact of investigation alone does not suffice; an investigation is principally a way to determine whether any remedy is needed and cannot substitute for the remedy itself." *Id.* at 1529.

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Advanced Investigations Techniques: When the Key Executive Is Under Suspicion

Robert J. Bohner Jr., Esq.
Philip Deming, SPHR, CFE
Kristine Grady Derewicz, Esq.
Eric A. Tilles, Esq.

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Agenda

- Who, What, Where, When, Why, and How
- Ensuring that your investigation techniques are effective and defensible
- Privilege Considerations



Fuller v. City of Oakland, 9th Cir. 1995

“ . . . The court is troubled by serious deficiencies in the . . . Investigation which give the appearance of bias against the plaintiff.”



Fuller v. City of Oakland, 9th Cir. 1995

Employer “failed to interview [harasser] promptly before he learned of the investigation... [Harasser] apparently was warned of the claims against him so that he could prepare extensive documentation in his defense.”

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Fuller v. City of Oakland, 9th Cir. 1995

“When [harasser’s] version of events differed from plaintiff’s, [employer] often accepted [harasser’s] version without taking reasonable and easy steps to corroborate that version.”

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Fuller v. City of Oakland, 9th Cir. 1995

“In addition, [employer] failed to interview . . . a percipient witness favorable to plaintiff.”

“The [employer’s] investigation was inadequate and does not constitute adequate remedial action.”



Scenarios

An IT employee, during a routine check of employees' emails, discovers an incriminating email that suggests the CEO is having an affair with another employee.



Why Conduct Effective Investigations?

- Statutory Incentives: SOX, Title VII, Whistleblower laws
- Affirmative Defense
- Internal ethics codes
- Insurance requirements
- Punitive damages avoidance

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When to Investigate

- Complaints of Improper Conduct
- Anonymous Complaints
- Third-Party Complaints
- Generalized Suspicions
- After Exit Interviews

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When to Investigate

IMMEDIATELY!



Case Study: What recent action by an employer caused a federal court to impose \$80,000 in punitive damages?

- Ⓐ Installed a camera in the restrooms
- Ⓑ Waited two months to investigate a harassment complaint
- Ⓒ Waited two weeks to investigate a harassment complaint
- Ⓓ Failed to investigate a harassment complaint

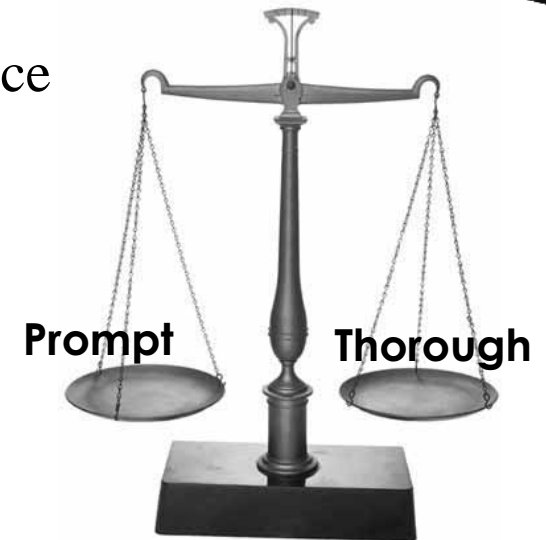


Huffman v. New Prime (W.D.Mo 2004)

By waiting two weeks to investigate claims of verbal and physical assaults, Employer was found **“deliberately indifferent”** to plaintiff’s federally-protected rights



The Balance





Where to Perform the Investigation

- Due consideration must be given to the comfort level of the employees involved and the confidentiality of the process.
- No hard and fast rule, but the decision regarding locale sets the tone of the investigation and should be made thoughtfully.



Who Should Perform the Investigation?



Who Should Perform the Investigation

- Critical that investigator is an impartial, skilled fact finder
 - Objective
 - Neutral
 - Not personal friends or long time colleagues



Who Should Perform the Investigation

Anyone who performs any significant investigation must have **formal training** in investigation techniques in order to withstand scrutiny.

But what kind of training?



Who Should Perform the Investigation

In addition to the investigator, the organization must identify key resources to support the process, e.g., Board commitment, counsel, human resources, IT, financial support.



What Are We Investigating?

- Key individuals must agree on the issue to be investigated.
- The key people must put together a well-conceived strategy and must identify meaningful objectives before the start of the fact-gathering.
- Do not overlook the importance of planning and preparation.



Planning the Investigation

Spend the time....

It's worth the effort.



Planning Issues

- What are the relevant issues?
- What are the relevant documents?
- Timing & scope
- Efficiency
- Interview Selection
- Preserving Evidence



How to Conduct an Effective Investigation

- Accomplishing the Who, What, Where, and When are the stepping stones to an effective investigation.
- Anticipate difficult issues, including taping interviews, antagonistic interviewees, document collection.
- Maintaining control.



How to Conduct an Effective Investigation

Verification and Analysis:

- Be circumspect of all of the evidence
- Determine the credibility of all witnesses



How to Conduct an Effective Investigation

How thorough is thorough?



Scope of Investigation

- Follow all leads
- Opportunity to respond
- Document what has been done
- Dig deep



How to Conduct an Effective Investigation

- Don't be afraid to draw conclusions
 - "Allegations were not corroborated"
 - "Misconduct did not occur"
 - "Allegations were inconsistent"
- No **Legal** Conclusions!



How to Conduct an Effective Investigation

- Making Recommendations
 - Have policies been violated?
 - Have similar violations occurred in the past?



How to Conduct an Effective Investigation

- Documentation
 - Nature and scope of issue
 - Summaries of interviews and evidence
 - Findings
 - Actions taken, if any



Pitfalls

- Going in with Bias
- Investigated employee not provided with fair opportunity to respond
- Report goes beyond facts to opinions or legal conclusions
- Failure to report outcome
- Not connecting the evidence
- Lack of documentation



Privilege Considerations

- Structure the investigation in such a way to maximize the application of privilege while maintaining the affirmative defense afforded by the investigation. Consider:
 - The role of in-house and outside counsel
 - The creation of documents
 - The implementation of remedial measures



Top 10 Advanced Investigation Tips

1. Document, (WISELY!)
2. Dig deep- go beyond the obvious
3. Connect the evidence
4. Preserve evidence and the file



Top 10 Advanced Investigation Tips

5. Confidentiality
6. Follow all leads – be thorough
7. Make factual conclusions



Top 10 Advanced Investigation Tips

8. Report results to complainant/accused
9. Release information only on a need-to-know basis
10. Ensure no retaliation



THANK YOU

Kristine Grady Derewicz, Esq.

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