

Conducting Investigations of Wrongful Workplace Conduct

ISSUES AND GUIDELINES

By Roy A. Ginsburg

With perhaps discouraging frequency, companies need to conduct investigations into allegations of employee misconduct. The subject matter of these investigations is diverse, encompassing topics such as sexual harassment, discrimination, embezzlement, misuse of a company's computer system, information posted about a company on a blog, employee theft, workplace violence, rules violations, drug or alcohol use, and numerous other issues. At times, the alleged wrongful conduct involves illegal activity and the appropriate investigators are federal or state law enforcement personnel. On other occasions, the primary focus of the investigative inquiry is on wrongful, but noncriminal conduct implicating well-established company policies and procedures. In both contexts (criminal and noncriminal conduct), there is almost always a risk of potential civil liability. The alleged wrongdoers (the targets of the investigation) may be the most senior directors and officers of the company (consider, for example, the recent

Hewlett-Packard investigation) or hourly employees.

This article explores several issues that may arise periodically in company investigations. By considering these issues before an investigation is commenced, and by adopting a thoughtful and principled approach to these situations, companies will avoid ad hoc and inconsistent decisions that exacerbate rather than alleviate the underlying problems.

Must Employees Participate?

One question that arises occasionally is whether employees are obligated to participate in a company investigation. A corollary inquiry is whether a company may discharge an employee who refuses to participate. Both questions can be answered affirmatively. Employees do have an obligation to cooperate with an employer in an investigation; indeed, employers often would be unable to conduct an effective investigation or elicit relevant information without employee cooperation. If the employee refuses to participate, out of misguided loyalty to a co-worker who has engaged in wrongful conduct, or because of some privacy theory, the company would be justified in terminating the noncooperating employee.

The "cooperate or face discharge" choice is even easier to justify when the company has a policy stating clearly that employees are expected to participate in

company investigations and that the refusal to do so will jeopardize employees' continued employment. Even in the absence of such policies, however, a company may legitimately demand that its employees cooperate in investigations.

Of course, a company may elect not to leap to the discharge sanction when an employee balks at providing assistance. Depending on the seriousness of the underlying issues, or the availability of alternative sources of information, discharge may constitute a disproportionate response to the employee's recalcitrance. It also may be advisable to impose intermediate disciplinary steps before discharge (suspension without pay, suspension until cooperation is obtained, demotion, or reduction in compensation). But particularly where the uncooperative employee holds key and otherwise unavailable information and where the issues being investigated are serious, termination is an option with or without prior progressive disciplinary steps. In fact, it is not difficult to imagine contexts where the failure to terminate a noncooperating employee could expose the company to liability, especially if the lack of cooperation impeded the investigation significantly or prevented the disclosure of critical information.

In a 2005 case from Ohio highlighting the competing interests of employers to provide a safe, violence-free work environment, and employees' legitimate

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privacy interests, the court concluded the employer's interests predominated and the employee was obligated to participate in the company's investigation. In *Rowe v. Guardian Automotive Products, Inc.*, 2005 WL 3299766 (N.D. Ohio), two employees of Guardian Automotive were living together. The male employee assaulted the female employee (Rowe) at their residence, breaking three of her ribs. He was charged with assault and convicted. This information came to the company's attention when the male employee later received a 30-day jail sentence for driving without a license. When Guardian Automotive explored that situation, it discovered the male employee had a lengthy criminal history involving alcohol abuse, threats to kill his ex-wife, physical acts of violence against his ex-wife, and the assault on Rowe. Based on this history of violence, the company terminated the male employee. The company then began an investigation to determine whether the now-ex-employee posed a risk of further harm to Rowe, her co-workers, supervisors, or other employees.

On three separate occasions, the company tried to elicit information from Rowe and each time she refused to cooperate, arguing that the inquiries invaded her privacy. She pointed out that she was on leave when the assault occurred and that it had not occurred at work. Despite those facts, the company terminated her employment based on her refusal to cooperate with the company's legitimate investigation. The federal district court upheld this decision, dismissing the plaintiff's invasion of privacy case on summary judgment. (Note that in the *Rowe* case, the company had a policy requiring participation in company investigations.)

The prudence of the company's discharge decision is easily illustrated by considering the potential consequences of a "do-nothing" approach. If the former employee had escalated the violence toward Rowe and committed a violent crime at the workplace against her or anyone who intervened, it would have been extremely difficult to justify

the company's lackadaisical response, particularly if the injuries suffered by Rowe or any other workers were serious. Defending a lawsuit by the other injured employees (or their families in the event of a death) would be difficult, at best.

The court's decision in *Rowe* implicitly recognized that employers have a duty to attempt to provide a safe work environment. While all risks cannot be anticipated, known risks cannot be ignored. The only way Guardian Automotive could fully understand the risks of workplace violence was by obtaining Rowe's cooperation in its investigation of her significant other. When she repeatedly refused to cooperate with the company's investigation, Guardian Automotive justifiably ended her employment relationship.

Should Third Parties Be Allowed?

At times, employees agree (whether readily or reluctantly) to participate in investigations but want someone to accompany them to the investigative interview. Whether this is appropriate may implicate several different issues, each of which may mandate a different analysis: is the interviewee a target of the investigation?; whom does the interviewee want to attend?; is the person being interviewed a unionized employee and what rights does the interviewee have under the collective bargaining agreement?; does the interview have the potential for resulting in discipline against the person being interviewed?

Someone from Outside the Company

Occasionally, employees will ask whether a friend from outside the company may attend the investigative interview. This request should be rejected.

First, investigations invariably involve some of the most sensitive workplace and corporate issues. The last thing a company wants is to allow these sensitive topics to be aired in front of an individual who is not under the company's control.

Second, many investigations implicate the privacy rights of those being investigated, as well as those who may

have been victimized by the wrongful conduct. Consider, for example, a sexual harassment investigation allegedly involving a sexual assault. While a company cannot promise complete confidentiality to the accused, the accuser, or third-party witnesses interviewed in the investigation, efforts should be made to treat these topics with considerable discretion, sensitivity, and confidentiality. All individuals interviewed in connection with the investigation should be reminded not to discuss the investigative topics with anyone, both because of

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the privacy issues at stake and because of the potential impact such discussions could have on the ongoing investigation. Allowing an individual from outside the company to sit in on the interview would undermine those goals. Further, if this third-party witness to the investigative interview simply disregarded the company's confidentiality interests or the privacy rights of the interviewees and/or the accuser and accused, the company would have little recourse.

Third, allowing third parties to sit in on an investigative interview, especially those not employed by the company, would establish an undesirable precedent. Will the company allow every interviewee to have another person in attendance? If so, the problems already alluded to would be exacerbated.

Someone from Inside the Company

A corollary inquiry to the point above may arise when an employee expresses the desire for a co-worker to attend the investigative interview. Again, barring a situation where the company

Set forth below are 10 general guidelines that are intended to facilitate the investigative process, regardless of the subject matter of the investigation.

- 1)** Define clearly the investigator's role. The company should decide in advance of the investigation what role the investigator will play. Will the investigator's sole function be fact gathering? Will the investigator be asked to make credibility determinations? (If so, those determinations will need to be factually grounded and explained in the investigative report.) Will the investigator have any responsibility for recommending the appropriate corporate response or determining the nature of the discipline to be imposed if wrongful conduct is established?
- 2)** Retain the right investigator. This person should have at least three critical skill sets. First, he or she must be a good communicator. Second, he or she must have the appropriate temperament to be able to conduct interviews effectively. This includes a mix of characteristics, some of the most important of which are a commitment to objectivity, a calm demeanor, a courteous approach (even in the face of tension or hostility), and a professional presentation. (Keep in mind that the investigator may later need to testify at trial.) Third, the investigator must have a fundamental knowledge base relating to the subject matter under investigation. For example, if someone does not know that one key issue in a sexual harassment allegation is whether the behavior was welcome, rather than consensual, that person will not formulate the right inquiries and the investigative results may be of little use.
- 3)** Act promptly. It is important that companies initiate appropriate investigations promptly. This may reflect legal standards for expedition that have been embodied in judicial decisions (as in the workplace harassment area), or it may reflect the need to take action that will help the company minimize potential legal liability (as with the risk of workplace violence).
- 4)** Conduct a thorough investigation. The investigation should be comprehensive, though the investigative scope often will correlate with the seriousness of the issues being investigated. Nevertheless, a company does not want critical or potentially outcome-determinative facts coming out after the investigation has been completed.
- 5)** Do not promise complete confidentiality. Although the company can and should inform the accuser, the accused, and third-party witnesses that the matter will be handled discreetly and with as much confidentiality as possible, the company will need to divulge certain facts in the course of its investigative interviews. Further, the company will need to discuss frankly the relevant issues when determining the corporate response. Likewise, the company may need to make certain disclosures at the completion of the investigation. In short, do not over-promise on confidentiality.
- 6)** Be nimble. Problems may arise in the course of the investigation that are not anticipated. This may require the company to change course, refocus, or even terminate the investigation. Be prepared to rethink the investigation as it progresses and relevant facts are revealed.
- 7)** Get help when needed. As the investigation unfolds, the investigator may realize that he or she needs help. It may reflect the potential for workplace violence. It may involve a situation where the investigator has uncovered criminal conduct. This may simply reflect difficult interaction with an unpleasant, intimidating, bellicose, or violent interviewee. When necessary, the investigator should obtain assistance from in-house counsel, security personnel, or others.
- 8)** Respond proportionally. When crafting the corporate response, recognize that the penalty imposed should be proportional to the problem uncovered. When the outcome of the investigation is ambiguity as to what happened or who participated or ratified the conduct, consider implementing additional training. Monitor the situation carefully in the future.
- 9)** Respond consistently. When determining the appropriate response to the information uncovered in the investigation, give thought to how parallel investigations were concluded in the past. How were similar offenses addressed previously? Avoid creating claims of differential treatment by imposing inconsistent penalties to similar underlying offenses.
- 10)** Communicate the outcome when possible. Don't leave those affected by the investigation in the dark as to what the investigation revealed. If there are reasons that the information cannot be shared until some point in the future, explain that fact and provide an estimate of when a more complete disclosure may be possible. This situation might arise, for example, if the investigation has revealed potential criminal conduct. If the outcome of the investigation can be shared with the complainant or others within the bounds of confidentiality and privacy, disclose what you can. To the extent that the outcome cannot be shared, explain the principles involved precluding disclosure, and explain that the company conducted and completed a thorough investigation and responded consistently with company policies and practices.

Additional Resources

For more reading on a similar topic, you can retrieve the following article on the *Business Law Today* Web site at: www.abanet.org/buslaw/blt.

All issues since 1995 may be accessed under the "Past Issues" heading at the bottom of the Web page.

Checking out claims of harassment: How to investigate by the book

By Anne Buckleitner

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is obligated to allow another individual's attendance (e.g., a unionized employee who may be disciplined as a result of the investigation), here too the participation of others is undesirable. Although the company will be able to exercise greater control over whether the additional employee disseminates the information outside the company, there remain difficult problems associated with privacy rights, attempting to maintain confidentiality, avoiding unnecessary publication of sensitive data, reducing (rather than increasing) workplace tensions, etc.

Further, even in contexts where it is mandatory to allow a third party to attend the investigative interview, that person's role should be well understood by all in attendance. That person should not be allowed to engage in conduct that disrupts the interview process. For example, he or she should not be allowed to answer for the witness. Similarly, he or she should not be allowed to pose questions in a way that interferes with the appropriate inquiries by the investigator. If the investigator is unable to control this independent "observer," barring extraordinary circumstances, the interview should be terminated.

A Lawyer

On rare occasions, an interviewee may ask to bring a lawyer to the investigative interview. This request typically

should be rejected for a multitude of reasons, many of which are referenced above. Allowing a lawyer to attend on behalf of the interviewee complicates the situation in other ways as well.

Often the lawyer will have more experience than the investigator in the Q & A context. The lawyer may intimidate the investigator. Or the lawyer may be more difficult to control. Equally troubling, the lawyer's role may be to scrutinize and find fault with the investigation, focusing on questions not asked and evidence not gathered. Although it may be legitimate to engage in these types of battles when the dispute is governed by federal or state civil procedure rules and monitored by a court, in the context of an informal investigation, this input will not enhance the likelihood of a positive and productive outcome. Employees should be informed that they will not be allowed to bring lawyers with them to investigative interviews.

Requests to Tape Record the Interview

Sometimes an interviewee will advise the interviewer that he or she wishes to tape record the investigative interview. The interviewer should be prepared for this possibility and be prepared to articulate clearly the reasons why the company disallows tape recorders. There are at least three compelling reasons to preclude a witness from tape recording the interview. First, the tape recorder itself

may chill the dialogue. The interviewer may be uncomfortable asking all of the appropriate questions with a tape recorder in the middle of the table. Even the witness may be adversely affected by the tape recorder, notwithstanding the fact that he or she proposed it. Individuals often become more circumspect when they know their comments are being recorded. In an investigative interview, the goal is to obtain unguarded, candid feedback.

Second, much like a third-party observer, once the tape recorder is taken out of the room, the company has little control over what is done with it and the information it contains. The questions and answers could be played for other witnesses, including the target of the investigation. Or, the tape recording could be shared with co-workers, with divisive consequences. In short, a tape recorder implicates some of the same confidentiality and privacy concerns addressed above.

Third, in these days of digitized audio and visual data, the recording could be presented in a highly public context. Investigative interviews are not intended for My Space, FaceBook, or blog sites, yet this is precisely where they could end up.

The interviewer should be familiar with each of these reasons and be prepared to explain calmly and professionally why the company prohibits tape recording of the interview. The interviewer also should be prepared to address the fact that these considerations outweigh the value of obtaining a "complete and accurate record" of the interview, the argument most interviewees will express in support of using the tape recorder.

At times, witnesses will record an investigative interview surreptitiously. If the interviewer becomes aware of that practice during the course of the interview, he or she should explain the reasons advanced above and ask for the tape. If the employee is unwilling to relinquish the tape, the interview should be terminated. Most often, however, the company will not learn that the interview was recorded until after the fact. In those circumstances, the company

should address the problem in a manner consistent with any other disciplinary issue that implicates breaches of company confidentiality and/or the invasion of employees' privacy rights.

If the Employee Implicates Him-/Herself

At times, an interviewer will be questioning a witness who is not the subject of the investigation and that person will implicate him- or herself. How a company responds in this situation again depends on several factors. What is the nature of the alleged offense? Is the interviewee a unionized employee? Under the company's collective bargaining agreement, does a target of an investigation or a person who is subject to potential discipline (up to and including termination) have a right to have someone else present at the interview?

Assuming the employee is not entitled to have someone else present,

there are pros and cons for proceeding apace with the interview. On the positive side, the witness/employee is voluntarily providing information that is useful, both with respect to the original target of the investigation and with respect to his or her own conduct.

Moreover, if the interview is terminated and the witness consults with others (including counsel), the company may not obtain nearly as candid a report in the future. On the negative side, however, the investigator will not necessarily be prepared to conduct a thoughtful interview into the new topics that the employee has raised and that implicate his or her own wrongful acts. It may be preferable in this context to limit the interview to the original subject matter the investigator intended to cover and advise the employee that the company will need to conduct a follow-up interview soon. Between the two interviews, the inves-

tigator can gather the requisite information to be able to conduct an effective interview into the conduct the employee already described.

Conclusion

The situations described above represent just a few of the unusual potential scenarios for which a skilled investigator should be prepared. There are innumerable other unanticipated situations that can confound an investigator and that will require the exercise of reasoned and thoughtful judgment. If an investigator encounters a problem or issue for which he or she feels unprepared, the interview should be terminated and guidance should be sought from in-house or outside counsel.