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The Workplace Scandal and Modern-Day Investigations: Harassment, Sexting, and Avoiding The “Rabbit Hole”

**PRESENTED BY BRITT-MARIE K. COLE-JOHNSON
& KATHLEEN E. DION
ROBINSON & COLE LLP
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Agenda

- Learning Objectives
- Today's Workplace Scandal
- The Modern-Day Investigation
- When Must an Employer Investigate an Employee Complaint?
- Staffing Your Team
- Witness Interview Strategy
- Avoiding the "Rabbit Hole"
- Takeaways

Learning Objectives

- You will understand when an employer is legally required to conduct an investigation as a result of an employee complaint.
- You will understand what to consider when staffing your investigation team.
- You will understand how to prepare for a witness interview.
- You will understand how critical it is to ensure that your investigation has the appropriate scope and learn strategies to help you to avoid falling into the “rabbit hole.”

Today's Workplace Scandal

- What does today's workplace scandal look like?
- Who is involved?
- Who is the investigator?
- What is the standard that employers are expected to meet when investigating a workplace matter?

The Modern-Day Investigation

- Technology
 - Impact on conduct as well as investigation strategy
- Social Media
- Blurred lines between work, home, and play
- Reputation and Organizational Branding
- Evidence
- The “Cover Up”

When Must an Employer Investigate an Employee Complaint?



- A workplace investigation should occur when indicated by law or policy as determined by the employer.
 - E.g., if an employer has a “zero-tolerance” policy, harassment does not have to be severe, pervasive, or unlawful

Organizational Duty to Investigate Violations of Workplace Policies

- **Disputed Facts**
 - Not trivial, such as simple employee relations
 - Allegations, if sustained violate policies or expectations that may result in discipline
- **Undisputed Facts**
 - If necessary to determine the extent of the harm or number of individuals harmed
 - Policy issue
- **Examples:**
 - NOT Illegal:
Petty slights, annoyances, and isolated incidents (unless extreme)
 - May be illegal:
Offensive jokes, slurs, epithets, or calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.

Statutory Duty

- EEOC/Title VII - Federal: Employers are obligated to “take all steps necessary to prevent harassment from occurring” and to conduct prompt, thorough, impartial investigations.

Notice: Knew or Should Have Known

- **Complainant**
 - Formal complaint
 - Informal complaint
 - “Confidential” complaint
 - Anonymous complaint
 - Rumors
 - Administrative charge or lawsuit

Notice: Knew or Should Have Known (continued)

- No Complainant (“knew or should have known”)
 - Observed misconduct
 - Reasonable suspicion of misconduct
 - *Initiated in good faith for the right reason*

Staffing Your Team

- **Objectivity**
- **Necessary Skill**
- **Multi-disciplinary teams**



- The EEOC states: “The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the person who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.”

Staffing the Investigation: Objectivity

- One option is the employer's human resources department or other neutral entity
- An investigator, who may have witnessed the complained-of conduct, may no longer be an impartial investigator
- Investigator ideally should not be in the chain of command of the accused, the complainant, or one of the witnesses

Staffing the Investigation: Necessary Skill

- One of the most common ways in which investigations can be undermined is through the use of untrained or inadequately trained investigators

Staffing the Investigation: Multi-Disciplinary Teams

- Consider whether you need a professional or professionals to assist with the investigation in the following areas:
 - Attorney
 - Threat-assessment
 - Information Technology
 - Forensic Accountant
 - Disability Expert

Investigations as a Non-Attorney

- Need to know what to look for
- Do NOT need to make legal findings

Witness Interview Strategy

- Interview the right people in the correct order; create a timeline
- Know what you're going to say about why you're interviewing the person
- Explain relevant company policies (retaliation, confidentiality, etc.)
- Act promptly to address scheduling issues

Witness Interview Strategy

- Be unbiased and credible
- Create a record of the interview (notes, recording, etc.)
- Ask open-ended questions
- Advise that lying or withholding information could have serious consequences

What to Bring to a Witness Interview

- Outline or list of questions
- Copy of the complaint
- Documents to ask the witness about
- Employer's policy
- Employee's personnel record (if appropriate)



Avoiding the “Rabbit Hole”

Defining issues to be investigated

- Preliminary scope-setting
- Nature of the scope
- How the scope comes into play in interviews
- Discussing the scope with the decision maker
- Responding to issues outside of the scope of the investigation



Avoiding the “Rabbit Hole” Preliminary Scope-Setting

- At the outset of the investigation, the investigator should obtain a general understanding of the assignment. The scope should be memorialized in writing.
- When an organization engages an investigator from outside the organization, the employer should create a contract between the outside investigator which defines the scope.

Avoiding the “Rabbit Hole” Nature of the Scope

- To a large degree, the scope of the investigation is determined by the complaint being investigated.
- For example:
 - If the complaining party claims that his supervisor tells sexual jokes, the investigation will likely include looking into the alleged telling of sexual jokes. However, the scope of a thorough investigation should be broadly drawn as looking into “alleged sexual misconduct by the supervisor.”

Avoiding the “Rabbit Hole” Scope in Interviews

- **Clearly Included Issues**
 - Given the preliminary scope of the investigation arrived at, the investigator needs to ensure that questions are not asked so narrowly as to exclude other inappropriate conduct, whether verbal, visual or physical.

Avoiding the “Rabbit Hole” Scope in Interviews (continued)

- **Borderline Issues**

- In the course of investigations, witnesses frequently air complaints that may appear to be on the borderline of inclusion in or exclusion from the scope. (e.g., in the context of discussing a supervisor’s “alleged sexual conduct” the witness may complain that her supervisor treats her badly by criticizing her work, and treating her poorly.)

Avoiding the “Rabbit Hole” Scope in Interviews (continued)

- **Issues Outside the Scope of the Investigation**
 - During an investigation, it is common for the complaining party or others to raise allegations that clearly are outside the scope of the investigation. Many times, however, these allegations also should be investigated. (e.g., investigation regarding sexual conduct; race discrimination discovered)
 - Consider whether anyone needs to be notified
 - Consider whether a separate investigation is appropriate
 - Should a different investigator investigate the new allegation(s)?

Avoiding the “Rabbit Hole”

Discussing the Scope with the Employer

- Any change in scope should be discussed as soon as possible, and should be put in writing, if appropriate.
- If internal, the communication can be made to the head of human resources, the head of the legal department, or whatever internal authority is responsible.
- If external, the communication should be made to the responsible authority at the company.
- IN BOTH cases, the investigator should inform the appropriate person and it is up to the employer to determine whether the investigator should investigate the allegations.

Avoiding the “Rabbit Hole”

Responding to Out-of-Scope Issues

- The investigator should document the change to the scope of the investigation in some way.
- Similarly, if the investigator is instructed not to expand the scope, this should be documented as well.

Avoiding the “Rabbit Hole” Conduct Outside of Work

- If conduct affects the workplace, an employer may have a duty to investigate.
- This may include contact with non-employees and third parties.

Takeaways

- Conduct investigations when required or appropriate
- Be strategic and thoughtful when staffing your investigation team
- Always prepare for witness interviews by gathering necessary documents and having questions; however, be flexible
- Defining scope is not an optional step in the investigation process; doing so is critical unless you're Alice and your desired destination is Wonderland

Questions?



Contact Information

For further advice, compliance information, or counseling, please contact:



Britt-Marie K. Cole-Johnson

Partner

Robinson & Cole LLP

860.275.8279

Bcole-johnson@rc.com



Kathleen E. Dion

Associate

Robinson & Cole LLP

860.275.8231

kdion@rc.com