

SCCE Internal Investigations Workshop San Francisco, CA



Introductory Concepts for Investigations

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A Good Investigator Knows. . .

- Your ultimate goal is to learn the truth.
- You are not the company's morality police.
- Your investigation can be undermined if your actions can be undermined.
- You are accountable to the company for every part of your investigation.
- Your investigation may affect someone's career, their reputation and even their freedom.
- If you conduct a poor investigation, you may create legal liability for your organization, hurt its reputation, and undermine a "speak up" culture.

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A Good Investigator Knows. . .

- Your findings are based only on the evidence and not what you believe happened.
- A substantiated allegation is likely the result of a perfect storm of factors.
- You should identify root causes of substantiated misconduct to improve business operations.
- A bad investigation is worse than no investigation at all.

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Elements of a Workplace Investigation

- A collegial fact-finding that arrives at a rational conclusion.
- Thorough interviewing of the Reporter, the Subject, and fact witnesses with relevant information.
- Gathering and analysis of relevant evidence.
- Comparing the evidence to the applicable standard.
- Assessing the credibility of each investigation participant and the strength of his / her evidence.
- Reaching a legally defensible determination of whether the improper conduct actually occurred.

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The Duty to Act Reasonably

When disciplining an employee for misconduct, the employer must show:

- The employer believes that the employee committed the misconduct;
- The employer's belief was based on reasonable grounds; and
- The employer conducted a reasonable investigation.

The reasonable investigation standard is the collection of investigation activities that a reasonably prudent employer would perform for a given allegation.

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The Duty to Follow a Fair Procedure

- The employee has a right to a hearing
 - Understanding the allegation and the evidence proving misconduct
 - Having an opportunity to respond to the allegation
 - Having an opportunity to offer exculpatory and mitigating evidence
- The investigator and decision-makers cannot be biased or have a conflict of interest
- The disciplinary decision must be based on the evidence
 - Gossip, speculation and suspicions may not factor into the determination
 - The investigator must be able to show the evidence upon which the decision is based
 - The employee must learn of the evidence gathered

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Investigator Bias

- Independence and integrity is not the same thing.
- Personal integrity relates to your personal bias.
- Do you consider your professional biases?
 - *Expectation bias*: is my investigation influenced by what the leaders want to hear?
 - *Workload bias*: are you choosing what is right or what is easy?
 - *KPI bias*: are you rushing through cases to make your metrics look good?

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Confidentiality in the Investigation

- You may promise confidentiality but not secrecy.
- You may use gathered information only for investigation purposes.
- You must keep the existence of the investigation confidential.
- You may not guarantee anonymity to Reporters and interviewees.
- You must keep the identity of the Reporter, Subject and interviewees confidential.
- You must protect the confidentiality of any documents you created during the investigation.

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The Bottom Line

- Raise and deal with issues as soon as reasonably possible.
- Have an investigations framework and process that ensures consistency.
- Make the necessary inquiries to establish the facts of the case.
- Inform the Subject of the allegation and give them an opportunity to respond before a decision is made.
- Allow the Subject to be accompanied (if required or allowed)
- Separate the fact-finding from the disciplinary decision
- Prepare a report to document your investigation

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