Evidence and the Legal Elements of an Investigation

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Elements of a Workplace Investigation

- A good-faith inquiry that reaches a rational conclusion
- Interviews of the reporter, the subject, and witnesses with relevant information
- Consideration of the relevant issues and the standards implicated
- Gathering and analysis of all relevant evidence
- Assessment of the credibility of the investigation participants and the strength of the evidence
- A rational, legally defensible conclusion of whether the conduct complained about actually occurred
Legal Standards in Investigations

- There is a qualified privilege to disclose matters relating to the investigation
- The investigation process must be consistent and programmatic
- An investigation cannot begin without a factual basis
- A finding must be based on a preponderance of the evidence
- An employee is not entitled to review the investigation report
- The attorney-client privilege does not generally apply

Legal Standards in Interviews

- Employees may not refuse to cooperate and be interviewed
- Do employees have Miranda rights?
- Employees have a process-fairness right to due process
- The right to be confronted with the proof and the opportunity to respond
- The prohibition against whistleblower retaliation
- Confidentiality in the interview
- The right to counsel
- The right to discuss the interview
The primary purpose of an investigation is gathering evidence and using it as a basis for decision-making.

For evidence to be meaningful, it must be **concrete** and **specific**.

We want to know **who** was involved in the conduct, **what** that person did, **when** and **where** they did it, and **why**.

Know the difference between fact, inference and opinion.

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Identifying Information

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Evidence Collection in Investigations

- Know your applicable business-conduct standard.
- You must prove each element of the allegation using proper evidence.
- Proper evidence is **relevant**.
- Proper evidence is **material**.
- Proper evidence is **competent**.
- Proper evidence is **authentic**.
- Proper evidence may be direct or circumstantial.
- Seek corroboration of key facts before accepting them as proven.
Hearsay Evidence

• The hearsay rule exists to protect the quality of the proof

• Hearsay is essentially a statement of fact made by someone other than the witness, which is then repeated by the witness in court, in order to prove the truth of those facts

• There are multiple exceptions because certain hearsay statements are unlikely to be false
  • Statements against interest
  • Business records exception

• We can use hearsay

Legal Claims When Things Go Wrong

• Defamation of an employee
• Retaliation for cooperating with an investigation
• False imprisonment in interviews
• Intentional infliction of emotional distress
• Assault and battery
• Invasion of privacy
• Malicious prosecution
Victims of Employee Misconduct

- Failure to maintain a safe workplace
- Retaliation for cooperating with an investigation
- Negligent hiring and / or supervision
- Negligent infliction of emotional distress

And they will use the investigation report as Exhibit A