

## SCCE Internal Investigations Workshop San Francisco, CA



### Evidence and the Legal Elements of an Investigation

Meric Bloch



1

### 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

2

## 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

3

## 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

4

## Identifying Information

- 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

5

## 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

6

## 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

7

## 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

8

## 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