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
Beginning an Investigation

- The obligation to investigate promptly and fairly
- The obligation to conduct an adequate investigation
- Investigations as a defense to other claims
- The obligation for a competent investigator
- The obligation to maintain confidentiality

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 reasonable 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

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
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

Closing Thoughts

- Evidence rules give you a logical framework for evaluating the reliability of evidence.
- Legal standards help set your burdens of proof and persuasion.
- Mistakes in investigations, especially the unintentional ones, can create liability in a number of ways.