**MORRISON & FOERSTER LLP**

# WORKPLACE INVESTIGATIONS:

# When, Who, and How

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I. INTRODUCTION

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Employers are required to conduct investigations in a number of instances in the workplace. The quality of an investigation can significantly impact an employer's ability to defend and potential exposure for legal claims. Employers, for example, use workplace investigations as part of their defense to discrimination and harassment claims. *See, e.g., Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998); *Farragher v. City ofBoca Raton,* 524 U.S. 775 (1998). Likewise, employers may use an effective workplace investigation as a defense to wrongful termination claims. *See Cotran v. Rollins Hudig Hall Intl.,* 17 Cal. 4th 93 (1998). Finally, in this age of increased scrutiny of corporations and their financial conduct, the Sarbanes-Oxley Act of 2002 further illustrates the need for employers to have effective procedures to investigate employee claims. *See* 15 U.S.C. Section 7201 *et seq.* While the exact procedures to be followed may differ based on the company, employees, or alleged conduct involved, there are certain principles about which those requesting and conducting workplace investigations should be aware. This memorandum is not intended to be an exclusive treatment of the topic of workplace investigations. Rather, it is intended to highlight these key principles and issues, and hopefully provide readers with a practical framework from which to begin the investigation process.

## II. WHEN TO CONDUCT AN INVESTIGATION

### A. ASAP after receiving a complaint.

1. Prompt and thorough interviews of the complainant, the accused, and all witnesses are essential elements of a sufficient response. *See Swenson v. Potter, 271* F.3d 1184 (9th Cir. 2001) (investigation just three days after management learned of alleged grabbing incident constituted prompt action to remedy situation); *Daugherty v. Henderson,* 155 F. Supp. 2d 269 (E.D.PA 2001) (investigation was prompt and thorough where company learned of complaint and, a week later, initiated a thorough investigation which determined the accusation could not be corroborated); *Schmansk v. California Pizza Kitchen, Inc.* 1122 F. Supp. 2d 761 (E.D. MI 2000) (where managers responded within days each time the plaintiff complained about co-workers by interviewing employees, counseling and, where appropriate, suspending culpable parties and re-educating the staff about the company's sexual harassment policies, response was sufficient); *Hodoh-Drummond v. Summit County,* 84 F. Supp. 2d 874 (N.D. OH 2000) (where the employer immediately placed the alleged harasser on unpaid leave pending an investigation which occurred a week later, and 2 weeks after that, placed the harasser on 30 days of unpaid leave, the investigation was sufficient).

2. *But see, Bennett v. New York City Dept. of Corrections,* 705 F. Supp. 979 (S.D.N.Y. 1989) (four week delay before interviewing complainant and co-worker not deemed prompt); *Sorlucco v. New York City Police Dept,* 971 F.2d 864, 867-69 (2d Cir. 1992) (interview of complainant and witnesses four months after complaint and interview of alleged harasser eight months after complaint insufficient).

### B. Actual versus Constructive Notice

1. An employer may be obligated to conduct investigations in the absence of an employee complaint or request if the employer otherwise has notice of the wrongdoing such that the employer "knows or should have known" of the conduct. *See 29* CFR § 1604.11(d) (2003) ("With respect to conduct between

fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action"). *See also Hostetler v. Quality Dining, Inc.,* 218 F.3d 798, 811 (7th Cir. 2000) (employer not liable for what occurred before it was put on notice of the harassment, but is liable for the harm inflicted after it has been put on notice or as a result of its inappropriate response); *Swenson v. Potter, 271* F.3d 1184, 1192 (9th Cir. 2001) ("employer cannot be held liable for misconduct of which it is unaware"); *Brooks v. City of San Mateo, 229* F.3d 917, 924 (9th Cir. 2000) (employer must have advance notice, and, if employer takes appropriate corrective action, it will not have ratified the conduct).

C. Interim relief to the complainant until the investigation is completed should be considered when:

1. The complainant is in a highly emotional state.

2. The relationship between the parties has become so adversarial that it is disruptive to the workplace, and coming to work has become highly unpleasant to the complainant.

3. When the allegations are very serious and believable.

4. When the complainant asks for relief.

5. Examples of interim relief include:

   a) offering temporary transfer to a position using the same general skills, with retention of all compensation and benefit levels;

   b) a paid leave of absence until the investigation is concluded;

   c) an unpaid leave of absence until the investigation is finished;

   d) reassignment to a different building, floor, or department, or to a special project that can be completed either at home or in a different work area.

6. Illustrative cases. *Chertkova v. Connecticut Gen. Life Ins. Co.,* 92 F.3d 81 (2nd Cir. 1996) (where employee told "you are not going to be here," a reasonable person might have thought they were discharged, though they had not received a letter of termination); *Degitz v. Southern Management Services Inc.,* 996 F. Supp. 1451 (M.D. FL 1998) (plaintiffs evidence was sufficient to create a jury question as to whether a reasonable person would have found the working conditions at issue and employers inaction so intolerable as to be compelled to resign); *Henderson v. Simmons Food,* 217 F. 3d 612 (8th Cir 2000) (court found plaintiff proved constructive discharge, despite fact that complainant had been on vacation for three weeks prior to resigning); *Logan v. Denny's, Inc.,* 259 F.3d 558 (6th Cir. 2001) (employee's contention that slanderous statements were made to her by coworkers and managers and her demotion from server to busboy created

an issue of fact as to whether the employer deliberately created intolerable working conditions as perceived by a reasonable person with the intention of forcing the employee to quit).

III. WHO SHOULD CONDUCT THE INVESTIGATION

A. Someone who is objective, skilled, experienced, and with sufficient authority to be credible. Typically, human resources not line management.

1. Objectivity. *See, e.g., Quela v. Payco-General American Credits, Inc.,* 82 FEP Cases (BNA) 1878 (N.D. Ill. 2000) (investigation of sexual harassment allegations tainted by personal bias and self-interest where investigator held high managerial position and person who aided in investigation was business partner of accused); *Gee v. Principi,* 289 F.3d 342 (5th Cir. 2002) (if ultimate decision maker influenced by others who had retaliatory motives, investigation is not "independent").

2. Skill and experience. *Smith v. First Union National Bank,* 81 FEP Cases (BNA) 1391 (4th Cir. 2000) (investigation inadequate where investigator had never previously investigated a sexual harassment claim, investigation focused on complaints about management style and ignored allegations of sexual harassment, failed to ask whether accused made sexually harassing remarks); *Henderson v. Simmons Foods, Inc.,* 83 FEP Cases (BNA) 279 (8th Cir. 2000) (investigation not model of competent and efficient responsiveness where supervisors interviewed non English speaking employees without aid of interpreter though key witness could not understand questions).

B. Attorney involvement. Tension between value and need for competent legal counsel and turning counsel into a witness.

1. Investigations conducted by experienced counsel often yield more relevant information than might be disclosed if less experienced employer representatives conducted the investigations. Also, as general rule, preferable to have attorney direct ensuing investigation to have privilege attached to investigation. *See, e.g., McIntyre v. Main St. & Main Inc.,* 2000 U.S. Dist. LEXIS 19617 (N.D. Cal. 2000) (motion to compel production denied with respect to investigation into sexual harassment conducted by defendant counsel; paralegal's notes and memoranda privileged); *Casella v. O'Kane Electric Co.,* 2000 U.S. Dist. LEXIS 1600. 84 Fair Empl. Prac. Cas. (BNA) 432 (S.D.N.Y. 2000) (notes made by investigator retained by counsel to assist in advising defendant in sexual harassment case covered by attorney client privilege); *Brownell v. Roadway Package System, Inc.,* 185 F.R.D. 19 (N.D.N.Y. 1999); *Peterson v. Wallace Computer Servs., Inc., 984* F. Supp. *821* (D. Vt. *1997); Harding v. Dana Transp., Inc., 914* F. *Supp. 1084 (D.N.J. 1996).*

2. Inclusion of lawyers in an internal investigation, however, does not automatically insulate an investigation from disclosure - despite assertions of attorney-client privilege. In-house counsel with multiple responsibilities who may have been involved in personnel decision-making before an investigation commences must be particularly cautious in concluding that their investigation will be found to be primarily for legal advice purposes. *See, e.g. City of Springfield v. Rexnord*

*Corp., 196* F.R.D. *7* (D. Mass. *2000)* (document must have been intended to be confidential and made for the purpose of giving or obtaining legal advice to be vested with the attorney-client privilege.); *F. C. Cycles International, Inc. v. FILA Sport, 184* F.R.D. *64* (D. Md. *1998) (citing United States Postal Service v. Phelps Dodge Refining Corp., 852* F. Supp. *156, 163-164 (E.D.N.Y. 1994)* ("[W]hat would otherwise be routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is `copied in' on correspondence or memoranda."); *E.IL duPont de Nemours & Co. v. Forma-Pak, Inc., 351* Md. *396 (1998)* (in-house counsel was considered to be performing a business function, not a traditional legal function, in pursuing collection of a corporate debt such that the in-house counsel's communications were discoverable).

3. On the general principles for assessing the privilege status of attorney-client communications, *see United States v. United Shoe Mach. Corp., 89* F. Supp. *357, 358-59* (D. Mass. *1950)* (privilege belongs to client, not counsel; communication must be between client and counsel acting in capacity as lawyer, outside presence of third parties, for purpose of obtaining legal opinion or other legal services; mixed legal and business or policy advice may be privileged, but primarily business advice not protected).

4. Regarding general principles governing assertion of attorney-client privilege by corporate clients, *see Upjohn Co. v. United States, 449 U.S. 383, 391-95 (1981)* (privilege protects both legal advice and information collected by attorney to facilitate informed advice, whether information comes from members of company's "control group," or other employees whose actions could embroil corporation in legal difficulties, but privilege does not shield underlying facts from production).

5. Even when an employer retains counsel to conduct an investigation in response to a threat of litigation, the company waives any attorney-client privilege when it asserts that the prompt investigation of alleged misconduct operates as a defense against liability, as will be done in response to most claims of harassment. An employer asserting that it properly investigated a complaint and responded appropriately to the findings of its investigation, places the details of the investigation directly at issue, and cannot claim attorney-client privilege to preclude any scrutiny of the investigation. Thus, employer and counsel must be prepared for the possibility that notes, documents, and records generated during an investigation will have to be disclosed in discovery. A strategy should be adopted to use documentation of the investigation to demonstrate the employer's reasonable investigation and prompt remedial action, and not to hide the process or results.

6. Illustrative cases. *Sinclair Oil Corp. v. Texaco, Inc.,* 208 F.R.D. 329 (N.D. OK 2002) (privilege waived when asserting party files suit or asserts affirmative defense, when the asserting party put protected information at issue by making it relevant to the case or if applying privilege would deny the opposing party access to information that was vital to the opposing party's defense); *Vardon Golf Company, Inc., v. Karsten Manufacturing Corp.,* 213 F.R.D. 528 (N.D. IL 2003) (attorney voluntarily disclosed selected portions of privileged communications

including letters between the attorney and the client, in his petition to the 7th circuit without placing them under seal for *in camera* inspection and therefore waived the attorney-client privilege to all documents of the same subject matter); *Harding v. Dana Transport, Inc.,* 914 F. Supp. 1084 (D.N.J. 1996) (defendant company waived the attorney-client privilege by using the results of the sex harassment investigation conducted by its attorney as a defense. The defendant was forced to produce "all of the underlying evidence" that reveals to the plaintiff the "nature and scope of the investigation"); *Wellpoint Health Networks, Inc. v. The Superior Court of Los Angeles County,* 1997 Cal. App. LEXIS 921 (1997) (investigation not protected by attorney-client privilege or work product doctrine once employer asserts it took appropriate corrective action); *Ryall v. Appleton Elec. Co.,* 153 F.R.D. 660 (D. Colo. 1994) (attorney's notes during investigation of harassment were work product protected from discovery in anticipation of litigation unless employer relied upon contents of interviews to support its defense; *McIntyre v. Main St. & Main Inc.,* 84 Fair Empl. Prac. Cas. (BNA) 1032 (N.D. Cal. 2000) (when employer conducts investigation and counsel conducts investigation, attorney-client privilege applies to counsel's investigation if employer does not rely on counsel's investigation to support its affirmative defense and the two investigations are in fact separate. If defense relies on investigation by outside counsel, privilege is waived. Defendant waived attorney client privilege with respect to all relevant records, opinion letters, interviews of witnesses, internal files, memoranda and notes which pertain to the validity of the attorney's assertion at issue); *Brownell v. Roadway Package System, Inc.,* 185 F.R.D. 19 (N.D. N.Y. 1999) (court granted former employee plaintiffs motion to compel discovery of investigation by defense counsel because written statements were related to affirmative defense asserted by the defendant against the plaintiff's sexual harassment claims. Attorney-client privilege is waived by the defense by placing the investigation "in issue." Equity requires that Plaintiff be permitted to explore the parameters of the investigation in order to rebut the affirmative defense that defendant "fully and fairly" investigated Plaintiff's allegations. Employers in defendant's situation may avoid this result in the future by foregoing the "reasonable investigation" defense or by separating the role of investigator from litigator).

a) The deposition of defense counsel who conducts the internal investigation may also be required. *See Harding v. Dana Transport,* 914 F. Supp. 1084, 1091 (D.N.J. 1996) (employer waived privilege by asserting affirmative defense of good faith investigation and combining role of attorney and investigator); *Jones v. Scientific Colors, Inc.,* 2001 U.S. Dist. LEXIS 10633 (N.D. Ill. 2001) (where attorney initiated and directed undercover investigation presented by employer as reasonable measure to prevent and correct harassment, nature and scope of investigation placed at issue; attorney in capacity as investigator must give deposition regarding scope and findings of investigation); *But see Ryall v. Appelton Elec. Co.,* 153 F.R.D. 660 (D. Colo. 1994) (denying motion to compel production of counsel's investigatory notes and deposition of counsel regarding the investigation); *Brooms v. Regal Tube Co.,* 881 F.2d 412, 422 and n.6 (7th Cir. 1989) (attorney's investigative notes not discoverable under work product privilege, attorney testified at trial, and investigative notes and report admitted into evidence).

7. While client's communications to the attorney during the course of the investigation may not be privileged, the attorney's communications to the client may remain privileged. *See, e.g., Sinclair Oil Corp. v. Texaco, Inc.,* 208 F.R.D. 329 (N.D. OK 2002) (communications between the attorney and the client, even when the parties are discussing factual information, are protected by the attorney client privilege. "The factual information discussed by the attorney and the client is discoverable, but the Court will generally not permit a party to inquire into the nature of the communications made between the attorney and the client, and the Court generally does not permit the deposition of the attorney ... Instead, the party conducting discovery is permitted to depose witnesses (including the client), and review documents which are available to both the parties and the attorneys but which do not constitute the communications between the client and the attorney").

## IV. HOW TO CONDUCT AN EFFECTIVE INVESTIGATION

### A. Confidentiality And Discretion

1. Confidentiality is essential to protect an investigation from disclosure. Counsel must keep all investigation records separate from other corporate materials.

   a) Allow people access to the file only on a "need to know" basis.

   b) Be careful not to put documents into the personnel files of any party.

2. Handle the investigation of a complaint on a "need to know" basis; make sure that facts and opinions are discussed only with individuals who must be involved in the investigation or in deciding the outcome.

3. Do not promise absolute confidentiality when interviewing witnesses or the complaining employee.

4. Where possible, avoid using the accused party's name. For example, in questioning a witness about Mary's complaint that Bill sexually harassed her, instead of asking, "Did you see Bill touch Mary?" you might ask, "Have you seen anyone at work touch Mary in a way that made her feel uncomfortable?"

5. Assume that everything said or written in investigation may be discoverable.

   a) Generally not a good idea to record or transcribe verbatim recounts of the alleged discrimination or sexual harassment by the complaining employee since these tend to be emotionally charged and may later reappear as evidence against the Company.

### B. Vigilantly Abide By All Legal Restrictions Imposed On The Methods Of Workplace Investigation

1. Employee Polygraph Protection Act - The Federal Employee Polygraph Protection Act ("EPPA"), 29 U.S.C.A. 2001 *et seq.*

a) Prohibits lie detector tests on employees except in certain narrow circumstances, see § 2002.

b) Establishes rights for employees in the administration of lie detector tests, including polygraphs, by private employers.

c) Punishes violations with $10,000 fines, and remedies violations with reinstatement and back pay for aggrieved individuals.

d) There are three exemptions from EPPA's broad prohibition that

(1) A private employer can request an employee to submit to a polygraph if the test is "administered in connection with an ongoing investigation involving economic loss or injury to the employer's business ... such as theft, embezzlement, misappropriation ... unlawful industrial espionage, or sabotage." § 2006(d)(1).

(2) Polygraphs may also be given to potential employees by any private employer whose primary business purpose consists of providing armored cars, security systems, and security personnel. *See* § 2006.

(3) Employers who are authorized to manufacture, distribute, or dispense controlled substances listed in schedule I, II, III, or IV of the Controlled Substances Act, 21 U.S.C. *et seq.,* may use polygraph testing. *See §* 2006(f).

e) Even in these three exempted areas where private employers can use polygraphs, there are still rules governing the use of polygraphs such as the protections guaranteed in § 2007(b). These rights include, for example, reasonable written notice of the date, time, and location of the test and of the examinee's right to obtain and consult with legal counsel or an employee representative before each phase of the test. A polygraph exam cannot be the sole basis for an adverse employment decision. *See §* 2007(a). *See Mennen v. Easter Stores,* 951 F. Supp. 838 (N.D. Iowa 1997) (grocery store held liable for demoting employee from manager to stock clerk based on suspected theft absent additional evidence beyond polygraph exam. The store argued the exam was not the sole basis for the employee's demotion, but the court rejected this argument because the company had awaited the test result, leaving the suspected employee in a position of trust, and acted only after being told the result); *Lyle v. Mercy Hosp. Anderson,* 876 F. Supp. 157, 161 (S.D. Ohio 1995) (hospital found liable for terminating an employee based on his refusal to take a polygraph exam. The hospital was investigating an alleged theft of money from the locker of a physician by another employee. The court held that the hospital did not qualify for the ongoing investigation exemption because it could not "demonstrate that it suffered an 'economic loss' [to its business] from the theft" because it was a theft committed by one employee against another).

f) Many states also prohibit lie detector tests in the workplace. *See* Alaska Stat. § 23.10.037; Cal. Lab. Code § 432.2(a)-(b); Conn. Gen. Stat. §§ 31-51g; Del. Code Ann. Tit. 19, § 704(a)-(e); D.C. Code §§ 36-801-803; Me. Rev. Stat. Ann. Tit. 32 § 7166; Md. Ann. Code Art. 100, § 95; Mass. Gen. Laws Ann. Ch 149, § 19B; Mich. Comp. Laws Ann. § 37.201-09; Minn. Stat. Ann. § 181.75(1)-(4); Mont. Code Ann. § 39-2-304; N.J. Stat. Ann. Tit. 2C: 40A-1; Or. Rev. Stat. § 659.225(1)-(2); 18 Pa. Cons. Stat. Ann. § 7321(a)-(b); Wash. Rev. Code Ann. § 49.44.120; W. Va. Code, 21-5-5b.

2. The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520

a) Outlaws the interception, use or disclosure of any wire, oral, or electronic communication. Workplace interception of telephone conversations can be within the scope of activity prohibited by this statute. *See Deal v. Spears,* 980 F.2d 1153 (8th Cir. 1992) (employer liability for tape recording employee telephone calls in course of theft investigation).

b) The Electronic Communications Privacy Act of 1986 ("ECPA") extends the scope of the Wiretapping Act to include "electronic communications." 18 U.S.C. § 207(a).

3. Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*

a) An employer wishing to obtain a consumer report from a consumer reporting agency must certify to that agency that it intends to use the report for employment purposes, and that it will follow the procedures under FCRA if the report is later used as a basis for an adverse employment decision. § 1681b(b)(1).

b) FCRA procedures include:

(1) providing notice to the employee prior to the investigation;

(2) obtaining the employee's consent to the investigation;

(3) providing a description of the nature and scope of the proposed investigation at the employee's request;

(4) potential release of the full, unredacted investigative report to the employee; and

(5) notice to the employee of his or her rights under FCRA prior to taking any adverse employment action.

c) An FTC opinion letter takes the position that "outside organizations" - such as law firms and consultants - used by employers to conduct sexual harassment investigations are considered "consumer reporting agencies" because they assemble or evaluate information and furnish consumer reports to a third party and hence are covered by FCRA and must comply

with its disclosure and consent requirements. *See* Opinion Letter issued on April 5, 1999, by staff attorney Christopher Keller.

d) Employers cannot obtain an investigative report unless, within three days of requesting it, the employer informs the targeted employee that it is seeking such a report and inform the employee that he or she has the right to ask for more information about the nature and scope of the investigation.

e) Upon request, consumer reporting agencies must disclose to the targeted employee "all information" in the consumer's file.

f) Before taking any "adverse action" based upon a consumer report, the employee must receive a copy of the report and a statement of his or her rights to dispute inaccuracies.

g) FCRA's definition of a "consumer reporting agency" contains four distinct requirements, all of which must be met. *See* 15 U.S.C. § 1681a(f). The agency must:

(1) act for monetary fees, dues, or on a cooperative nonprofit basis;

(2) regularly engage in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers;

(3) act for the purpose of furnishing consumer reports to third parties, and

(4) use any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

h) Violation of the FCRA can expose an employer to liability for actual damages, punitive damages, and costs including reasonable attorneys' fees. *See §* 1681(n).

i) Violations of FCRA may not, however, be used to support wrongful discharge claims based upon a violation of public policy. *See Salazar v. Golden State Warriors,* N.D. Cal., No. C-99-4825, (2000) (employer's failure to follow the FCRA requirements could not be used as the basis for a claim of wrongful discharge in violation of public policy).

j) There are no requirements under federal law for employers conducting their own investigations of employees/applicants. However, employers in California must abide by California's Investigative Consumer Reporting Agencies Act (ICRAA), Cal. Civ. Code Sec. 1786 et seq. Under ICRAA, employers must disclose to an employee the results from an internal investigation conducted by the company if the information was obtained from public records. "Public records" includes records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or information that is available from the Internet or other public sources.

Therefore, the company does not have to disclose to an employee a routine internal investigation that is based on private records. The public record provision is intended to prevent employers from obtaining and using inaccurate information found in public records. Employees may waive their rights to copies of an investigation under ICRAA. However, if the employer takes any adverse action based on information obtained from public records, the employer must provide a copy of the public record despite a waiver.

## V. BEWARE OF POSSIBLE TORT CLAIMS

### A. Defamation

1. Defamation is the communication to a third person of a false statement that tends to harm the reputation of another. An investigation of an accusation that an employee has engaged in wrongdoing, implying that the employee engaged in wrongdoing as accused, may give rise to a claim for defamation if the claim is later proved false.

2. The employer has a qualified privilege to do and say what is necessary to conduct its business (in this case, investigate the complaint), but the privilege can be lost by:

   a) Discussing the situation with too many people. *See Patterson Dental Supply Co. v. Wadley,* 401 F.2d 167 (10th Cir. 1968) (defamation where persons who have no need to know of the results of an investigation are told about them).

   b) Acting or appearing to act out of malice toward the claiming individual.

   c) Making statements believed to be truth but with no factual basis for the belief in their truth.

   d) Conveying information for no proper purpose.

3. In the workplace, statements made in connection with an investigation may be defamatory per se because they involve the plaintiff's competence at work. *See Loughry v. Lincoln First Bank,* 494 N.E.2d 70 (1986) (holding accusations of cocaine use and larceny supported claim for defamation).

4. There may be a privilege, however, for an employer to ask questions and make statements when investigating employee wrongdoing. *See Dent v. Smith,* 414 So. 2d 77 (Ala. 1982) (defendant's statement regarding plaintiff in course of theft investigation privileged though plaintiff found not-guilty of stealing).

5. Statements made to co-workers have served as a basis for defamation actions. *See, e.g., Jones v. J. C. Penny, 297* S.E.2d 339 (Ga. App. 1982) (statements of reasons for an employee's discharge); *McCone v. New England Telephone,* 471 N.E.2d 47 (Mass. 1984) (statements made in internal performance evaluations); *Loughry,* 494 N.E.2d at 70 (statements made during corporate meetings); *Gordon v. St. Joseph's Hosp.,* 496 A.2d 132 (R.I. 1985) (statements made in internal

correspondence and memoranda); *Sturdivant v. Seabound Sys.,* 459 A.2d 1058 (D.C. App. 1983) (statements made in internal security reports).

6. In the context of defamation in the workplace, the truth defense will protect the defendant from liability even if the precise literal truth of the defamatory statement cannot be established. *See, e.g., Wehling v. C.B.S.,* 721 F.2d 506 (5th Cir. 1983) (holding that the television station's statements about the defendant's wrongdoing were sufficiently close to the truth not to be defamatory).

B. Invasion of Privacy

1. In the context of an employer's investigation of an employee, surveillance of many varieties may give rise to tort liability for intrusion. *See, e.g.,* R. A. Smolla, *The Law of Defamation §* 10.03 [2] [a] (1998); *Pinkerton Nat'l Detective Agency v. Stevens,* 132 S.E.2d 119 (Ga. App. 1963) (if an employer takes an investigation outside of the workplace, invasion of privacy may result from peeping through windows of a home); *Reitmaster v. Reitmaster,* 162 F.2d 691 (2d Cir. 1947) (eavesdropping by means of wiretap or microphones); *Birnbaum v. United States,* 588 F.2d 319 (2d Cir. 1978) (surreptitiously opening one's mail).

2. An employee may, by accepting employment, give implied consent to his employer to maintain surveillance of him in the workplace. *See Schibursky v. IBM Corp.,* 820 F. Supp. 1169 (D. Minn. 1993) (extensive workplace surveillance was not outrageous); *See Billings v. Atkinson,* 489 S.W.2d 858 (Tex. 1973); *Ribas v. Clark,* 696 P.2d 637 (1985) (wiretaps, electronic monitoring, and eavesdropping on telephone extensions have been held to be an invasion of privacy).

3. Unreasonable intentional intrusion into another person's private affairs, which would be offensive to a reasonable person, may violate the right to privacy. *Compare Anderson v. Low Rent Housing Commission of Muscataine,* 304 N.W.2d 239 (Iowa 1981), *cert. denied,* 454 U.S. 1086 (1981) (responses to press inquiries as to reasons for her termination was privacy violation), with *Cangelosi v. Schwegmann Bros. Giant Super Markets,* 379 So. 2d 836, *aff'd,* 390 So. 2d 196 (La. 1980) (no invasion of privacy where employer had sufficient basis to investigate, investigation was in good faith, brief, and reasonable).

C. False Imprisonment

1. False imprisonment involves non-consensual, intentional confinement, however short. *Molko v. Holy Spirit Assn.,* 762 P.2d 46 (Cal. 1988).

2. The length of time can be as brief as 15 minutes. *See Fermino v. Fedco, Inc., 872* P.2d 559 (Cal. 1994) (department store employee summoned to interrogation concerning theft allegedly witnessed by customer subjected to profanities and demands for confession; physically prevented from leaving). *See also Alterauge v. Los Angeles Turf Club,* 218 P.2d 802 (Cal. 1930). *But see Foley v. Polaroid Corp.,* 508 N.E.2d 72 (Mass. 1987) (employer entitled to confine employee for reasonable time and manner to inquire about sexual assault charge).

3. *Moffat v. Buffums' Inc.,* 69 P.2d 424 (Cal. 1937) (restraint may be effectuated by means of physical force); *Adams v. National Bank of Detroit,* 508 N.W.2d 464 (Mich. 1993) (threat of force or of arrest); *Vandiveer v. Charters,* 294 P. 440 (Cal. 1930) (bank liable for false arrest after causing erroneous arrest of employee for theft), *Schanafelt v. Seaboard Finance Co.,* 239 P.2d 42 (Cal. 1951) (confinement by physical barriers), or by means of any other form of unreasonable duress. *See* Restatement (Second) of Torts § 40A (1977).

4. The mental state required to prove false imprisonment is the intent to confine or to create a similar intrusion. Prosser & Keeton, Torts (5th ed. 1984) § 11, pp. 52-53.

   a) *But cf., Kelly v. West Cash & Carry Bldg. Materials Store,* 745 So. 2d 743, 750 (La. App. 4 Cir. 1999) ("submission to the mere verbal direction of an employer, unaccompanied by force or by threats, does not constitute false imprisonment", and " there is no false imprisonment where an employer declines to terminate an interview of his employee if no force or threat of force is used"); *Schrader v. McGonigal,* 1990 Ohio App. LEXIS 1042 (1990) (An employee was questioned by her employer about improper activities at work. The office door remained unlocked throughout the employee's interview, and she was not physically restrained from leaving the office. The evidence suggested that she had the choice of answering the questions or being fired. The court held that being forced to decide between leaving the room and losing your job does not constitute false imprisonment); *Hampton v. Dillard Dept Stores,* 985 F. Supp. 1055, 1060-61 (D. Kan. 1997) (the court held that the statement made by a store security guard to the plaintiff, "that she needed to calm down or he would call the Overland Park Police" does not constitute false imprisonment. "No liability attaches for future threats, such as calling the authorities or having plaintiffs arrested. Such conduct amounts to moral pressure, but not unlawful restraint.")

D. Intentional Infliction of Emotional Distress

1. An employer may be liable for intentional infliction of emotional distress if:

   a) the employer acted intentionally or recklessly;

   b) the conduct was extreme and outrageous; and

   c) the actions of the employer caused plaintiff severe emotional distress. *See* Restatement (Second) of Torts § 46 (1977). *See S.M.* Speiser, C.F. Krause, and A.W. Gans, The American Law of Torts § 16:13 (1999).

2. *See, e.g., Kentucky Fried Chicken Nat'l Management Company v. Weathersby,* 607 A.2d 8, 14 (Md. 1992) (employer' removal of keys and suspension employee in front of customers not extreme conduct; "The workplace is not always a tranquil world where civility reigns. Personality conflicts and angst ... [and] even a certain amount of arbitrary nastiness may be encountered ... it is not enough to show that one has suffered emotional distress ... the conduct complained of must have crossed the threshold of decency into a realm of atrocity...."); *but see Russ*

*v. TRW, Inc.,* 570 N.E.2d 1076, 1082 (Ohio 1991) (misleading employee to believe company pricing practices were legitimate, discharging employee to convey impression he was responsible for practices, and targeting employee in federal investigation is outrageous).

VI. 5 PHASES OF AN EFFECTIVE INVESTIGATION

A. PHASE 1: Intake

1. Complaint received, Employer's initial response is to:

a) Thank employee for raising issue.

b) Make clear to alleged victim that alleged conduct, if true, is not tolerated by the Company.

c) Ask alleged victim who else he/she spoken to about allegations.

d) Ask alleged victim what he/she would like to be done about situation.

e) Inform alleged victim that Company will investigate claims, and that you will be in contact with him/her shortly to formally interview alleged victim as first step in Company's investigation process.

f) Don't guarantee confidentiality.

g) Assure no retaliation.

2. Alleged victim leaves office, Employer's first step is to:

a) Document initial conversation with alleged victim; and

b) TELEPHONE COUNSEL NOW.

B. PHASE 2: Draft investigation plan

1. Ensure a thorough and fair investigation.

a) A fair procedure requires that the employee have a truly meaningful opportunity to tell his or her side of the story and to influence the employer's decision. *See, e.g., Cotran v. Rollins Hudig Hall Int'l, Inc.,* 17 Cal. 4th 93, 110, 948 P.2d 412 (1998); *Olivarez v. Centura Health Corp.,* 203 F. Supp. 2d 1218 (D. Col. 2002) (reviewing pertinent documentation, interviewing complainant, three managers, and two employees before reaching conclusion of no harassment was thorough and fair investigation); *Fuller v. City of Oakland, 47* F.3d 1522 (9th Cir. 1995) (criticizing sexual harassment investigation which failed to promptly interview accused, to corroborate accused's explanation, to interview witness for complainant, or to credit complainant's evidence); *Waters v. Churchill,* 130 L.Ed.2d 10 (1994) (assessing claim of infringement of public employee free speech rights, Court focused attention on reasonableness of employer's investigation of statements

made and whether factual conclusions as to what was said were reached in good faith); *Kestenbuam v. Pennzoil Co.,* 108 N.M. 20, 4 IER Cases 67 (1988), *cert. denied,* 490 U.S. Sup. Ct. 1109 (1989) (plaintiff's verdict in wrongful termination suit upheld based upon summary and ineffective investigation of false sexual harassment charges).

2. Who will need to be interviewed? When? Sequence?

   a) Union setting?

      (1) Weingarten rights. *But see* Epilepsy Foundation of Northeast Ohio, 331 NLRB 676 (nonunion employee has right to have a co-worker present at any investigatory interview that the employee reasonably believes might result in disciplinary action).

      (2) Unions also have an obligation to investigate allegations of wrongdoing or discrimination against their members, arising out of their fiduciary duty to fairly represent them in their grievances. *See Vaca v. Sipes,* 386 U.S. 171 (1967); *McConney v. GreatAtl. & Pac. Tea Co.,* 455 F. Supp. 1143, 1147 (E.D. Pa. 1978). An inadequate investigation can be the basis for a claim that a union has breached the duty of fair representation. *See Jackson v. T & N Van Service,* 83 FEP Cases (BNA) 137 (E.D. Pa. 2000); *Armstrong v. Chrysler Corp.,* 972 F. Supp. 1085,1089-90 (E.D. Mich. 1997).

3. Relevant documents?

4. Alleged victim's history?

5. Similar claims in the past?

6. Appropriate deadline for completion? (Generally no more than 10 days.)

7. Interim relief appropriate?

8. Draft list of questions as guide for interviews. *See Hill v. The Children's Village,* 196 F. Supp. 2d 389,401 (S.D. N.Y. 2002) (asking general questions (not created in advance) and not taking any notes is not effective investigation).

9. Include rationale for plan.

10. Consult with counsel.

C. PHASE 3: Interviews

1. Interview the complaining employee (may or may not be the alleged victim).

2. Interview the accused.

   a) Do not disclose sources of info or allegations.

b) Innocent until proven guilty.

c) Give opportunity to respond to allegations.

(1) Go through each act alleged.

(2) The alleged harasser must have a fair opportunity to respond, *contrast Swentek,* 830 F.2d at 558 (investigators confronted alleged harasser with complaint and questioned him about allegations), *and Foster v. Township of Hillside,* 780 F. Supp. 1026, 1040 (D.N.J. 1992) (investigator informed alleged harasser in detail about complaint to allow alleged harasser to respond to allegations), *with Smith v. First Union National Bank,* 81 FEP Cases (BNA) 1391 (4th Cir. 2000) (investigation inadequate where investigator failed to ask whether accused made sexually harassing remarks, had never previously investigated a sexual harassment claim, investigation focused on complaints about management style and ignored allegations of sexual harassment).

3. Interview any other witnesses who might have relevant information. *See, e.g., Foster,* 780 F. Supp. at 1032 (investigator met individually with each woman whom alleged harasser supervised); *Giordano,* 804 F. Supp. at 643 (investigator interviewed twenty-one employees who may have known about alleged misconduct); *EEOC v. Mount Vernon Mills,* Civ.A. 4:89-cv-184-HLM, 1992 U.S. Dist. LEXIS 926 (N.D. Ga. 1992) (investigator interviewed all participants and witnesses related to alleged discrimination); *Heelan v. Johns-Manville Corp.,* 451 F. Supp. 1382, 1390 (D. Colo. 1978) (company liable failed to investigate plaintiff's complaints of sex discrimination other than to call the accused for verification or denial).

D. PHASE 4: Evaluate evidence, determine and implement remedy.

1. Decision makers should review all relevant evidence, not only investigator's summary report.

2. A witness's credibility cannot be judged under any objective, rote formula, and no single factor is ever determinative, but an investigation will be deemed incomplete if it fails to follow-up with second interviews with the complainant and/or others after interviews or other evidence raises new questions. *See College-Town v. Massachusetts Commission Against Discrimination,* 400 Mass. 156 (1987) (inadequate investigation absent follow-up interview with complainant after interview with alleged harasser); *Broom v. Regal Tube Co.,* 881 F.2d 412, 421 (7th Cir. 1989) (same); *Marsh v. Digital Equip. Corp.,* 675 F. Supp. 1186, 1191-97 (D. Az. 1987) (investigation inadequate absent attempt to corroborate or disprove allegations and no follow-up). *See also EEOC v. Total System Svcs., Inc., 221* F.3d 1171 (11th Cir. 2000) (employer who concludes that employee/witness lied during internal investigation may terminate employee).

3. Document the rationale for the remedy.

4. What happens if investigation inconclusive? 17

E. PHASE 5: Close the loop.

1. Report back to complainant, accused (and possibly key witnesses).

2. Oral/written.

3. Remind parties and witnesses about confidentiality and possible defamation and privacy actions for breaches thereof.

4. Retrieve any documents distributed to those who "needed to know."

5. Follow-up.

a) Every couple of months for a reasonable period, or as necessary.

**General Interview Guidelines**: (These are guidelines only and should be amended as appropriate given the circumstances).

- Proper demeanor ("all business").
- Be objective. Never give the impression of disbelief
- Explain company policies regarding conduct and investigation.
- Issues of confidentiality.
- Inform employee of potential defamation/privacy actions for false statements.
- Role of investigator.
- Explain fact gathering purpose (regardless of whether good or bad).
- Make sure employee is comfortable with you as interviewer.
- • You want to let the employee know that this is a serious matter, but also put them sufficiently at ease to speak with you.
- Timeline - schedule of events.
- No retaliation.
- With whom have you spoken about the incident?
- Chronological order, as a general rule.
- Acts and events - get the details!
- Open-ended questions, as opposed to yes/no.

- What happened?
- Why?
- Where?
- What was your reaction?
- Why do you think that?
- When?
- How long?
- What said?
- How did you feel?
- Exhaust witness recollection. (Is there anything else?)

- Try not to ask potentially embarrassing or hostile questions at the beginning. But make sure not to conclude the interview without asking the "tough" questions.
- Review and confirm witness information.

- Any questions?
- Additional questions.
    - Awareness of company policy?
    - Ability to work with harasser?