



Minnesota Counties Insurance Trust Resource Briefing

June 2000

Conducting Workplace Investigations

BACKGROUND

There is a growing need for today's public sector employers to have the skills to conduct timely and impartial investigations in the workplace. While members of the Minnesota Counties Insurance Trust have made great strides in controlling the frequency and severity of sexual harassment, discrimination and offensive conduct claims they still occur. When these occasions arise and allegations are made the employer is required to conduct an investigation. This Resource Briefing outlines the rationale for initiating an investigation, how to prepare for and conduct an investigation, preparing the written report and addressing data practices concerns. While most workplace investigations will concentrate on allegations of sexual harassment or offensive conduct, this information can be used for all types of investigations the employer may be obligated to undertake.

WHY SHOULD YOU CONDUCT WORKPLACE INVESTIGATIONS?

There are a number of reasons to conduct workplace investigations, with three important reasons listed below:

1. Affirmative Duty In Sexual Harassment Complaints

An employer has an affirmative duty to investigate sexual harassment complaints and incidents. Gillison v. State Dept. of Natural Resources, 492 N.W.2d 835 (Minn.Ct.App.1992, review denied Jan. 28, 1993).

2. Liability

If the employer fails to take prompt and appropriate remedial action in response to a harassment complaint, it will be held liable for the underlying harassment. See Guiliani v. Stuart Corp., 512 N.W.2d 589 (Minn.Ct.App.1994).

Failure to fully investigate a complaint of sexual harassment by interviewing the alleged harasser and taking disciplinary action when deemed appropriate could subject the employer to liability if the complaint was untrue.

- In the case of Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn 1990), the Minnesota Supreme Court ruled that an employer "who takes no steps to investigate but relies entirely on accusations made by employees who may be biased or on second-hand hearsay with no identification of sources, has not acted as a reasonably prudent person and lacks probable or reasonable grounds for making a potentially defamatory statement."

- In the case of Lewis v. Equitable Life Assurance Soc., 389 N.W.2d 876 (Minn. 1986), the Minnesota Supreme Court held that an employee who is terminated for reasons which turn out to be false, and who is then compelled to disclose these untrue reasons for his/her termination when explaining that termination to potential employers, may state a claim for defamation against the employer. If the employer did not have reasonable grounds to believe that the reasons for terminating the employer were actually true, then the employer loses its qualified privilege, and may be liable even though it did not itself publicize the reasons for the termination.

The failure to investigate can enhance a claim of municipal liability.

- For example, in the case of Herrera v. Valentine, 653 F.2d 1200 (8th Cir. 1981), city officials had received numerous complaints of excessive force, sexual misconduct, racist conduct, and selective enforcement of the law against minorities. Nearly forty complaints were brought forward at a public hearing, yet nothing was done. Months later, a police officer kicked a pregnant minority woman in the stomach while arresting her husband. The jury found that the city's failure to provide the police department with the especially "close and continuing supervision" it needed in view of these complaints caused the injuries which the plaintiff suffered. "Where senior personnel have knowledge of a pattern of constitutionally offensive acts by their subordinates but fail to take remedial steps, the municipality may be held liable for a subsequent violation if the superior's inaction amounts to deliberate indifference or tacit authorization of the offensive act." Herrera, 653 F.2d at 1224.

3. Defense

If the employer properly investigates and takes prompt and appropriate remedial action, it may be able to protect itself from liability for the underlying harassment. Fore v. Health Dimensions, Inc., 509 N.W.2d 557 (Minn.Ct.App. 1993); Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984)

WHAT ARE SPECIAL CONSIDERATIONS IN CONDUCTING INVESTIGATIONS?

1. Assume Discoverability

It is important in any investigation to remember that the investigation may be open to review. The investigator's notes and mental impressions are potentially discoverable. It is important to be accurate and thorough in the note-taking process. The investigator's notes are a crucial part of proving the adequacy of the investigation should that become necessary. Carefully and honestly record the witness' statements during the interviews. Document only the facts described to the investigator, not the investigator's opinions. Be prepared to defend the notes as accurate documentation of statements made during the process.

2. Avoid Defamation Claims

An employer must be very careful regarding comments to employees and to others about allegations that are the subject of an investigation. Defamation actions by employees against employers can easily result from remarks by an employer during an investigation into employee misconduct. Additionally, if the employer fails to adequately investigate a complaint before making a disciplinary decision, the accused employee may sue for defamation. Duffy v. Leading Edge Prod., 44 F.3d 308 (5th Cir. 1995); Klontz v. Puget Sound Power & Light Co., 951 P.2d 280 (Wash.Ct.App. 1998)

- In Medved v. Minneapolis Star/Tribune (No. 785628 Hennepin County District Court, December 1984), the alleged harasser was granted a substantial jury award. The jury concluded that an appropriate investigation of the harassment allegations had not been conducted prior to the company's decision to discharge the alleged harasser.
- In the case, Neece v. Kantu, 507 P.2d 447 (N.M. App. 1973), the employer of a supervisor who investigated an employee's alleged theft and told a union steward the employee was a thief was held liable for defamation where the employee showed the allegation was false and injurious to his reputation with co-workers.

Because the employer needs to be free to investigate employee wrongdoing, an employer has a qualified privilege that will partially shield the employer from defamation actions in some circumstances. For example, employers have "qualified privilege" which insulates them from defamation based on communicating allegations of sexual harassment to persons with a need to know if the statements are made in furtherance of the employer's obligation to investigate such concerns.

During an investigation all employees should be counseled that the interviews are confidential and violations of the employers policy regarding confidentiality will be dealt with as serious infractions. Employees will never feel free to bring a complaint forward if they believe that the complaint will be a source of gossip. It is important when talking with witnesses, to remember that what the investigator and witness discuss will likely be carried back to other employees as well as the complainant. The investigator should not discuss his/her assessment of the situation, strategy, or opinion with the complainant, alleged offender and witnesses.

3. Avoid Negligent Investigation Claims

The employer may face a suit based on a theory of "negligent investigation" (by the alleged harasser) or of failure to reasonably investigate (by the complainant). Williams v. Continental Airlines, 943 P.2d 10 (Colo. App. 1996). In general, the courts have recognized that the tort of negligent investigation exists, but have been hesitant to find an employer negligent in the employment context.

The victim of harassment can sue the employer for negligently carrying out the investigation of allegations of harassment or subsequent discipline (if any), especially if this is done in violation of the employer's policies. Additionally, an alleged harasser can sue an employer for negligence who permits negligent discipline of an alleged harasser, especially in violation of the employer's rules. Nove v. Hoffman-LaRoche, 570 A.2d 12 (Super Ct. N.J. 1987), cert. denied 584 A.2d 218 (1990). Further, Minn. Stat. 363.02, Subd. 1 (2) (c) requires an employer to undertake prompt and appropriate actions when it knew or should have known of sexual harassment in the workplace. If this investigation is not undertaken or conducted negligently, a claim of negligence may be asserted.

4. Avoid Invasion of Privacy Claims

Minnesota now recognizes that the right of privacy exists in the common law of Minnesota with respect to causes of action for intrusion upon seclusion, appropriation, and publication of private facts. See Elli Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998). These causes of action may include:

- **Interference with a person's solitude or seclusion;**
 - o Intentional intrusion (physically or otherwise);
 - o Upon the solitude, seclusion, private affairs, or concerns of another; and
 - o The intrusion would be offensive to a reasonable person.
- **Public disclosure of private facts;**
 - o Publicity to the private matters of another person's life
 - o The publicity would be highly offensive to a reasonable person and
 - o The publicity is not of legitimate concern to the public.

“Public Disclosure of Private Facts” is the claim most frequently asserted in actions by employees for invasion of privacy. This claim may arise during a workplace investigation when an employer discloses to third parties matters concerning the private life of an employee, if the matter disclosed is one which does not legitimately concern the public. For example, public statements about the reason for an employee’s termination may result in claims that the employer has publicized private matters about the employee. Statements, which involve disclosure of an employee’s failure to pass a polygraph or drug test, health conditions or sexual preference, may be actionable. In such actions, truth is not a defense, but the employer is largely protected by a qualified privilege, as in defamation cases.

- **Appropriation of a person’s name or likeness**
 - o The use of the name or likeness of another for personal benefit.

The employer’s policies should address whether the employees have any expectation of privacy in the workplace and the extent that conduct and communications in the workplace may be monitored. There are situations that have the potential to give rise to a claim of invasion of privacy and they are as follows:

- Employer investigations or surveillance of off-duty conduct.
- Searches of employees’ briefcases, purses, cars, desk drawers, file cabinets, lockers or other areas.
- Inquires into the personal lives or medical conditions of employees and job applicants.
- Monitoring of phone calls, voicemail messages, and e-mail communications.
- Video or audio recording of certain areas in an office or facility.

With regard to searches in the workplace, whether a search is legal will depend upon the following key factors:

1. Whether or not the employer has provided advance notice to employees regarding employer’s search and seizure policies.
2. Whether or not an employer has good reason for the search; and
3. Whether or not the employer has conducted the search in a reasonable manner.

Consider the following with regard to prohibited and permitted forms of employee surveillance:

- **Polygraphs:**
 - o Under Minnesota law no employer or employer’s agent may directly or indirectly request or require a polygraph, voice stress analysis, or any other test purporting to test the honesty of any employee or applicant. Employers and their agents who violate this are guilty of a misdemeanor and may be liable for civil damages payable to the state, and are subject to an injunction. Individuals may bring a civil action. Employers are liable for punitive damages as well. Minn. Stat. 181.75.
 - o Federal law also restricts the use of polygraphs and other truth detection examination by employers. For example, it allows for a limited exemption for polygraph testing of employees in the course of investigating a specific incident, for example theft or embezzlement of property or other workplace misconduct. The law is not intended to preempt restrictive state laws, and any provisions of the Minnesota law which are more restrictive than the federal law would prevail.
- **Telephone, Video and other Electronic Surveillance:**
 - o Generally the use of closed-circuit television is permissible in the workplace as long as it is not done where employees have a reasonable expectation of privacy. The use of closed-circuit television in areas designated for health and personal comfort (i.e. restrooms, locker rooms, lounges, etc.) should be avoided.
 - o Surreptitious surveillance is prohibited.
 - o Under federal law, employers are generally prohibited from using surreptitious electronic surveillance

of employees. 18 U.S.C. 2510-20. Thus, it is important for an employer to inform its employees that they may be subject to silent surveillance. Where employees are notified that monitoring may occur, and where the monitoring is not unreasonable, courts will typically find that the monitoring was justified to achieve a legitimate purpose.

- o An employer may listen in on an employee's telephone conversation on an extension where it is done in the ordinary course of the employer's business. 18 U.S.C. 2510-20. However, once the employer discovers that the employee's telephone conversation is of a personal nature, the employer must immediately discontinue the surveillance.
- o Federal and state law prohibits all private individuals, organizations and employers from intercepting wire (wiretapping) or oral (bugging) communications of others. Minn. Stat. 626A.01 et seq. Employers who violate this are liable for actual damages and punitive damages including costs and attorney fees.
- o Employers may use non-surreptitious photographic surveillance of the general workplace to monitor employee honesty or performance. Additional rules apply when the employees are unionized or engaged in union organizing activities under the National Labor Relations Act.
- o The making of voice recordings without the agreement of at least one party to the conversation is illegal in Minnesota and in most other states. Minn. Stat. 628 A.01-.23. See also, 18 U.S.C. 2510-20.
- o Computer monitoring should be conducted only after the employer notifies the employees that it may occur.
- o Telephone data recording devices, used to record the date, time and number dialed, are legal.

5. Avoid Intentional or Negligent Infliction of Emotional Distress Claims

Intentional infliction of emotional distress occurs when a person intentionally engages in outrageous conduct resulting in severe emotional distress to another. In general, an employer who conducts an investigation in a reasonable manner will not commit the extreme behavior required for this claim. There is no clear definition of what conduct is prohibited. The term "outrageous" is subjective, largely determined by societal perceptions of certain types of behavior. This is often an issue of fact to be determined by a jury.

6. Avoid Claims of Assault and Battery

During a workplace investigation, an employer who physically detains or attempts to detain an employee or threatens or uses physical force against an employee may commit assault and/or battery. Battery is the willful and unlawful use of force or violence upon the person of another. Assault is the threat to commit a battery where the threat places the other in apprehension of imminent harm.

7. Avoid Claims of False Imprisonment

False imprisonment claims may arise during an investigation where an employee is detained against his/her will during an interrogation or investigation. An employer may be liable for creating actual or perceived physical barriers by using physical force or threats, or otherwise through duress. Voluntary consent is a complete defense to a claim of false imprisonment. If someone wants to terminate the interview and leave-let him/her.

8. Beware of the Allegations of Wrongful Termination

Minnesota law prohibits an employer from discharging, disciplining, threatening, or otherwise discriminating against or penalizing an employee because:

- The employee has made a good faith report of a violation or suspected violation of any federal or state law or rule to an employer or to any governmental body or law enforcement officer;
- The employee is requested by any government body or law enforcement official to participate in an investiga-

tion, hearing or inquiry; or

- The employee refuses an employer's order to commit an act which the employee believes to violate any state or federal law or rule or regulation and the employee informs the employer that the order is being refused for that reason.

For more details see Minn. State 181.932 Disclose of Information by Employees, also known as the Whistleblower Law.

9. Avoid Claims of Discrimination

If an alleged harasser can prove that his/her input during an investigation was ignored because of race, gender, age, disability, sexual preference or other protected class status, a claim against the employer is available under the state or federal discrimination laws. This has been found where a member of a protected minority has been accused of harassment for actions that were acceptable when done by non-minorities. Valdez v. Church's Fried Chicken, 683 F.Supp.596 (W.D.Tex. 1988)

WHAT SHOULD YOU DO TO PREPARE FOR THE INVESTIGATION?

CHECKLIST

1. Establish an Investigation Plan

- Determine the goal(s) and parameters of the investigation.

For instance, is the investigation simply to determine whether a violation of the employer's sexual harassment policy occurred, or does the employer want to also investigate the alleged harasser's effectiveness as a manager? Often the scope of the investigation changes as interviews are conducted, so the investigation plans needs to be flexible.

- Identify the person(s) to interview.

- Complainant
- Alleged Offender
- Observers of the incident (s) or actions/statements
- People identified by those interviewed in the investigation
- Current employees and former employees
- Authors of relevant documents

- Determine the order of interviews and plan to interview each person separately.

Typically the complainant is interviewed first, followed by witnesses and then the alleged offender. There may strategic or logistic reasons for the order of witnesses. Second interviews may be necessary to discuss factual issues that need clarification.

- Consider whether a Confirmation Memorandum (confirming the allegations, advising of the person who will conduct the investigation, etc.) should be sent to the interviewees.
- Determine which documents are available for review and review them prior to the commencement of the interviews, if possible. (See list below in Number 4.)

- ❑ Anticipate and be prepared to respond to difficult questions.
 - ❑ Am I being investigated?
 - ❑ How will you use the information you are given?
 - ❑ Is the information confidential?
 - ❑ Who will receive this information?
 - ❑ What are you really investigating?
 - ❑ Will I get into trouble by giving you this information? Will I be fired if I tell you the truth?
 - ❑ Can I have an attorney present at the interview?
 - ❑ Can I tape record the interview?
 - ❑ Generally, tape-recording of interviews is not advisable. Tape-recording often frightens interviewees and makes them hesitant to share the facts that they have. If an interviewee insists on taping, and the interviewer consents, the interviewer should tape as well and retain the recording.
- ❑ Determine a timeframe for the investigation. Realize that investigations can be time intensive. They usually take longer than initially anticipated.
- ❑ Decide whether a witness to the interview is necessary. In some circumstances a witness aids in note taking and helps support what actually occurred in the meeting if questions later arise. It must be considered whether the presence of two interviewers would be too intimidating to the witness. If a witness is used, one person should conduct all the interviews with the witness simply taking notes. Employees may be uncomfortable if they are bombarded with questions from two persons at once.
- ❑ Remain in control of the investigation. Do not let the complainant, alleged offenders, attorneys for the parties, or others dictate the investigation.

2. Selection of Setting

- ❑ Location should be neutral (e.g. private conference room or off-site meeting room).
- ❑ The interview should take place outside the interviewee's regular work area, where there is privacy and few distractions. Find a place:
 - ❑ Where the parties cannot be overheard
 - ❑ Where the parties cannot be seen walking in and out (or how long the interview lasts)
 - ❑ Where there are no distractions
- ❑ Location should be well lit and well ventilated.
- ❑ Take the telephone off the hook or turn them off.
 - ❑ Have water, tissue and restroom available.
 - ❑ If the interview is by telephone, make sure the person being interviewed is able to talk without being overheard.

3. Request to Complainant, Alleged Offender and Witnesses

- ❑ Ask parties in advance to bring or forward any statements, letters, notes, diaries, calendars, or other documents that would be helpful to the investigation.
- ❑ Advise the parties to refrain from discussing the matter.

4. Reviewing the Relevant Documentation

- Determine what policies, guidelines or practices or other documents apply to this situation and review them before the interviews (if possible).
 - Complaint and notes regarding it
 - Handbook (employee and manager handbooks) and Training Records
 - Standard operating procedure
 - Code of ethics, or code of conduct
 - Sexual harassment/offensive behavior policies
 - Expense reimbursement rules, etc.
 - Security guidelines
 - Complaint procedure
 - Any policy identifying an employee's obligation during an investigation
 - Other relevant rules, policies, procedures and instructions
 - Collective bargaining agreement
 - Relevant personnel files, including performance evaluations
 - Expense reports/telephone/email records
 - Information from prior investigations
 - Correspondence to/from relevant persons
 - Tape recordings, transcripts and statements
 - Documents or other tangible evidence identified by the complainant, alleged offender, witnesses and other employees.

5. Determine the Appropriate Notices or Warnings to be Given

- Purpose (nature) of the interview and investigator's role.
- Tennessen Warning (Minnesota Government Data Practices Notice)
- Garrity Warning

6. Prepare Opening/Closing Remarks

- Purpose (nature) of the interview and investigator's role.
 - State what is being investigated (i.e., why the interview is taking place).
 - Advise what role the interviewee may play in the investigation.
 - Tell how the information may be used.
 - Explain that information obtained during the interview will be reported to those with a "need to know."
 - Explain the seriousness of the investigation.
 - Explain the importance of accurate information and the individual's obligation to provide truthful, thorough information.
 - If the interviewee refuses to participate in the interview, explain the consequences and document it.

- ❑ For example, if the person alleged to have engaged in misconduct refuses to participate, indicate to him/her that the interview is designed to give the individual an opportunity to relate his/her version of the events and to advise management of any information it should consider before it finalizes its investigation. If he/she refuses to participate, management should tell the interviewee that the employer will base its decision on the other information gathered during the investigation, the inferences drawn from that evidence and the person's unwillingness to cooperate.

- ❑ Employer's policy on confidentiality.

Instruct each person interviewed not to discuss the matters covered during the interview with the complainant, alleged offender, or any other person. Explain that confidentiality is necessary to protect the integrity of the investigation and to ensure that the employer receives trustworthy information in an atmosphere free from coercion. Advise the person should report any concerns relating to confidentiality immediately.

- ❑ Employer's policy on non-retaliation.

Each person should be advised that the employer prohibits retaliation against any person who reports concerns or participates in an investigation. Advise that the person should report concerns or information relating to retaliation immediately.

- ❑ Both the complainant and alleged harasser should be advised that they will be advised of the results of the investigation and any action taken.

7. Prepare Interview Questions

- ❑ Have a full understanding of the laws, policies or guidelines that will be critical in reaching a resolution of the issues when the facts are ascertained.
- ❑ The drafting of questions helps ensure that important questions are not inadvertently not asked. Prepare a detailed outline of key questions. These will be based upon those issues that should be explored with the witness. Understand what facts are necessary to reach a conclusion.
- ❑ Determine what written documents will assist in reaching a conclusion or in determining certain facts and have copies available to review with the witness.
- ❑ See section on Interviewing Skills.

8. Consider a Site Inspection

- ❑ Consider an inspection of the work site, especially if the investigator is not familiar with it. This may be helpful in understanding the allegations. Photographs of the site may be helpful, depending upon the nature of the allegations.

WHAT ARE THE BASIC INTERVIEW TECHNIQUES?

CHECKLIST

1. Questions

Beginning the Interview-Opening Remarks:

- Have your outline and a tablet for recording notes.
- Advise of the purpose of the interview/role of investigator.
 - Thank the person for meeting with you.
 - State what is being investigated (i.e., why the interview is taking place).
 - Advise what role the interviewee may play in the investigation.
 - Provide the appropriate Tennessee Warning and/or Garrity Warning
 - Tell how the information may be used.
 - Explain that information obtained during the interview will be reported to those with a "need to know."
 - Explain the seriousness of the investigation.
 - Explain the importance of accurate information and the individual's obligation to provide truthful, thorough information.
 - If the interviewee refuses to participate in the interview, explain the consequences.
 - Advise that the investigator will take notes (not available to interviewee)
 - Advise whether the investigator is taping the interview and ask the interviewee if he/she is taping the interview. (If the interviewee is taping, the investigator must determine whether to allow the interview to proceed or whether to tape as well. The investigator should always tape if the interviewee will be taping. The investigator should retain the recording, generally not transcribing it.)
 - Advise the interviewee that he/she can take a break as needed.
- Ask the interviewee if there are any concerns regarding the location of the interview.
- Review policy regarding confidentiality.
 - The interviewee should not talk with anyone (including family, friends, co-workers) regarding the investigation or interview.
 - Determine if the interviewee has talked with anyone regarding the investigation (if so, who has the interviewee talked to and what has been discussed; what information does the interviewee have regarding the investigation).
- Review policy regarding non-retaliation.

The Information Portion of the Interview

- Begin with broad, open-ended, non-judgmental questions.
- Follow up with specific questions: "Think W."
 - What?**
 - o What happened?

- What did the alleged harasser do?
- What did you say?
- What happened next?
- What did you do to indicate disapproval?
- What was the conduct, communications or response of others that witnessed the incident(s)?
- What have you done in response to conduct?
- What other information do you have regarding similar incidents involving others?
- What is the source of your information (direct v. hearsay)?
- What would you like to happen in response to your concern?

□ Who?

- Who engaged in the conduct you complain of?
- Who was there?
- Who witnessed any of the conduct/communications?
- Who did you report the conduct to?

□ When?

- When did it happen?
- What day?
- What time?
- When did you first complain to your supervisor (or other person)?

□ Where?

- Where did the incident(s) happen?
- Where were you (physical location)?
- Where was the alleged offender?
- Where was each witness?

□ Why?

- Why do you think the alleged harasser did this?
- Why did you react in the way that you described?
- Why did you wait (stated period of time) to report the incident(s)?

- Make your questions simple. Do not ask compound questions.
- Typically ask questions that force the interviewee to relate events chronologically to ensure thorough coverage. Comparing different witnesses' chronological versions will help assess credibility.
- Ask the alleged offender broad, non-threatening questions in the beginning (do not start the interview with a direct question that specifically addresses the elements of the allegations). For example, it is more productive to approach the allegations by first eliciting affirmative responses concerning the activities that led up to the alleged misconduct, rather than asking if the person engaged in sexual harassment (a conclusion).
- Say as little as possible. Let the witness do the talking. It's O.K. to let the witness talk or "tell their story" without interruption.
- Remember that pauses are all right and may actually encourage the witness to continue providing information.

- Do not “finish the sentences” of the witness.
- Remain neutral in your questions and responses.
- Focus on fact gathering, not consoling or emphasizing with the interviewee. Do not allow the interview to turn the meeting into an interview of the investigator.
- Save questions that may be perceived as hostile or embarrassing until the end.
- If the interviewee becomes threatening, hostile, or abusive during the interview, note their conduct and advise him/her that the interview will be terminated until such time as the person gets control.
- After you have asked the broad questions, then narrow the questions as more information is revealed.
- In investigations regarding specific events, cover all the events that occurred during the relevant time frame in chronological blocks of time. Do not leave the time block until all the details necessary to recreate the scene have been established. Pin the witness down to facts: specifically what the witness saw, heard, did, smelled or felt and distinguish matters of which the witness has personal knowledge from hearsay.

For example, for each block of time cover:

- Exactly what occurred?
 - How did it happen? (Go step by step-break up the events, actions, etc.)
 - When did it happen?
 - Who was involved or otherwise present?
 - Where were these other persons?
 - How were the other persons involved?
 - What do you think the others observed?
 - How do you know what others observed (what is your basis)?
 - What was said/done by the other persons?
- You may want to use leading questions toward the end to pinpoint or “nail down” the facts.
 - Make sure the witness identifies what is direct or indirect information.
 - If information provided by the witness is indirect, have the witness identify the source of the information.
 - Ask complainant what he/she wants done to resolve the problem.
 - Invite suggestions, but do not suggest that complainant drop the complaint or promise to deliver on proposed resolutions. Let the employee know the employer will make the final determination regarding the best way to resolve the issue; however, the employee’s input is valuable and will be thoughtfully evaluated.
 - Let him/her know that if he/she has forgotten to tell you anything, that he/she should contact you.
 - Have the person identify anyone with information relative to the investigation.
 - Have the person identify any documents relative to the investigation.

Concluding the Interview

- Before concluding the interview, review all significant information provided by the interviewee (ensure you have accurately recorded the information provided and give the interviewee an opportunity to provide any further information.) Ask the interviewee if there are any corrections.

- Ask the witness broad closing questions:
 - Is there anything else that you think would be helpful (or relevant) to the investigation?
 - Have I not asked you any questions that you think should have been asked?
 - Have we now talked about all your concerns (or information relating to this investigation)?
- Thank complainant for using policy and procedure.
- Advise the interviewee to contact the investigator if he/she thinks of additional information.
- Tell complainant and alleged offender that the complaint will be investigated and he/she will be advised of the results and resolution and whom to contact.
- Reiterate the confidentiality policy.
 - Advise the interviewee not to discuss the investigation with anyone.
 - Advise the interviewee to contact the investigator (or other identified person) immediately with any concerns regarding confidentiality.
- Reiterate the non-retaliation policy.
 - Assure the interviewee that there will be no retaliation for making the complaint or participating in the investigation and give instructions on the person who should be contacted if the interviewee has concerns of retaliation occurs.
- Explain the approximate timeframe for the investigation.

2. Notetaking

- Begin a new page for each witness (do not combine summaries).
- Note the witness' name on each page of the interview notes.
- Note the date of the interview and the person being interviewed.
- Note the start/finish times.
- Note any breaks (e.g. time) and the length of the breaks.
- Note who was present during the interview.
- Note the location of the interview (e.g. in person, place, by telephone, etc.).
- Number the pages of the notes (e.g. page 7 of 10).
- Advise the person being interviewed that you are taking notes.
- If the person requests a copy of your notes, decline.
- Try to take detailed notes, as close to verbatim as possible, including what was asked and what information the interviewee provided.
- Do not include your interpretations, beliefs, assumptions, conclusions, etc. about the facts stated. Rather than guess at reasons and intentions, ask the interviewee and record the response.
- Observe and record all physical and verbal reactions of witnesses.
- Do not write down or record in any way conclusions regarding credibility.
- Assessments relating to credibility may be based on the interviewed person's:
 - Memory

- Perception
 - Perceived truthfulness
 - Corroboration, lack of corroboration and implications
 - Bias
 - Consistency of accounts
 - Prior misconduct, or lack of it, and implications
 - Plausibility of accounts
- At the conclusion of the interview (before leaving the interview or hanging up the telephone), go back and clarify any information with the interviewee and determine if the interviewee has something to add and make sure your notes are complete.
 - Review your notes immediately following the interview and fill in any missing information and ensure the notes are complete.
 - Make sure that if your notes are not legible, that you summarize (e.g. type) the information provided by the interviewee shortly after the interview while the information provided during the interview is "fresh."

PREPARING THE WRITTEN REPORT

When preparing the final investigative report: **ASSUME DISCOVERABILITY**

1. Purpose of the Report

The purpose is to provide an accurate, written account of information gathered during the investigation that will provide management with the information necessary to make decisions about the complaint.

2. Requirements of the Report

- The report must be a **neutral summary** of the facts. Information contained in the report should be objective.
- It should be prepared and submitted in a **TIMELY** manner.
- The following information should be included:
 - A brief, introductory description of the charge or allegations.
 - The name of the complainant and respondent.
 - A brief summary of the background information on the alleged incident(s).
 - A description of the investigative procedure, including a list of all persons interviewed and documents reviewed or collected for Data Practices reasons you may not want to include names, but, rather, prepare a key.
 - Reference to, or listing of, all allegations made and investigated.
 - Copies of documents gathered or created during the investigation.
 - Summary of the **FACTS**.
 - Findings.

Consider: A report that does not contain any findings, legal conclusions or recommendations.

Investigative notes, memoranda and reports may be discoverable when the employer relies upon the affirmative defense of the adequacy of its investigation into the alleged sexual harassment under the Title VII. The attorney-client and/or attorney work product privileges are essentially waived.

3. Format of the Report

- The report should be in narrative, rather than outline, format.
- It should be written in the third person.
- It is important to provide the reader with a complete picture of the information gathered and all corroborating and refuting evidence. Some reports may provide a summary of each interview. Other reports have the findings listed, allegation by allegation.

4. Things to Avoid in the Report

- Never give opinions in the report.
- Never speculate in the report.
- Do not raise issues that are unrelated to the specific allegations you have investigated. Confine the report to those matters that you have reviewed during the investigation.
- Do not make recommendations for employee discipline.
- Do not draw legal conclusions.

There should only be one report which is provided to the designated person “with a need to know” and who is responsible for making a decision regarding the complaint and possible corrective action or discipline.

FILE MAINTENANCE

1. Typical Components of an Investigation File

- Log of investigator’s action (e.g. Activity Log).
- Contemporaneous and final interview notes for each witness.
- All communications to and from witnesses/other relevant to investigation.
- All draft and final witness statements.
- All complaints.
- All documents which establish or refute the issues investigated.
- Relevant physical evidence, such as tape recordings, product samples, etc.
- Investigator’s final report (and any supplemental reports).
- Documents reflecting notification of investigation results and any remedial action.

2. File Organization

- Do not keep the notes from the investigation in the employee’s personnel file.
- These documents should be kept in a separate file and be held strictly confidential.

3. File Maintenance

Always keep original notes, tapes, documents, etc.

Before destroying records, make sure you are not placing the employer at risk for violation of any laws or administrative regulation.

CONCLUDING THE INVESTIGATION

Once the facts have been gathered as accurately as possible from the appropriate persons, the investigator should meet with the appropriate persons (e.g. Human Resource Department, Management, Legal Counsel) to discuss the facts. These facts will include that which is already known and any additional questions that the investigator should ask or facts that should be obtained.

In reaching conclusions, the following considerations are relevant:

- Credibility
- Bias
- Relationship of the witness to the parties
- Prior misconduct, or lack of it
- Memory or failure of memory
- Perceived truthfulness
- Logic/Consistency of story
- Affirmative statements
- Corroboration, or lack of corroboration
- Plausibility of accounts
- Employer's policies
- Employer's prior handling of similar allegations

It is important to make a determination, even if the allegations are unfounded and discipline or corrective action is not warranted. The results of the investigation then should be communicated in such a way so as not to defame someone, violate anyone's rights or violate the Minnesota Government Data Practices Act.

WHAT ARE PROCEDURAL CONSIDERATIONS?

1. Minnesota Government Data Practices Act

The Minnesota Government Data Practices Act, Minn. Stat. 13.01, et seq. governs the treatment of data obtained in the context of an investigation. When gathering information during the course of an investigation consideration must be given to the distinction between public vs. private data that becomes part of a record which may ultimately be disclosed.

Not all “personnel data” is public, in fact, most is not. The Minnesota Data Practices Act defines “personnel data” as data on individuals collected because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a state agency, statewide system or political subdivision or is a member of or an applicant for an advisory board or commission. Minn. Stat. 13.43, subd. 1 (1997).

Because certain information becomes public after the final disposition of any disciplinary action, it is important to determine when there is a “final disposition.” A final disposition occurs when the state agency, statewide system, or political subdivision makes its final decision about the disciplinary action, regardless of the possibility of any later proceedings or court proceedings. In the case of arbitration proceedings arising under collective bargaining agreements, a final disposition occurs at the conclusion of the arbitration proceedings, or upon the failure of the employee to elect arbitration within the time provided by the collective bargaining agreement. A final disposition includes a resignation by an individual when the resignation occurs after the final decision of the state agency, statewide system, political subdivision, or arbitrator. Minn. Stat. 13.43, Subd. 2 (b). Always consult with counsel to determine if the release of information is appropriate due to final disposition.

Data regarding claims of sexual harassment are subject to their own regulations. When allegations of sexual or other types of harassment are made against an employee, the employee does not have access to data that would identify the complainant or other witnesses if the responsible authority determines that the employee’s access to that data would:

1. Threaten the personal safety of the complainant or a witness; or
2. Subject the complainant or witness to harassment.

If a disciplinary proceeding is initiated against the employee, data on the complainant or witness shall be available to the employee as may be necessary for the employee to prepare for the proceeding. Minn. Stat. 13.43, subd. 8 (1997).

CONCLUSION

When a workplace investigation results in discipline or termination, there are many items that need to be considered and included in this process. MCIT is developing future publications and articles that deal with the subjects of Veterans Preference, Tennessen Warnings, Garrity Warnings, Loudermill Hearings and other important areas involved with public sector human resource management. If you have questions on what these items entail you can contact your legal counsel or MCIT.

This Resource Briefing was prepared with the assistance of Therese Pautz, President of NeuVest.

THE INFORMATION CONTAINED IN THIS DOCUMENT IS INTENDED FOR GENERAL INFORMATION PURPOSES ONLY AND DOES NOT CONSTITUTE LEGAL OR COVERAGE ADVICE ON ANY SPECIFIC MATTER.