

Investigations In The Workplace Are The New Firing Squads



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Investigations in the workplace are the new firing squads. As soon as an employer announces an investigation of an employee, that employee is usually suspended.

That can amount to a constructive dismissal unless the employer has the right to suspend an employee baked into their employment agreement. Also, it is virtually guaranteed that the investigated employee will be terminated – often for cause – because the result is a foregone conclusion.

Few investigations end with “nothing to see here.” And even if they do, the investigated employee is guaranteed to not have warm feelings toward the employer after the stress and incriminations of an investigation, quite apart from the embarrassment due to the suspension and the apprehension by their coworkers of apparent wrongdoing.

An investigated employee is deprived of all of the due process of the trial process. They are generally forbidden to speak to anyone about the issues in question while the investigator lines up witnesses against them. The investigator obtains the employee’s responses while continuing to secure rebuttal evidence. Unlike the trial process where both sides are examined and both are permitted to speak to any witness, there is no reciprocity.

It is in the interests of both employers and employees to bring some sanity to this topic – and to encourage fewer investigations, overall.

Employers should have a written policy on what will be investigated and the process which will be followed. That policy should contain the following cautions:

1. Not all complaints will be investigated. If a complaint is frivolous it will be dismissed.

Let’s give a concrete example – allegation of harassment arising from one comment or gesture. Harassment is a pattern of conduct that the alleged harasser knows or should know is unwelcome. A single act (unless it is egregious) seldom justifies a full investigation. However, if someone objects to the behaviour (words or conduct) of a

co-worker, that co-worker should be told such behaviour is objectionable and must not be repeated. Generally, a warning should suffice. If the behaviour provably recurs, the co-worker should usually be terminated and an investigation is seldom necessary. The underlying facts are usually not difficult to ascertain.

2. Complaints must be in writing with details of the alleged misconduct (parties, date, time, place, alleged misconduct and law or policy violated). Without such a detailed written complaint, an investigation should seldom be commenced.

3. Employees should never be told that their identity will be kept confidential. That is misleading. If there is litigation, the identity of the complainant(s) and all witnesses interviewed legally must be disclosed and a complainant might even be examined under oath by the dismissed employee's lawyer. This should also discourage frivolous complaints.

4. Most important, employees must be told that a demonstrably false allegation found to be made in bad faith for personal reasons will be cause for immediate discipline. This will have the impact of discouraging meritless (and possibly vindictive) complaints.

If an employee is suspended pending an investigation that employee should immediately seek legal advice and make the following inquiries:

1. Is the employer following its complaints policy, if it has one? If not, what is the plan for the investigation? Who is being interviewed?
2. Is there a written complaint and can they obtain that or, at least, a summary of the details?
3. If there is an outside investigator, is that person independent and has not been retained by the employer previously? What is their record of finding employees guilty?
4. What is the mandate of the investigator? Is it to investigate facts? Or make findings of credibility and legal conclusions – in which case only a retired judge has the required competency? No HR consultant has the qualifications or experience to do either. Even lawyers lack training or experience in assessing credibility. In the unusual event that you need to hire an outside investigator rather than someone internal, use a retired judge. That will also provide far more credibility to the recommendations.
5. If the employee is dismissed, demand production of the investigator's communications with the employer, notes or transcripts of interviews, drafts of any report and the names of all witnesses.

It is important to note that outside investigators can be sued for conducting a negligent investigation, whereas employers, if they do the investigation internally, cannot be sued for negligence in the conduct of the investigation. But the employer can be still be sued if the employer has wrongfully dismissed the employee, constructively or actually. As well, internal investigators already know the employers policies, practices and the personnel involved. They also will not charge a six-figure amount about an employee who, if fired without cause, might be entitled to less than the cost of the investigator.

Employers should know that the findings of an investigator have no weight in court, both because they are inherently hearsay and because the judge is required do draw their own conclusions from the witnesses who actually testify.

Employers should exercise great restraint before deciding to initiate an

investigation and should follow these prescriptions.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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