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WHAT TO DO WHEN THE WHISTLE BLOWS

A Practical Guide

EMPLOYMENT LAW SEMINAR

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I.

INTRODUCTION

Employers and employees generally want fair and impartial treatment in the employment setting. Human resource professionals and supervisors must constantly deal with complaints about unfair treatment or employees who either “blow the whistle” on another employee or are the subject of such a complaint. Based on the nature and extent of such complaints, employers must decide whether an investigation should be conducted. If an employee complains about another employee’s actions, an investigation may be warranted; some legal considerations may dictate against such “retaliation.” In certain cases, such as sexual harassment, an immediate and thorough investigation is essentially mandatory. In other areas, such as differences over the interpretation of an internal policy, investigations may be unwarranted and unnecessary. Regardless of the circumstances, management should send a message to its employees that it will resolve disputes in a fair manner. The best way to do that is to conduct fair and impartial investigations prior to disciplining employees. This requirement applies to both governmental and non-governmental employment settings.

Properly conducted investigations can minimize or eliminate the possibility of costly litigation. On the other hand, investigations conducted poorly or simply initiated in response to a whistleblower situation can invite litigation and increase liability in a situation where the likelihood of a lawsuit may already exist. This paper is designed to assist attorneys, human resource professionals, and managers in preparing for and conducting internal investigations. The following paper concludes with two important goals of successful investigations: (1) to resolve disputes fairly and impartially, and (2) to minimize potential liability to employers.

II.

TEXAS WHISTLEBLOWER ACT

In Texas, an employee may report a violation of law by another employee without fear of retaliation, under the Texas Whistleblower Act. Tex. Gov’t Code, §§ 554.001-554.010. The Act establishes what a plaintiff must prove in order to recover:

A state or local government entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing government entity or another public employee to an appropriate law enforcement authority.

Tex. Gov’t Code § 554.002. *See also Texas Dep’t of Human Servs. v. Hinds*, 904 S.W.2d 629, 632-33 (Tex. 1995). The Act further provides that the report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity, or of the federal government, that the employee in good faith believes is authorized to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law. Tex. Gov’t Code, § 554.002(b). If successful, the employee who is suspended

or terminated, or is subjected to an adverse employment action, may win injunctive relief, actual damages, court costs, reasonable attorney's fees, reinstatement, lost wages, reinstatement of fringe benefits and seniority rights, and pain and suffering and emotional damages (up to certain limits, depending on the number of employees). Tex. Gov't Code, § 554.003.

Does the governmental entity enjoy sovereign immunity in this situation? No, sovereign immunity is specifically and expressly waived. Tex. Gov't Code, § 554.0035. The Act does provide for an affirmative defense, however, that is available to governments in response to claims by employees of unlawful retaliation for whistleblowing activities:

It is an affirmative defense to a suit under this chapter that the employing state or local governmental entity would have taken the action against the employee that forms the basis of the suit based solely on information, observation, or evidence that is not related to the fact that the employee made a report protected under this chapter of a violation of law.

Tex. Gov't Code § 554.004(b). *See also La Grange v. Nueces County*, 989 S.W.2d 96, 99 (Tex. App. – Corpus Christi 1999, writ denied). The Texas Supreme Court has held that “if the employer had sufficient legitimate grounds for taking action against the employee, it could not be liable for the action simply because an additional ground was the employee’s report of illegal conduct.” *Hinds*, 904 S.W.2d at 635.

A trial court is required to submit controlling factual issues which are essential to a defense to the jury for determination. *Id.*; *C & C Partners v. Sun Exploration & Prod. Co.*, 783 S.W.2d 707, 715 (Tex. App. – Dallas 1989, writ denied). “A controlling issue is one which requires a factual determination to render judgment in the case.” *Collins v. Beste*, 840 S.W.2d 788, 790 (Tex. App. – Fort Worth 1992, writ denied). Accordingly, this affirmative defense is to be presented to the jury.

An element necessary for a plaintiff to establish a violation under the Act is proof of causation. *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000). The plaintiff has the burden of proof at trial. Tex. Gov't Code, § 554.004. If an independent investigation firm (of experienced former law enforcement officers, for example) is hired to investigate the employee's activities, the break in causation may occur. This is particularly true if the investigations were detailed, lengthy, and thorough. If the results of the investigation forms the basis of the city's decision to terminate the employee, the investigation effectively breaks the chain of causation. *See Tharling v. City of Port Lavaca*, 329 F.3d 422, 430-431 (5th Cir. 2003)(citing *Zimlich*); *Blocker v. Terrell Hills City*, 900 S.W.2d 812, 814 (Tex.App.—San Antonio 1995, writ denied). *See also Long v. Eastfield College*, 88 F. 3d 300, 307 (5th Cir. 1996); *Shager v. Upjohn*, 913 F.2d 398, 405 (7th Cir. 1990)(in Title VII cases, link between retaliation and intent broken by third-party investigation).

The employee must have reported a violation of law *in good faith*. Tex. Gov't. Code § 554.002. The Texas Supreme Court has held that “good faith,” for purposes of the Act, means that (1) the employee believed that the reported conduct was a violation of law, and (2) the employee's belief was reasonable *in light of the employee's training and experience*. *Wichita*

County, Texas v. Hart, 917 S.W.2d 779, 784 (Tex. 1996)(emphasis added). See also *Wichita County v. Hart*, 989 S.W.2d 2, 6 (Tex.App. -- Fort Worth 1999, writ denied)(law enforcement officers held to a higher standard in establishing reasonableness of their belief in criminal law violations)(citing *Harris County Precinct Four Constable Dept. v. Grabowski*, 922 S.W.2d 954, 956 (Tex. 1996)).

May the employee sue first without filing a grievance? No, the employee must first file a grievance or pursue whatever appeal procedures exist before filing suit, within ninety (90) days after the alleged violation occurred or was discovered by the employee (using reasonable diligence). Tex. Gov't Code, § 554.006. The employee then has ninety (90) days to file suit if the appeal is not successful. Tex. Gov't Code, § 554.005. Generally speaking, suit must be brought either in the district court of the county in which the cause of action arises, or in Travis County district court. Tex. Gov't Code, § 554.007. At the conclusion of the lawsuit, there may also be imposed a civil penalty against a supervisor found to have violated the Act (Tex. Gov't Code, § 554.008), and an audit conducted by the state of the local government entity. Tex. Gov't Code, § 554.010.

III.

FIRST AMENDMENT RETALIATION

Another issue that may be raised in a whistleblowing context is a claim by the employee that, after his statements were made, he was subjected to unlawful retaliation in violation of his rights under the First Amendment to the United States Constitution. In other words, an employee may have some rights that transcend an employer's desire for a quiet, harmonious work place, particularly when it comes to an employee's speech. There are four elements to an employee's First Amendment retaliation claim against his employer: First, the Plaintiff must suffer an adverse employment decision. See *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997). Second, the Plaintiff's speech must involve a matter of public concern. See *Thompson v. City of Starkville*, 901 F.2d 456, 460 (5th Cir. 1990)(citing *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 ... (1983)). Third, the Plaintiff's interest in commenting on matters of public concern must outweigh the City's interest in promoting efficiency. *Id.*(citing *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 ... (1968)). Fourth, the Plaintiff's speech must have motivated the Defendants' action. *Id.*(citing *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 ... (1977)). *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999).

Building on the seminal employee speech case of *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the *Connick* Court explained that “[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole court record.” *Connick*, 461 U.S. at 147-48, 103 S.Ct. 1684. *Connick* elaborated on its general rule:

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate

forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147, 103 S.Ct. 1684.

Since *Connick* was decided in 1983, the courts have grappled with defining the contours of its test and its holding. See, e.g., *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1269-70 (5th Cir. 1992)(employee's reports of sexual harassment perpetrated against her and others deemed a matter of public concern); *Urofsky v. Gilmore*, 167 F.3d 191, 195-96 (4th Cir. 1999)(law "restricting state employees from accessing sexually explicit material on computers that are owned or leased by the Commonwealth unless given permission to do so ... regulates the speech of individuals speaking in their capacity as Commonwealth employees, not as citizens, and thus ... does not touch upon a matter of public concern"); *Tang v. Rhode Island*, 163 F.3d 7, 10-13 (1st Cir. 1998)(stating that state employee's allegations of workplace harassment did not constitute a matter of public concern); *Gardetto v. Mason*, 100 F.3d 803, 812-14 (10th Cir. 1996)(reasoning that plaintiff's "advocacy to obtain a vote of 'no confidence'" in a "highly visible public official" was a matter of public concern); *Swineford v. Snyder County Pa.*, 15 F.3d 1258, 1270-72 (3^d Cir. 1994)(plaintiff's complaint against county commissioner's office regarding election improprieties deemed a matter of public concern); *Havekost v. United States Dep't of the Navy*, 925 F.2d 316 (9th Cir. 1991)(plaintiff's complaints about Navy commissary supervisor, which led to his discharge, not a matter of public concern). Speech regarding police misconduct constitutes a matter of public concern. See *Forsyth v. City of Dallas*, 91 F.3d 769, 773-74 (5th Cir. 1996); *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988). Speech concerning the conditions of one's employment is a private matter. See *Gillum v. City of Kerrville*, 3 F.3d 117, 120-21 (5th Cir. 1993).

Some speech involves both matters of public concern and of private matters, and are referred to as "mixed speech" situations. In a "mixed speech" situation, the court's inquiry is "to decide whether the speech at issue ... was made *primarily* in the plaintiff's role as citizen or primarily in his role as employee." *Terrell, id.* at 1362 (emphasis added). In *Moore v. City of Kilgore*, 877 F.2d 364 (5th Cir. 1989), the court reiterated that whether speech should be characterized as a matter of public concern depends on its "content, context and form." *Moore*, 844 F.2d at 369-70. These factors "must be considered as a whole package, and [their] significance ... will differ depending on the circumstances of the particular situation." *Id.* at 370. Thus, *Terrell* established, and *Moore* squarely applied, a balancing test approach to the treatment of mixed speech cases in this circuit. In cases involving mixed speech, courts are bound to consider the *Connick* factors of content, context, and form, and determine whether the speech is public or private based on these factors. See, e.g., *Thompson v. City of Starkville*, 901 F.2d 456, 463-65 (5th Cir. 1990)(applying three-factor balancing test).

The three-factor test has been summarized, at times, as a test to determine whether one is speaking as a citizen or as an employee. See, e.g., *Dodds v. Childers*, 933 F.2d 271, 273 (5th Cir. 1991)(stating that "issues rise to the level of public concern if an individual speaks primarily as a citizen rather than as an employee"); *Ayoub v. Texas A&M Univ.*, 927 F.2d 834, 837 (5th Cir. 1991)(holding that plaintiff's pay discrimination complaint did not constitute a matter of public concern, because he "consistently spoke not as a citizen ... but rather as an employee"). "Our

task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee." *Terrell*, 792 F.2d at 1363. The utility of this shorthand approach is limited somewhat by the fact that it may be inappropriate in particular factual situations—such as when the employee in question is a public ombudsman. *Cf. Warnock v. Pecos County*, 116 F.3d 776, 780 (5th Cir. 1997). Nevertheless, more often than not, the "citizen versus employee" test will point us in the right direction, and so courts consider it, in conjunction with the more lengthy three-factor balancing test described. *Gillum v. City of Kerrville*, 3 F.3d 117, 121 (5th Cir. 1993).

IV.

TITLE VII RETALIATION

In the context of a discrimination claim under 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), there is sometimes available to an employee a retaliation claim if an employee is punished for exercising his Title VII rights. Title VII prohibits retaliation against employees who have participated in or exercised their Title VII rights. The purpose of the anti-retaliation provision is to protect employees who assert Title VII violations and to encourage employees to report Title VII violations. The provision prevents employers from retaliating against employees who have opposed unlawful employer conduct under Title VII. The section also prevents employers from retaliating against employees who have made a charge of discrimination, testified, or assisted in an investigation, proceeding or hearing concerning a Title VII violation. Care should therefore be taken to avoid taking any adverse employment action against an employee who has filed a discrimination claim under Title VII.

V.

PRACTICAL QUESTIONS

The foregoing cases bring to the forefront a series of considerations that must be dealt with when an employee is complaining about another employee or supervisor:

1. What is the speech?
2. What is the form of the speech?
3. What is the context of the speech?
4. Is the speech concerning a violation of law? A public matter? A private employee grievance against a supervisor?
5. What action is contemplated against the employee?
6. Based on the answers to the foregoing questions, is an investigation warranted?

VI.

NEGLIGENT INVESTIGATION CLAIMS IN TEXAS

Why be concerned about the quality of internal investigations? While this paper will not provide an exhaustive review of the law, the recent case of *Texas Farm Bureau Mutual Insurance Cos. v. Sears*, 84 S.W.3d 604 (Tex. 2002), is instructive. As a matter of first impression, the Texas Supreme Court refused to recognize a cause of action against employers for negligent investigation of their at-will employees' alleged misconduct. As for other potential causes of action, such as whether a cause of action would be available for intentional infliction of emotional distress or defamation, the Texas Supreme Court continued to recognize the high factual threshold that must be met before such cause of action can be proved. For governmental entities in Texas, of course, sovereign immunity bars intentional tort claims. See Tex.Civ.Prac. & Rem.Code, § 101.057.

The facts of the *Sears* case are fairly straightforward. Gene Sears worked as an adjuster at Texas Farm Bureau Insurance Co. According to an anonymous letter to the company, he was involved with other employees in a kickback scheme. Supposedly, a local contractor would inflate bids on repairs for the company's adjusters. An investigation was conducted, and Sears and other insurance agents were terminated. Two of them, although not Sears, were indicted for mail fraud, with one going to the prison. Several years earlier, ironically, Sears had reported to his superiors that he believed a kickback scheme was going on in the office, but no investigation was conducted.

On those facts, Sears came up with a clever argument to get around the Texas at-will employment doctrine. He maintained that the company investigation was negligently conducted. He argued that if it had been done properly, he would have kept his job. The jury agreed and awarded Sears \$2.1 million. The Waco Court of Appeals set aside the jury verdict, however, on the basis of insufficient evidence. The Court of Appeals nonetheless left open the door for future "negligent investigation" claims:

Given that so much was easily within its control, the company cannot complain that it would be unreasonable to place a duty of reasonable care on the company regarding the investigation.

Texas Farm Bureau Ins. Cos. v. Sears., 54 S.W.3d 361, 369 (Tex. App. – Waco 2001). The Texas Supreme Court has now shut that door.

To reiterate, the issue was whether a duty to conduct non-negligent investigations would be imposed upon the at-will employment doctrine. Of course, the Texas Supreme Court recognized that an employer has no duty to investigate at all before terminating an at-will employee, because either party may end the relationship at any time without reason or justification. See *Garcia v. Allen*, 28 S.W.3d 587, 591 (Tex. App. – Corpus Christi 2000, pet. denied). The issue the Court had to decide was whether there was a duty of ordinary care once the employer has decided to investigate the employee's alleged misconduct. Recognizing that at-will employment is an important and long-standing doctrine in Texas (*Fed. Express Corp. v.*

Dutschmann, 846 S.W.2d 282, 283 (Tex. 1993)(per curiam)(citing *East Line & R.R.R. v. Scott*, 72 Tex. 70, 10 S.W. 99, 102 (Tex. 1888)), the Court has historically been reluctant to impose new common law duties that would alter or conflict with the at-will relationship. See *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000). Here, the Court rejected the invitation to impose such a duty upon the employment at-will doctrine, because it would significantly damage the at-will relationship.

The Court reasoned:

By definition, the employment-at-will doctrine does not require an employer to be reasonable, or even careful, in making its termination decisions. If the at-will doctrine allows an employer to discharge an employee for bad reasons without liability, surely an employer should not incur liability when its reasons for discharge are carelessly formed. Engrafting a negligence exception on our at-will employment jurisprudence would inevitably swallow the rule.

Sears, 84 S.W.3d at 609. From a practical standpoint, the Court determined that imposing such a duty conflicted with important public policy considerations:

Nearly every investigation that an employer conducts requires it to resolve factual disputes and make reasonable credibility determinations. Certainly it is hoped that employers will exercise due care in making the potentially devastating decision to terminate an employee for misconduct. But second-guessing an employer's judgment in such a situation provides a strong disincentive for companies to investigate allegations of employee misconduct in the first instance. It is simply not in the public's interest to dissuade employers from conducting internal investigations when employee-wrongdoing is suspected. Nor is it in employees' best interest to recognize a duty that would encourage employers to discharge employees suspected of wrongdoing without first attempting to discover the truth.

Id. As a result, there is no legal impediment to conducting an investigation into alleged employee misconduct.

While public employers generally are not liable for negligent investigations, based upon sovereign immunity and the limited waivers of sovereign immunity in the Texas Tort Claims Act, Tex.Civ.Prac. & Rem.Code §§ 101.001 *et seq.*, the case nevertheless emphasizes the need for employers to pay attention to how they conduct employee investigations. That need is particularly important in other areas that touch upon internal investigations, such as claims under the Texas Whistleblower Act, Tex. Gov't Code, §§ 554.001 *et seq.*, or First Amendment free speech, rights of association or retaliation claims brought under 42 U.S.C. § 1983, or conducting sensitive investigations into sexual harassment claims in the context of a discrimination claim under 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). To reiterate, the scope of this paper is not to provide a review of the law applicable to such claims, but is provided instead to offer practical advice to be able to better defend against such claims, if necessary.

VII.

SUCCESSFUL INVESTIGATIONS OUTLINED

A. Initial Meeting With The Complainant

1. Initial Neutrality. Your initial reaction when receiving an employee complaint may set the stage for the employee's perception of the entire investigatory process. You should not give the impression of forming a quick opinion or being judgmental. For example, you should not say, "Well that sure does not sound like Chuck!" Your demeanor, therefore, is critical. You must convey a sense of empathy to the employee's problem, yet reserve judgment until the investigation is complete. You may need to calm the employee down before you can begin to ask questions. Once the employee is calm, gather all the material facts that you can without rushing. Ask pointed questions. Separate the "I feels" and the "I believes" from what really happened. If all you have is "I feel" answers, try to find out upon what facts they are based.

2. Ask the Right Questions. To gather the relevant facts, in addition to asking "who, what, where, when, why and how," additional questions to ask are:

- **Who are the witnesses?**
- **Was this an isolated incident or an event that occurs frequently?**
- **Was the employee's work affected? If so, how?**
- **Are there any written records to support the complaint?**
- **Does the employee have any other information that would be helpful to the investigation?**
- **What, in the opinion of the employee, was the motivation for the negative action taken by the accused?**
- **How does the employee think the accused will see the matter and why?**
- **Does the employee feel that he was in any way responsible for the incident?**

B. Closing The Initial Meeting

1. Thank the Complainant. Start by thanking the complaining employee for bringing the matter to your attention. You should also convey to the employee that the city or company prohibits retaliation. If you feel an investigation is warranted, then you should inform the employee that it will occur. Assure the employee that in the event of a

full investigation, the matter will be handled as confidentially as possible and will involve as few people as possible. Instruct the employee that it would be best if the employee kept the matter confidential, as well.

2. Questioning of the Accused. Explain to the employee that a necessary part of the investigation will be to question the accused, which may entail revealing who has lodged the complaint and what the accusations are. This can be a delicate moment in the initial interview because many complainants do not want the accused to know that they were the one lodging the complaint. You will need to explain to him, in order to give the accused a fair opportunity to respond to the complaint, that it will be necessary to tell him *who accused him and what he is accused of*. In the public sector, this is a matter of due process. Explaining this may prompt you to again assure the employee of protection from retaliation as a matter of management policy.

3. How to Resolve the Issue? You may want to ask the employee how he feels the dispute or issue should be resolved. Let him know that the city or company will make a decision in a timely manner and that the person making the investigation will get back with the employee to tell him of the results and the action to be taken, if any.

4. Written Response. At this point it would be a good idea to encourage the employee to write down his side of the story and turn it in to you promptly to help you conduct the investigation and to make sure you have the facts correct. Encourage him to list as many facts as possible, including names, dates, times, who said what to whom and when, etc. This will protect management from incorrectly investigating the wrong issues and/or the wrong people. If the employee resists giving you a written account of the facts, then you will have to rely solely on your notes (in addition to considering whether such refusal amounts to insubordination). Restrict your note taking to the facts presented to you by the complainant. Do not put into your notes your *impressions, interpretations, or any preconceived ideas* you may have with respect to the case. Stick with the facts! Whether or not the employee gives you a statement, you will want to issue a letter or memorandum to the employee confirming the facts as you believe they related them to you. This letter/memorandum should include:

- **The issue as it was described to you**
- **The facts as presented to you**
- **Emphasize that the investigation will be done in an impartial manner**
- **Identify the city's or company's expectations of the complainant**
- **Describe how the investigation will be conducted**
- **Give assurances of non-retaliation**

C. Documentation

1. Identify and Obtain Documentation. All documents relevant to an investigation should be identified and obtained quickly (*i.e.*, attendance records, past performance appraisals, time cards, disciplinary notices, written statements, etc.). It is important that throughout all of your interviews you seek out any written documentation that may be available to help resolve the dispute. Identify and note how the documentation came into your possession. Show documents only to those with a legitimate business need to know.

2. Document the interviews. Document the investigation in the same manner as the initial interview with the complainant. Notes should be taken throughout the process. Tape record witness interviews if the witness is informed and agrees in advance. Again, take only factual notes. Notes should be made on separate pieces of paper. Avoid bound notebooks or other formats that might contain information outside of the particular investigation. In the event that your notes are produced in litigation, your entire notebook might be shared publicly, including notes irrelevant to the case.

3. Respect Privacy. Employees have a right to privacy. Employers, however, have an obligation to investigate and resolve certain types of claims. These competing interests must be weighed to determine what and how much may be revealed to whom and when. Employers must consider whether that employee had a “reasonable expectation of privacy” in a given situation. Employers should not give employees an unconditional guarantee of confidentiality, but rather assure the employee that confidentiality will be maintained on a business need-to-know basis.

D. Informal Resolution or Full-Scale Investigation?

Not all issues require a full-scale investigation. Problems can often be resolved quickly to the satisfaction of all parties. To do this, investigators need to be able to discern problems that can be resolved informally from those that merit a full internal investigation. Common examples of issues that lend themselves to informal resolution include: (1) misunderstandings about city or company policies; and/or (2) incorrect information received by an employee.

If it is possible to resolve an issue with an employee at the initial meeting or with very little subsequent effort, a full-scale investigation is usually not warranted. If you need additional information from other sources, a formal investigation may be necessary. You may, however, be able to solve a problem with a small number of employees through the use of dispute resolution procedures or mediation.

E. Preparing For the Investigation

1. The Nature of the Complaint. The issues raised by the complainant dictate the type of investigation you will need to conduct. It is very important that you fully understand the issues and any special legal obligations that the city or company may have in investigating and acting (*i.e.*, sexual harassment, disability discrimination,

discriminatory application of city or company policy, race discrimination, etc.). If any of the issues raised concern such special legal obligations, you should consult with an attorney to discuss the strategy that you will use and any possible legal hurdles. Only after you fully understand the issues and their potential ramifications, are you ready to conduct the internal investigation. An example of these concerns is a sexual harassment claim. The city or company has a legal responsibility, once it *knows or should have known* of the existence of sexual harassment, to investigate, and if the claim is found to have merit, put a stop to the conduct. Investigators should understand this prior to considering an investigation. Be aware that a whistleblower statute may also protect the complainant, in many of the types of complaints made by employees. In these and other similar situations, early legal advice can help to avoid potential liability.

2. Miscellaneous Considerations. Before beginning an investigation, consider what city or company policies or practices apply to the situation. Consider and determine the relevant documents you need to obtain. You also need to consider, in view of the nature of the complaint, who is the right person to conduct the investigation. This is of particular importance when the investigation concerns matters within police, public safety, or other paramilitary organizations, or involves matters of a sensitive nature, such as sexual harassment. The investigator must be someone who will be viewed by the employees involved as impartial or its credibility will be suspect before you get started. You also must consider whom you will interview and take statements from and what order you will interview witnesses.

F. Interim Action

After your initial interview with the complainant, you will need to decide if any immediate action is necessary. For example, consider if this is an issue involving the safety and welfare of other employees, or whether city or company property or employees need to be protected. Is there an illegal act being alleged that includes fraud or misuse of city or company funds or property? If so, consider taking measures immediately to safeguard the property. In view of the increasing incidents of violence in the workplace, you should consult a professional immediately or at a minimum separate (transfer) the affected parties, as needed. The following are additional examples of issues that may trigger an immediate duty to act pending an internal investigation:

- **Allegations of dangerous conditions or safety violations**
- **Allegations of violence**
- **Allegations of sexual harassment involving physical touching**
- **Whistleblower claims**
- **Other serious incidents involving city or company property**

Often the most prudent action to take in a serious situation is a suspension or administrative leave of the accused. You do, however, need to consider whether a suspension will make things better or worse; whether suspension is appropriate before or after discussing the matter with the accused; how will you explain the suspension to the accused; should you consult with your attorneys for help and guidance; what will you say to co-workers about the accused's absence; the terms of the suspension (are there any past practice problems with the accused?); and whether a risk assessment is needed by a professional (police psychologist?). With respect to the public sector, you will need to consider the type of due process necessary, if any, before the accused can be suspended or placed upon administrative leave. You will also need to consider whether the suspension or leave will be paid or unpaid (generally with pay is appropriate unless there are mitigating circumstances or the fault of the employee is clear).

G. The Investigation Process

1. Fact Gathering. The key to a successful investigation is the ability to continue to gather facts. Your success may be dependent on the ability to identify and separate facts from opinions. Pay attention to the facts you gather and separate out non-relevant facts early in the investigation.

2. Interview Preparation. Prepare for your interviews. Create an outline of questions to ask to ensure that you completely cover all your anticipated areas of inquiry. Try to anticipate questions that the witness may ask of you. You need to show the interviewees during questioning that you are sensitive to the issue and their positions. At the end of each interview, you should tell the interviewee that no conclusions will be reached until the investigation is complete. You should also tell the interviewees that they should not fear risk of retaliation for the statements they gave, reminding them again that all information will be kept confidential to the greatest extent possible.

3. Make the Interviewee Comfortable. One of the important objectives to gathering relevant facts and information is making the interviewee comfortable prior to questioning. Investigators will have the bigger picture, but interviewees may not even know why they are being questioned. Toward achieving the desired level of comfort, consider sharing the following with them in broad terms:

- **Why the interviewee is being questioned**
- **What you are investigating**
- **What the interviewee's role is in the matter**
- **How the information from the interviewee will be used**
- **Prospects of discipline as a result of the information given by the interviewee**

- **Explain the need for confidentiality**

4. Interviewee's Perspective. Try to realistically figure out where the interviewee is coming from. Is he sympathetic to the complainant? Is he a friend? Does he have an ax to grind with anybody? Some interviews will elicit more information than you may want or need. The trick is to stick to the *facts* and the interviewee's *first-hand knowledge*. Other interviewees do not want to get involved and may be reluctant to give you information. To get through to these types you must work harder to assure them that any information gathered will be used to reach a fair and just resolution of the problem, and that without their help the problem may not be resolved. You should consider issuing a "gag" order to all witnesses in a written form for signature at the conclusion of the interview. Share the broader parameters of the investigation, but do not share any details with individual interviewees.

5. Evaluate Credibility. The value of an individual's witness statement depends on his credibility. Credibility is a judgment call that rests with the interviewer's impressions. Consider these and other factors when evaluating credibility:

- **What is the witness's reputation in the workplace?**
- **How did he come across in the interview?**
- **How much did his account of the story vary from others?**
- **Did his version conflict with any written statements?**
- **Did the witness make any specific denials or admissions?**

Often it is beneficial to have witnesses answer some preliminary questions in written form before the interview. This may actually help the investigator organize a question outline for the individual witness beforehand.

6. Assure Quality of the Investigation. Relay to the witness toward the conclusion of the interview that the city or company desires fairness and justice as the outcome. Stress the importance of truthfulness of the interviewee's answers. Again, stress confidentiality and the importance of the interviewee to not discuss the matter with anyone else.

H. Confronting the Accused

1. Explain Issues/Charges in Detail. The accused cannot effectively respond to extremely generalized allegations of wrongdoing. It is in the best interests of the city or company to attempt to explain, in as much detail as possible, the allegations. Tell the accused that you are interested in hearing his side of the story and that your objective is

to get to the *facts* in order to solve the problem. If the investigation involves a subject matter where the employer has a legal obligation to investigate, *i.e.*, sexual harassment, so advise the accused.

2. Interview in Chronological Order of Events. One way to effectively organize your interview is to ask questions by order of chronological events. This helps structure what is sometimes a tough interview, and provides for effective post-interview evaluation.

3. Accused Representation. The accused employee may ask for his attorney or other representative to be present during this interview. I would advise against the presence of legal counsel unless criminal charges may result from the investigation. Investigators may want to give a *Garrity* warning, so that the accused cannot refuse to answer questions based upon Fifth Amendment protections.

4. Accused Reactions. The accused may react with shock, denial, extreme anger, or at best, provide a confirmation of the facts as offered by the complainant. You will have to ask questions of the accused without offending or sounding judgmental. Be conscious of the tone of your voice and any body language you may inadvertently communicate. Effective questioning of the accused begins with good preparation. Relate questions in a business-like manner as they pertain to specific policies, guidelines, past practices or governing laws. Try to understand in advance which facts are necessary for you to reach a conclusion and what facts may be relevant down the road. Also, be prepared to ask questions about any documents or other evidence that you reviewed prior to the interview. Lastly, save tough questions to the end of the interview. If you start with these, it will hinder your ability to obtain more facts, and hard questions may draw an emotional response from the accused that hinders the remainder of the interview. It is best to start with broad questions and narrow your focus based on the accused's responses. When you do finally reach the tough questions, you must forge ahead to get the facts despite the accused's discomfort. While you may be tempted to back off when encountering tears or extreme anger, you may be just short of the key facts that will solve the case. Some suggested questions for the accused:

- **Ask who, what, why, where, when, how**
- **Ask open-ended questions**
- **Avoid compound questions (requiring two answers)**
- **Do not form conclusions or give the impression of being judgmental**
- **Make sure you get all the information you came for and allow he accused to add anything else he feels is relevant**

- **Summarize and review your understanding of the information received at the end of the interview**

5. Accused Denial of All Allegations. If the accused denies all wrongdoing and accuses the complainant of lying, ask him why the complainant would lie. Frequently, accused employees will file a corresponding claim against the complainant employee and the employer. Investigators should keep in mind that the accused of today may be the plaintiff of tomorrow. Ask the accused if there are any reasons that the complainant would file a false claim. Sometimes a complainant will file a claim against a supervisor in retaliation for a poor performance appraisal or a reassignment of duties, for example. You must keep in mind throughout the interview of the accused credibility issues.

6. Wrapping Up. Before concluding, encourage the accused to return to see you if he thinks of anything else that bears on the situation. Also, try to give him a time frame if possible in which you hope to achieve resolution of the problem. Assure him again that no conclusions have been reached and that all the evidence will be considered. Remind the accused, particularly if the accused is the supervisor of the complainant, that retaliation will not be tolerated. Remind the accused that one outcome of an investigation might be that the complaint has no basis.

7. Polygraph Examinations. Can an employee of a municipality be required to take a polygraph test? Generally the answer is no, as far as it being a condition of employment, but a widely acknowledged exception to that rule is that a police officer may be required to take a polygraph test if certain factors are met. *See* Tex. Gov't Code, § 614.063. Those factors include investigating activities related to employment, extraordinary circumstances, and internal operations of the organization. *Id.* *See also Firemen's and Policemen's Civil Service Comm'n, City of Austin v. Burnham*, 715 S.W.2d 809, 811 (Tex. App. – Austin 1986, pet. denied). In fact, Texas courts have demonstrated deference to the important interests served by public agencies that directly involve the compelling state goal of protecting the safety of the general public. *See Richardson v. City of Pasadena*, 500 S.W.2d 175, 177 (Tex.Civ.App. – Houston [14th Dist.] 1973), *rev'd on other grounds*, 513 S.W.2d 592 (Tex. 1974). Thus, there are unique circumstances inherent with police personnel that may justify requiring a polygraph examination in the appropriate situation. *See Texas State Employees Union v. Texas Dep't of Mental Health and Mental Retardation*, 746 S.W.2d 203, 206 (Tex.1988).

Absent the law enforcement circumstance, a polygraph examination may only be ordered in limited circumstances that include employment related subjects. Examples of such instances are using drugs during work hours or theft. *See Talent v. City of Abilene*, 508 S.W.2d 592, 596 (Tex. 1974); *Farrington v. Sysco Food Services, Inc.*, 865 S.W.2d 247, 253 (Tex. App. – Houston [1st Dist.] 1993); *Bailey v. City of Baytown*, 781 F.Supp. 1210, 1214 (S.D. Tex. 1991); and *Calbillo v. Cavender Oldsmobile, Inc.*, 288 F.3d 721 (5th Cir. 2002). These cases discuss that the right of privacy is implicated by polygraph examinations, and that generally that right is a safeguard against unreasonable intrusions. Such protection should yield when the government demonstrates that the intrusion will achieve a compelling governmental purpose which cannot be attained with any less

intrusive means. The cases state that one must consider whether the intentional intrusion upon the seclusion, solitude, or private affairs of another is one which a reasonable person would find offensive. Generally, the employer must be able to demonstrate unique circumstances that are adequately compelling to warrant a polygraph testing procedure. This is particularly important in the government's compelling interest in public safety issues.

I. Resolution After Investigation

1. Analyze the Facts. The first order of business will be to analyze the facts you have gathered. Here are some suggested criteria for consideration in the summation of facts:

- **Why would the complainant lie?**
- **What history is there between the complainant and the accused, if any?**
- **Does the complainant have a history of making unfounded complaints?**
- **Does the accused have a history of negative conduct? Is it of the type complained about here?**
- **Were the issues of complaint raised in a timely fashion?**
- **Why would the accused deny the accusations? What would motivate the accused to do the offensive conduct?**
- **Why would the accused lie?**
- **Did the investigation reveal facts that tend to discredit the stories of the accused or complainant?**
- **What in total do the facts reveal?**
- **Reconcile any conflicts in statements**

J. Recommendations

After analyzing all of the facts and weighing the credibility of all of the participants, you should be prepared to make a recommendation to management. Suggested factors for consideration of the outcome and any disciplinary actions:

- **What has been the employer's past practices with regard to similar violations?**

- **Was there a specific ordinance, policy or guideline that was violated?**
- **How serious was the violation?**
- **How long has the accused employee been employed?**
- **Has the accused ever violated other policies? How many times?**
- **What is the performance record of the employee?**
- **Are there any mitigating circumstances?**
- **What was the response of the employee during the investigation? Did he lie? Was he sorry the incident occurred?**
- **What is appropriate to discourage the reoccurrence of similar incidents?**

Employers should keep in mind that the purpose of discipline is generally to modify behavior. Most of the time your goal will be to salvage an employee who may have excellent skills but has violated a particular rule. If a verbal warning will accomplish that end, then it may be the appropriate action. If the violation is severe or pervasive, however, then the best course of action may be harsher discipline, up to and including termination. Employers must be cautious not to use the opportunity of a complaint being lodged against an unproductive employee to terminate that employee for any behavior outside of that which was contained in the complaint.

K. Summary of the Investigation

Complete your investigation with a brief written summary from start to finish. The summary should have all of the names of the participants, dates of meetings and interviews, and summary of statements taken as they related to the facts obtained. Key facts that led you to the decisions made should be highlighted. The summary should also include documentation of the specific practice or policy violated and the ultimate method of resolving the dispute. Keep in the back of your mind that everything you write may in the end be used against you at the courthouse! Keep the summary businesslike and factual. Remember that for public agencies, the Open Records Act will likely permit access to the results at conclusion.

VIII.

CONCLUSION

The purpose of this paper is to provide you with some practical recommendations related to responding to employee complaints of possible whistleblower accusations, including performing internal investigations when appropriate. The circumstances surrounding complaints will dictate the methods you ultimately use in successfully performing and completing investigations. Remember that your objectives in resolving disputes through investigations should provide for: (1) the fair handling of issues that provides minimal impact on employee productivity, and (2) a reduction in the potential for employer liability. Poorly handled investigations often drive parties to the courthouse for resolution. That event should be avoided to the extent possible.