



Workplace Investigations

A Practical Guide for City Attorneys

Presented to: League of California Cities

Date: July 29, 2015

By: Daphne M. Anneet

Burke, Williams & Sorensen, LLP

www.bwslaw.com

danneet@bwslaw.com

Presentation Overview

- **Why Investigate?**
- **City Attorney's Role**
 - **Responding to Complaint**
 - **Defining Investigation**
 - **Overseeing Investigation**
 - **Concluding Investigation**



Presentation Overview-Key Issues

- **Whether an investigation is necessary**
- **Immediate interim measures**
- **Privileges and waiver**
- **Safeguarding employee rights**
- **Disclosure of results**





**WHY CONDUCT WORKPLACE
INVESTIGATIONS?**

Legal Duty to Investigate



- **FEHA**
 - “Take all reasonable steps to prevent discrimination and harassment from occurring.”
 - Gov. Code § 12940(k)

Legal Duty to Investigate



- **Title VII**
 - **“Take all steps necessary to prevent harassment from occurring.”**
 - **29 C.F.R. Section 1604.11(f).**
 - **EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999).**

Investigations Reduce Liability

- **California**
 - **May reduce liability for harassment claims**
 - Limit damages to date employee made complaint
 - *McGinnis*
 - **Good faith basis for adverse employment action**
 - *Cotran and Silva*



Investigations Reduce Liability

- **Federal**
 - **No liability for harassment claims**
 - No tangible action
 - Employer took action to prevent and correct harassment
 - Employee failed to avail itself of preventive corrective measures
 - *Ellerth and Faragher*



Consequences of Failure to Investigate

- **Violation of City policy and state and federal law**
- **Policies perceived as ineffective and meaningless**
- **Discourages complaints**
- **Undermine City's defense**
 - **Bolster weak claims**
 - **Evidence of pretext/retaliation**
 - **Reversal of discipline**
 - **Undermine summary judgment**
 - **Significant liability exposure**





RESPONDING TO THE COMPLAINT

When to Investigate

Alleged conduct, if true, could lead to discipline

- **Harassment, discrimination, retaliation**
- **Alcohol or drug use**
- **Violence or threats of violence**
- **Dishonesty**
- **Attendance**
- **Insubordination**
- **Falsification of records**
- **Criminal conduct**



Interim Actions



- **Assess safety issues**
- **Take immediate action to stop ongoing harassment or harm**
- **Anti-retaliation steps**
- **Preserve evidence**
- **Establish notification protocol**

Interim Measures – Administrative Leave

**Should Respondent
Be Placed On Paid
Administrative Leave?**

- **Civil service employees: due process rights**
 - **Unpaid leave**
 - **Involuntary retirement**
 - **Paid involuntary leave**
- **At-Will employees: liberty interest**



Interim Measures – Administrative Leave

**Can Complainant
be Moved?**

- **No involuntary transfer = retaliation**
- **What is Complainant's preference?**



Interim Actions – High Ranking



- Respondent a direct report to City Manager
- Respondent an elected official
 - Confidentiality key
 - Who is final decision-maker?
 - Who will hear disciplinary appeal?



DEFINING THE INVESTIGATION

Who Should Investigate?



- **Qualities of Investigator:**
 - **Impartial**
 - **Professional**
 - **Experienced**
 - **Available**
 - **Knowledgeable of relevant laws, policies**
 - **Excellent writing skills**
 - **Strong witness**

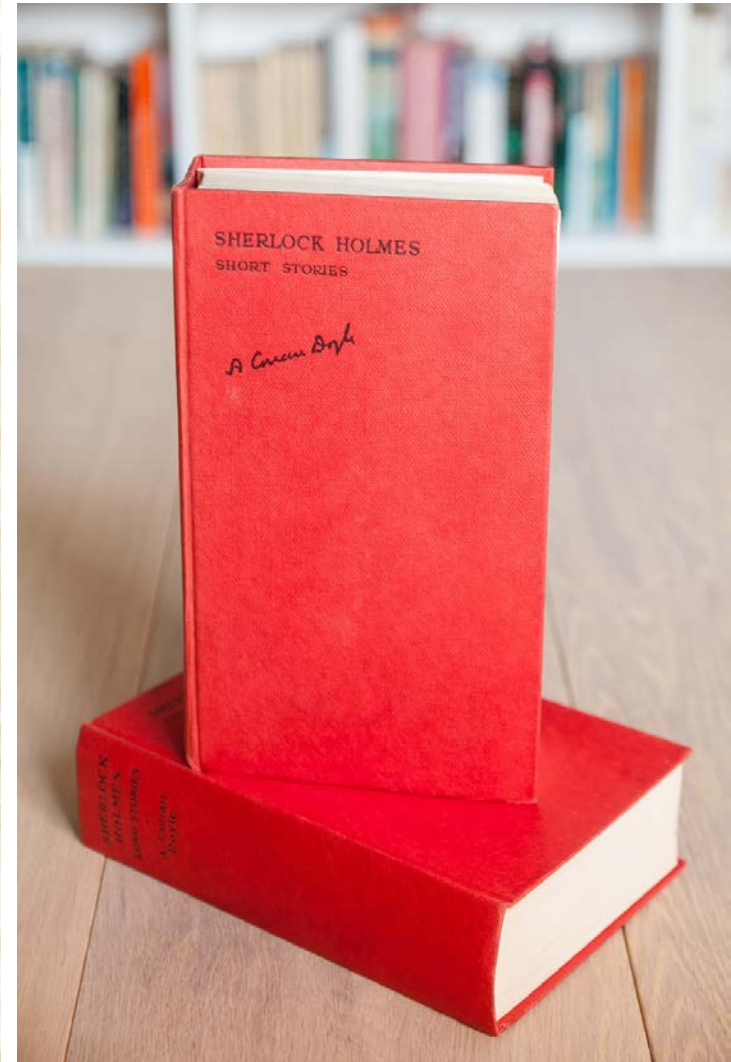
Who Should Investigate?

- **Internal vs. External**
 - **Internal Investigator**
 - Supervisor
 - In-house HR
 - In-house attorney
 - **External Investigator**
 - Outside Counsel
 - Outside special counsel
 - Outside *qualified* HR professional



Use of External – High Ranking

- **Liability exposure**
- **Remove potential conflicts of interest**
- **No role in future disciplinary action**
- **Potential perceived bias of internal investigator**



Using Outside Investigators



California Private Investigator Act ("CPIA")

- State licensed private investigator, or
- State licensed attorney
- Unlicensed human resources consultants *cannot* legally conduct workplace investigations
 - Cal. Bus. & Prof. Code §§ 7520-7539

Investigations by Attorneys

CPIA -Attorney Exemption



- **Attorney does not have to be a licensed private investigator**
- **Must be acting as an attorney**
- **Fact-finding is a necessary part of rendering legal services under CIPA**
 - **Cal. Bus. & Prof. Code § 7522(e)**

Investigations by Attorneys

Special Considerations



- **Duty to notify City of “reasonably foreseeable legal problems” discovered during investigation**
- **Fiduciary duties**
 - **Competence, loyalty, avoid conflicts of interest, protect confidential information**
- **Ethical duties**
 - **No communication with represented employees**

Investigations by Attorneys

Attorney-Client Privilege

- **Dominant Purpose
Test:**

- Dominant purpose of workplace investigation must be to obtain legal advice or legal services

- *Costco Wholesale Corp.*



Investigations by Attorneys

Anticipate Waiver of Privilege



- Investigation report key evidence to defend employment claims
 - Must waive privilege to rely on investigation in defense
 - *Wellpoint*
- Report as basis for disciplinary action
 - Must produce all documentation relied upon by decision-maker
 - *Skelly*

Investigations by Attorneys

Anticipate Waiver of Privilege



- **Structure investigation to secure protection of legal analysis**
- **Bi-furcation of fact-finding and legal advice to decision-maker**
 - *Kaiser Foundation Hospital*

Retaining The Investigator

- **Define Scope**
 - **Limit to set allegations**
 - **Identify in scope of work**
 - **No work beyond scope without authorization**
 - **Only City Attorney power to expand scope or order a separate investigation**
 - **Communications not privileged**



Retaining The Investigator

- **Investigator's Role**
 - **Factual Findings**
 - Specify that City Attorney will rely on report to render legal advice
 - **Define Findings**
 - Sustained, Not Sustained, Unfounded
 - **Require Credibility Determinations**
 - **Affirm Independence**



Retaining The Investigator

- **Communication Protocol**
 - **Right to Representation**
 - Safety: right to representative of choice
 - Non-safety: right to union representative
 - **Recording of Interview**
 - Safety: right to record
 - Non-safety: no right
 - **Recalcitrant witness**
 - Lybarger warning



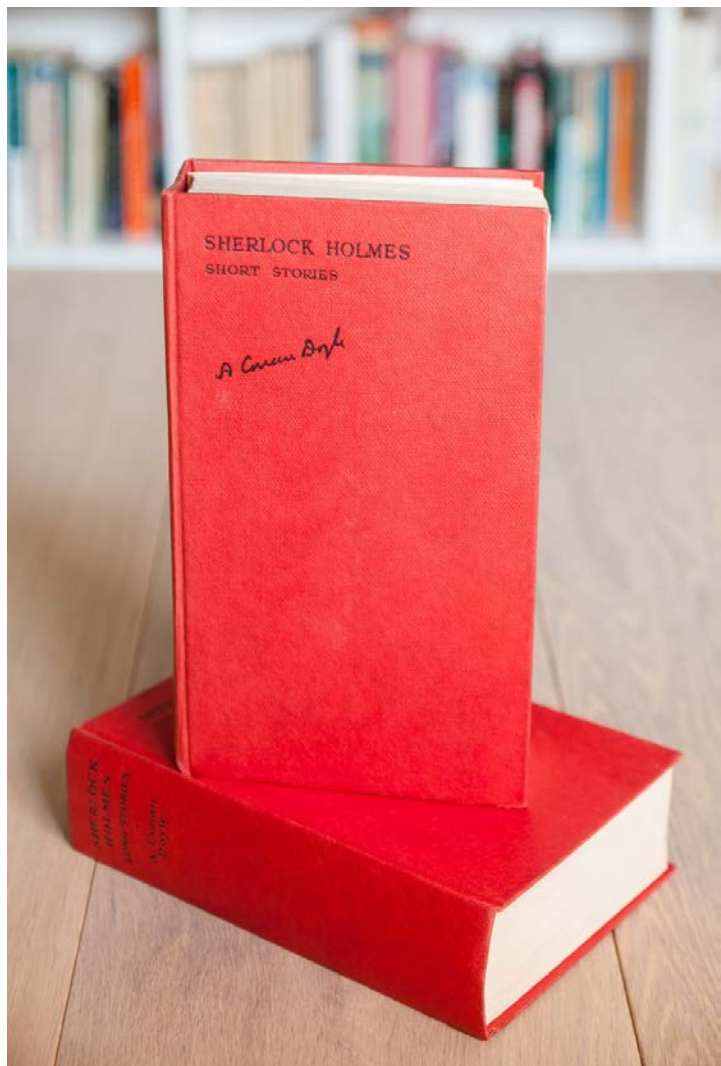
Retaining The Investigator

- **Communication Protocol**
 - Employer representative
 - Limit communications
 - Maintain communications re legal advice separate
 - Proper advisements
 - Safety officers
 - Nature of investigation *before* interview
 - Anti-retaliation policy



Considerations for High Ranking

- **Strong public interest in disclosure of report**
- **Potential for leaks in confidentiality of investigation**
- **Strong investigator to protect integrity of process**





CONFIDENTIALITY AND PRIVACY

City's Interest in Confidentiality

- **Support investigative process**
- **Protect privacy rights of parties and witnesses**
- **Protect parties and witnesses from retaliation**
- **Protect evidence**
- **Preserve privileges**



Employee's Interest –Concerted Activity



- **Meyers-Milias-Brown Act (“MMBA”)**
 - Right to freely participate in activities of employee organizations, including open discussion regarding working conditions

Employee's Interest –Free Speech

- **First Amendment right to speak freely on matters of public concern**



Limitation on Confidentiality

- **Balancing Test: Does City's Legitimate Business Justification Outweigh Associational Rights**
 - Will dissemination of information about investigation/complaint among employees interfere with City's ability to conduct effective investigation?

No Blanket Confidentiality

- **Federal Law: National Labor Relations Board (“NLRB”)**
 - **Blanket policy that prohibits employees from discussing complaint under investigation violates employee’s associational rights**
 - **Employee entitled to ask co-workers for help to preserve evidence for a harassment claim**
 - *Banner Health*



No Blanket Confidentiality

- **California Law: Public Employment Relations Board (“PERB”)**
 - No-contact instruction issued pursuant to standard policy interfered with employee’s associational rights
 - No specific showing of risk that employee would taint evidence
 - *Perez v. LACC*



Limitation on Confidentiality

- **Blanket confidentiality instruction does not justify restrictions on employees' associational rights**
 - **City must make specific showing of need to justify issuance of confidentiality instruction while investigation is pending**

Protecting Confidentiality



- **Modify any policy that requires blanket confidentiality instruction**
- **Adopt case-by-case approach**
- **Specify investigation under attorney-client privilege**
- **Except union and attorney from any instruction**



OVERSEEING THE INVESTIGATION

Overseeing the Investigation

Limited Role



- **Scope issues**
- **Due process issues**
- **Retaliation issues**
- **Investigation on track?**
✓ Prompt, fair, thorough



CONCLUDING THE INVESTIGATION

Concluding The Investigation

- **Review of Report**
 - **Is investigation properly documented?**
 - **Scope**
 - **Investigation process**
 - **Applicable policies/procedures**
 - **Evidentiary standard**
 - **Identification of evidence**
 - **Summary of evidence**
 - **Evaluation of evidence**
 - **Statement of findings**



Concluding The Investigation

Review of Report



- **Are findings consistent with scope?**
 - Findings of fact
 - Well-reasoned
 - Credibility determination
- **Proper evidentiary standard?**

Concluding The Investigation

Review of Report

- **Handling Deficiencies**
 - Discoverability
 - Draft report
 - Contract management
 - Resolve evidentiary issues
 - Seek clarification



Concluding The Investigation

Considerations

- **Nature of allegations**
- **Respondent's status**
- **Potential conflict**
- **Potential liability**
 - **Enforcement action/civil action/discipline**





PROTECTING REPORT FROM DISCLOSURE

Protecting Report From Disclosure



- **Privileges that may provide protection**
 - **Attorney-Client**
 - **Attorney Work-Product**
 - **Deliberative Process**
 - **Closed Session Reporting**
 - **Employee's Right to Privacy**

Protecting Report From Disclosure

Disclosure to Complainant



- **Do not:**
 - Volunteer disclosure of report
- **Do report:**
 - Outcome
 - Appropriate action being taken
 - Anti-retaliation process
 - Thank employee
- **May have to disclose if subsequent claim**

Protecting Report From Disclosure

Disclosure to Respondent



- **Disciplinary action:**
 - Disclosure required in *Skelly* process
 - What decision-maker relied on
 - Redact to protect privacy rights of third parties
- **No disciplinary action:**
 - No obligation to disclose for non-safety*
 - Report results
 - Anti-retaliation reminder

Disclosure to Public Safety Officers

- **“Adverse Comment” Rule:**
 - Notice and opportunity to respond to “adverse comments” in personnel file
 - Gov. Code §§3305 and 3255
 - Any document that may affect employment
 - No need for direct punitive action
 - Document maintained in *any* file
 - Not necessarily entitled to entire file
 - Applies regardless of outcome of investigation

Protecting Report From Disclosure

Disclosure to Union



- In response to demand for disclosure, City may:
 - Assert objections based on privileges
 - Demand showing that information is necessary and relevant to representation

Disclosure to the Union

- **“Necessary and Relevant” Standard:**
 - Under the MMBA, Union entitled to information that is “necessary and relevant” to representation of members
 - Gov. Code §3505
 - Refusal to provide report or portions of it may constitute an unfair labor practice.

City of Redding

Protecting Report From Disclosure

Disclosure to Union



- **Necessary and Relevant?**
 - ≠ General concern with investigation process or outcome insufficient
 - ≠ Investigation of employee outside bargaining unit insufficient
 - ✓ Concern of potential ongoing harassment and unsafe working conditions of members sufficient

Disclosure to the Public

- **“Substantial Nature” and “Reasonably Well-Founded” Standard:**
- **Under California Public Records Act (“CPRA”), personnel records are generally exempt from disclosure.**
 - Gov. Code §6254(c)
- **Apply balancing test for disclosure of investigation reports that reflect allegations of a “substantial nature” and are “reasonably well-founded.”**

Protecting Report From Disclosure

Disclosure to Public

- Substantial Nature & Well Founded?
- ≠ Unfounded charges against attorney
 - Irreparable harm to reputation



Protecting Report From Disclosure

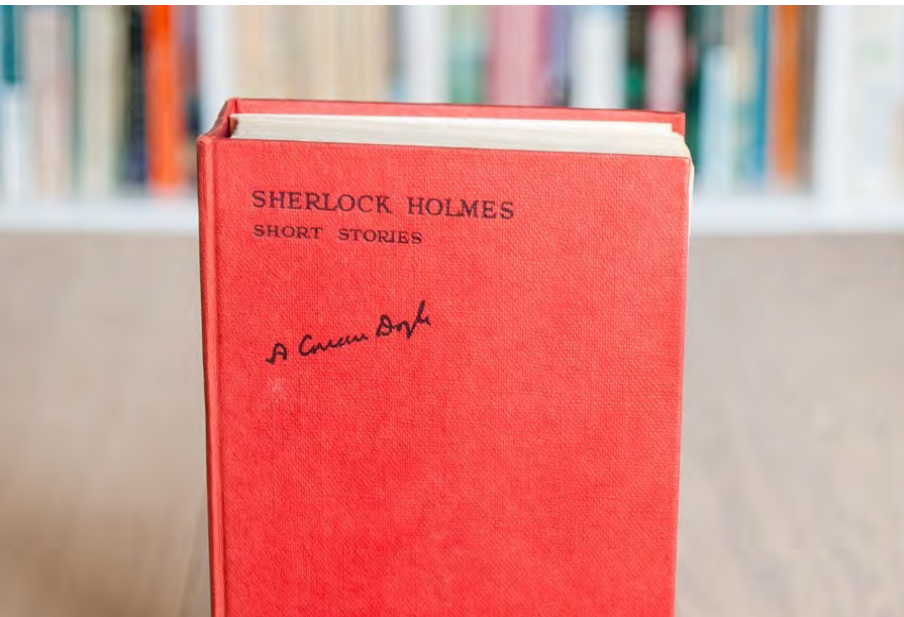
Disclosure to Public



- **Substantial Nature & Well Founded?**
 - ✓ High ranking official: investigation of sexual harassment of pupils by superintendent following voluntary resignation
 - ✓ Position of trust: investigation of alleged sexual harassment of pupils by teacher who received reprimand
 - ✓ Redact to protect privacy

Protecting Report From Disclosure

**High Ranking
Managers and
Officials**



- **Greater likelihood of disclosure**
 - High rank
 - Position of trust
- **Name clearing**
 - Nature of finding
 - Sustained
 - Not sustained
 - Unfounded

Post Investigation Measures



- **Implement remedial measures**
 - Training
 - Create/revise policies and procedures
- **Disciplinary process**
- **Protect against Retaliation**
- **Prepare City's defense**

High Ranking Respondents: Recap



- **City's duty to protect employees extends to conduct of elected officials**
- **Notification Protocol**
 - **Chain of Command**
 - **Need to know**

High Ranking Respondents: Recap



- **Conflicts of Interest**
 - **Final decision-maker**
 - **Who reviews appeal of decision**
- **External investigator**
- **Prepare for disclosure of report/portion thereof**



QUESTIONS?