# *CONDUCTING A LEGAL AND EFFECTIVE WORKPLACE INVESTIGATION*

***by***


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## INVESTIGATING DIGITAL & SOCIAL MEDIA RESOURCES

### I. THE FEDERAL WIRETAP ACT OF 1968: INTERCEPTING OR DISCLOSING EMPLOYEE COMMUNICATIONS (18 U.S.C. § 2510, et seq.)

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, or The Federal Wiretap Act ("FWTA") (18 U.S.C. § 2510 et seq.), as amended by Title I of the Electronic Communications Privacy Act ("ECPA") of 1986 (18 U.S.C. § 2701 et seq.) prohibits any person from:

1. **Intercepting or recording any wire, oral or electronic communications through the use of any electronic, mechanical or other type of device as well as**

2. **Disclosing any information obtained in violation of the FWTA.**

The FWTA does not apply when:

1. The person intercepting the transmission is also a **PARTY** to the communication,

2. When anyone who is a party to the communication has given their **PERMISSION** to have the transmission intercepted or has been **PLACED ON NOTICE** that this interception will take place or

3. The interception was done with a **LEGITIMATE BUSINESS REASON.**

(Employers should also realize that every state also has laws that govern employee privacy rights in some way. Therefore, even if employers are in compliance with the FWTA and the ECPA, they should always check the laws of the state where they do business.)



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## II. TITLE II OF THE EMPLOYEE COMMUNICATIONS PRIVACY ACT: MONITORING STORED COMMUNICATIONS (18 U.S.C. § 2701 et seq.)

Once an electronic communication, such as an e-mail, has been received, it becomes a "stored" communication. As a result, since the FWTA only covers the "interception" and disclosure of intercepted communications, the FWTA does not protect employees' privacy rights regarding their stored e-mail messages. Therefore, if an employer wanted to go into an employee's computer terminal and read the employee's stored e-mails, the FWTA would not protect that employee's privacy rights, even if these e-mail messages were personal and not business-related.

To correct this gap in the law, Congress passed Title II of the Electronic Communications Privacy Act, or the "ECPA" (18 U.S.C. § 2701, et seq.). However, since the ECPA applies to communications that have already been received, the ECPA is also referred to as the "Stored Wire Act."

Therefore, whether monitoring another person's electronic communication falls under the FWTA or Title II of the ECPA depends on whether the message was intercepted "on route," wherein the FWTA would apply. On the other hand, if the message had already been received and was in "storage" when it was monitored, Title II of the ECPA would cover this communication.

Under Title II of the ECPA, even though employers are not permitted to retrieve the stored personal e-mail communications of their employees, the same exceptions that apply to the FWTA also apply to Title II of the ECPA.

## III. EXCEPTIONS TO THE FWTA & THE ECPA

### A. Ordinary Course Of Business or Legitimate Business Reason Exception

The FWTA and the ECPA specifically prohibit **any person** from intercepting another individual's wire, oral or electronic communication through the use of an "electronic, mechanical, or other device." However, the FWTA does permit employers to intercept their employees' communications when such an interception is done in the **ordinary course of the employer's business** by means of equipment supplied to it by a provider of wire or electronic communications that is also used in the ordinary course of the employer's business.

The courts have therefore permitted employers to intercept their employees' communications at work whenever the employer has a "legitimate business interest" in the communication and this interception occurs in the ordinary course of the employer's business under the FWTA.

For instance, in Briggs v. American Air Filter, 630 F.2d 414 (5th Cir. 1980), the manager of American Air Filter's Atlanta office, William McClure, heard that Dan Roby, one of his employees, was supplying Phillip Briggs, one of American Air



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Filter's competitors, with confidential information. McClure then informed Roby that American Air Filter employees were prohibited from disclosing confidential information to its competitors.

Later, as Roby secluded himself in a private office at American Air Filter during working hours, McClure learned from a secretary that Roby may be on the phone supplying Briggs with confidential information. McClure then went to an extension phone and recorded part of Roby and Briggs' conversation. Neither Roby nor Briggs were aware of the fact that McClure was listening in or recording their conversation.

Roby and Briggs contended that McClure, and therefore American Air Filter, violated their rights under the FWTA by intercepting and recording their conversation. However, the Fifth Circuit held that McClure did not violate the FWTA by intercepting and recording Roby and Briggs' telephone conversation. The court reasoned that this conversation between Roby and Briggs was related to American Air Filter's business and was not of a personal nature. This fact was undisputed by either party.

Further, McClure had a very good basis for believing that Roby's conversation was related to American Air Filter's business since McClure knew Roby had been supplying confidential information to a competitor.

The court therefore held that since American Air Filter intercepted and recorded this conversation in the ordinary course of its business and that it had a legitimate business reason for doing so, which was to protect its confidential information from being distributed, it had not violated the FWTA. As a result, even though American Air Filter had not put either Briggs or Roby on notice that their conversation was subject to interception, no violation of the FWTA occurred.

Just as under the FWTA, the "ordinary course of business" exception also applies to the ECPA. Therefore, if an employer reviews the e-mail messages of its employees based upon a legitimate business reason without first notifying its employees that such monitoring will occur, then no violation of the ECPA will exist. Such monitoring may be permitted in order to allow employers to perform maintenance functions on their computer systems or to determine if employees are using their systems in prohibited ways.

In Bohach v. City of Reno, 932 F.Supp. 1232 (D. Nev. 1996), where the police department retrieved the electronic messages two officers were sending to one another, the court held that the police department did not violate the ECPA by retrieving these messages. Instead, the court reasoned since employees do not enjoy a reasonable expectation of privacy when sending such e-mail messages, and since these messages were stored on the employer's system, the police department was free to access these messages.



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## B. ALERT! Ordinary Course Of Business or Legitimate Business Reason Exception: Notice May Be Required Anyway

In Adams v. City of Battle Creek, a municipal corporation, and Kruithoff, an individual, No. 99-1543 (6th Cir. 2001), David Adams, an officer with the Battle Creek Police Department, was suspected of dealing illegal drugs. In order to investigate, a police supervisor tapped into Adams' pager, which was supplied by the Police Department, to see if he was in fact assisting drug dealers.

As it turned out, Adams was not dealing in drugs, but he was also not placed on notice that these messages might be monitored. Adams sued both the City of Battle Creek and Jeffrey Kruithoff … personally.

Battle Creek and Kruithoff argued that under the Federal Wiretap Act, they were permitted to read the messages on Adams' pager without giving him any notice since the pager belonged to the City. As a result, reading the messages fell under the "ordinary course of business" exception to the law.

The 6th Circuit disagreed and found for Adams. The court reasoned that even under the "ordinary course of business" exception, notice must be provided before any monitoring any such communications.

Therefore, it is always best to place employees on notice before conducting any type of electronic surveillance in the workplace.

## C. E-Mail Cases Under The ECPA

In Bourke v. Nissan Motor Company, No. YC003979, Cal Sup. Ct., Los Angeles Cty. (1991), the employer terminated two employees who sent e-mail to one another that contained off-color jokes and criticized their supervisor. The court ruled that the employer was entitled to read the employees' e-mail because the company owned the system on which the message was stored.

In Smyth v. Pillsbury Company, 914 F. Supp 97 (E.D. Pa. 1996), when the employer discovered that an employee was sending "unprofessional" and "inappropriate" e-mail over the employer's system, he was terminated. The court held that unless the employer had given this employee some assurances that it would not monitor e-mail messages, reviewing the employee's e-mail did not violate the state's public policy regarding privacy rights.

In fact, the court reasoned that once an employee sends a message over an e-mail system, any reasonable expectation of privacy is lost. The court also held such monitoring is not a highly offensive or substantial invasion of an employee's privacy rights.



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## D. Ordinary Course Of Business Exception: FRAUD

In Konop v. Hawaiian Airlines, No. 99-55106 (9th Cir. 2001), Robert Konop, an employee of Hawaiian Airlines, set up his personal website for chatting with non-management co-workers. Konop issued passwords to those fellow employees who were given access to the website. However, in return for receiving a password to the site, members were required to promise not to give the password to anyone in management. Hawaiian Airlines convinced an employee to let it use his assigned password so the company could monitor the communications of its employees.

When Hawaiian Airlines then terminated Konop for the derogatory remarks made on his website. Konop sued the company under the Federal Wiretap Act and the Stored Communications Act for illegally monitoring his communications.

The Ninth Circuit agreed with Konop and found the company's activities to be based on fraud and therefore illegal under the Federal Wiretap Act and the Stored Communications Act.

## E. Eliminating Employees' Reasonable Expectation Of Privacy

Employers are also permitted to intercept, monitor and record their employees' communications in the workplace under pop the FWTA And the ECPA whenever the employer has **clearly** obtained the employees' consent to do so. In order to be effective, the notice given to employees must clearly destroy any reasonable expectation of privacy they might have formerly enjoyed.

Some jurisdictions have held that this notification given to employees must be **very clear and that such notices will be strictly construed against the employer**. In fact, some courts have held that merely notifying employees that the employer is **able** to monitor their communications whenever it desires is **inadequate**. Rather, the employer must inform its employees that it **will be monitoring** their communications. (Watkins v. L.M. Berry & Co., 704 F.2d 577, 581 (11th Cir. 1983)).

Therefore, such consent must come in the form of clearly putting the employees on notice that their communications **will be monitored by the employer…not simply that these communications may be monitored or that the employer reserves the right to monitor these communications.** If an employer clearly puts its employees on notice that they enjoy no reasonable expectation of privacy in their workplace communications, and that the employer will be intercepting their communications at anytime as it deems appropriate, then the employer may monitor its employees' communications and not be in violation of the FWTA or the ECPA.



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## F. Party To The Communication Under The FWTA

Whenever an employer is actually a party to an employee's communication, the employer is able to intercept, monitor, and record the message. Whether the employer would want to disclose the communication depends on privacy laws, for instance, and the content of the message.

As a general rule, employers should only disclose information regarding their employees to those individuals who are on a need-to-know basis.

## G. May An Employer Monitor the Personal Communications of Its Employees When The Employees Have Been Placed On Notice?

Even if an employer monitors an employee's communication in the ordinary course of its business based on a legitimately related business reason, the courts have tended not to allow employers to monitor their employees' personal communications. Instead, employers have been permitted to monitor their employees' communications **only long enough to discover whether the communication is personal or business-related**. Once it is determined that a communication is personal, the employer must immediately cease monitoring the communication.

Some courts have indicated that when an employer has clearly put its employees on notice that their communications will be and are monitored by the employer so that these employees enjoy no reasonable expectation of privacy in the messages they send or receive, then there is really no difference between a personal or a business-related communication. The employer may intercept, monitor and record them freely. However, many courts have not ruled on this issue as of yet.

As the best matter of course, many employers choose not to intercept or monitor the personal communications of their employers for many reasons. First, putting employees on clear notice that they enjoy no right to privacy in their personal workplace communications can be an employee relations nightmare.

Further, if an employer becomes privy to some very confidential information regarding an employee as a result of monitoring personal communications, such as the employee is having an extra-marital affair, has become pregnant, or is HIV positive, the employer could face tremendous liability if such information would negligently "leak out." In practicality, the more interesting the information is, the greater the likelihood it will be passed onto others.

And finally, there is really no business reason to monitor the personal communications of employees. If an employee is making a personal communication in violation of company policy, the employer is permitted to determine the nature of the message, stop its monitoring once it is discovered that the call is personal in nature, and then deal with the employee accordingly. There



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is really no advantage to continuing to monitor an employee's communication once it is determined that the message is personal.

Therefore, many employers who have placed their employees on notice that their communications will be monitored do not continue to monitor these communications once the nature of the message is determined, even though they may be legally permitted to do so.

### H. Summary

Consequently, under the FWTA and the ECPA, as amended, intercepting, disclosing or retrieving an employee's communication in the workplace is illegal if:

1. There is an interception of an employee communication by means of any electronic, mechanical or other device, and
2. The employee had no expectation that the wire or electronic communication was subject to interception, and the employee's expectation was reasonable under the given circumstances,
3. The person who intercepted the communication was not a party to it and
4. The communication was not related to the employer's business.

## IV. LIABILITY AND DAMAGES UNDER THE FWTA AND THE ECPA

Penalties under either the FWTA or the ECPA can run as high as the actual damage to the plaintiff, or the greater of $100 a day or $10,000 per offended individual. Also, since both laws apply to "any person," not only can employers be held liable for violating these laws, but both the employee and the individual with whom the employee was communicating under both the FWTA and Title II of the ECPA can also hold managers personally liable.

In Rodgers v. Wood, 910 F.2d 444 (7th Cir. 1990), the court held that the awarding of damages is mandatory. However, in Nalley v. Nalley, 53 F.3d 649 (4th Cir. 1995) the Fourth Circuit held that whether a court decides to award damages is discretionary.

Also, not only can an employer be held liable for violating the FWTA and the ECPA, but managers can be held personally liable as well. In Deal, the court ordered Newell and Juanita Spears to each pay $10, 000 to Sibbie Deal and another $10,000 to Calvin Lucas. Altogether, the Spears were ordered to pay $40,000 in damages.

## V. SOCIAL MEDIA CAN CREATE RETALIATION LIABILITY

In Stewart et al. v. CUS Nashville, LLC, et al., 3:2011cv00342 (M.D. Tenn., Feb. 6, 2013), Misty Blu Stewart was one of the employees named in the FLSA suit. She had been terminated from her position as a bartender (or a "coyote" in Coyote Ugly speak) nearly two years before the suit was filed for giving away free drinks, or stealing, which she denied doing.



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A month after the lawsuit was filed, the founder and president of the franchise posted the following blog comment on Coyote Ugly's website: "This particular case will end up pissing me off [be]cause it is coming from someone we terminated for theft."

Stewart testified that she was humiliated and embarrassed by the posting.

The next piece of the story involves Sarah Stone, another "coyote" and part of the group of employees suing Coyote Ugly for wage and hour violations. Stone quit her employment after Daniel Huckaby, director of operations for CUSDC, made what she believed were two retaliatory comments about her.

The first was a posting on his Facebook wall while he was visiting the franchise location for an anniversary party in which he wrote: "Dear God, please don't let me kill the girl that is suing me. . . . [T]hat is all."

When he made the post, he was aware that Stone was one of the plaintiffs in the FLSA suit.

According to Stone, Huckaby was sitting across the bar from her when he made the Facebook post. She was Facebook friends with him at the time and saw the post on his Facebook wall when she checked her cell phone at work. The post was removed by Huckaby the next day. Huckaby claimed he was intoxicated when he wrote it and couldn't recall making the comment or taking it down.

To make matters worse, the next night Huckaby responded to a customer who threatened to sue the bar after she fell down by yelling:

"Why does everyone sue? I'm tired of all these bi___es taking their issues out on our company. They're f___ing idiots."

Stone witnessed the entire incident.

Again, Huckaby didn't recall making the statement. Nevertheless, Stone quit the next day, claiming constructive discharge.

As a result of the blog and Facebook comments, Stewart and Stone filed additional claims against Coyote Ugly arguing the social media postings were in retaliation for their FLSA suit. CUSDC requested summary judgment (pretrial dismissal) of the retaliation claims and lost.

In asking the court to throw out the retaliation claims, Coyote Ugly argued that neither Stewart, in being the subject of a blog entry, nor Stone, in being the subject of a Facebook post, suffered any adverse employment action, which is required to prove retaliation under the FLSA.

However, the court held that there is a vast difference between what constitutes an **adverse action in the discrimination context** and what is considered an **adverse action in the retaliation context**.



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In the discrimination context, an adverse action is a "**material employment action**" such as a demotion or termination.

In the retaliation context, however, the adverse action can be outside the context of employment, and an employee merely has to show that "**a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination**." (This is a restatement of the Burlington decision.)

Using that analysis, the court found that Stewart and Stone produced enough evidence to preclude Coyote Ugly's request to dismiss the retaliation claims. Even though Stewart was terminated before the lawsuit for wage and hour violations was filed, the founder's Facebook post referred to someone who was fired for theft. Stewart testified that she suffered embarrassment and humiliation as a result, and a reasonable jury could find that the blog entry constituted an adverse action since it falsely stated she engaged in theft.

Stewart also argued that this statement about her would have likely dissuaded a reasonable worker from making or supporting an FLSA claim.

As for Stone's claim that her constructive discharge constituted an adverse action, the court noted that to prove constructive discharge, she had to show

(1) Her employer deliberately created working conditions that would have been perceived as intolerable by a reasonable person,

(2) The employer took the action with the intention of forcing her to quit, and

(3) She actually quit.

The court reviewed the two incidents that Stone claimed made her work environment intolerable, Huckaby's Facebook post and his rant the next night, and held that they were sufficient to cause a jury to believe that she was constructively discharged in retaliation for joining the FLSA suit.

## WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The court's decision greatly expands not only what constitutes an adverse action in the retaliation context but also what type of conduct suffices to create an intolerable work environment. The court found an adverse action had occurred because a former employee felt embarrassed and humiliated by being the unnamed subject of a hostile blog entry. It also found an intolerable work environment was created when a company director made a Facebook post that didn't name anyone specific and then expressed his frustration in a rant at the bar.

The case serves as a cautionary tale about the importance of training your employees, including high-level managers, about proper social media etiquette and the necessity of having effective social media policies. Here are some key takeaways:



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- Make sure your social media policy addresses what is and isn't proper use of social media.

- Supplement your policy with training. Having a policy isn't enough. Company owners, managers, and supervisors should be trained on the policy and informed of what can happen when they use social media to vent about an employee or a workplace situation. You should use this case as an example.

- Discourage supervisors, managers and executives from being Facebook friends, becoming Twitter followers of, or connecting via social media with their direct reports.

- Finally, just because something happens on a social media forum doesn't mean you can ignore it. You must address complaints made on social media the same way you would respond to any other complaint about inappropriate workplace conduct. That means HR should thoroughly investigate the allegations and respond by taking proper corrective action.

## VI. ONE PARTY vs. TWO PARTY STATES

Since many companies have employees in different states or conduct business in different states, they should also be aware of the fact that not only are they governed by the FTWA and ECPA, but each state also has their own privacy, wiretapping and electronic communication laws. Depending on which state a company is conducting business in, the rules could be very different.

The following is a listing of all 50 states indicating whether each state is either an "ALL PARTY" state, which means ALL PARTIES must consent to being recorded, or whether they are "ONE PARTY" states, which means ONLY ONE party need consent to being recorded.

**Alabama - One Party**
**Alaska - One Party**
**Arkansas - One Party**
**Arizona – One Party**
**California - All Party**
**Colorado - One Party**
**Connecticut - All Party**
**Delaware - All Party**
**District of Columbia - One Party**
**Florida - All Party**
**Georgia - One Party**
**Hawaii - One Party**
**Idaho - One Party**
**Illinois - All Party**
**Indiana - One Party**
**Iowa - One Party**
**Kansas - One Party**



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**Kentucky - One Party**
**Louisiana - One Party**
**Maine - One Party**
**Maryland - All Party**
**Massachusetts - All Party**
**Michigan - All Party**
**Minnesota - One Party**
**Mississippi - One Party**
**Missouri - One Party**
**Montana - All Party**
**Nebraska - One Party**
**Nevada - One Party**
**New Hampshire - All Party**
**New Jersey - One Party**
**New Mexico - One Party**
**New York - One Party**
**North Carolina - One Party**
**North Dakota - One Party**
**Ohio - One Party**
**Oklahoma - One Party**
**Oregon - One Party**
**Pennsylvania - All Party**
**Rhode Island - One Party**
**South Carolina - One Party**
**South Dakota - One Party**
**Tennessee - One Party**
**Texas - One Party**
**Utah - One Party**
**Vermont - One Party**
**Virginia - One Party**
**Washington - All Party**
**West Virginia - One Party**
**Wisconsin - One Party**
**Wyoming - One Party**

Further, some states include in their constitutions a guarantee of privacy. Some of these states include Alaska, Arizona, California, Florida, Illinois, Louisiana, Montana, South Carolina and Washington.



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# FCRA: INVESTIGATING BACKGROUNDS

## I. FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act, or the "FCRA," (15 U.S.C. § 1681, et seq.), which was an amendment to the Consumer Credit Reporting Act, and was most recently amended by the Consumer Credit Reporting Reform Act of 1996, regulates two types of background reports generated by consumer reporting agencies. These two types of reports include "consumer reports" and "investigative consumer reports." The FCRA was previously regulated by the Federal Trade Commission, or the "FTC." However, the FRCRA is now regulated by the Consumer Financial Protection Bureau, or the "CFPB."

### A. Definitions

#### 1. Consumer Reporting Agencies

The FCRA further defines "consumer reporting agencies" as being any person or organization which, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing this information to third parties, such as employers.

#### 2. Consumer Report

The FCRA defines a "consumer report" as being any written, oral or other communication of any information by a consumer reporting agency relating to a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living which is to be used or is expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing a the consumer's eligibility for:

a) Credit or insurance to be used primarily for personal, family or household purposes,

b) Employment purposes, including reassignment, retention, and so on, or

c) Any other purpose permitted under the FCRA.

#### 3. Investigative Consumer Report

The second type of report governed by the FCRA is an "investigative consumer report." The FCRA defines an "investigative consumer report" as being any report generated by a consumer reporting agency which involves investigating an individual's character, general reputation,



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personal characteristics and mode of living by interviewing the person’s friends, neighbors, relatives, associates and so on.

Therefore, an investigative consumer report differs from a consumer report in that no personal interviews with friends, former employers or anyone else occurs in generating a consumer report. Instead, basically a "records only" type of report is requested when an employer authorizes a consumer report, unlike an investigative consumer report.

## B. Requirements For Requesting A Consumer Report

Under the FCRA, whenever an employer requests a consumer report be generated on an employee or job applicant, the following requirements must be met:

1. The job applicant or employee must be provided with a "clear and conspicuous" written **disclosure** informing the individual that the employer intends to request and possibly use a consumer report in making its employment decision. This disclosure must exist as its own document and may not be part of the employer's employment application or any other form.

   However, this disclosure notice may be combined with the individual's authorization to perform and use the consumer report. The employer is then required to obtain the individual's signature acknowledging receipt of this disclosure either **before** ordering the report from the consumer reporting agency or within three days of placing such an order. This signed disclosure must then be retained by the employer.

2. The employer must also first obtain the individual's written **authorization** to have the consumer reporting agency conduct such an investigation. This authorization form must state that the job applicant or employee consents to the employer's use of this report. The individual's authorization may be included on the same form as the employer's notice of disclosure, as mentioned above.

   Further, consumer reporting agencies are prohibited from supplying an employer with any information relating to the individual's medical history without first obtaining that person's written permission. (See sample "Consumer Report Disclosure and Authorization" form at the end of this section.)

## C. Requirements For Requesting An Investigative Consumer Report

The second type of report governed by the FCRA is the “investigative consumer report.” The FCRA defines an "investigative consumer report" as being any report generated by a consumer reporting agency which involves investigating an individual’s character, general reputation, personal characteristics and mode of



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living by interviewing the person's friends, neighbors, relatives, associates and so on.

Therefore, an investigative consumer report differs from a consumer report in that no personal interviews with friends, former employers or anyone else occurs in generating a consumer report. Instead, basically a "records only" type of report is requested when an employer authorizes a consumer report, unlike an investigative consumer report.

Due to the more intrusive nature of conducting investigative consumer reports, either before an employer orders an investigative consumer report from a consumer reporting agency or within three days of making such a request, included in the disclosure the employer provides to the employee or job applicant is a statement which also informs the person that he has the right to request a complete and accurate disclosure of the nature and scope of the investigation requested by the employer and a summary of the individual's rights under the FCRA.

(Opinion letters generated by the Federal Trade Commission indicate that it is only necessary to provide these individuals with a summary of their rights after they have made such a request. This disclosure therefore must merely inform them of their right to receive such information.)

(See sample "Summary Of Rights Under The Fair Credit Reporting Act" handout, the "Acknowledgment Of Receipt Of Summary of Rights And/Or the Nature and Scope of the investigative Consumer Report Requested Under The Fair Credit Reporting Act" and the "Fair Credit Reporting Act Investigative Consumer Report Disclosure and Authorization" form at the end of this section.)

However, the FCRA provides an exemption from complying with the requirements of the Act regarding investigative consumer reports for employment agencies. Specifically, the Act states that if an agency is procuring an employee to work for a prospective employer, and that agency regularly performs such procurement, and the information collected is used only for the purpose of procuring the individual's employment, then the requirements of the FCRA for conducting an investigative consumer report need not be met. This situation most often arises when a search firm checks the references of a potential job candidate.

## D. Obsolete Information And The FCRA

Reports supplied to employers under the FCRA cannot include any **obsolete** information that may be adverse to the individual. Previously, obsolete information was defined so as to include records as arrest records, indictments, convictions, lawsuits, judgments, and so on, which are over seven years old.

However, this seven-year limit on considering arrest records, indictments or convictions has been eliminated. Therefore, employers now have no time



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restrictions placed upon them by the FCRA when considering such information in relation to their employment decisions.

Any information relating to **bankruptcies** over ten years old is also considered obsolete and may not be included in these reports. However, if the report is relating to the employment of an individual who will earn an annual salary of $75,000 or more a year, such information may be included.

## E. Requirements Relating To Adverse Actions Taken Against Individuals

**Before** an employer takes any action adverse against a job applicant or an employee that is based even in part upon the results contained in any consumer report or investigative consumer report, the individual must be provided with the following:

1. Oral, written or electronic notice of the adverse action to be taken against the person,
2. A copy of the report,
3. A summary of the person's rights under the FCRA, which includes the individual's right to request a disclosure of the nature of the report, the sources of the information contained in the report and a listing of anyone who received a copy of the report,
4. The name, address and telephone number of the consumer reporting agency that provided the report (If a toll free telephone number exists, that must be provided as well.),
5. A statement that the consumer reporting agency did not make the employment decision which was adverse to the individual and is therefore unable to explain why the decision was made,
6. A statement informing the individual that he is entitled to receive a free copy of his file from the consumer reporting agency within 60 days of making such a request, and
7. A statement informing the individual that he has the right to dispute the accuracy and/or the completeness of the information provided by the consumer reporting agency.

(The FCRA defines an "adverse action" as being any denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.)

(See sample letter to a person receiving an adverse action based at least in part upon a consumer report at the end of this section.)



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Although the FCRA fails to state how long an employer must wait to take its action which is adverse to the job applicant or employee after the individual has received notice of the employer's decision, an FTC Opinion Letter dated June 27, 1997 states that a reasonable period of time for an employer to wait would be **five business days.**

## F. Disputing Information In An Investigative Consumer Report Or A Consumer Report

### 1. Dispute Existing With Consumer Reporting Agency Data

If an applicant or employee wishes to dispute the information contained in the report, the individual must first inform the agency that he is challenging the accuracy of its data. The agency would then have **30 days** in which to reinvestigate its information. If the applicant or employee supplies the agency with new information, the agency would then have an additional **15 days** to investigate, if necessary. The agency would then have **five business days** after receiving the individual's objection or presentment of new information to inform its source of this dispute and to supply its source with this newly discovered information.

Within **five days** after completing its reinvestigation, the agency must inform the applicant or employee of its results. If the agency changes its report as a result of this reinvestigation, then the agency must also give the individual a copy of this revised report within this **five day** period.

### 2. Dispute Existing With An Employer's Data

If a job applicant or employee notifies an employer that it has supplied incomplete or inaccurate data, the employer is also under a duty to conduct an investigation and review all of the relevant information it has supplied to the consumer reporting agency within **30 days** of receiving the individual's notice. If the employer discovers an error, it must notify the consumer reporting agency of its correction. The employer must also notify the agency of any such disputes as they arise.

The FCRA also prohibits employers from providing information to a consumer reporting agency that they know or consciously avoid knowing to be incomplete or inaccurate.

Further, if an employer "regularly and in the ordinary course of business" supplies information to either one or more consumer reporting agencies and later discovers that it has furnished incomplete or inaccurate information, the employer must promptly notify the agency of the error. The employer must inform the agency of any additional information it discovers and it must make any necessary corrections to the information it furnished to the consumer reporting agency in order to ensure the accuracy and



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completeness of the information it provided.

## G. An Additional Consideration Regarding The Use Of Credit Information In Making Employment Decisions

Of course, if an employer does request that a consumer report or an investigative consumer report be conducted and intends to consider the individual's credit history in making its employment decision, the employer should be certain that the person's credit is **clearly** relevant to the position.

If it can be shown that the individual's credit is not clearly relevant to the position, then using such information in making the employment decision may be seen as a discriminatory employment practice in violation of Title VII. Since more minorities have poor credit than do non-minorities, then such a practice has been found to have a disparate impact against certain protected class individuals.

## H. Penalties Under The FCRA

Penalties for violating the FCRA can be quite severe. For willfully violating the Act, an employer could be forced to pay the applicant or employee his actual damages, statutory damages, attorney's fees, costs and punitive damages. Such damages may be no less than $100.00 and no more than $1,000.00.

If an employer willfully obtains a report from a consumer reporting agency under false pretenses or without a permissible purpose, both the individual who was the subject of the report and the consumer reporting agency may collect the greater of their actual damages or $1,000.00 from the employer.

If either the employer or the consumer reporting agency acts negligently and violates the FCRA, both could be held liable to the applicant or employee for actual damages. Costs and attorney's fees are also available.

Violating the FCRA may involve criminal penalties as well. Obtaining a consumer report under false pretenses may also bring criminal penalties, which may include fines and imprisonment for up to two years.



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## Fair Credit Reporting Act Sample Forms

### Prescribed Summary of Consumer Rights

This summary must be a separate document on paper no smaller than 8x11 inches in size with text no less than 12-point type (8-point for the chart of federal agencies) in bold or capital letters as indicated. The form in this appendix prescribes both the content and the sequence of items in the required summary. A summary may accurately reflect changes in numerical items that change over time (e.g., dollar mounts, or phone numbers and addresses of federal agencies), and remain in compliance.

**For a complete report on the FTC's Final Summaries And Notices Under FACTA, go to http://www.ftc.gov/opa/2004/11/facta.htm.**

For the latest Summary of Rights Form and a full description of the FCRA, just go to here (www.gpo.gov) and here (Amazon – Federal Register Public Inspection).

***Para información en español, visite http://www.consumerfinance.gov/learnmore o escribe a la Consumer Financial Protection Bureau, 1700 G Street N.W., Washington DC 20552.***



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## A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under the FCRA. **For more information, including information about additional rights, go to www.consumerfinance.gov/learnmore or write to: Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20552.**

- **You must be told if information in your file has been used against you.** Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment - or to take another adverse action against you - must tell you, and must give you the name, address, and phone number of the agency that provided the information.

- **You have the right to know what is in your file.** You may request and obtain all the information about you in the files of a consumer reporting agency (your "file disclosure"). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:
  - a person has taken adverse action against you because of information in your credit report;
  - you are the victim of identity theft and place a fraud alert in your file;
  - your file contains inaccurate information as a result of fraud;
  - you are on public assistance;
  - you are unemployed but expect to apply for employment within 60 days.

- In addition, all consumers are entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See www.consumerfinance.gov/learnmore for additional information.

- **You have the right to ask for a credit score.** Credit scores are numerical summaries of your credit-worthiness based on information from credit bureaus. You may request a credit score from consumer reporting agencies that create scores or distribute scores used in residential real property loans, but you will have to pay for it. In some mortgage transactions, you will receive credit score information for free from the mortgage lender.

- **You have the right to dispute incomplete or inaccurate information.** If you identify information in your file that is incomplete or inaccurate, and report it to the consumer reporting agency, the agency must investigate unless your dispute is frivolous. See www.consumerfinance.gov/learnmore for an explanation of dispute procedures.

- **Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information.** Inaccurate, incomplete or unverifiable information must be removed or corrected, usually within 30 days. However, a consumer reporting agency may continue to report information it has verified as accurate.

- **Consumer reporting agencies may not report outdated negative information.** In most cases, a consumer reporting agency may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.



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- **Access to your file is limited.** A consumer reporting agency may provide information about you only to people with a valid need -- usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.

- **You must give your consent for reports to be provided to employers.** A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.consumerfinance.gov/learnmore.

- **You may limit "prescreened" offers of credit and insurance you get based on information in your credit report.** Unsolicited "prescreened" offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address from the lists these offers are based on. You may opt-out with the nationwide credit bureaus at 1-888-567-8688.

- **You may seek damages from violators.** If a consumer reporting agency, or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.

- **Identity theft victims and active duty military personnel have additional rights.** For more information, visit www.consumerfinance.gov/learnmore.



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**States may enforce the FCRA, and many states have their own consumer reporting laws. In some cases, you may have more rights under state law. For more information, contact your state or local consumer protection agency or your state Attorney General.**

**For Information about your Federal rights contact:**

| TYPE OF BUSINESS: | CONTACT: |
|---|---|
| 1. a. Banks, savings associations, and credit unions with total assets of over $10 billion and their affiliates.<br>b. Such affiliates that are not banks, savings associations, or credit unions also should list, in addition to the CFPB: | a. Consumer Financial Protection Bureau<br>1700 G Street NW<br>Washington, DC 20552<br><br>b. Federal Trade Commission:<br>Consumer Response Center – FCRA<br>Washington, DC 20580<br>(877) 382-4357 |
| 2. To the extent not included in item 1 above:<br>a. National banks, federal savings associations and federal branches and federal agencies of foreign banks<br><br>b. State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies and Insured State Branches of Foreign Banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act<br><br>c. Nonmember Insured Banks, Insured State Branches of Foreign Banks, and insured state savings associations<br><br>d. Federal Credit Unions | a. Office of the Comptroller of the Currency<br>Customer Assistance Group<br>1301 McKinney Street, Suite 3450<br>Houston, TX 77010-9050<br><br>b. Federal Reserve Consumer Help Center<br>PO Box 1200<br>Minneapolis, MN 55480<br><br>c. FDIC Consumer Response Center<br>1100 Walnut St., Box #11<br>Kansas City, MO 64106<br><br>d. National Credit Union Administration<br>Office of Consumer Protection (OCP)<br>Division of Consumer Compliance and Outreach (DCCO)<br>1775 Duke Street<br>Alexandria, VA 22314 |
| 3. Air carriers | Asst. General Counsel for Aviation Enforcement & Proceedings<br>Aviation Consumer Protection Division<br>Department of Transportation<br>1200 New Jersey Avenue, S.E.<br>Washington, DC 20590 |
| 4. Creditors Subject to Surface Transportation Board | Office of Proceedings, Surface Transportation Board<br>Department of Transportation<br>395 E Street, S.W.<br>Washington, DC 20423 |
| 5. Creditors Subject to Packers and Stockyards Act, 1921 | Nearest Packers and Stockyards Administration area Supervisor |
| 6. Small Business Investment Companies | Associate Deputy Administrator for Capital Access<br>United States Small Business Administration<br>409 Third Street, SW, 8th Floor<br>Washington, DC 20416 |



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| | |
|---|---|
| 7. Brokers and Dealers | Securities and Exchange Commission<br>100 F Street, N.E.<br>Washington, DC 20549 |
| 8. Federal Land Banks, Federal Land Bank Associations, Federal Intermediate Credit Banks and Production Credit Associations | Farm Credit Administration<br>1501 Farm Credit Drive<br>McLean, VA 22102-5090 |
| 9. Retailers, Finance Companies, and All Other Creditors Not Listed Above | FTC Regional Office for region in which the creditor operates or Federal Trade Commission:<br>Consumer Response Center - FCRA<br>Washington, DC 20580<br>(877) 382-4357 |



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**SAMPLE**
**FAIR CREDIT REPORTING ACT**
**CONSUMER REPORT**
**DISCLOSURE AND AUTHORIZATION**

_______________(Company) has disclosed to me that it may procure and may take into consideration the results of a consumer report as part of its background investigative process for pre-employment purposes and/or at anytime throughout my employment with the Company, should I be hired.

I also authorize________________(Company) to procure and use as part of its background investigation the results of such a consumer report for pre-employment purposes and/or at anytime throughout my employment with the Company, should I be hired.

Should I become employed by _____________(Company), ______________(Company) will retain this form on file.

My signature below signifies my authorization of these above mentioned items and my receipt of this disclosure.

________________________________ ______________

Signature Date

________________________________

Print Name



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**SAMPLE**
**FAIR CREDIT REPORTING ACT**
**INVESTIGATIVE CONSUMER REPORT**
**DISCLOSURE AND AUTHORIZATION**

_______________(Company) has disclosed to me that it may procure and may take into consideration the results of an investigative consumer report for pre-employment purposes and/or at anytime throughout my employment with the Company, should I be hired.

I also authorize________________(Company) to procure and use as part of its background investigation the results of such an investigative consumer report for pre-employment purposes and/or at anytime throughout my employment with the Company, should I be hired.

Should I become employed by ___________(Company), ___________(Company) will retain this form on file.

I understand that I have the right to demand a complete and accurate disclosure of the nature and scope of any investigative consumer report requested on my background, as well as a summary of my rights under the FCRA.

My signature below signifies my authorization of these above mentioned items and my receipt of this disclosure.

_________________________________ ______________

Signature Date

_________________________________

Print Name



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**Sample letter to individual receiving adverse action based at least in part upon a consumer report.**

Dear ____________:

This letter is to inform you that (Explain the adverse action taken against the individual.) As part of our decision making process, a consumer report was obtained on you. Attached you will find a copy of this report for your inspection, as well as a summary of your rights under the Fair Credit Reporting Act.

In compiling this report, the following sources were used: (List the sources of this report from the agency.) Further, this report was provided only to (List those who received a copy of this report.)

This report was provided to us by (Give name, address and telephone number of the Consumer Reporting Agency compiling the report. If a toll free number exists, it must be provided as well.)

You are also entitled to receive a complete copy of your file from this agency at no charge within 60 days of making such a request in writing to the agency at the previously mentioned address. However, even though this agency provided this report to us, it played no part in making this decision and is unable to explain to you why this decision was made.

You also have the right to dispute the accuracy and/or the completeness of the information provided by the agency.

Sincerely,



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# USING LIE DETECTORS

## I. THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

### A. Coverage Of The EPPA

The Employee Polygraph Protection Act of 1988 (EPPA) (29 U.S.C. § 2001, et seq.) made it illegal for private employers to require their employees, or their potential employees, to submit to a polygraph test, which includes a prohibition against deceptographs, psychological stress evaluators, voice stress analyzers or any other similar devices used for determining whether someone is telling the truth regarding their honesty or dishonesty. On the other hand, written "honesty" tests are not covered by this Act.

Section 2006 of the Act states that the **EPPA does not apply to federal, state, or local governmental employers, nor does it apply when such testing is being used for national security or defense purposes**. This Act also does not apply to private employers whose business relates to security services or who are engaged in the manufacturing, distribution, or disbursement of controlled substances.

However, § 2006 of the EPPA does allow private employers to administer such tests whenever the testing is performed as a result of an economic loss or injury suffered by the business. Still, in order to qualify for this exception, the employer must have a reasonable suspicion that those employees being tested were involved in the loss. The employer must also be able to show that those employees being tested had access to the property that is the subject of the investigation.

### B. Rights Of Examinees

Should a qualifying event occur, § 2006 requires employers who want to test their employees' honesty to execute a written statement, which is to be given to each employee before the test is administered. This statement must:

1. Specifically identify the incident or activity being investigated, which includes identifying the specific economic loss suffered by the employer,

2. It must specifically state the basis for testing each particular employee, including a statement indicating that the employee had access to the property that is the subject of the investigation, as well as a statement describing the employer's reasonable suspicion for believing the employee was involved in the incident,

3. The statement must then be signed by someone who is authorized to legally bind the employer, other than the polygraph examiner, and

4. These documents must be retained by the employer for at least three years.



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Section 2005 states that the Act is enforced by the Secretary of the Department of Labor, who may fine employers up to $10,000 for each offense. Additionally, plaintiffs are allowed to pursue their own private civil actions against employers.

Further, § 2007 of the EPPA states that the examinee may not be asked questions in a manner that is designed to degrade or intrude on the privacy of the examinee. The examinee may not be asked any questions regarding his:

1. Religious beliefs or affiliations,
2. Beliefs or opinions regarding racial matters,
3. Political beliefs or affiliations,
4. Any matter relating to sexual behavior, or
5. Any beliefs, affiliations, opinions, or lawful activities regarding labor organizations.

Also, § 2007 states that an employee who produces sufficient written evidence from a physician that he is suffering from either a medical or psychological condition or is undergoing treatment that may cause an abnormal response cannot not be required to undergo the examination.

Before the test is administered, the employee must be provided with a written notice that fully explains:

- The date, time and location of where the test will be given,
- The fact that the individual has the right to obtain and consult with legal counsel, or an employee representative, before beginning each phase of the test,
- That the employee may end the test at anytime,
- The employee must also be provided an opportunity to review all the questions that will be asked during the test beforehand,
- The nature of the test that will be administered, the instruments that will be used,
- Whether the testing area contains a two-way mirror, a camera, or any other device through which the test can be observed,
- Whether any other type of recording or monitoring device will be used, including any device used for recording or monitoring the test itself and not the individual,



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- That either the employer or the examinee have the right, with mutual knowledge, make a recording of the test, and

- Before any adverse employment action can be taken against the employee based even in part upon the results of this polygraph test, the employer is required to discuss the results of the test with the employee.

The employee must also read and sign a written notice explaining:

- That the employee cannot be required to take the test as a condition of employment,

- That any statement made during the test may constitute additional supporting evidence that can be used against the employee,

- The a summary of the full legal rights of both the employee and the employer under the EPPA, as previously explained, including the fact that the employee may end the test at any time,

- The legal remedies available to the employer and the employee under the EPPA, and

- Any other limitations imposed by the EPPA.

Additionally, after the test is completed, the employer must give to the employee:

- A written copy of the results of the test,

- A copy of the questions that were asked during the test and

- A charted record of the employee's responses.

And finally, § 2003 states that employers are required to notify their employees of their rights under the EPPA Act by posting a notice outlining these rights in a "conspicuous place" at the employer's place of business.

## C. Requirements Placed Upon Examiners

The EPPA also places specific requirements upon polygraph examiners. Section 2007 of the EPPA states that:

1. Examiners are not allowed to conduct and complete more than five polygraph tests on a calendar day,

2. Every polygraph test administered by an examiner shall be at least 90 minutes in duration,



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3. The examiner must have a valid and current license granted by the proper licensing and regulatory authorities of the state in which the test is given, if the state requires such a license,

4. The examiner is required to maintain at least a $50,000 bond or an equivalent amount in professional liability coverage and

5. The examiner is then required to render his opinion or conclusions regarding the test in writing based solely on his analysis of the polygraph test's charted responses. Therefore, the examiner's opinions or conclusions from test cannot contain any information other than:

    a) The employee's admissions,

    b) The information provided by the employee,

    c) The facts of the case, and

    d) The examiner's interpretation of the employee's charted responses that are relevant to the purpose and stated objectives of the test. The examiner is therefore forbidden to make any recommendations regarding the employee's discipline or the future employment prospects of the employee.

### D. Enforcement And Penalties

Section 2005 states that the Act is enforced by the Secretary of the Department of Labor, who may fine employers who are found to be in violation of the EPPA up to $10,000 for each offense. Additionally, plaintiffs are allowed to pursue their own private civil actions against employers who violate the Act.

# PUBLIC SECTOR RIGHTS

## I. PUBLIC SECTOR "GARRITY" RIGHTS

If the employee refuses to answer questions in an investigation based upon the employee's fear of self-incrimination, then the employee is to be given a "Garrity Warning." (See Garrity v. New Jersey, 385 U.S. 493, 500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).) An employee must be given his/her "Garrity Warning" before being disciplined for refusal to answer.

In short, under Garrity, employees cannot be forced to choose between self-incrimination and job loss. However, if the employee being interviewed has not been threatened with discipline, then Garrity does not apply and the employee must answer the employer's questions. It is the appointing authority's responsibility to investigate the allegations/violations prior to imposing discipline.



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An Appointing Authority may discharge an employee for failure to answer questions which specifically, directly and narrowly related to his/her performance of duties. (See Jones v. Franklin County Sheriff, 52 Ohio St. 3d 40, 555 N.E. 2d 940 (1990).)

As a note, unionized employers should consult the collective bargaining agreement prior to initiating the disciplinary process to ensure compliance.

## II. PUBLIC SECTOR "LOUDERMILL" RIGHTS

In McDonald v. City of Dayton (2001), 146 Ohio App.3d 598, Dayton Police Officer Michael McDonald was on duty on February 17, 1998 when he went to a Wendy's restaurant and ordered dinner. When the order clerk allegedly gave McDonald the wrong change, an argument ensued. When the argument escalated, McDonald shot the clerk with pepper spray and arrested her.

On February 18, 1998, McDonald was ordered to attend a "show cause hearing" concerning the allegations surrounding the attack and any discipline that may be imposed. McDonald was then suspended with pay.

However, on March 18, 1998, the clerk who was pepper sprayed by McDonald filed criminal charges against him. As a result, the city suspended his pay as well. The city failed to conduct any form of hearing before suspending McDonald's pay while he was on leave.

In June 1998, McDonald was cleared of all charges.

On July 21, 1998, a predisciplinary hearing was held by the city on the matter. On July 24, 1998, McDonald was terminated by the city.

McDonald argued that his rights under "Due Process Clause" of the Fourteenth Amendment of the U.S. Constitution were violated. The "Due Process Clause" of the Fourteenth Amendment of the U.S. Constitution states that no state shall "deprive any person of life, liberty, or property without due process of law." A two-step analysis is used when considering whether a public sector employee's due process rights have been violated.

Under Cleveland Bd. of Edn. v. Loudermill (1985), 470 U.S. 532, first, a court must determine if the individual has a right or interest that is entitled to due process protection. If such property rights exist, then the court must determine what due process is due.

In deciding the first question, whether McDonald possessed a Fourth Amendment property interest in continued employment with the city police department, property rights are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

McDonald possessed a property interest in his employment as a police officer that came from his position as a "classified" employee pursuant to R.C. 124.11. In addition, the collective bargaining agreement between the FOP and the city established his property right. Therefore, the first prong of the due process inquiry is satisfied with respect to and on the



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basis of his deprivation of a property interest or some right associated with it. Therefore, the courts next turn to the second prong of Loudermill, which is to determine what process McDonald was due.

Generally, when a plaintiff is deprived of a protected property interest, a predeprivation hearing of some sort is required to satisfy the dictates of due process. The predeprivation process need not be elaborate, depending upon the importance of the interests at stake. When determining the amount of process due, a balance must be struck between the private right in retaining the property interest, the governmental interest in swift removal of unsatisfactory employees and avoidance of administrative burdens, and the risk of an erroneous decision.

In this case, a predeprivation hearing was held on February 18, 1998 to determine McDonald's suspension and another one was held on July 21, 1998 to determine his termination on July 24, 1998. McDonald argued that these hearings were insufficient to satisfy due process requirements because the decision maker, Chief Lowe, had determined prior to the hearing to terminate McDonald. In other words, McDonald argues that these predeprivation hearings were both "shams."

Even though a predisciplinary hearing may only confer a limited "right of reply," a predeprivation hearing is designed "to invoke the employer's discretion, its sense of fairness and mutual respect, its willingness to reconsider." In addition, predeprivation hearings do not require the kind of neutral and independent decision maker that independent, quasi-judicial appeals from the deprivation would require.

There was evidence that Chief Lowe had condemned and repudiated McDonald's use of pepper spray in the Wendy's incident. Also, there was evidence that Chief Lowe and the city were under considerable public pressure to avoid such conduct, which was alleged to arise from a racial bias and poor management. This evidence portrays the possibility of bias. However, it does not portray a resolve to terminate McDonald's employment that was so fixed and absolute as to render McDonald's hearing before Chief Lowe on July 21, 1998, a sham. Therefore, no genuine issue of material fact exists concerning whether McDonald's due process rights were violated in that respect.

However, since no predeprivation hearing occurred before McDonald's pay was suspended, his Loudermill rights were in fact violated. Therefore, back pay for McDonald while he was on leave is appropriate.

It is important to note that in some instances, a post-disciplinary hearing may satisfy the requirements of the predisciplinary hearing. The courts have traditionally balanced three factors to determine what process is constitutionally due:

1. The private interest that will be affected by the official action,

2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally,



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3. The Government's interest.

Therefore, it is possible to preserve the employee's rights under Loudermill if a post-disciplinary hearing is held soon after the action is taken against the employee.

# III. OHIO REVISED CODE §149.43: OHIO'S PUBLIC RECORDS ACT

## A. What Is A Public Record?

***"Any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code . . ."***

This first element of the definition of a record focuses on the existence of a recording medium; in other words, something that contains information in fixed form. The physical form of an item does not matter so long as it can record information. A paper or electronic document, e-mail, video, map, blueprint, photograph, voicemail message, or any other reproducible storage medium could be a record. This element is fairly broad. With the exception of one's thoughts and unrecorded oral communication, most public office information is stored on a fixed medium of some sort. A request for unrecorded or not-currently-recorded information (a request for advice, interpretation, referral, or research) made to a public office, rather than a request for a specific existing document, device, or item containing such information, would fail this part of the definition of a "record." A public office has discretion to determine the form in which it will keep its records. Further, a public office has no duty to fulfill requests that do not specifically and particularly describe the records the requester is seeking.

***". . . created, received by, or coming under the jurisdiction of a public office . . ."***

It is usually clear when items are created or received by a public office. However, even if an item is not in the public office's physical possession, it may still be considered a "record" of that office. If records are held or created by another entity that is performing a public function for a public office, those records may be "under the public office's jurisdiction."

***". . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office."***

In addition to obvious non-records such as junk mail and electronic "spam," some items found in the possession of a public office do not meet the definition of a record because they do not "document the activities of a public office." It is the message or content, not the medium on which it exists, that makes a document a record of a public office. The Ohio Supreme Court has noted that "disclosure [of non-records] would not help to monitor the conduct of state government." Some items that have been found not to "document the activities," etc. of public offices include public

employee home addresses kept by the employer solely for administrative (i.e. management) convenience, retired municipal government employee home addresses



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kept by the municipal retirement system, personal calendars and appointment books, juror contact information and other juror questionnaire responses, personal information about children who use public recreational facilities, and non-record items and information contained in employee personnel files. Similarly, proprietary software needed to access stored records on magnetic tapes or other similar format, which meets the first two parts of the definition, is a means to provide access, not a record, as it does not itself document the activities, etc. of a public office. Personal correspondence that does not document any activity of the office is non-record. Finally, the Attorney General has opined that a piece of physical evidence in the hands of a prosecuting attorney (e.g., a cigarette butt) is not a record of that office.

## B. Coverage

1. Ohio's Public Records Act (R.C. §149.43) applies to all state public offices, which includes all state agencies, counties, cities, school districts, and so on.

2. Ohio's Public Records Act also applies to any other organization established under Ohio law for the purpose of exercising any function of government.

3. Private entities may be forced to comply with Ohio's Public Records Act if it:

    a) Prepares records in order to carry out the responsibilities of a public office,

    b) The public office is able to monitor the private entity's performance and

    c) The public office has access to these records.

## C. Requirements of Ohio's Public Records Act

1. Covered employers are required to "promptly" prepare and make available for inspection to <u>any person</u> at all reasonable times during regular business hours.

2. Upon request by any person, the individual responsible for maintaining public records is required to make copies available at cost within a reasonable period of time after receiving such a request.

3. In order to facilitate broader access to public records, governmental units are required to maintain these records in a manner that can be made available for inspection.

## D. Exceptions Under R.C. §149.43

- R.C. §149.43 states that a "public record" means any record that is kept by any public office, including, but not limited to, state county, city, village, township and school district units. However, thirteen exceptions exist to Ohio's Public Records Act, which include:

    a. Medical records;



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b. Records pertaining to probation and parole proceedings;

c. Records pertaining to actions under §2151.85 of the Revised Code and to appeals of actions arising under that section; (minor female request for abortion.)

d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under §3705.12 of the Revised Code;

e) Information in a record contained in the putative father registry established by §3107.062 of the Revised Code;

f) Records listed in division (A) of §3107.42 of the Revised Code or specified in division (A) of §3107.52 of the Revised Code, which relates to such adoption records as:

   (1) File of releases,

   (2) Indices to the file of releases,

   (3) Releases and withdrawals of releases in the file of releases, and the information therein, and

   (4) Probate Court records of adoption.

g) Trial preparation records;

h) Confidential law enforcement investigatory records;

i) Records containing information that is confidential under §4112.05 of the Revised Code; (privileged communications)

j) DNA records stored in the DNA database pursuant to §109.573 of the Revised Code;

k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of §5120.21 of the Revised Code;

l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to §5139.05 of the Revised Code;

m) Records which may not be released under state or federal law.



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## E. Other Exceptions

1. Any taxpayer records or

2. Social Security numbers.

## F. Private Ohio Employers, Other Than Keepers of Public Records

In the private sector, Ohio law states that the employer owns the employees' personnel files. Therefore, it is up to each employer to decide whether it will allow its employees access to their records.

## G. Complying With A Request

1. Whenever a request for public records is obtained, the records should first be researched and the appropriate documents retrieved. If any information in these records falls under one of the exceptions to Ohio's Public Records Act, such as one of the thirteen exceptions of R.C. §149.43, this data should be excluded. The remaining information should then be disclosed to the requester.

2. The request should be in writing.

3. Public employers may charge the individual for the "actual cost" of copying these records. (labor costs excluded.)

4. Public agencies are not required to create any new information or to perform any new analysis of existing information.

5. Any person can also request to simply inspect public records.

## H. In What Form Must The Public Record Be Delivered To The Individual?

1. The standard format to deliver documents to the requester is in the form of a paper copy.

2. However, if the public record exists in another format that may either better organize or compress the data, which often occurs when such information is stored on computer disc, and the requester presents a legitimate reason why a paper format is insufficient, then the requester must be given the computerized form.



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## II. OHIO'S REVISED PUBLIC RECORDS ACT

As of June 27, 2007, all state and local public sector employers are required to have implemented new procedures for responding to public records requests as outlined in House Bill 9 (H.V. 9). HB9, which was sponsored by Ohio Representative Scott Oelslager (R-Canton) and signed into law by Governor Taft in December 2006, changes many aspects of Ohio Public Records Act.

### A. Oral Requests and Identity and Intent of Person Making Request

The Public Records Act now contains restrictions on when a public body can request that a public records request be placed in writing. Under the new statute, a public body can ask that a request be placed in writing only if two conditions are met.

1. First, it may do so only after disclosing that a written request is not mandatory, and that the requesting person may decline to reveal his or her identity or the intended use of the information.

2. Second, the public body may ask that the request be placed in writing when a written request or disclosure of the identity or intended use would benefit the requesting person by enhancing the ability of the public office to identify, locate or deliver public records.

Therefore, Ohio's revised Public Records Act allows public officials to ask that a request for public information be made in writing, it may ask for the requester's identity and it may ask about the intended use of the requested information ***only*** if the public official discloses to the requester that compliance with these requests are not required and the public official describes how this information will enhance the public entity's ability to comply with the request. Therefore, requests for public information may be made anonymously and the person making the request cannot be required to disclose his/her intended purpose for the request.

If a public official attempts to require such information before releasing public information, this requirement will be viewed as a denial to supply the information, unless specifically required to inquire as to the intended use of the information or authorized by specific state or federal law to do so.

For example, one important exception to this requirement is contained in Ohio Revised Code 3319.321, the statute that governs student records in Ohio. House Bill 9 clearly states that when a school district receives a request for student directory information, it can require the requesting person to disclose his/her identity and what the person intends to do with



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the information in order to ascertain whether the information will be used for a profit-making plan or activity.

## B. Responding to Public Records Requests

Under Ohio's revised Public Records Act, while public entities are still required to respond "promptly" to any records request, the new law significantly changes the manner in which public officials deal with public records that contain "confidential" information that should ***not*** be released to the public, such as medical information, information protected by attorney-client privilege, etc. Previously, public officials would simply remove any protected information from the records being released. In other words, the public officials could just withhold the information and the person making the public records request never knew these documents were missing from the request. However, Ohio's revised Public Records Act changes this process.

First, if any information is removed from the requested documents, the revised Public Records Act will view this removal of information as a denial of the person's request for information "except if federal or state law authorizes or requires a public office to make the redaction." The public entity must then notify the person making the request that certain information had been removed from these documents being released or the removal must be "plainly visible" by reviewing the documents. If any such information is removed or denied to the person making the request, the public entity must also provide the legal authority it relied upon to remove the information from the documents. The authority to withhold such information would most likely be found in the Public Records Act itself or in Ohio case law interpreting the Act.

Ohio's revised Public Records Act also allows a public entity to deny a person's request for public information if the request is "ambiguous," "overly broad," or if the public official releasing the records cannot reasonably identify what records are being requested. If such if the case, the public official must provide the person who is requesting the information with an opportunity to revise his/her request. The public official must inform the person making the request:

1) The manner in which the records are maintained by the public office and

2) How the public entity's records are accessed in the ordinary course of its business.

The reasoning behind this provision is clear:

We do not want someone denied their access to public records simply because they did not ask for the information in the proper manner or



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because the person making the request did not have a sophisticated knowledge of how the records are kept.

Ohio's revised Public Records Law also clarifies that a public entity may require the person who is asking for the public records to pay the cost involved in providing those records ***in advance***. The law further states that the public entity is not required to allow the person requesting these records to make their own copies. People making public records requests may still ask to have the records provided to them in a paper format or in any other format which the public entity keeps them.

## C. Records Retention Schedules

Under Ohio's Public Records Act, the schedule under which records have been retained by public entities has always been a public record open for release to the public. However, public entities must now provide copies of their current records retention schedule "at a location readily available to the public."

## D. Penalties for Wrongful Denial of Public Records Requests

Previously, public entities faced the possibility of paying attorneys fees if the requesting person had to resort to the courts in order to obtain public records. The General Assembly has now added language to the Public Records Act to provide that a public body ***may*** be required to pay court costs and statutory damages in addition to attorney's fees in such cases. In certain cases, the award of attorney's fees will be mandatory, absent certain mitigating circumstances, as determined by the court.

A person who was wrongfully denied a request for public records is entitled to statutory damages ***only*** if the public records request was submitted in writing by hand delivery or certified mail, providing proof of the request. In such a case, if the court determines that a public office wrongfully withheld public records, the requesting person is entitled to statutory damages of $100.00 for each business day during which the public records were wrongfully withheld. The amount of statutory damages is capped at **$1,000.00**, and the time period that is used to determine the amount of statutory damages begins on the day on which the requesting person files an action in court to recover the statutory damages.

The court may reduce the award of statutory damages, or not award statutory damages at all, if the court determines two things.

1. The court must determine that, based on the ordinary application of statutory and case law as it existed at the time of the request, a well-informed public official or records custodian would believe that the withholding of the records was not a failure to comply with an obligation under the Public Records Act.



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2. Second, the court must determine that a well-informed public official or records custodian would believe his or her actions served the public policy that underlies the authority asserted for withholding the information.

Ohio's revised Public Records Act also contains similar provisions related to both court costs and attorney's fees. As for court costs, the new law requires that a court award costs against the public entity when it finds in favor of the person who was wrongfully denied access to public records.

Similarly, the court is required to award attorney's fees against the public office when it determines either of the following:

1. The public office or the person responsible for the public records failed to respond to the public records request in the time allowed under the Public Records Act or

2. The public official or the person responsible for the public records promised to permit the requesting person to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

In other cases, the award of attorney's fees remains discretionary.

The court may reduce the award of attorney's fees or not award attorneys' fees at all by making the same determinations required for the reduction of the award of statutory damages.

## E. Public Records Policy

The new law also requires all public entities to adopt a public records policy to comply with Ohio's revised Public Records Act. Even though the Ohio Attorney General's Office is required to develop and provide to all public offices with a model public records policy in compliance with the Public Records Law, this required training is also intended to provide guidance that can be used by public officials in developing and updating their new Public Records Policy.

Once the policy is adopted, each public official must distribute the policy to each employee who serves as the records custodian, records manager, or otherwise has custody of records of the office. The employees must, in turn, acknowledge receipt of the policy.

Each public office must also create a poster that describes its Public Records Policy. The poster must be displayed in a conspicuous place in the public office and in all locations where the public entity has branch offices. If the public office has a manual or handbook of its general policies and



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procedures for all employees, it must include a copy of its Public Records Policy in the handbook.

### F. Excluded Accountant Records

Ohio's revised Public Records Act restores the current law regarding the provision in the Accountants Law that provides that, generally, statements, records, schedules, working papers, and memoranda made by a public accountant or certified public accountant incident to or in the course of an audit of a public office or private entity are not public records.

### G. Excluded Accountant Records

Ohio's revised Public Records Act also addresses sheriff's records relating to either issued, suspended or revoked applications to carry a concealed handgun. Specifically, the new law:

1. Allows a journalist to submit to a sheriff a signed, written request to view the name, county of residence, and date of birth of each person for whom the sheriff has suspended or revoked a license to carry a concealed handgun or a temporary emergency license to carry a concealed handgun. If the journalist submits a request to view the name, county of residence, and date of birth of each person to whom the sheriff has issued a license or replacement license to carry a concealed handgun, renewed a license to carry a concealed handgun, issued a temporary emergency license or replacement temporary emergency license to carry a concealed handgun, or the name, county of residence, and date of birth of each person for whom the sheriff has suspended or revoked a license to carry a concealed handgun or a temporary emergency license to carry a concealed handgun, the sheriff must grant the journalist's request and it …

2. Prohibits a journalist from copying the name, county of residence, or date of birth of each person to and for whom the sheriff has issued, suspended, or revoked a license, as described above.

# RETALIATION ISSUES

## I. OPPOSITION CLAUSE RETALIATION: PARTICIPATING IN INVESTIGATIONS IS A PROTECTED ACTIVITY

In Crawford v. Metropolitan Government of Nashville and Davidson County, No. 06–159129 S.Ct 846 (U.S. Supreme Court, January 26, 2009), the Metropolitan Government of Nashville and Davidson County ("Metro") opened an internal investigation into allegations of sexual harassment against Dr. Gene Hughes ("Hughes"), the employee-relations director for the Metro School District, in 2002. Since Hughes was responsible for investigating sexual harassment claims, direct complaints were not raised with him. Instead, such complaints went to the Metro legal department. Metro assigned the Human Resources



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Department to investigate the complaint, and Human Resources interviewed several women who worked with Hughes, including Petitioner Vicky Crawford ("Crawford").

During the interview, Crawford related several specific instances of sexual harassment by Hughes. Crawford also stated during the interview that she was afraid that her participation in the internal investigation would result in her losing her job.

Ultimately, the investigation concluded that no witnesses could corroborate the extent of the harassment that the employees had complained of, so no disciplinary action was taken against Hughes. After the findings of the investigation had been released, Crawford was fired from Metro on charges of embezzlement. However, these claims were later "found to be unfounded."

Other women interviewed during the internal investigation were similarly discharged.

Crawford filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and brought suit, alleging retaliation under Title VII of the Civil Rights Act of 1964.

Title VII states that "it shall be unlawful practice for an employer to discriminate against any of his employees . . . because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has . . . participated in any manner in an investigation, proceeding, or hearing under this title." 42 U.S.C. § 2000e-3(a).

Crawford asserted that she "opposed" the harassment by participating in the internal investigation, and therefore her participation was protected activity under Title VII. The district court granted summary judgment in favor of Metro, stating that cooperation with an investigation did not constitute opposition under the statute.

On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed, holding that precedent dictates that unless an employee has participated in an EEOC investigation or engaged in persistent oppositional behavior, Title VII does not cover employee participation in an employer-initiated internal investigation. Crawford appealed to the Supreme Court of the United States, arguing that Title VII does cover participation in an employer's internal investigation.

## U.S. SUPREME COURT'S RULING

The anti-retaliation provision's protection extends to an employee who speaks out about discrimination not on her own initiative, but also in answering questions during an employer's internal investigation. The Court reasoned that because "oppose" is undefined by statute, it carries its ordinary dictionary meaning of "resisting or contending against" some issue. Crawford's statements made in the course of this investigation were therefore protected by the "Opposition Clause" of Title VII.

The Court reasoned that the term "oppose" goes beyond "active, consistent" behavior in ordinary discourse, and may be used to speak of someone who has taken no action at all to advance a position beyond disclosing it. Thus, a person can "oppose" something by responding to someone else's questions just as surely as by provoking the discussion.



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Nothing in the statute requires a "freakish rule" protecting an employee who reports discrimination on her own initiative but does not protect another employee who reports the same discrimination in the same words when asked a question.

The Court reasoned that employers have a strong inducement to ferret out and put a stop to discriminatory activity in their operations. Therefore, if an employee who is answering questions in an investigation can be penalized with no remedy for providing information in an investigation, prudent employees would have a good reason to keep quiet about Title VII offenses.

Also, because Crawford's conduct was found to be protected by the opposition clause, the Court did not make any ruling on whether Crawford was protected by the participation clause of Title VII.

## II. NEW RETALIATION STANDARD

In Burlington Northern and Santa Fe Railway Co. v. White, – U.S. –, 126 S.Ct. 2405 at 2412 (2006), Sheila White applied for a job as a forklift operator with Burlington Northern & Santa Fe Railway Company in its Maintenance of Way Department in Memphis, Tennessee. Burlington hired White for the job. White was the only female forklift operator in this department.

After a few months on the job, White filed a complaint of sexual harassment against her supervisor, Bill Joiner. The company investigated and determined that Joiner had in fact sexually harassed White. Joiner was suspended without pay for 10 days and was required to go to sexual and illegal harassment training.

However, as a result of its investigation, Burlington discovered that there were a great many complaints about White working in the forklift position. The forklift position was much cleaner and physically less demanding than the other jobs in the department. Other employees complained that a less senior person should not have been given this job.

As a result, Burlington removed White from the forklift position. White was replaced by a more senior male employee. Burlington did not change White's pay or benefits when she was transferred. However, White's new job was much dirtier and much more physically demanding than that of a forklift operator.

White filed a charge of retaliation with the Equal Employment Opportunity Commission. Afterwards, White filed this charge with the EEOC, she got into a dispute with her supervisor, and she was suspended without pay for the offense of insubordination, pending Burlington's investigation.

After Burlington investigated White's suspension for insubordination, management determined that White had not been insubordinate. Burlington therefore reinstated White with back pay, which equaled 37 days. White then filed suit against Burlington for retaliation under Title VII. The trial court held for Burlington.

White then appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit held for White.



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Burlington appealed to the United States Supreme Court. The Court held for White.

Specifically, the U.S. Supreme Court held that:

> "The anti-retaliation provision seeks to secure [a non-discriminatory workplace] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees."

The Supreme Court then went onto hold in Burlington that a plaintiff must demonstrate that he suffered a "materially adverse" retaliatory action, which it defined as one that:

"**well might have dissuaded a reasonable worker from making or supporting a charge of discrimination**."

In this case, however, even though White's pay and benefits were not changed, she was transferred to a job that was harder, dirtier and had less prestige. Ever since White started working at Burlington there was great resentment amongst the other workers that she received the forklift position. It was only **after** White filed her sexual harassment complaint that Burlington took action and removed White from the forklift position.

Also, suspending White without pay for 37 days was no small matter. It is clear that White was suspended because she was seen as a "trouble-maker" for filing a charge with the EEOC. Even though Burlington later recognized the error and reinstated White with back pay, the harm had been done. White had to sit at home for over one month without pay and wondering whether or not she would still have a job.

Therefore, the Court held that Burlington had in fact retaliated against White for filing a sexual harassment complaint and a charge of illegal discrimination with the EEOC.

# NLRB RIGHTS

## I. WHY DO NONUNION EMPLOYERS HAVE TO WORRY ABOUT THE NLRA?

Under Section 7 of the National Labor Relations Act, rank-and-file employees have the right to unionize. Employers are not permitted to unlawfully interfere with employees as they exercise this right.

Likewise, Section 8(a)(1) of the NLRA says that employees are permitted to discuss the "wages, terms and conditions of employment" amongst themselves and with others.

Therefore, not only are unionized employers covered by the NLRA, but so are nonunionized employers because their employees ***may*** want to unionize one day.

Since the SERA in Ohio's public sector was modeled entirely on the NLRA back in 1983, this same logic applies to the SERA.



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## II. NLRB FINDS "NO DISCUSSION OF INVESTIGATION" RULE TO BE AN ULP

In Banner Health System, 358 N.L.R.B. No. 93 (July 30, 2012), the employer, Banner Health System, provided its human resources employees with an "Interview of Complainant Form" to use when interviewing employees as part of an internal investigation. While the form was titled "Interview of Complainant Form," it apparently was also used for interviews of the subjects of complaints. One of the bullet points under "Introduction for all interviews" noted that employees should be told not to discuss ongoing investigations. Although the form was never provided to employees, one human resources manager testified that she frequently, but not always, instructed employees not to discuss the investigation.

Members Richard Griffin and Sharon Block concluded that such an instruction violated Section 8(a)(1) of the Act because the statement, "viewed in context, had a reasonable tendency to coerce employees, and so constituted an unlawful restraint on Section 7 rights." The Board held that "to justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights."

In its ruling, the Board sustained objections to the administrative law judge's determination that the prohibition on discussing ongoing investigations was justified by the employer's concern in protecting the integrity of the investigations. The Board rejected such a "blanket approach" justification. Instead, the Board noted that the employer had the burden "to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up." The Board found that the general assertion of protecting the integrity of an investigation "clearly failed to meet" that burden.

The majority rejected Member Hayes' conclusion that the instruction was only a suggestion because it appeared as part of the introduction "for all interviews" and was given in most interviews. On the basis of those facts, the Board concluded that the instruction or rule had the tendency to coerce employees against exercising their Section 7 rights. Further, the majority noted that a supervisor's instructions carry sufficient weight to make a statement unlawfully coercive even without actual discipline or the threat of discipline.

### WHAT DOES THIS MEAN TO HUMAN RESOURCES?

The Board's Banner Health decision applies equally to unionized and nonunion settings. The decision, however, is not a total prohibition on asking employees for confidentiality during an internal investigation. However, employers who do ask for confidentiality should be prepared to establish that confidentiality is necessary to protect a witness, prevent the destruction of evidence, preserve testimony, prevent a coverup, or further another legitimate business interest.



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In light of the Board's Banner Health decision, employers should consider reviewing their internal investigation policies, appropriately revising forms that may be used, and discussing the decision with their human resources professionals in order to avoid potential violations of the NLRA.

## III. THE WEINGARTEN RULE

It is also important to note that the "Weingarten Rule" under the National Labor Relations Act, as modified by NLRB v. Epilepsy Foundation of Northeast Ohio, 331 N.L.R.B. No. 92, which is basically a "right to representation" policy, applies to union employees. The Weingerten Rule says that whenever it is reasonably believed by the employee that an investigation interview with the employer might lead to disciplinary action, an employee cannot be denied a request to have a union representative or a co-worker present.

Therefore, if an employee requests that another employee be present at such meetings, or if a union employee requests that a union steward be present, management should not deny such a request.

Additionally:

- ♣ The employee must invoke this right. The employer has no duty to advise the employee of his/her right to have a co-worker present.
- ♣ These rights only apply to the employee who is the subject of the investigation. Therefore, if the investigation applies to another employee, the interviewee does not have the right to have a co-worker present.
- ♣ The Weingarten Rule only applies to investigation interviews and does not apply to sessions where an employee's punishment or discipline has already been decided and it is merely being pronounced to the employee.
- ♣ The Weingarten Rule does not apply to outside parties, such as lawyers. Therefore, if an employee insists on having an attorney present, the request can be denied under the Weingarten Rule, since the rule would not apply.
- ♣ The employee is not entitled to have any particular co-worker present.
- ♣ The Weingarten Rule includes the right for the co-worker/witness to speak, such as in asking questions and statement. However, the co-worker/witness is not permitted to interfere with the investigation.
- ♣ The Weingarten Rule does not apply to supervisors.



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# HONEST BELIEF RULE

## I. WORKPLACE INVESTIGATIONS AND DECISIONMAKING

In Hitt v. Harsco Corp., 356 F.3d 920 (8th Cir. 2004), William Hitt was a 65 year old employee with Harsco. Hitt also worked with his son-in-law, Mark Odom, age 34. However, Hitt filed to gain legal custody of Odom's son, which was also Hitt's grandson. Since then, Odom denied Hitt any access to his grandson. As a result, there was a great deal of tension between Odon and Hitt.

On the morning of August 23, 2000, Hitt allegedly sought out Odom in the company's lunchroom. The discussion, which centered on Odom's son, became quite heated. Witnesses reported that Hitt told Odom that he was going to kick Odom's "ass." Odom then said they should "take it outside."

The two left the lunchroom. Witnesses reported that Hitt then took a swing at Odom and Odom kicked Hitt. Both men were terminated based on these eye witness accounts.

Hitt then filed suit against the company, claiming that he was fired in violation of the ADEA. Still, the court held for the employer, Harsco.

The court reasoned that the key question is not whether the plaintiff actually participated in the fight, but instead whether the employer **BELIEVED** that the employee had been a participant. Even though terminating an employee based on faulty information might be unfair, it is not illegal age discrimination.

### WHAT DOES THIS MEAN TO EMPLOYERS?

Employees should be instructed to tell the truth in all investigations. Lying subjects the company and the employee him or herself to liability for defamation. To lie in an investigation should result in the employee's termination. Human resource people should include in their policies that refusing to give full and honest responses in an investigation may result in immediate termination.

However, in order to protect themselves, employers should document such statements. This documentation is vital since it can later be used to show exactly what information the employer relied upon that in making its employment decisions.

### POLICY CONSIDERATION

**The Following Prohibited Conduct, as determined by management, may subject employees to immediate dismissal.**

- **Failing to cooperate in a Company investigation, which includes giving false or misleading information to the Company, or omitting information from an investigation that might prove to be important to the situation at hand, as determined by management.**



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## III. "HONEST BELIEF RULE" USED AS GROUNDS FOR TERMINATION

In Seeger v. Cincinnati Bell Telephone Co., 681 F. 3d 274 (6th Cir. May 8, 2012), Tom Seeger was employed as a network technician by Cincinnati Bell Telephone Company (CBT). In August 2007, Seeger began experiencing pain and numbness in his left leg. On September 5, 2007, a physician confirmed that Seeger had a herniated lumbar disc, and Seeger started an approved FMLA leave of absence the same day.

On September 19, Seeger was examined by Dr. Michael Grainger, his primary care physician. Dr. Grainger observed that it was difficult for Seeger to change positions, get in and out of a chair, and walk. The following day, Dr. Grainger's office left a message for CBT that Seeger was unable to perform any restricted work.

On September 23, Seeger attended an Oktoberfest festival in Cincinnati for approximately 90 minutes, during which time he admittedly walked a total of 10 blocks. While at the festival, Seeger encountered several co-workers. One co-worker observed that Seeger was able to walk, seemingly unimpaired, for approximately 50 to 75 feet through the crowd, and the co-worker reported his observations to CBT's HR Manager. On October 15, 2007, Seeger reported to Dr. Grainger that he had been asymptomatic for two days, and Dr. Grainger authorized his return to work. Seeger resumed his full-time position on October 16, 2007.

Meanwhile, CBT investigated the matter by obtaining sworn statements from Seeger's co-workers and by reviewing his medical records, disability file and employment history. Based on the inconsistency between Seeger's reported medical condition and his behavior at Oktoberfest, CBT decided to suspend Seeger's employment and scheduled a suspension meeting with him. At the meeting, Seeger defended his actions and denied committing disability fraud. CBT invited Seeger to submit any relevant information, and Seeger provided a letter from Dr. Grainger. The letter stated, in part, that "[w]alking for one and a half hours at one's own pace doesn't equal working for an eight hour day nor is it reasonable to assume that he could perform even limited duties for an eight hour day."

Ultimately, CBT concluded that Seeger had "over reported" his symptoms and terminated his employment. Seeger filed a lawsuit alleging that he was fired in retaliation for taking protected leave. The trial judge dismissed the suit and Seeger appealed.

While the Sixth Circuit determined that Seeger established a *prima facie* case of retaliatory discharge due to the short amount of time between his return from FMLA leave and his termination, it also concluded that CBT articulated a legitimate, nondiscriminatory reason for discharging Seeger. In the court's words, "Fraud and dishonesty constitute lawful, non-retaliatory bases for termination."

The court then considered whether Seeger produced adequate evidence demonstrating that CBT's professed reason was a pretext for discrimination. Essentially, Seeger attempted to show that there was no factual basis for CBT's proffered reason for discharging him because CBT had ignored medical evidence in its possession that Seeger was responding to treatment, and his pain had improved before Oktoberfest.



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Under the "honest belief rule," the inference of pretext is not warranted where the employer can show an honest belief in the proffered reason. The court explained that an employer's professed reason is deemed honestly held where the employer can show that it made a reasonably informed and considered decision before taking the adverse action. The court cautioned that an employer's invocation of the honest belief rule does not automatically shield it from liability because the employee must be given a chance to produce evidence to the contrary.

The Sixth Circuit held that CBT demonstrated that it reasonably relied on specific facts in determining that Seeger had committed disability fraud, and Seeger failed to refute CBT's honest belief. The court emphasized that Seeger's argument and presentation of competing medical evidence were misdirected. "The determinative question [was] not whether Seeger actually committed fraud, but whether CBT reasonably and honestly believed that he did." Accordingly, the Sixth Circuit upheld the judgment in favor of CBT.

**WHAT DOES THIS MEAN TO HUMAN RESOURCES?**

The significance of this decision is that employers can protect themselves from employees who are exaggerating or misrepresenting a medical condition to get off work. To substantiate a 'reasonably informed and considered' belief of FMLA fraud, employers should conduct a thorough investigation, including whether the off-work activity is actually inconsistent with the medical restrictions, and give the employee an opportunity to defend his or her actions. An employer cannot 'jump the gun' and act precipitously on a suspicion no matter how well founded. Here the quality of the employer's investigation, and affording the employee an opportunity to explain his actions, were instrumental in upholding the discharge decision."

## II. STUPID COMMENTS DEFEAT HONEST BELIEF RULE

In Stewart v. Kettering Health Network, 576 Fed. Appx. 518 (6th Cir., Aug. 13, 2014), 59-year-old Doug Stewart was the oldest security officer working at Grandview Hospital.

On February 22, 2011, Grandview Hospital had a patient in a padded room that was becoming very upset and was cursing loudly. Dr. Robert Hunter asked Stewart and another officer, Officer Mardy White, to undress the patient and put him into a hospital gown. After blows were exchanged, Stewart was forced to use his stun gun to subdue the patient.

The patient appeared unaffected by the Taser, but shortly afterwards Stewart and White were able to tackle the patient to the floor and handcuff him with his hands in front of his body.

The door to the exam room was open during the incident. Stewart did not see anyone in the hall but medical staff came rushing in all of a sudden. Stewart recalls Dr. Hunter and Sergeant Jones ("Jones"), among others, coming into the room.

At this point, what happened to the patient is disputed.



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Jones, Dr. Hunter and Dr. Fish testified that Stewart kicked the restrained patient in the head. Jones described the event in his report to Miller. Officer D. Stewart then took what appeared to be his right foot and moved it to the patient's face in a quick motion. It appeared that his foot had struck the patient in the area of his forehead and nose...."

Jones also reported that Doctors Hunter and Fish confirmed that they saw Stewart kick the patient's head.

Stewart testifies to a different story. According to Stewart, the patient was spitting blood on everybody and everything. Dr. Hunter, in an effort to redirect the patient's head to avoid possible disease from the patient's blood, pushed his foot on the patient's head. Stewart told Dr. Hunter that "we" had the situation under control and he needed to remove his foot from the patient's head.

Dr. Hunter refused.

Stewart then placed his foot on the patient's head but he says he had no pressure on the patient's head.

When the patient calmed down, Stewart removed his foot and Stewart also removed Dr. Hunter's foot.

During the follow-up investigation, Stewart denied kicking the patient.

White's incident report mentions nothing of Stewart kicking the patient's head.

Dr. Fish's handwritten statement made shortly after the incident says nothing about Stewart kicking the patient's head.

Dr. Hunter's handwritten statement made shortly after the incident says nothing about Stewart kicking the patient's head.

During an interview following the incident, the patient said nothing about Stewart kicking him.

Finally, according to Stewart, the only injury that the patient had was a bloody nose and the bloody nose was from being punched by White, the other security officer.

Following an investigation headed by its chief of security, David Miller, Grandview fired him for using excessive force.

Stewart sued Grandview for age discrimination.

In support of his claims, he pointed to a number of incidents in which Miller allegedly made remarks about his age. Grandview didn't dispute that Miller had remarked that he generally wanted to hire younger officers.

According to Stewart, Miller told him he wanted "young bulls" instead of "old guys."



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Further, another officer testified that Miller had asked him to "keep an eye on" Stewart and that he felt Stewart's "days were numbered."

The trial court dismissed Stewart's lawsuit, finding that he failed to present sufficient evidence to refute Grandview's position that it appropriately terminated him based on its "honest belief" of the truthfulness of the witnesses' accounts of the patient altercation.

Stewart appealed that decision to the Sixth Circuit.

The Sixth Circuit reversed the trial court's ruling and found that Stewart came forward with enough evidence to warrant a trial. The heart of the issue was the honest belief rule.

Under that rule, an employer's termination or other disciplinary decision isn't unlawful if it was based on its "honest belief" of the facts, even if the employer makes a mistake about the facts.

According to the court, the "employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." Therefore, Grandview argued, even if Stewart did not actually kick the patient in the head, it was reasonable for it to determine that he did based on the doctors' statements.

However, the Sixth Circuit found that in this case, a jury, rather than a judge, should have the opportunity to determine whether Grandview could rely on the honest belief rule.

The court was particularly bothered by three things in this case.

First, Stewart was able to point to several comments by his supervisor that suggested a prejudice against his age.

Second, "the fact that neither doctor present at the time of the incident giving rise to [the] termination saw fit to mention [the alleged misconduct] in his contemporaneous notes undercuts the credibility" of their subsequent testimony.

Third, Miller, who was the primary person heading up the investigation, was the same person who allegedly made comments that suggested he was prejudice against older employees.

Taking all of that into consideration, the court found that there were plenty of reasons that reasonable minds could differ on the employer's true motives. Therefore, Stewart should be allowed to present his claims to a jury.

**WHAT DOES THIS MEAN FOR EMPLOYERS?**

Under the Sixth Circuit's interpretation of the honest belief rule, an employer is not required to show that its decision-making process was "optimal or that it left no stone unturned."

However, the courts will not "blindly assume that an employer's description of its reasons [for an adverse action] is honest." The decision must be based on "particularized facts" rather than on "ignorance and mythology."



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Grandview should have made sure that its physicians did a better job of documenting this incident. When their notes and their statements did not match, much doubt was cast on the truthfulness of their testimony.

Also, Miller's previous discriminatory comments are simply absurd. His credibility was destroyed.

As a result, the credibility of this entire process was tainted.

In the end, a lack of supervisor and physician training cost the employer.

# CONCLUSIONS BY DECISION MAKERS

## I. "CAT'S PAW" THEORY IS ALIVE AND WELL

In Marshall v. The Rawlings Co. LLC, 854 F.3d 368, 377 (6th Cir. 2017), Gloria Marshall took an unexpected FMLA leave in February and March 2012 to receive treatment for her depression, anxiety and PTSD. Upon her return, she had a backlog of work waiting for her. There was conflicting evidence on whether she received any assistance catching up on her work and when she did catch up, her supervisor became worried that a new backlog was forming.

In September 2012, Marshall was demoted after one of her supervisors recommended that she be demoted to the division president. The president confirmed that she was the final decisionmaker and the decision was based solely on Marshall's performance.

In March 2013, the Marshall took a second FMLA leave and also took periods of intermittent leave from April through August. In September, her supervisor noticed that Marshall and a coworker were not at their desks for much of the day. When he confronted Marshall, she claimed her other supervisor had harassed her on two occasions. The supervisor reported the alleged harassment to the president who, after meeting with Marshall, believed she "was someone who was not doing her job, had been called on the carpet by her supervisor, and in order to deflect it," brought up the harassment allegations. The president then met with the owner, who decided to terminate the employee for making false allegations of harassment.

Marshall then sued, asserting claims under the FMLA, ADA, and state law and the district court granted summary judgment to the employer.

Marshall appealed to the Sixth Circuit Court of Appeals.

The court first found that the rationale for the cat's paw theory applies equally to FMLA retaliation claims as to other types of employment discrimination and retaliation claims. Further, all of the justifications for applying the cat's paw theory apply when there are multiple layers of decisionmakers. The court found that there was no reason to prohibit plaintiffs from pursuing a cat's paw theory when a lower-level supervisor carried out a scheme to discriminate and in turn influenced multiple layers of higher-level supervisors in making their decisions.



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The court also found that plaintiffs alleging FMLA retaliation based on a cat's paw theory of liability include proving that the ultimate decisionmaker was the cat's paw of a biased subordinate.

Finally, in considering the use of the honest-belief rule in cat's paw cases, the court reasoned that in a cat's paw case, Marshall's allegation is that a biased subordinate intentionally manipulated the decisionmaker. Under these circumstances, the decisionmaker's intent does not matter and consequently, the honesty of the decisionmaker's belief does not matter.

The court then looked at Marshall's FMLA retaliation claim, the court noted that there was conflicting evidence regarding her performance both before and after her demotion that showed she was performing well in some areas and poorly in others. However, there was no evidence regarding the relative importance of these different areas or how her overall performance compared with that of her coworkers.

Further, when her supervisor asked Marshall as to whether she planned on taking more leave, and then directed her in the same meeting to clear her backlog, this raised the inference that he was displeased with Marshall exercising her FMLA rights.

The Sixth Circuit then noted that there was conflicting evidence as to why the owner fired Marshall. As a result, the court found that on this record, a reasonable jury could find a causal connection between Marshall's use of FMLA leave and the subsequent adverse actions.

Also, there was not any evidence that the president conducted an independent investigation apart from the information she was given by the lower level supervisor. However, there was evidence suggesting the supervisor had a significant influence on her decision as she appeared to have made the decision shortly after receiving his recommendation.

The court noted that when the president met with the owner, one of the supervisors was also present. There was also evidence suggesting that the owner's only source of information regarding the false harassment claim came this same supervisor, and then a brief meeting with the employee where he fired her.

There was also no indication that the president or the owner ever asked the alleged harassing supervisor about his behavior toward the employee.

Therefore, a reasonable jury could find the president and owner "did not conduct an adequate independent investigation, that they had no interest in doing so. Instead, they merely acted as a conduit for their subordinates' retaliatory intent."

Therefore, the court found for Ms. Marshall on her FMLA retaliation claim.

Also, since Marshall made the same arguments to support her ADA discrimination claim as her FMLA retaliation claim, the court found that the same fact issues existed here as with the FMLA retaliation claim and again found for Marshall.



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## II. PROTECTED CLASS COMMENTS AND BAD INVESTIGATION LEADS TO AGE DISCRIMINATION LIABILITY

In Neff v. Aleris Rolled Prods., No. 2:11-cv-960, 2013 U.S. Dist. LEXIS 81256 (S.D. Ohio, June 10, 2013), Arnold D. Neff started working for Aleris Rolled Products, Inc., as an assembly line worker and eventually became a line supervisor. At the time of his termination in February 2010, he was 61 years old. He had worked at Aleris for 38 years, and according to his last performance evaluation in February 2008, he was "a very skilled, conscientious employee and an excellent supervisor" who exceeded expectations.

After that performance evaluation, however, Aleris hired a new manufacturing manager, Dale Childress, to supervise Neff and five other line supervisors. Childress almost immediately began asking Neff when he planned to retire. Apparently, he asked that question several times, including just one month before he terminated Neff's employment. Additionally, he commented on more than one occasion that Neff "was set in [his] ways" and that the production line was "not the same like it used to be back 10 or 15 years ago. . . . Times ha[ve] changed now and you've got to change with it."

The incidents that led to Neff's termination began in June 2009 when Childress disciplined him for operating a production line with three workers instead of four and then for allegedly retaliating against a coworker who informed management of the problem.

Neff denied he had done anything wrong. Instead, he claimed that June 2009 was when Childress started creating a paper trail that would eventually lead to his termination.

The next incident occurred in February 2010 when two workers were assigned to perform a manufacturing line changeover (switching from production of one product on the manufacturing line to production of a different product). The two workers were supervised by Neff. Once the manufacturing line changeover was complete, the changed line was producing defective products because a guard was blocking the product from moving through the line unhindered. Neff instructed the two workers to fix the problem by clamping the guard in a certain position so it no longer hindered the line.

The workers ignored Neff's instructions. Instead, they went to another supervisor, who instructed them to run the line without any safety guards because that would fix the problem more easily than Neff's proposed fix. A technician later noticed that the two workers were running the manufacturing line without safety guards and instructed an employee to ask Neff (who was in his office) whether he wanted the manufacturing line "run that way." Because of the ambiguous nature of the question, Neff assumed the employee was referring to how he had instructed his employees to clamp the guard. He had no idea the employee was referring to running the line without any safety guards at all.

The next day, Childress interviewed Neff about what had happened. Neff denied telling anyone to run the production line without safety guards; rather, he told Childress his workers had been instructed to simply clamp the guard so it didn't obstruct the line. Two days later, Childress suspended Neff without pay after concluding he had instructed his workers to run the production line without safety guards.



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Childress, the HR manager, and the plant manager then conducted an investigation. They interviewed several people, but not the two workers who had ignored Neff's instructions and removed the safety guards. Nor did they interview the supervisor who told the two workers to run the manufacturing line without any safety guards. Moreover, Childress discovered during the investigation that the other supervisor had previously run manufacturing lines without any safety guards and had never been disciplined for that practice.

Childress recommended that Aleris terminate Neff for running a manufacturing line without safety guards, a Level 4 safety violation under the company's work rules. The HR manager and the plant manager agreed with his recommendation. The company never disciplined the other supervisor in any way, despite the evidence uncovered during the investigation that he had run manufacturing lines without safety guards. Neff was eventually replaced by a worker 10 years younger than he is.

Neff sued the company for age discrimination under federal and Ohio law. After discovery (the pretrial exchange of evidence), Aleris asked the court to dismiss the case without a trial. The court denied its request because of the mistakes made by Childress.

In particular, the court focused on Childress' inquiries about Neff's retirement plans and his comments that Neff was "set in his ways" and that "times have changed . . . and you've got to change with it." The court found those remarks were indicative of age bias.

At the same time, the court took the company to task for conducting a poor investigation in which the two workers and the other supervisor who allegedly were responsible for removing the safety guards from the manufacturing line weren't even interviewed. The court also found it telling that the other supervisor, who consistently ran manufacturing lines without safety guards, was never disciplined in any way. Comparing that evidence to Neff's 38 years of service and strong performance reviews and the fact that he only encountered problems after Childress became his direct supervisor, the court found that the case had to be resolved by a jury.

## WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This decision highlights how important it is to train your supervisors. Childress made numerous mistakes in managing Neff.

First, he made inappropriate comments that implicitly referred to Neff's age.

Second, he conducted a grossly incomplete investigation and didn't even interview three of the four primary actors in the incident that led to Neff's termination.

Third, he failed to follow up and discipline or terminate the other supervisor, who had engaged in the same type of behavior for which he terminated Neff.

The case provides a sobering lesson about the importance of training your managers not to make inappropriate comments based on someone's protected class, conducting thorough investigations and ensuring that they follow up and treat similarly situated employees the same in matters of discipline and discharge.



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# IV. OSHA's NEW ACCIDENT REPORTING RULES

## A. Overview of New Rule

Thousands of employers implement post-accident drug and alcohol testing policies to promote workplace safety. However, the legal landscape shifted on May 12, 2016, when the Occupational Safety and Health Administration published its **final rule** on electronic reporting of workplace injuries and illnesses.

Specifically, effective 90 days after publication of the rule, on August 10, 2016, employers must establish "**a reasonable procedure**" for employees to report work-related injuries and illnesses promptly and accurately. The rule prohibits this procedure from **deterring or discouraging a reasonable employee from accurately reporting a workplace injury or illness.**

The rule also prohibits any retaliation for reporting an injury or illness.

One day after the filing of a memorandum and emergency motion by the Manufacturers Center for Legal Action (MCLA) seeking to enjoin the enactment of OSHA's new injury and illness rule, the Department of Labor announced a delay in enforcement of the new rule until **DECEMBER 1, 2016.**

The National Association of Manufacturers (NAM), along with other organizations, filed the challenge against OSHA's electronic record-keeping rule. The coalition has asked the court to declare that the rule is unlawful because it prohibits or otherwise limits incident-based employer safety incentive programs and/or routine mandatory post-accident drug testing programs.

More specifically, OSHA's new a final rule that amended 29 C.F.R. 1904.35 to add two new provisions:

- Section 1904.35(b)(1)(i) makes explicit the longstanding requirement for employers to have a ***reasonable procedure*** for employees to report work-related injuries and illnesses, and

- Section 1904.35 (b)(1)(iv) incorporates explicitly into Part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illnesses under section 11(c) of the OSH Act, 29 U.S.C. § 660(c).

## B. Reporting Injuries, Illnesses and Accidents As Soon As "PRACTICAL" … ***Not Immediate***

To establish a violation of section 1904.35(b)(1)(i), OSHA must show that the employer either ***lacked a procedure for reporting work-related injuries or illnesses***, or that the employer had a procedure that was ***unreasonable***. The employer must establish a ***reasonable procedure*** for employees to report work-related injuries and illnesses. An employer's reporting procedure is reasonable if



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it is not unduly burdensome and would not deter a reasonable employee from reporting.

For example, OSHA explained that it would be reasonable to require employees to report a work-related injury or illness ***as soon as practicable*** after realizing they have the kind of injury or illness they are required to report to the employer, such ***as the same or next business day*** when possible.

However, it would not be reasonable to discipline employees for failing to report an injury ***before they realize they have a work-related injury*** they are required to report or for failing to report "immediately" when they are incapacitated because of the injury or illness. A rigid prompt-reporting requirement that results in employee discipline for late reporting even when the employee could not reasonably have reported the injury or illness earlier would violate section 1904.35(b)(1)(iv).

It would also be reasonable to require employees to report to a supervisor through reasonable means, such as by phone, email, or in person. However, it would not be reasonable to require ill or injured employees to report in person if they are unable to do so. Likewise, it would not be reasonable to require employees to take unnecessarily cumbersome steps or an excessive number of steps to report.

For a reporting procedure to be reasonable, and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses ***within a reasonable timeframe after the employee has realized that he or she has suffered a recordable work-related injury or illness and in a reasonable manner.***

## WHAT DOES THIS MEAN TO HR?

First, all employers must have a process for employees to follow in reporting accidents, injuries and illnesses.

Next, the days of requiring employees to report all accident and injuries "**IMMEDIATELY**" are gone. Instead, policies should now say something like:

> In the case of accidents, injuries or illnesses, employees must promptly notify their supervisor or some company official as soon as practical.
>
> *Incident Report Forms are provided for this purpose and may be obtained from _______________. The supervisor will then complete a "____________ Form." These reports should be sent to ________________. Failure to report an injury or illness as required by organization policy could result in loss of compensation benefits and possibly lead to disciplinary action, up to and including termination.*



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## C. Safety Incentives

OSHA says Section 1904.35(b)(1)(iv) does not prohibit safety incentive programs.

Instead, according to OSHA, it ***does*** prohibit taking any adverse action against employees simply because they report work-related injuries or illness. Withholding a benefit, such as a cash prize drawing or any other substantial award, simply because an employee reported an injury or illness would likely violate section 1904.35(b)(1)(iv) regardless of whether such an adverse action is taken pursuant to an incentive program.

Penalizing an employee simply because the employee reported a work-related injury or illness ***without*** considering the circumstances surrounding the injury or illness ***is not objectively reasonable*** and therefore not a legitimate business reason for taking adverse action against the employee.

OSHA then gave the example of where an employer promises to raffle off a $500.00 gift card at the end of each month if no employee sustains an injury that requires the employee to miss work. If the employer cancels the raffle in a particular month simply because an employee reported a lost-time injury without also considering the circumstances of the injury, such as the cause of the accident, this would likely violate section 1904.35(b)(1)(iv) because it would constitute adverse action against an employee for reporting a work-related injury ... ***not*** for violating a safety rule.

However, OSHA says if an employer conditions the raffle on complying with legitimate safety rules or participating in safety-related activities for that month, that ***would not*** violate section 1904.35(b)(1)(iv).

In this previous example, suppose an employer raffles off a $500.00 gift card each month **if** all of the employees have universally complied with legitimate workplace safety rules, such as using required hard hats, fall protection and following lockout-tagout procedures, would not violate the rule.

Likewise, rewarding employees for participating in safety training or identifying unsafe working conditions would not violate the rule.

On the other hand, OSHA encourages employers to find creative ways to incentivize safe work practices and accident-prevention measures that do not disproportionately penalize workers who report work-related injuries or illnesses. If OSHA determines that an employer withheld a benefit from an employee simply because the employee reported a work-related injury or illness without also considering the circumstances surrounding the injury or illness, OSHA may issue a citation under section 1904.35(b)(1)(iv).



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## WHAT DOES THIS MEAN TO HR?

Penalizing employees for not following safety rules or for not attending safety training or events is permissible under OSHA. However, penalizing employees for having an accident or for missing work due to an accident will most likely be an OSHA violation.

### D. Post-Accident Drug and Alcohol Testing

Section 1904.35(b)(1)(iv) does not prohibit employers from drug testing employees who report work-related injuries or illnesses so long as they have an ***objectively reasonable basis for testing***, and the rule does not apply to drug testing employees for reasons ***other*** than injury-reporting.

Further, OSHA will not issue citations under section 1904.35(b)(1)(iv) for drug testing conducted under a state workers' compensation law or other state or federal law, such as under DOT regulations.

In order to issue a violation against an employer under 1904.35(b)(1)(iv), OSHA will need to establish the three elements of retaliation:

- A Protected Report of an Injury or Illness;
- Adverse Action and
- Causation.

When evaluating whether an employer had a reasonable basis for drug testing an employee who reported a work-related injury or illness, the **central inquiry** will be whether the employer had a reasonable basis for believing that drug use by the reporting employee ***could have contributed to the injury or illness*.**

If so, it would be objectively reasonable to subject the employee to a drug test. When OSHA evaluates the reasonableness of drug testing a particular employee who has reported a work-related injury or illness, it will consider the following factors:

- Whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred),
- **Whether other employees involved in the incident that caused the injury or illness were also tested or whether the employer only tested the employee who reported the injury or illness**, and



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- Whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due the hazardousness of the work being performed when the injury or illness occurred.

OSHA will only consider whether the **drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available**. **Therefore, at this time, OSHA will consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs**.

The general principle here is that drug testing may not be used by the employer as a form of discipline against employees who report an injury or illness, but may be used as a tool to evaluate the root causes of workplace injuries and illness in **appropriate circumstances**.

OSHA then cites to the example of a crane accident that injures several employees working nearby but not the operator. The employer does not know what caused the accident, but there is a reasonable possibility that it could have been caused by operator error or by mistakes made by other employees responsible for ensuring that the crane was in safe working condition. In this scenario, OSHA says it would be reasonable to require all employees whose conduct ***could have*** contributed to the accident to take a drug test, whether or not they reported an injury or illness. Testing would be appropriate in these circumstances because there is a reasonable possibility that the results of drug testing could provide the employer insight on the root causes of the incident. **However, if the employer only tested the injured employees but did not test the operator and other employees whose conduct could have contributed to the incident, such disproportionate testing of reporting employees would likely violate section 1904.35(b)(1)(iv).**

Furthermore, OSHA cites that drug testing an employee whose injury ***could not possibly*** have been caused by drug use would likely violate section 1904.35(b)(1)(iv).

For example, OSHA cites where drug testing an employee for reporting a repetitive strain injury would likely ***not*** be objectively reasonable because drug use could not have contributed to the injury. Also, OSHA cites that Section 1904.35(b)(1)(iv) prohibits employers from administering a drug test in an unnecessarily punitive manner regardless of whether the employer had a reasonable basis for requiring the test.

## WHAT DOES THIS MEAN TO HR?

According to OSHA, the real key here for employers lies in bullet #2:

**Is the employer testing EVERYONE potentially involved in the accident … or just the person who reported it?**



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Therefore, employers should consider using wording similar to the following:

> Post-accident testing will be conducted whenever an accident occurs as defined below:
>
> 1. A fatality of anyone involved in a workplace accident,
> 2. Anyone involved in a vehicular accident causing damage in apparent excess of $750, as determined by the Company, (You may decide on this amount) or
> 3. Anyone involved in a non-vehicular accident causing damage in apparent excess of $500, as determined by the Company, (You may decide on this amount) or
> 4. Anyone involved in reportable work-related accident wherein someone is injured and management believes off-site medical attention is required.
>
> When any such accidents occur, any employee the Company believes may have contributed to the accident will also be tested for drugs or alcohol use or both.

## V. OSHA's NEW PENALTY SCHEDULE

In November 2015, Congress enacted legislation requiring federal agencies to adjust their civil penalties to account for inflation. The Department of Labor has adjusted penalties for its agencies, including the Occupational Safety and Health Administration (OSHA).

The new penalties took effect August 2, 2016. Any citations issued by OSHA on or after this date will be subject to the new penalties if the related violations occurred after November 2, 2015.

| Type of Violation | Previous Maximum Penalty | Current Maximum Penalty |
|---|---|---|
| Serious<br>Other-Than-Serious<br>Posting Requirements | $7,000/violation | $12,471/violation |
| Failure to Abate | $7,000/day<br>beyond abatement day | $12,471/day<br>beyond the abatement day |
| Willful or Repeated | $70,000 per violation | $124,709 per violation |



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# TERRIBLE INVESTIGATION

## I. SAME SEX SEXUAL HARASSMENT AND TERRIBLE INVESTIGATION LEADS TO LIABILITY

In Smith v. Rock-Tenn Servs., No. 15-5534, 2016 Fed. App'x 0033P (6th Cir., February 10, 2016), Jeff Smith worked as a support technician at a corrugated box company in Tennessee. About 70% of the employees were male.

Smith alleged that coworker Jim Leonard was sexually harassing only the males in the facility.

Earlier that year, Leonard had been disciplined for touching another worker while they were standing at a urinal.

The first day Smith worked with Leonard, Smith said that he saw Leonard walk up behind another male machine operator, grab his butt and then sniff his finger.

Later, Leonard walked up behind Smith and slapped him on the butt as he walked by him.

Smith claimed he pointed his finger at Leonard and told him not to do that again.

A week later, Leonard came up behind Smith and grabbed him so hard on the butt that it hurt. Once again, Smith told Leonard never to touch him again.

About a month later, Smith was bent over to load boxes on a pallet when Leonard came up behind him and started "hunching" on him so that Leonard's "privates" were up against Smith's "tail." Smith grabbed Leonard by the throat and lifted him off the ground.

Leonard later apologized to Smith, saying, "I didn't know how far I could go with you."

The employer's policy required employees in such situations to directly ask his harasser to stop engaging in the offensive conduct before bringing it to a manager's attention. Smith had done that, but without any success.

Smith then reported these incidents with Leonard at a safety meeting. Smith's supervisor admitted that Leonard had done this type of thing in the past.

Smith then officially reported the incidents to plant superintendent, Scott Keck. Keck told Smith that nothing could be done until the following Friday because the supervisor was on vacation. At the end of the meeting, Keck sent Smith back out to work with Leonard.



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Smith took a week of sick leave and went to counseling due to Leonard's behavior. Smith then took short-term disability leave for a year and a half and never returned to the company.

After Smith's leave began, the company conducted an internal investigation. Leonard denied the allegations, but other employees reported hearing about similar behavior by him. The company didn't take written statements from any employees or prepare a formal investigation report.

General manager David McIntosh decided to suspend Leonard for two days. He based his decision only on the incidents involving Smith. He didn't investigate any allegations of previous misconduct by Leonard.

At the time he imposed the suspension, McIntosh wasn't aware that Leonard had been disciplined earlier that year for touching another worker while they were standing at a urinal. That incident was described as "sexual harassment-horseplay," and Leonard had been instructed not to have contact with any coworker in a way that could be interpreted as sexual harassment.

Smith filed suit in the U.S. District Court for the Middle District of Tennessee on June 15, 2012, alleging sexual harassment, wrongful termination, and retaliation under the Tennessee Human Rights Act. After receiving a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), he amended his complaint to add claims for hostile work environment and constructive discharge under Title VII of the Civil Rights Act of 1964.

The district court granted the company partial summary judgment (dismissal without a trial) on the retaliation and constructive discharge claims but denied summary judgment on the sexual harassment and hostile work environment claims. The case went to trial, and the jury returned a verdict in favor of Smith. The jury awarded Smith $307,000, but it was reduced to $300,000 to comply with the federal damages cap.

The company appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit held that the evidence presented to the jury was enough to establish the existence of a hostile work environment. The court concluded the harassment was "based on sex" because a jury could reasonably find that Leonard's activities were directed only toward men, even though female employees also worked at the company.

The court emphasized that harassment involving incidents of "**physical invasion"** are more severe than making harassing comments alone. As a result, it was important to the court that all of the incidents Smith complained about and/or observed involved an element of physical invasion.

The court also agreed that the trial court properly allowed evidence of Leonard's behavior toward **other men at the workplace**, even though Smith did not directly observe all of the alleged misconduct. This conduct towards other men showed that



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Leonard had indeed targeted men and such incidents only added to the "hostile environment."

**The court also took great issue with the company's investigation of Smith's complaint. The court found that a reasonable jury could conclude that the investigation wasn't conducted in a timely manner because the general manager waited 10 days to begin the inquiry.**

The court also found it reasonable that a jury could conclude that the company should have separated Smith and Leonard pending the investigation and should have done more than suspend Leonard for two days because previous complaints had been lodged against him.

## WHAT DOES THIS MEAN TO HR?

This case was a disaster by the employer from the very start.

First, it has been clear since 1998 that same sex sexual harassment is a cause of action under Title VII. (Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998))

Next, employees should be required to confront their alleged harasser only if they are comfortable doing so. If not, they should have the option of going directly to a member of management.

**Also, the law has been clear for decades regarding when an employer should begin an investigation for alleged harassment: *IMMEDIATELY!***

**Smith should have never been put back into the same area as Leonard. The two should have been separated and the investigation should have started either that very day or the next.**

Further, this alleged investigation was an absolute joke. No written statements or digital recordings of these statements were taken. The other offensive acts committed by Leonard against other men were not taken into account. It has been clear for years that in order to substantiate a charge of hostile environment, the alleged harasser's conduct throughout the workplace must be considered. Anything that contributes to the creation of a "hostile environment" must be taken into account.

And to top it all off, to give Leonard only two days off for behavior that could be interpreted as a form of sexual assault is obscene. Such a response shows at best a perpetuation of the "good old boy network," and at worst … approval of Leonard's behavior.

Employers are required to take "reasonable measures to end the harassing acts." Giving Leonard two days off was an insult to Smith and the other victims.

And finally, the contention that Leonard's conduct was mere "horseplay" is absurd and insulting. In 1993, well over 20 years ago, the U.S. Supreme Court gave us the standard



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we still use today to see if offensive behavior rises to the level of creating a "hostile environment." (Harris v. Forklift Systems, 510 U.S. 17 (1993))

In Harris, the Court held that a **"subjective/objective" test** is to be used to determine whether or not the harasser's offensive conduct was severe or pervasive enough to substantiate a claim of sexual harassment.

The first prong of this formula is the **subjective test**. Under the subjective test, the question to ask is **whether or not this particular victim subjectively perceived the environment to be so abusive or so hostile that the conditions of her employment were actually altered.** If the answer to this question is "no," then the inquiry stops there. No hostile environment exists. However, if the answer to this question is "yes," then the plaintiff must also pass the second prong of the test.

The second prong of this formula is the real test. It is the **objective test**. Under this test, according to the Harris Court, the first question to ask is **whether or not the offensive conduct was so severe or pervasive that a "reasonable person" would consider the work environment to be so abusive or so hostile that it altered the employee's conditions of employment.** If so, then a hostile environment under Title VII will be viewed as having been created. If "no," then the plaintiff's sexual harassment claim based on hostile environment would fail.

In other words, if Mr. Leonard's behavior was on the front page of USA Today … what would most people think?

I think most people would be so offended they could not function in their jobs properly.

# WHO SHOULD CONDUCT THE INVESTIGATION?

## I. CHECKLIST FOR CHOOSING THE INVESTIGATOR

First and foremost, the investigator should be one who has a respected level of knowledge or a certain level of expertise in the subject matter at hand. In short, the investigator should have credibility as a subject matter expert to conduct the investigation.

### 1. Ability To Function As A Witness

If the subject matter of the investigation is one that may likely progress onto litigation (i.e., Illegal harassment, illegal discrimination, etc.), then the investigator should be one who has experience in testifying as a witness.

Additionally, the investigator should also be available to testify.



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## 2. Objectivity

Sometimes, as in harassment and discrimination cases, it is best to have an investigator from outside the organization whose objectivity will not be questioned.

## 3. Litigation/Deposition Mindset

The investigator should consider what issues will likely arise in litigation. Questions should be asked and issues addressed that will prepare the employer for deposition and litigation.

If the interviewer does not have this background, then the interviewer should work with outside counsel in spotting the pertinent issues and in drafting the interview questions.

## 4. Confidentiality

The investigator should be able to keep the facts of the investigation confidential.

## 5. Sufficient Time

Time is the one commodity that we all run short of and is not renewable. Investigations are time consuming ordeals and should be planned for accordingly. The investigator should have ample time to prepare for the investigation, conduct the investigation, and perform the appropriate follow-up to the investigation.

Also, the investigator should be available to testify.

## 6. Skilled and Experienced As An Investigator

Knowing how to conduct a proper investigation is a true skill. It should not be left to amateurs.

The investigator must know how to plan the investigation, how to spot the real issues in the investigation, how to draft the interview questions, how to interview the witnesses, how to properly formulate and ask the questions, the laws that govern today's investigations and how to draft the final report.

A properly executed investigation can diffuse such risks as public and employee relations disasters and any potential lawsuits.



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## II. USE OF COUNSEL AND PROTECTING ATTORNEY-CLIENT PRIVILEGE

### A. Disqualification

According to Disciplinary Rule 5-102, if counsel conducts the investigation and may therefore be required to serve as a witness at trial, then the attorney **will not** be permitted to serve as a litigator on the case. In other words, an attorney cannot serve as both litigator and witness.

### B. Attorney-Client Privilege Preserved

If the notes of the investigation are co-mingled with the strategy of the employer in conjunction with counsel, the attorney-client privilege regarding the employer's strategy will be lost.

Therefore, notes taken during the interviews should be kept separate from those notes made in conjunction with legal counsel regarding defensive strategies.

# DIGITALLY RECORDING THE WITNESS INTERVIEWS

Personally, I will never conduct an investigation when potentially serious issues are involved without digitally recording every interview I conduct. I have been burned on this in the past and will never let that happen again.

No matter which way the investigation goes, someone will be upset. When the results of the investigation are made public, whoever disagrees with its findings will instantly attack the investigator.

- Did the investigator lead the witnesses?
- Did the investigator accurately interpret what the witnesses said?
- Did the investigator ask the right questions?
- Did the investigator allow the witness to fully answer the questions?
- Did the investigator allow the witness to make any additional statements?
- Did the investigator break any laws or violate any Constitutional rights of the witnesses?
- Did the investigator "pressure" or "bully" the witnesses?

When The Ohio State University launched an investigation of the practices of its band and its band director, Jon Waters, in 2014, the investigator did not digitally record the statements he got from the witnesses he interviewed. As soon as the investigation was



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published, several witnesses stepped forward and claimed that their testimony had been used out of context and that they disagreed with the conclusions of the investigation. The entire investigation came under fire and the controversy escalated.

I personally have had witnesses claim that I yelled at them and bullied them. In one instance, I was accused of yelling at employees and I was not even in the building at the time.

In end, someone somewhere is going to be deeply offended by the results of the investigation, so the investigator had better be able to prove the basis of his findings.

Also, witnesses lie ... a lot. They give contradictory statements … and then deny what they previously said. Such confusion cannot happen if the investigator digitally records all of the statements witnesses provide.

I also record all of the interview sessions because you can count on some of the witnesses secretly recording the interviewer. To safeguard against having a witness editing the interview session and chancing its meaning, it is always a good idea to have a "master" copy of the interview in order to combat any such devious tactics.

I also like to record these interview sessions so I can listen to them again later. The investigation must be thorough, legally defensible and accurate. An investigator can easily listen to hours of witness statements each day. So, it is best to have a digital recording of the interview sessions in order to carefully listen to what the witnesses are saying.

Of course, these recordings also hold the interviewer accountable to what is really being said in these sessions. If the interviewer fabricates anyone's statements, it will be evident in the recordings.

Also, the emotions of the witnesses comes through in the recordings. This does not happen in written notes taken by the investigator. Assessing the credibility of a witnesses is a major part of an investigator's job.

I have had witnesses enter the interview room and instantly start attacking me. I have had to dismiss witnesses due to how overbearing and unruly they were becoming. When I have their horrendous behavior captured in a digital recording, I have no problem showing why that witness was dismissed or why that witness was not given any credibility.

Finally, I never secretly record a session. That would destroy the trustworthiness and the credibility of the investigator. It puts the investigator in a devious light.

Instead, I have a prepared statement that I read to each interviewee before any statement sessions begin.



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# SAMPLE:

# INVESTIGATION OPENING STATEMENT

My name is Scott Warrick. I am an attorney and a human resource consultant. I have been brought into investigate some very serious allegations. My job is to offer you the opportunity to give input into this investigation with your first-hand knowledge, your personal observations and any facts that will help us discover the truth.

I have assembled a list of questions that go to the matters we are investigating. I will ask you these questions and please feel free to expound upon them with whatever first-hand knowledge or facts that you have to share. I may also ask you follow up questions depending on what you tell me in order to get to the bottom line truth.

Also, as is the case in any investigation, some people will like the results and some will not. As a result, either your credibility or my credibility will be called into question by those who disagree with the findings.

So, in order to keep my final report honest, as well as everyone else involved, **I will be recording these interviews**. That way, I cannot fabricate answers.

Protecting misperceptions and faulty recollections is also critical. We all know if there are 50 witnesses to a bank robbery and the police get statements from these people, each witness will give a slightly different description of what they saw … even though they all witnessed the same event. The witnesses are not lying … they just saw it and remembered it differently.

Again, all of these precautions must be taken to ensure accuracy.

Do you understand everything that I have just explained to you?

Please state you name and position here at _______________.



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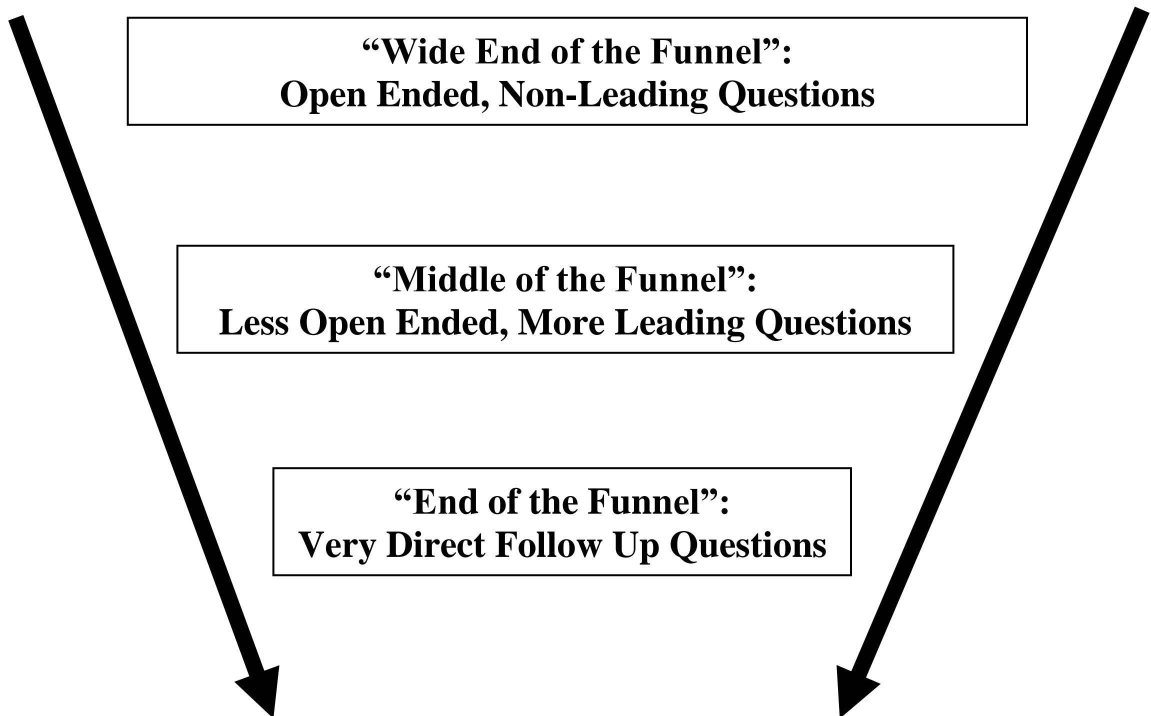
# THE INVESTIGATION PLAN

## I. DRAFTING INTERVIEW QUESTIONS

### A. Preparing Questions For The Investigation: The "Funnel" Approach




#### 1. "Wide End of the Funnel": Open Ended, Non-Leading Questions

In most investigations, it is best to begin interviewing a witness by asking non-leading, open-ended questions. It is critical that the investigator ask these broad open-ended questions at the beginning of the witnesses' interview because one attack often made once the investigation is over is that the investigator "led" the witness to give only certain responses that the investigator wanted. Unfortunately, such manipulation by bad investigators does occur, which will kill the credibility of the investigation.

For instance when investigating whether an employee is doing her job properly, asking co-workers such questions as, **"Do you think Sally is pulling her weight?" or "What problems have you seen with Sally?"** or **"Why do you think Sally is so stupid?"** are not proper. They are very leading and can be used to show that the investigation was not impartial and was prejudicial against the accused employee.

Instead, interviewers should begin by asking such non-leading and open-ended questions as, **"What can you tell me about Sally?"** or **"What is it like to work with Sally"** or **"What kind of worker is Sally?"**



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Open-ended, non-leading questions do not prompt the interviewee to give a certain answer. Good investigators want honest answers from employees. As witnesses give more and more information, the interviewers can ***then*** ask more pointed questions related to what the interviewee is telling the investigator.

The witness should lead the investigator … ***not*** the other way around.

In cases where the allegations made against a harasser or against someone who is committing acts of discrimination in the workplace, usually just asking an opening non-leading question is all that is needed to "open the flood gates."

Another reason to ask broad non-leading questions to start the interview is because investigators never really know what might come out of the interview. Asking such open-ended, non-leading questions allows witnesses to bring up other avenues of information that the interviewer may not have considered.

For instance, in a sexual harassment investigation, a proper opening question would be, **"What is it like working for Peter?**"

In such instances, the interviewee might answer, **"Well, he's OK, but it bothers me a bit that he is stealing from the company. Is that what this is all about?"**

Clearly, the interviewer would want to ask such questions as, "Yeah, sure. Why don't you tell me about that?"

Once the witness has told the investigator all about the theft, the investigator would want to get back over to any issues of harassment that might exist.

For instance, the investigator might ask such questions as, "How does Peter act around you?" or "How about the others?" or "Have you ever seen any inappropriate behavior exhibited by Peter?"

An ***improper*** leading question, even at this stage, would be to ask, "Have you ever seen Peter sexually harass anyone … like Tammy?"

Of course, if the interviewee does not provide any relevant information in response to the non-leading questions, then either the witness is not willing to talk or the witness really doesn't know anything about the issue at hand.

The bottom-line with asking open-ended, non-leading opening questions is to keep from pointing the witness into giving a certain type of answer. A good interviewer wants the interviewee to bring up the pertinent subjects … not the other way around.



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## 2. "Middle of the Funnel": Less Open Ended, More Leading Questions

Suppose the investigator asks the witness, **"What can you tell me about Sally?"** In response, the witness says:

**"Sally? She is a terrible worker. Why?"**

The interviewer would then follow up with a more specific and pointed question like,

**"Why is she a terrible worker?<br>Can you give me some specific examples?"**

In this case, the witness has "opened the door" for the investigator to then ask more specific questions about Sally. The witness has lead the investigator there … not the other way around.

## 3. "End of the Funnel": Very Direct Follow Up Questions

If the witness provides pertinent information in response to an open-ended question, then the investigator should ask very direct and specific follow-up questions.

For instance, consider the following exchange:

> "You said Perter does act inappropriately. Give me some specific examples."
>
> "You mean like when he unsnaps my bra?"
>
> "Yeah … let's go with that. When did he do that? Who else saw this?"

Obviously, the interviewee has now "opened the door" on the subject of sexual harassment, so it is permissible to ask pointed questions in order to get to the truth. This is the time to get **VERY** specific.

## 4. Draft Opening And Pertinent Questions Beforehand

Investigators should have their open-ended questions written down before they begin. The investigator will then ask the necessary follow up questions based on what each witness says. Still, investigators should make sure they ask their "core" pre-written questions so they do not forget to ask important questions.



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Whenever I conduct an investigation, I put together an "Interview Question Packet" for each person I am going to interview. Each page has one questions at the top of the page. That way, I have the whole page to take notes on and to write down any other questions I might ask or thoughts I might have on what the witness is saying. (See example at the end of these materials.)

**5. Chronological Series Questions**

Sometimes, it is best to ask a series of questions that place events into a logical timeframe. This helps the interviewer to understand the sequence and it may also help to organize this process for the interviewee.

**6. Keep Questions Simple: Avoid compound questions and address only one issue at a time.**

Do not overwhelm or confuse the witness. Keep the questions simple.

## II. CREDIBILITY: WHO TO BELIEVE?

In Harris v. Forklift Systems, 510 U.S. 17 (1993), a female manager, Teresa Harris, received numerous unwanted sexual comments and offensive innuendoes from Charles Hardy, the company president.

In front of others, Hardy would suggest that he and Harris go to the Holiday Inn and "negotiate" her raise, he would ask Harris and other female employees to get coins out of his front pants pocket, he would call her a "dumb-ass woman," he would throw objects on the ground in front of Harris and other female employees, then ask them to pick these items up, and he would make sexual comments about Harris' and other women's clothing.

The final straw came one day after Harris had secured business from a customer. Harris introduced the new customer to Hardy. Hardy looked at the customer, then at Harris, and asked her, "What did you do, promise the guy...some [sex] Saturday night?"

Hardy claimed that Teresa Harris was simply hypersensitive and that the reasonable person would not be all that offended by his behavior because he was simply "kidding." She took it all wrong.

In order to determine whether Harris was hypersensitive, the Court developed the following test:



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### *A "SUBJECTIVE/OBJECTIVE" TEST*

One of the Court's most important holdings in Harris was that a **"subjective/objective" test** is to be used to determine whether or not the harasser's offensive conduct was severe or pervasive enough to substantiate a claim of sexual harassment.

The first prong of this formula is the **subjective test**. Under the subjective test, the question to ask is **whether or not this particular victim subjectively perceived the environment to be so abusive or so hostile that the conditions of her employment were actually altered.** If the answer to this question is "no," then the inquiry stops there. No hostile environment exists. However, if the answer to this question is "yes," then the plaintiff must also pass the second prong of the test.

The second prong of this formula is the **objective test**. Under this test, according to the Harris Court, the first question to ask is whether or not the offensive conduct was so severe or pervasive that a **"reasonable person"** would consider the work environment to be so abusive or so hostile that it altered the employee's conditions of employment. If so, then a hostile environment under Title VII will be viewed as having been created. If "no," then the plaintiff's sexual harassment claim based on hostile environment would fail.

**Important Lessons Under Harris**

**THE HARASSER'S INTENT IS IRRELEVANT**

**&**

**WHAT IS YOUR REPUTATION?**

Therefore, in order to determine if either the alleged harasser or the alleged victim is to be believed as being the most credible, the harasser's reputation and conduct is put to the test ... as is the reputation and conduct of each witnesses.

- Has the accused or witness lied to the investigator?
- What is the accused or witnesses' reputation in the workplace?
- Does the accused or witness have an agenda?
- How did they conduct themselves in the interview session?



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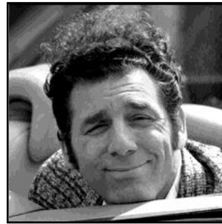
Think of it this way:

Assume Kramer is taking a cab ride to the airport. There is no one in the cab but Kramer and the cabbie. Once they get to the airport, the cabbie, who is a person of color, accuses Kramer of using all kinds of racial slurs against the cabbie. Of course, since no one was there but Kramer and the cabbie, it all gets down to what the "reasonable person" thinks. Since Kramer's reputation works against him here, the cabbie will most likely be the most credible because …

***THAT*** **IS THE REPUTATION KRAMER HAS CREATED FOR HIMSELF.**



**Michael Richards**

**In 2006, Richards went on a three minute tirade during his comedy routine in which he used numerous racial slurs.**

**KEY POINT: What is Your Reputation In The Workplace?**

**How Are You Being Perceived By Others When You Act And Speak?**

# DEFAMATION ISSUES

## I. DEFAMATION: EMPLOYER/EMPLOYEE STATEMENTS PROTECTED

### A. Defamation: What The Plaintiff Must Prove

In most states, in order to sustain a charge of defamation, the plaintiff must prove the following:

a) That the defendant made a false **statement** about the plaintiff,

b) The statement was a non-privileged communication made to a third party,

c) The defendant was negligent in making the statement and

d) The plaintiff was harmed by the statement.

Defamatory statements made about one's profession in some states is referred to as "Per Quod Defamation," which is a very serious charge. It is not necessary for the plaintiff to show damages in such cases.



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However, in order to substantiate a case of defamation, the aggrieved person must prove that the investigator made a "false **statement** about the plaintiff." The key word here is "statement." Issues of defamation arise when the investigator makes "statements of fact" regarding anyone involved in the investigation.

Instead of making "statements of fact," investigators are expected to make conclusions … all of which are based on their opinions. Opinions are not statements of fact.

For example, saying that "Peter is a sexual harasser and has broken the law" is a statement of fact, which could open the investigator up to charges of defamation.

Instead, the investigator should say something like, "In my opinion…" or "I believe…" or I have concluded that ..."

Such statements reflect the investigator's opinions, which are not statements of fact subject to charges of defamation.

It is the difference between saying, "Peter is a pervert" and "I think Peter is a pervert." The second phrase is not a statement of fact so it is not actionable.

I really do think he is a pervert. Prove that I don't.

This is how investigators should discuss their conclusions and draft their final reports.

## B. The Truth: An Absolute Defense

An absolute defense to any charge of defamation is the truth. (Shifflet v. Thompson Newspapers., 69 Ohio St. 179, 431 N.E.2D 1014 (1982))

## C. Privileged Statements

### 1. Between Management Team Members

Communication between officers of a corporation, or between different branches/departments of the same corporation, are privileged. Such communications are not considered "publications" for the purposes of defamation law. McKenna v. Mansfield Leland Hotel, 55 Ohio App. 163, 9 N.E.2d 166 (Richland Co. Ct. App 1936).



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### 2. Between Employer and Employees

Further, Ohio courts have overwhelmingly held that communications between an employer and its employees made in the course of an investigation are protected by the "business dealings" qualified privilege. (Evely v. Carlton, 4 Ohio St. 3d 164, 447 N.E.2d 1290 (1983)

### 3. To Customers

Additionally, the Ohio Supreme Court has ruled that even communications to customers and business partners for business purposes fall under the protection of the "business dealings" qualified privilege.

In Hahn v. Kotten, 43 Ohio St. 3d 237, 331 N.E.2d 713 (1975), the court held that an insurance company's statements to its policyholders regarding why the plaintiff, an insurance agent, was terminated were all privileged statements. The court reasoned all "that is necessary to entitle such communications to be regarded as privileged is that the relation of the parties should be such as to afford reasonable ground for supposing an innocent motive for giving information."

### 4. Losing The Qualified Privilege

Employers will not be held liable for mere rumors that cannot be traced to its doorstep. (Gray v. General Motors, 52 Ohio App. 2d 348, 370 N.E.2d 747 (Cuy. Co. Ct. App. 1977))

However, if the plaintiff can prove by clear and convincing evidence that the defendant acted with actual malice, which means that the employer acted with "knowledge that the statements are false or acting with reckless disregard as to their truth or falsity," then the qualified privilege will be defeated. Therefore, the subjective belief of the author/publisher is critical. (Jacobs v. Frank, 60 Ohio St. 3d 111, 573 N.E.2d 609(1991))



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### D. Co-Workers Cannot Sue Each Other For “Business Interference"

In Barilla v. Patella, 14 Ohio App.3d 524 (2001), John Barilla and Nick Patella worked as furniture salesmen with Dillard’s department store in Cleveland. The store had two tables for sale that had been damaged, although one was damaged more than the other. Due to this damage, both tables were marked down, although one table was marked down more than the other since it had sustained more damage.

However, Barilla switched the prices on the table, thus selling the less damaged table for a VERY low price. When Patella discovered what Barilla had done, Patella reported the incident to Dillard management. Barilla was terminated.

Barilla then sued Patella for interference with a business relationship. The court ruled against Barilla.

The court reasoned that an employee cannot be sued for intentionally interfering with the employment relationship between a disciplined employee and his employer. Otherwise, employee would be discouraged from fulfilling their duty to report dishonesty by a co-worker to their employer.

## II. FALSE IMPRISONMENT

### A. What If An Employee Wants To Leave An Investigation?

“False imprisonment” occurs when an employer “confines one intentionally without lawful privilege and against his consent with a limited area for any appreciable time … however short.” (Feliciano et al. v. Kreiger et al., 50 Ohio St. 2d 69, 362 N.E. 2d 646 (1979))

In order to prove a case of false imprisonment, the plaintiff only has to prove that he was deprived of his liberty. If that is the case, then the presumption is that the employee’s restraint was unlawful.

Therefore, physically restraining an employee, or physically restricting his ability to leave an investigation interview, may very likely result in a charge of false imprisonment. If an employee insists on leaving an investigation interview session, the employee should be allowed to physically leave. The employer should then invoke its disciplinary system against the employee who refused to cooperate.’



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> Employer handbooks should include as an immediately terminable offense any refusal to participate in a workplace investigation … as well as falsifying any information provided in that investigation.

## CONDUCTING THE SESSION

### ADOPTING A RELAXED COMFORTABLE ENVIRONMENT

If you watch most any TV show where the police interrogate a suspect, you will see the stereotypical cop leaning in and almost smothering the person. The cop's voice is raised. The person sinks back into his chair. He begins to sweat. The scene is very intimidating.

The cop then thinks the person is lying because he "acted nervous."

Well, who wouldn't?

This is an antiquated approach to investigation.

The reason we interview the accused and various witnesses is to get them to talk. The more they talk, the better. If the person is lying, all of those little facts they put forth get very hard to keep straight if the person is lying.

Instead of modeling your interviewing skills on the stereotypical police approach, look to the 1970's Lt. Columbo.

Columbo was the perfect interviewer.

He was very unassuming and non-threatening. He asks questions and plays dumb to his suspects, so they continue to talk. He doesn't talk too much or say more than he needs to say.

In short, he gains their trust. That is how to do it.

Whenever I conduct an interview, I will make myself very comfortable. I will lean back on my shoulders and slouch back in my chains. I will use a calm voice when I ask my questions. I want it all to be as conversational as possible.



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# <u>BUILDING TRUST WITH THE WITNESS</u>

I will also use my Verbal Jeet, or the "EPR" skills of "respect," in order to build trust with the witnesses, which stands for **<u>EMPATHIC LISTENING, PARROTING & REWARDS</u>**.

## EMPATHIC LISTENING

In an investigation, you ask your questions, then engage in ***"Empathic Listening,"*** which is to listen from the ***other person's perspective.***

This means you have to put yourself in the other person's shoes. How do they see it? Why do they see it that way? Of course, in order to do this, you have to be able to put your ego into your back pocket. You have to actually have to believe that the other person's opinion and perspective matters … maybe as much as yours.

## ACTIVE LISTENING v. EMPATHIC LISTENING

### Active Listening Skills

Most people don't think of "listening" as being a skill at all. Instead, most people think of listening as something that "just happens" and requires putting forth very little or no effort. However, that is not "listening." **That is the purely physical function called "hearing."**

In fact, developing and using the skills necessary for **"Active Listening"** is not a natural act for most people.

Listening effectively requires a high degree of concentration and a consciously concerted effort put forth by the Receiver of the message to truly comprehend what is being conveyed by the Sender. To accomplish this task, Receivers must practice becoming good listeners by adopting certain effective listening techniques.

Therefore, as they strive to listen effectively, Receivers should:

1. **Concentrate on the Sender's message**, which means clearing their minds of other worries or concerns not related to the Sender's ideas, not "fiddling" with physical objects, such as pens, pencils, papers, etc. Receivers must also ignore any external distractions. **Good listeners have to <u>want</u> to listen,** which means concentrating only on the Sender's message.

2. **Learn to speed up their "point-of-contact" of the Sender's message.** Too many times, Receivers do not really "listen" to the Sender's message until after the Sender has already started talking. As a result, the Receiver usually ends up "missing" the first part of the Sender's message. Therefore, Receivers should "listen" to the Sender's first few words instead of "jumping into" the conversation and start



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"listening" as soon as the Sender begins sending his message.

3. **Listen for overall ideas and the intent of the Sender rather than concentrating heavily on the individual words used in the message.** Many people have a difficult time effectively expressing their ideas to others, and, as a result, they often use words incorrectly or out of context and therefore misstate their true meaning.

4. **React to the ideas being conveyed by the Sender and <u>not to the person transmitting the message</u>.** Too many times, Receivers react more to their own personal likes and dislikes of the speaker than to the Sender's message.

5. **Don't "mentally argue" with the Sender.** Let the speaker complete his idea before forming a conclusion. **Receivers should listen now, analyze later.**

6. **Do not interrupt the Sender!** More Receivers are guilty of violating this listening technique than all of the others combined. Let the Sender convey his message. No one can talk and listen at the same time. Therefore, Receivers should try to **"shut up"** long enough to let the Sender get his idea across. (This is extremely difficult for some people, but it is essential for effective listening.)

7. **Take notes on <u>only</u> the <u>important points</u> being conveyed.** Trying to write "everything down" will only cause the Receiver to fall further and further behind the Sender. However, on the other extreme, not taking any notes when a Sender's message has a good deal of depth or breadth to it is just as bad, since the Receiver will probably only remember a few of the Sender's important points. Therefore, Receivers should take only enough notes as deemed necessary to properly recall the Sender's message.

8. Interjecting **"Encouragers,"** such as an occasional **"yes," "I see," "O.K.,"** or simply nodding in agreement demonstrates to the Sender that the Receiver is indeed "receiving" the message and that the Sender should continue.

9. **Ask questions if a point is unclear or possibly misunderstood.** Too many times, Receivers are too embarrassed to ask a Sender to repeat himself if they are confused over the message or if parts of the message tend to conflict. However, conventional wisdom should be enough to tell anyone that if a Receiver does not completely understand a Sender's message, the Receiver should ask for **clarification** before serious mistakes are made as a result of the misunderstanding.



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## PARROTING

Once we have "Empathically Listened" to the other person's point of view, we then need to **"PARROT"** back to the other person what they said ***to their satisfaction***.

Of course, you don't actually "mimic" back what the person said like a common Myna bird. However, you do need restate back to the other person:

1. **The facts of what they said so we fully understand their point of view and**

2. **How they felt about what happened.**

***You do not move on*** in the conversation until the other person agrees that you truly do understand his point of view and how he felt about the situation. "Parroting," or restating someone's position and feelings back to them accurately, requires us to listen closely and truly grasp the other person's point of view, rather than just granting that person mere "lip service."

You can accomplish this by saying something like:

- Now, to make sure that I understand everything you just said, let me repeat it back to you. If I get it wrong, interrupt me and let me know … or

- OK. I think I heard and understood what you just said, but just to make sure, let me repeat it all back to you and correct me if I get it wrong.

Parroting back to someone what they said and how they felt about a situation helps ensure that both parties have a common understanding and that the interviewer is really listening. This helps to build trust.

## "REWARDS"

Once the other person agrees that you understand how he sees the facts and how the other person feels about the situation, then you need to give the other person a "reward."

"Rewarding" someone else's opinion would involve saying something like:

# "I understand …"

However, giving someone a reward ***does not*** mean that you agree with that person's opinion or point of view. **Quite to the contrary**. What it means is that you are ***validating*** that person's point of view. You are acknowledging that you understand ***why*** the other person said what he said, ***why*** he did what he did or ***why*** he feels the way he does. However, it certainly does not mean that you are agreeing with the other person, only that you understand his position.



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What you are really doing when you are validating someone else's point of view, which is a "reward," is separating that person from his opinion. While on one hand you are telling the person that you understand his point of view, in the next breath you are most likely going to disagree with that person's opinion on this matter. In other words, you are not going to tie their value as a human being to this opinion.

NEVER understand the power of building trust and getting people to continue talking by using the simple phrase, "I understand."

## III. CREATING THE INVESTIGATION PLAN

### A. Investigation Checklist

1. When will investigation begin? (Usually … IMMEDIATELY!!!)

2. Identify, define and understand all of the various issues involved.

3. Identify, define and understand all internal policies, procedures and practices that may apply.

4. Identify, define and understand all of the external factors involved. (i.e., What laws apply? Government regulations? Public relations? Client relations?)

5. Who will conduct the investigation? (See previous discussion.)

6. Who will be interviewed?

    a) Who might have any pertinent information? Witnesses?

    b) Inside sources? Outside? Customers?

    c) If harassment or discrimination issues are involved, ask the alleged victim who should be interviewed. Also, ask the alleged harasser who should be interviewed.

    d) In short, interview anyone who may have credible information. Do not take the word of only a few employees unless their comments can be substantiated. REMEMBER: The truth eventually comes out. Good interviewers and investigators look for a pattern to emerge among the comments collected … that is where the truth lies.

7. What documents will be reviewed? Review any available documents to see if the employee's problems/issues are quantifiable or substantiated.

    a) Emails?

    b) Supervisor files?



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c) Prior investigations?

d) Photos?

Sometimes, the issue involves product or equipment that has been damaged. Truly, a picture is worth a thousand words. Taking a photograph to will not only preserve the evidence, but showing the photo to the employee can be quite an “eye opening” revelation for them.

e) Personnel files?

f) Surveillance recordings?

g) Calendars?

h) Logs?

i) Business Records?

2. Decide the proper order in which to interview the various interviewees. Usually, it is best to interview the alleged victim first if a harassment or discrimination charge is at issue. Next, it is probably best to interview the individual who allegedly committed the harassing or discriminatory acts. The individuals will most likely be able to shed some more light into the scope of the investigation, as well as who should be interviewed.

3. Choose a private location to conduct the interviews.

4. Decide who should be in the room when the interviews are conducted. Usually, only one person should conduct the interviews. Too many people in the room may be intimidating for the witnesses.

5. Conduct the interviews with the witnesses.

6. Record the answers given by each witness: **<u>Digitally Recording The Interviews</u>**

    a) If the interviewer decides to **<u>record</u>** the witness statements, the interviewer should acknowledge their identity at the beginning of the session. The interviewees should also acknowledge that the sessions are being recorded.

    b) However, digitally recording the interviews does bring a more serious sense to the session. Therefore, recording interviews is usually reserved for only more serious investigations.

7. Record the answers given by each witness: Written Notes



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a) All written notes should be understandable so that someone else can read them and follow them later,

b) All notes should be dated,

c) Each failed attempt to contact witnesses should be recorded and tracked,

d) Record the facts and only the facts as the witnesses make their statements. Do not record impressions or conclusions during the interview. Record facts … which will include facial expressions, demeanor, etc. Elaborate regarding impressions and credibility after the sessions have ended.

e) Keep the notes from the interviews separate from consultations with counsel. Clearly label communications with counsel as privileged.

**REMEMEBER: You want facts … not impressions or feelings … but facts. Facts form the basis of an investigation, as well as a warning/reprimand.**

## B. Typical Session Process

1. Escort the interviewee into the room.

2. If the interviewee does not know you, introduce yourself and tell him/her about your role with the organization.

3. Explain to the interviewee in general terms that an issue has arisen and that you want to get to the truth.

   - "As you may know, recently, some issues have arisen regarding ABC Department."
   - "Apparently, some items have been damaged."
   - "Recently, some items have come up missing here at XYZ Company."

4. Tell the interviewee you will be taking notes and/or recording the session.

5. If the interviewee asks if the session is confidential, tell him/her that the session is not. Assure the interview that no retaliatory actions will be taken against him/her. You simply want to get to the truth.

6. Begin the interview session with non-leading questions.

   - "What can you tell me about working in ABC Department?"
   - "What can you tell me about working for Elmer Fudd?"



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- “Tell me about working here.”

7. Let the interviewee talk. Silence is a very powerful tool in getting people to talk.

8. If the interviewee makes an interesting or pertinent statement, or if the interviewee is NOT providing any pertinent information, the interviewers should ask more pointed follow-up questions.

9. Ask for witnesses that can corroborate what the interviewee is saying. This may add to the interview list and increase the accuracy of the investigation.

10. ALWAYS close with a “Zipper Question”:

**“Is there anything else I should know?”**

11. Remind the interviewee to follow-up with the interviewer is he/she thinks of anything else later.

**C. Post-Interview**

The interviewer should review his/her notes after the session.

- ♣ Did new information arise?
- ♣ Did new issues arise?
- ♣ Should someone else be added to the witness list?
- ♣ Is a pattern forming among the interviewees?
- ♣ How credible was the interviewee?

The interviewer should record his/her impressions in all of these areas.

## THE FINAL REPORT

Writing the final report is by far the most difficult and tedious aspect of conducting an investigation.

After all of the various aspects of the investigation have been completed, the investigator needs to piece all of these minute facts and evidence of the case together and draw his/her conclusions. In making his/her conclusions, the interviewer needs to organize and restate ***in plain English*** all of the facts and evidence that were collected and the credibility of the interviewees.



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**(614) 738-8317**

To: ____________________________
From: Scott Warrick
RE: Report on ____________
Date: ______________

## PURPOSE AND BACKGROUND

Here, the investigator outlines the purpose of the investigation. Who filed a charge? What happened that led up to the charge? A listing of the pertinent parties and facts should go here.

The investigator should also identify him or herself. What are the investigator's qualifications? Why is the investigator considered to be objective in this matter?

The investigator should also describe the methodology used to conduct the investigation. How many witnesses were interviewed? What documents were examined? What other evidence was considered? Were the interviews digitally recorded? How were the witnesses not led to give certain answers? (i.e., Funnel Approach)

The investigator should make sure people are reassured that the investigation was conducted fairly. If the investigator and the investigator do not have credibility, then the entire process will be seen as worthless.

REMEMBER: As soon as the report is released, it will come under attack, as will the investigator.

## LEGAL AND POLICY STANDARDS

Whatever laws and policies apply should be listed and explained here.

**ISSUE #1:** ____________________________________________________

**ISSUE #2:** ____________________________________________________

**ISSUE #3:** ____________________________________________________



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In these sections, the investigator should specifically identify each issue that was examined in the case.

Were there issues of harassment? Theft? Retaliation? Violence? Etc.

For example:

1. WAS THE DECISION TO ROTATE THE COURT REPORTERS BETWEEN THE VARIOUS JUDGES DONE AS AN ILLEGAL RETALIATORY ACT OR "BECAUSE" OF MS. OLIVIER'S SEX?

2. THE DECISION TO MOVE MS. OLIVIER AND KATHY NICHOLSON FROM THEIR 3RD FLOOR OFFICE TO THEIR 4TH FLOOR OFFICE

3. KATHY NICHOLSON'S ROLE

4. OTHER HARASSMENT AND RETALIATION ISSUES BROUGHT UP IN MS. OLIVIER'S INTERVIEW

5. HOSTILE ENVIRONMENT AT BUTLER COUNTY COURT

In order to keep the report organized and easier for the reader to follow and understand, it is often best to keep the issues separate.

## CONCLUSIONS

Here the investigator will make his/her conclusions.

In short, based on the evidence collected, the organization's policies and the law, what does the investigator believe happened? What should the punishment be? What steps should be taken moving forward?



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## Notice: Legal Advice Disclaimer

**The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.**

**Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.**

**Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.**

**Therefore, whenever such issues arise, the advice of an attorney should be sought.**



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Scott Warrick (www.scottwarrick.com) is a practicing Employment Law Attorney, Human Resource Professional and best-selling author with 40 years of hands-on experience. Scott uses his unique background to help organizations get where they want to go, which includes coaching and training managers and employees on site in his own unique, practical and entertaining style.

**Scott Trains Managers & Employees ON-SITE in over 50 topics,** all of which are customized for each client. Scott travels the country presenting seminars on such topics as Healing The Human Brain, Employment Law, Conflict Resolution, Leadership and Tolerance, to mention a few.

Scott combines the areas of law and human resources to help organizations in "Solving Employee Problems ***BEFORE*** They Start." Scott's goal is ***NOT*** to win lawsuits. Instead, Scott's goal is to ***PREVENT THEM*** while improving ***EMPLOYEE MORALE***.

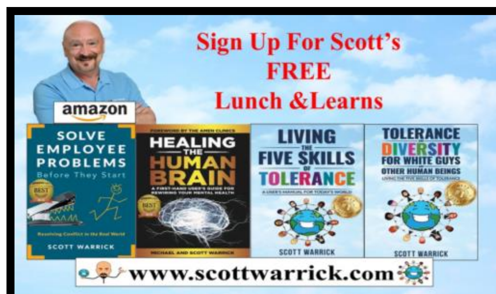
Scott is also a three-time best-selling author. His first book, ***Solve Employee Problems Before They Start: Resolving Conflict in the Real World***, is a #1 Best Seller for Business and Conflict Resolution. It was also named by EGLOBALIS as one of the best global Customer and Employee books for 2020-2021. Scott's next book, ***Living The Five Skills of Tolerance: A User's Manual For Today's World***, is also a #1 Best Seller in 13 categories on Amazon. His most recent book, ***Healing The Human Brain***, is an International Best Seller in 14 categories with sales in over a dozen countries worldwide.

Scott's ***MASTER HR TOOL KIT SUBSCRIPTION*** is a favorite for anyone wanting to learn Employment Law and run an HR Department.

Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Quotient Counsellor (CEQC) and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008, 2010 and 2012. Scott has also received the Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of HR Management and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

Scott's academic background and awards include Capital University College of Law (Class Valedictorian (1st out of 233) and Summa Cum Laude), Master of Labor & Human Resources and B.A. in Organizational Communication from The Ohio State University.

**For more information on Scott, just go to www.scottwarrick.com.**



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## *CONDUCTING A LEGAL AND EFFECTIVE WORKPLACE INVESTIGATION*

## SHRM Activity ID: Activity 24-NCZMY

## HRCI Program ID: 662698

### 3 Credit GENERAL Hours

## Start Date: 3/11/2024
## End Date: 12/31/2024



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