
BRIDGING CITIES

THROUGH INNOVATION & TRADITION



Bettendorf

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ANNUAL CONFERENCE & EXHIBIT

Employee Investigations

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Handouts and presentations are available in the conference app.



1. THE LAW
2. HOW TO CONDUCT AN EFFECTIVE AND DEFENSIBLE INVESTIGATION
3. WRITING A CLEAR AND OBJECTIVE REPORT
4. A/C PRIVILEGE



1. THE LAW



IOWA CODE SECTION 80F.1 PEACE OFFICER BILL OF RIGHTS

- Certified law enforcement officer, CO, EMT, fire fighter, public safety telecommunicator etc.
- Training required
- Informal Inquiry
- OR Formal Admin. Investigation
- Follow the “rules”
- Individ. liability-false complaint



ELLERTH/FARAGHER “AFFIRMATIVE DEFENSE”

- No tangible employment action;
- The employer exercised reasonable care to prevent and correct harassing behavior; and
- Employee unreasonably failed to take advantage of preventive or corrective opportunities.





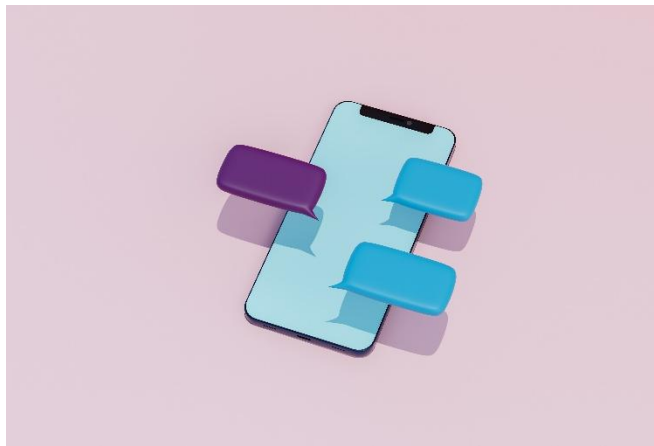
U.S. Equal Employment Opportunity Commission

Under reasonable corrective action: Investigations must be **prompt** and **adequate**.

Prompt: Reasonably soon after complaint-fact sensitive.

Adequate: “Sufficiently thorough to arrive at a reasonably fair estimate of the truth” ... “conducted by an impartial party” who seeks “information about the conduct from all parties involved.”

Not impartial if the alleged harasser has supervisory authority over the investigator and if the alleged harasser has any direct or indirect control over the investigation.



Feedback v. Swift Pork Co., (Iowa Mar. 31, 2023)

Swift Pork Co. fired a long-time employee after he sent offensive text messages to supervisor. “The first read ‘F*** You!’ The second, ‘Believe who and what you want.’” Feedback sued alleging discrimination, harassment, and wrongful termination.

Iowa Supreme Court affirmed Summary Judgment on behalf of the employer:

- Short duration of investigation did not support inference of discrimination.
- Honest belief rule.

2. HOW TO CONDUCT AN EFFECTIVE AND DEFENSIBLE INVESTIGATION





Admin.
Leave?
Transfer?

Internal
or
external?

Open
separate
file.

Freeze
and seize
evidence.



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Policy
violation?

Legal
violation?

What
documents/
data do you
need?
Who to
interview?

Where and
when?

Start list of
questions
based on
complaint
and any
evidence
already
gathered.

2. HOW TO CONDUCT AN EFFECTIVE AND DEFENSIBLE INVESTIGATION

- Introduction, including warnings.
- Recording? (Iowa Code Section 80F.1?)
- Duty to participate and be honest.
- Duty to preserve evidence.
- Duty to turn over evidence (BYOD).
- Open v. leading questions: who, what, when, where.
- Listen, watch, be patient.
- “Who would you interview if you were me, and why?”



2. HOW TO CONDUCT AN EFFECTIVE AND DEFENSIBLE INVESTIGATION

POINTS OF ATTACK

- When are you done?
- (Cumulative witnesses...what are they going to tell me?)
- Failing to connect the misconduct to a policy/law.
- Side issues-tangents.
- Bias or the appearance thereof.
- Investigation and/or Iowa Code Section 80F.1 training.



3. WRITING A CLEAR AND OBJECTIVE REPORT



3. WRITING A CLEAR AND OBJECTIVE REPORT



- Verbal report?
- Summary v. full report?
- When retained.
- Claims
- Timeline of events investigation (prompt?)
- What policies or laws at issue.



3. WRITING A CLEAR AND OBJECTIVE REPORT



- Documents/Data relied on.
- Make factual findings-include the good and bad.
- Make credibility assessments as a reasonable juror.
- This is not *CSI*!
- Preponderance of the evidence.
- Substantiated or Not?
- Draft and final?

ATTORNEY CLIENT PRIVILEGE

- **ATTORNEY CLIENT PRIVILEGE** attaches when you retained a lawyer to investigate AND obtain legal advice.
- Must limit dissemination to “**NEED TO KNOW**” and **MANAGEMENT LEVEL EMPLOYEES**.
- This and the **WORK PRODUCT DOCTRINE** may protect the investigation/report from the public eye.
- The doctrine relates to when you conduct an investigation in reasonable anticipation of litigation.
- Opposing party **MAY** obtain the investigation information if demonstrates a **SUBSTANTIAL NEED/UNDUE HARDSHIP**.
- **PRIVILEGE WAIVER**: entity owns the privilege.

INVESTIGATOR AS WITNESS



- Everything you discuss with them is fair game.
- You cannot prepare them for their deposition... Risk tainting them as partial.
- They should testify only to their notes and their report.
- Recommendations?



RHEEDER V. CITY OF MARION ET AL, AND INVESTIGATION REPORT

- Two investigative issues, one report.
- Issue two redacted.
- Interlocutory appeal: “We find ... that, contrary to Rheeder’s assertion, the implied waiver does not automatically render the entire confidential report discoverable by [her]. When the city claims the non-produced portion of the report is not relevant and should still be considered privileged, the court in conducting an in camera review must decide if the redacted portion of the report is relevant to Rheeder’s claim, or similar claims involving the alleged harasser, or necessary for Rheeder or the trier of fact to challenge or evaluate the adequacy and reasonableness of the investigation.... The results of the investigation could well have been divided into two separate reports. But redaction seems like a reasonable way of severing the two investigations.” No. 20-1116, Iowa Ct. App. November 23, 2021.

THANK YOU

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*Workplace Investigations and
How They Are Attacked in Litigation*

