



LIEBERT CASSIDY WHITMORE

6033 WEST CENTURY BOULEVARD,  
5<sup>TH</sup> FLOOR  
LOS ANGELES, CALIFORNIA 90045  
T: (310) 981-2000  
F: (310) 337-0837

135 MAIN STREET,  
7<sup>TH</sup> FLOOR  
SAN FRANCISCO, CALIFORNIA 94105  
T: (415) 512-3000  
F: (415) 856-0306

5250 NORTH PALM AVENUE,  
SUITE 310  
FRESNO, CALIFORNIA 93704  
T: (559) 256-7800  
F: (559) 449-4535

401 WEST "A" STREET,  
SUITE 1675  
SAN DIEGO, CALIFORNIA 92101  
T: (619) 481-5900  
F: (619) 446-0015

400 CAPITOL MALL  
SUITE 1260  
SACRAMENTO, CALIFORNIA 95814  
T: (916) 584-7000  
F: (916) 584-7083

# 2023 CITY LEADERS SUMMIT

## City Council and Staff's Role in Workplace Investigations

*APRIL 13, 2023*

*PRESENTED BY:*

Shelline Bennett

# City Council and Staff's Role in Workplace Investigations

2023 City Leaders Summit | April 13, 2023

Presented By: Shelline Bennett

**LCW** LIEBERT CASSIDY WHITMORE

## City Council and Staff's Role in Workplace Investigations

2023 City Leaders Summit  
April 13, 2023

Presented By:  
Shelline Bennett

### AGENDA

- Hypotheticals
- Your Role in Investigations
- Investigation Process and Practicalities
- Post-Investigation Follow Up

**LCW** LIEBERT CASSIDY WHITMORE

**LCW** LIEBERT CASSIDY WHITMORE

## HYPOTHETICAL – What do you do?

*A department head brought a sex harassment complaint against the City Manager directly to a Council Member and asserts, "Legally, you must keep me updated on the investigation."*



LIEBERT CASSIDY WHITMORE

## HYPOTHETICAL –What do you do?

*City Council member received a social media post from an employee alleging disability discrimination against the Public Works Director.*



LIEBERT CASSIDY WHITMORE

## HYPOTHETICAL –What do you do?

*City Council member advised by City Attorney that the City Manager is accusing the Council member of retaliation based on free speech.*



LIEBERT CASSIDY WHITMORE

## HYPOTHETICAL –What do you do?

*City Manager/department head have just been informed by Human Resources that an employee is accusing them of discrimination based on lawful off-duty use of cannabis.*



LIEBERT CASSIDY WHITMORE

## Your Role in Investigations



## Your Role in Investigations

- City Council Member
- City Manager
- Department Head
- Supervisor
- Human Resources/Personnel



LIEBERT CASSIDY WHITMORE

# City Council and Staff's Role in Workplace Investigations

2023 City Leaders Summit | April 13, 2023

Presented By: Shelline Bennett

## Your Role in Investigations

### Controlling Documents:

- Law – Statutes/Case Law
- Municipal Code
- Resolutions/Ordinances
- Personnel Rules/Regulations/Handbooks
- MOU
- Department Policies
- Codes of Conduct



LIEBERT CASSIDY WHITMORE

## Your Role in Investigations

### City Manager

- Day-to-Day Operations
- Personnel Issues



LIEBERT CASSIDY WHITMORE

## Your Role in Investigations

### City Council

- Stay out!
- Stay within your legal lane:
  - Jurisdiction = City Manager/City Attorney
  - Do not act alone
    - Loss of legislative shield of immunity
    - Creates confusion – who is the boss?
    - Creates legal liability for City and yourself individually



LIEBERT CASSIDY WHITMORE

## Your Role in Investigations

### City Council – Stay in Your Lane cont.

- Admissions against interest
- Jeopardize the integrity of the employee discipline-appeal process
- Undermine City's commend structure and hierarchy
- Invasion of Privacy
- Unfair Labor Practice Charge
- Retaliation
- Violation staff's free speech rights



LIEBERT CASSIDY WHITMORE

## Your Role in Investigations

### City Council cont.

- Act only on matters within jurisdiction;
- And only at duly convened meetings;
- And the voice of one gives way to the voice of the majority

## Your Role in Investigations

*Ultimately, it is Human Resources and/or Legal who takes the lead and guides us through the investigation process; let them lead and do not do anything that could be perceived as interference.*



## Investigation Process and Practicalities



### Investigation Process and Practicalities

- For Discrimination/Harassment/Retaliation Claims
- Employers have a legal duty to “take all reasonable steps necessary to prevent discrimination and harassment from occurring.” Cal. Gov’t. Code Sec.12940(k)



LIEBERT CASSIDY WHITMORE

## Investigation Process and Practicalities

“All reasonable steps” includes:

- Prompt, thorough, fair investigation
- Due process is a formal way of saying “fairness” – employers should be fair to all parties during an investigation



LIEBERT CASSIDY WHITMORE

## Investigation Process and Practicalities

Practical application of “fairness”

- Conduct a thorough interview with the complaining party
- Give the accused party a chance to tell his/her side of the story
- Relevant witnesses should be interviewed and relevant documents should be reviewed
- Do other work that might be necessary for you to get all the facts (perhaps you need to visit the work site, view video, take pictures, etc.)
- Reach a reasonable and fair conclusion based on the information collected, reviewed and analyzed



LIEBERT CASSIDY WHITMORE

## Investigation Process and Practicalities

Under federal and state law:

- Affirmative obligation to promptly investigate harassment complaints
- Take corrective action to prevent
- Impose appropriate discipline



## Investigation Process and Practicalities Legal Triggers

- Sex/Gender/Gender Identity/Gender Expression
- Sexual Orientation
- Race (includes hair textures & protective hairstyles)
- National Origin/Color
- Disability/Medical Condition
- Genetic Information/Characteristics
- Religious Creed
- Marital Status
- Military/Veteran Status
- Age (40 Years of Age and Older)
- Opposition to Discrimination/Harassment
- Association/Perception
- Reproductive Health Decision-making (*new*)

## Investigation Process When to Investigate?

- Complaint
- Observations
- Rumors

**RESPOND PROMPTLY!**



LIEBERT CASSIDY WHITMORE

## Investigation Process Who Investigates?

- Internal personnel
- Outside investigator
- Attorney



LIEBERT CASSIDY WHITMORE

## Investigation Process Selecting the Investigator

- Credibility, rank, authority
- Personality, demeanor, character
- Impartiality
- Investigative experience
- Accountability, continuity
- Report-writing ability

## What Standard Does An Investigation Have To Meet?

“Investigative fairness contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to their case without the procedural formalities of a trial.”

*Cotran v. Rollins Hudig Hall Intern, Inc.* (1998) 17 Cal.4<sup>th</sup> 93, 107.

# City Council and Staff's Role in Workplace Investigations

2023 City Leaders Summit | April 13, 2023

Presented By: Shelline Bennett

## Legal Significance of Investigations

### DFEH WORKPLACE HARASSMENT GUIDE FOR CALIFORNIA EMPLOYERS

- Basic Steps Required to Conduct Fair Investigation
  - Interviews: complainant, accused, witnesses, other work to get all facts
- Confidentiality: Cannot Promise or Require Complete Confidentiality
- Promptly Start & Conclude Investigation Balanced by Fairness to Parties & Need to be Thorough
- Type of Questioning
  - Open-ended
  - No interrogation/cross-examination
- Making Credibility Determinations- Nine Credibility Factors
- Burden of Proof
- Documentation of Witness Interviews, Investigation Steps and Findings
- Reach a Reasonable & Fair Conclusion Based on Evidence Collected



LIEBERT CASSIDY WHITMORE

## Investigation Process Interim Steps to Continue Delivering Public Service

- Administrative leave
- Transfer
- Modify work schedule
- No retaliation
- Fair and consistent treatment



LIEBERT CASSIDY WHITMORE

## Investigation Process and Practicalities

- Strategic “complaints” by:
  - Employee being disciplined
  - Co-elected as political sword
- Continue with legitimate business - no retaliation
- Setting the example

## Investigation Process: Review Relevant Documents

- E-mails, text messages, WhatsApp, Zoom, Slack, Instagram, GPS, Facebook and other social media
- Activity log, timesheets
- Evidence relevant to physical location
- Memos, disciplinary documents, policies
- Physical evidence
  - videos, surveillance tapes, receipts
- Personnel file, if relevant



## Investigation Process: Identify Potential Witnesses

- Complainant(s)
- Respondent
- Other employees;
  - Co-workers
  - Supervisors
- Anyone else with knowledge of the relevant facts

## Investigation Process: Notice Of Interview

- Employee rights in interviews
- “Gag” orders
    - Los Angeles CCD, PERB Dec. 2404
    - Banner Health System, 358 N.L.R.B. No. 93 (July 30, 2012)
    - The Boeing Company 362 NLRB No. 195 (August 27, 2015)
    - Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (2019)
  - Weingarten revisited
    - *SEIU v. Sonoma Co. Superior Court*, PERB Dec. 2409-C



## Investigation Process: Search of Personal Cell Phones

### ***City of San José v. Superior Court (2017) 2 Cal.5th 608.***

The court found that records in local agency employees' personal accounts or devices (including personal cell phones) may be subject to the California Public Records Act (CPRA) if the records pertain to public business.

## Post-Investigation Follow Up

## Communicating Findings To Complainant

- Follow agency rules
- Factual findings
- Corrective action to be taken (if sustained allegation)
- No retaliation
- No disclosure of investigative report

## Communicating The Findings To Respondent Employee

- Factual findings
- Recommended corrective action to be taken (if sustained allegations)
- No retaliation
- If discipline, *Skelly* notice, investigative report and other supporting documents provided to employee being disciplined

## Communication Of Findings To Others

- No - Privacy rights
- Only general statement that retaliation and harassment are prohibited



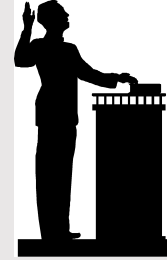
## What If Union Requests Report?

### ***SEIU v. City of Redding* (2011) PERB Decision No. 2190-M**

Union entitled to copy of investigation report, redacted to reflect only the information union needed in order to represent employees in “negotiations, processing of grievance and administration of contract.”

## Post-Investigation Concerns

- Is the report discoverable?
- Who will testify at the appeal hearing?
- California Public Records Act requests
- Grand Jury requests



## Post-Investigation Follow Up Consequences

- Discipline of employees
- Censure Resolution and/or Removal from Committees of City Council Member
  - What goes into open and what goes into closed sessions
  - Recusal
  - Due Process

## Post-Investigation Follow Up Consequences

### City Council cont.

- Quo Warrento
- Temporary restraining order
- Fair Political Practices Commission
- Grand Jury



LIEBERT CASSIDY WHITMORE

## Thank You!

**Shelline Bennett**

**Managing Partner | Fresno/Sacramento**

[559.256.7800](tel:559.256.7800) | [sbennett@lcwlegal.com](mailto:sbennett@lcwlegal.com)

<https://www.lcwlegal.com/people/shelline-bennett/>



LIEBERT CASSIDY WHITMORE