CAMPUS INVESTIGATIONS AND THE ROLE OF GENERAL COUNSEL

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Barbara L. Krause[1]
Deputy General Counsel
Appalachian State University

No one understands better than higher education business officers the myriad of compliance, risk management, and legal issues facing colleges and universities. Allegations of misconduct that could create the need for some sort of investigation arise in many contexts, including the following:

- Misuse of public funds or resources
- Conflict of interest or commitment
- Employment discrimination
- Inappropriate sexual relations and sexual harassment
- Research misconduct
- Violation of sponsored research agreements or regulations
- Athletics (recruiting and other NCAA violations, academic integrity, etc.)
- Computer misuse
- Plagiarism
- Code of Conduct violations
- Falsification of credentials
- Visa/immigration status concerns

Any of these situations, and many more, will require your institution to ensure that a prompt, impartial, and thorough investigation is conducted and, if appropriate, to ensure that appropriate sanctions are imposed or remedial measures are implemented. The scope of the investigation will vary depending on the facts – but at a minimum, in any of these situations, you must conduct a sufficient inquiry to determine what investigation actually *is* appropriate. Done properly, an investigation will create confidence among members of the campus community (and the public at large) that the process was fair, deliberate, and therefore trustworthy – even if people cannot be informed of the outcome or if they disagree with it. An investigatory process that is not done well can damage the institution's credibility in ways that can take years, if not decades, to restore.

[1] The presenter acknowledges with gratitude the assistance of presentations made by colleagues at past conferences of the National Association of College and University Attorneys.

This presentation offers an outline of issues to consider when confronted with allegations of wrongdoing that require some sort of investigation. Among other things, these questions are suggested to help you:

- Determine when and how to engage general counsel
- Decide who should investigate depending on the circumstances
- Identify the difference between internal and external investigations
- Indicate how to define and structure the investigation

Please note that the guidance set forth in this document is only that – guidance, and not legal advice. Every campus has different policies, different resources, different historical experiences, and different cultures, all of which may influence decisions about how to address allegations of misconduct. You should always confer with your general counsel for legal advice specific to your institution.

I. When to engage your general counsel

A. Early and often!

1. Your general counsel has a broad institutional perspective and can guide you on legal and procedural matters.
2. The issue of whether to conduct a search with the protection of attorney-client privilege must be determined at the very beginning.

II. Pre-investigation considerations

A. What are the allegations?

1. Personnel issues, or minor policy violations – may be handled informally through discussion, performance dialogue, or warning.
2. More serious or complex allegations – may require internal investigation (or external investigator retained by the university). *See section below on "Who Should Investigate?"*
3. Allegations of criminal conduct – must consider notifying law enforcement authorities or encouraging the complainant to do so.

B. Are any immediate steps required?

1. Are there safety considerations?
    a. Consider temporary reassignment of duties or supervisor, investigatory leave with pay, or other measures.
    b. Does the alleged misconduct create environmental health or safety concerns in the workplace?
    c. Consider notifying campus police and/or local law enforcement.
    d. Should your threat assessment team be convened?
    e. Does the situation implicate a Workplace Violence policy?

2. Are there other institutional risks to be managed immediately?
    a. Financial controls.
    b. Relationships with third parties (contractual or otherwise).
    c. Public relations.
3. Determine steps to ensure preservation of evidence.
    a. Work with IT, as appropriate, to freeze accounts, disable automatic purges, retain back-ups.
        a. Consider IT security and data preservation for all devices!
        b. Be especially attentive to mixed work/personal devices
    b. Litigation hold.

4. Retaliation warnings to all involved.

Potential retaliation is one of the most important issues to address very early upon learning of potential wrongdoing. **See Attachment 1** for guidance on this critical matter.

C. Who should be notified immediately?

1. "No surprises" for the boss vs. integrity of the investigation.
2. Maintaining neutrality of decision-makers up the chain (initial and on appeal).
3. Consider who will notify whom, including whether General Counsel should notify certain parties (attorney-client privilege).
4. Whenever possible, establish clear institutional understandings ahead of time about duty to report various types of incidents – expectations will vary depending on the leadership and management styles of individuals involved.
5. *When should the respondent be notified?*

III. Who should investigate?

A. General factors

1. Nature and scope of the allegations
    a. Specialized knowledge required?
    b. Number of people involved?
    c. Number of units involved?
    d. Position of alleged wrong-doers in the organizational structure?
2. Potential conflicts of interest (real or perceived) of possible investigators – *confidence in the investigator's fairness and impartiality is critical*.
3. Estimated time to investigate and workload of potential investigators – must be able to conduct and conclude the investigation in a timely manner.
4. Must have the skills to do the work credibly – respectful, organized, investigative techniques, appropriately skeptical and tenacious, etc.

B. Commonly used investigators

1. Supervisors or department chairs
2. Human Resources
3. Internal equity office
4. Office with specialized knowledge (e.g., research integrity)
5. Internal Audit
6. Office of General Counsel
7. External (outside counsel, external auditors, etc.)
8. Board of Trustees or Trustee committee

C. Considerations if hiring an external investigator

1. Who will engage on behalf of the university (consider attorney-client privilege issues)
2. Engagement letter
    a. Scope
    b. Due date
    c. Expected final product (fact-finding, recommendation, determinations of legal or policy wrongdoing)
    d. Compensation (when, amount)

IV. What is the purpose of the investigative report

A. Does it assess credibility, or simply report on who said what and make factual determinations?
B. Does it conclude whether or not there is a violation, or indicate "more likely than not"?
C. Does it recommend action to the administrative decision-maker?
D. Who receives a copy of the report, and when?

V. Initiating the investigation

A. **External investigator** – will likely have developed a particular approach for the investigation plan.
    1. Consider what information will be communicated to the external investigator, and by whom – prepare, but do not bias.
        a. History of or any pending disciplinary action (including any prior investigative reports).
        b. History of interactions between the parties.
        c. Other contextual information that might be relevant (pending reviews, accreditation visits, audits, etc.) that might shed light on credibility and motive.
        d. Other.
    2. Identify particular individuals (Office of General Counsel, HR, others) who can provide appropriate background information to the external

investigator (organizational charts, names, titles, contact information, or other institutional data necessary to the investigation)

3. Review any issues of particular concern to the institution (importance of retaliation warnings, preservation of evidence on all devices, possible negative media attention, etc.)

B. **Internal investigator** – develop an investigation plan.
    1. Consider what information will be communicated to the investigator, and by whom.
    2. Follow any existing, written investigative processes – comply with the letter and the spirit of such procedures.
    3. For any investigator, and especially for one who is conducting the investigation outside of her or his usual duties, emphasize the importance of developing a plan that includes the following:
        a. Identify the allegations.
        b. Identify relevant policies, laws, regulations, etc.
        c. Determine the scope of the investigation
            a. Focus on allegations, but allow enough flexibility to address other issues that may arise.
            b. Consider confirming scope, in writing, with complainant and respondent.
            c. State clearly that the scope may change as the investigation continues and information is obtained.
        d. Create a preliminary chronology of key events (and identify gaps to be filled in).
        e. Identify witnesses and the order in which they will be interviewed.
        f. Determine if there are any key physical locations that should be visited.
        g. Consider specific details of witness interviews
            a. Location
            b. Flexibility to address requests of accommodations
            c. Presence of "support persons"
            d. Recording the interview – address this specifically with the interviewee prior to beginning
                i. Note-taking by investigator or other note-taker
                ii. Audio recording
            e. Explain the role of the investigatory
            f. Address confidentiality
            g. If the investigator is an attorney, clarify that the investigator is not the witness's attorney and that the investigation is *not* protected by the attorney-client privilege[2]

[2] These statements are related to what has become known as an "*Upjohn* warning." In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court held that a company could invoke the attorney-client privilege not only to protect communications between in-house counsel and managerial employees, but to communications with non-management employees as well. While the case itself did not specify any warning procedure, the decision gave rise

VI. Parallel internal and external processes

A. Examples of possible internal parallel processes

1. Faculty/staff/student disciplinary processes (faculty handbook, workplace, student conduct, Department of Athletics, etc.)
2. Promotion, tenure, performance reviews
3. Academic integrity or other academic decisions

B. Examples of possible external parallel processes

1. Criminal investigation and/or charges
2. EEOC
3. OCR
4. NCAA
5. Research compliance audits

C. Determine and communicate about:

1. Any mandatory reporting obligations
2. Timing of reports received alleging wrongdoing
3. Timing of proceeding with investigation and decision-making
    a. Taking care not to impede any criminal investigation
    b. Meeting requirements of other agencies to address complaints in a timely fashion (e.g., OCR's Title IX guidance that a university must proceed even if a law enforcement inquiry is underway)
    c. Be aware of other decisions or actions that may need to be made while an investigation is pending (e.g., request for a transcript, determination whether or not to continue financial aid, tenure or promotion decisions, etc.)
    d. Review your own policies! When possible, ensure that internal investigation and decision-making need not wait for external determinations.

VII. Issues your general counsel will be considering

A. Who is the client?
B. What communications are privileged?
C. Should any investigation be conducted?
D. Should the investigation be privileged?

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to the procedure now known as the "*Upjohn* warning" to ensure that employees understand that the attorney represents the company, not the employee; and that the company may waive the attorney-client privilege at any time and disclose the contents of the conversation between the attorney and the employee. Failure to provide an *Upjohn* warning may allow the employee to claim that the conversation with in-house counsel is privileged.

E. Obligation to preserve evidence and other documentation
    1. Work with IT on electronic preservation issues
    2. Consider all electronic devices – including those with mixed professional and personal use
    3. Litigation holds
    4. Conflict of interest and commitment
    5. Confidentiality
    6. Retaliation warnings
F. If general counsel is investigating, communication of an Upjohn warning to employees being interview. *See supra*, footnote 2.

ATTACHMENT 1

RETALIATION CONCERNS IN THE CONTEXT OF WORKPLACE INVESTIGATIONS

Background

Many statutes and policies include language prohibiting retaliation against individuals who complain about or participate in an investigation of potential wrong-doing. This prohibition is reflected in numerous federal laws[3] and may be also included in specific policies and whistleblower laws specific to your institution or jurisdiction.

Being vigilant about retaliation is critical for a number of reasons. First and foremost is the importance of creating a workplace and community in which individuals can express concerns about wrongdoing without fear of reprisal. Vigilance is also required, however, because of the increasing prevalence of retaliation claims and because external agencies treat such claims very seriously.

According to statistics published by the United States Equal Opportunity Commission, for example, retaliation charges were included in 42.8% of all claims filed in Fiscal Year 2014. That percentage was considerably higher than claims based on race (35%), sex (29.3%), age (23.2%), or any other protected class. http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.[4] The year 2014 also marked the 12th year in a row in which the percentage of retaliation charges increased in EEOC filings. *Id*.

Retaliation is challenging in part because of the understandable human emotions involved. Anyone who has ever considered filing a complaint against a supervisor can understand how vulnerable a complainant might feel in that situation and, therefore, how natural it might be to experience even actions taken in good faith as retaliatory. And any supervisor who has ever had a complaint filed against her or him (especially by a low performing employee) understands how challenging it can be to keep in check feelings of indignation, resentment, and even anger; and to continue working as if the complaint had not been filed.

Retaliation has become such an important and contested issue that numerous cases involving retaliation claims have made their way to the United States Supreme Court. The following are among the more important decisions:

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[3] Federal laws that specifically prohibit retaliation include (but are not limited to) Title VII of the Civil Rights Act of 1964, Civil Rights Act of 1866 (Section 1981), Americans with Disabilities Act, Age Discrimination in Employment Act, Family and Medical Leave Act, Fair Labor Standards Act, Equal Pay Act, National Labor Relations Act, Uniformed Service Employment and Reemployment Act, Occupational Safety and Health Act, Asbestos Hazard Emergency Response Act, and the Bankruptcy Act. This is only a partial list of the federal laws prohibiting retaliation. Numerous state laws also prohibit retaliation, and local laws may also prohibit such acts.

[4] The percentages indicated total to more than 100% because complaints often allege more than one form of discrimination.

- *Burlington Northern & Santa Fe R.R. Co. v. White*, 548 U.S. 53 (2006) – held that to be "materially adverse action" sufficient to constitute retaliation, a plaintiff must establish that the action "might well have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " *Id*. at 68; citation omitted. (Sexual harassment case under Title VII plus retaliation claim; change in job responsibilities and suspension without pay was retaliatory, even though the company revoked the suspension and reimbursed the plaintiff's lost pay. Unlawful retaliation is not necessarily limited to employment actions against the complainant.)

- *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517 (2013) – held that a Title VII retaliation claimant must establish that his or her protected activity was a "but-for" cause of the alleged adverse action by the employer – i.e., "that the unlawful retaliation would not have occurred in the absence of the alleged wrongful [retaliatory] action or actions of the employer." *Id.*, Slip Opinion at 20. (Race and religion discrimination claims plus retaliation; Supreme Court rejected the EEOC's position that retaliation is a basis for employer liability whenever it is a motivating factor for an adverse action).

- *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011) – retaliation against third parties (e.g., an employee's fiancé) can be actionable.

Lower court rulings of note include two cases recognizing that pursuit of a defamation claim against the complainant could constitute retaliation. *See, e.g., Illiano v. Mineola Union Free Sch. Dist.*, 585 F. Supp. 2d 341, 352 (E.D.N.Y. 2008), citing *Kessler v. Westchester County Dept. of Social Services*, 461 F.3d 199, 207 (2d Cir. 2006).

For comprehensive guidance on how one agency views retaliation, visit the EEOC's website at http://www.eeoc.gov/laws/types/retaliation.cfm ("Policy and Guidance" link brings up EEOC Compliance Manual, Section 8, Retaliation).

Retaliation Warnings

At the start of any investigation (internal or external), an appropriate person should provide appropriate retaliation warnings to the respondent(s) accused of wrongdoing. You should confer with your general counsel to determine who will provide such warnings and what the content of the warnings will be. Consider the following:

1. Define retaliation.
    a. Plain language: bad acts against the complainant or witnesses (including against individuals closely associated with the complainant or witnesses) as punishment for complaining or participating in a complaint process.
    b. Supreme Court language: any act that could dissuade a reasonable person from complaining or participating in a complaint process.

2. Provide specific examples.
    a. Scorn (refusing to talk to the complainant, badmouthing complainant to others, ridiculing or humiliating, etc.)
    b. Professional isolation or sabotage (denying professional opportunities, blacklisting the complainant through negative evaluations, refusing to provide a recommendation, etc.)
    c. Demotion, involuntary transfer, termination/forced resignation.
    d. Negative employment action toward a spouse, partner, or other close family member.

3. Describe the process; emphasize the importance of following the process and that the respondent will have an opportunity to tell her or his side of the story.

4. Address confidentiality. Emphasize how important it is not to discuss the complaint in the workplace, especially with those below them in the organizational structure.

    a. Blanket prohibitions on discussing a pending investigation are problematic, at least in some contexts. *See, e.g.*, *Banner Health Systems*, 358 NLRB 93 (2012).
    b. Rather than a blanket prohibition, consider specific instructions, on a case-by-case basis, related to preserving the integrity of the investigation (e.g., protecting witnesses from harassment or intimidation, protecting evidence from destruction, ensuring that testimony will not be fabricated, preventing a cover-up, etc.)
    c. Be specific in what it means not to discuss (no in-person conversation, on or off campus; no phone calls, email, or text messages; no social media; no indirect communication through third parties).
    d. Provide examples of an appropriate response if anyone attempts to engage them in conversation (e.g., "I'm sorry, but I've been advised not to discuss this matter.")

5. ***Advise any respondent to confer with general counsel before taking any adverse disciplinary or academic action.*** Filing a complaint does not insulate the complainant from disciplinary, academic, or other adverse actions – however, a respondent/supervisor should work closely with the general counsel's office before taking such actions.