



Winter 2024 Virtual CLE Workshop · February 7 – 9, 2024

Employment Law

Conducting a High-Profile Workplace Investigation

SPEAKERS

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NORWICH PRESIDENT STEPS DOW


- Mark Aranumo announces departure
- Comes after allegations of policy violations
- Aranumo was originally placed on leave
- Dr. Karen Gaines appointed acting president
- Investigation is ongoing

CL 00:00:00 VT-WINDSOR 11:05 38°

HEADING ELEMENTARY SCHOOL

The Harvard Crimson

Dana-Farber Cancer Institute Researchers Accused of Manipulating Data



A data investigation blogger accused four senior Harvard cancer researchers of research misconduct across dozens of papers last week. By Joey Huang

By Veronica H. Paulus and Akshaya Ravi, Crimson Staff Writers



What is “High Profile”?

- The Three “I”s:
 - Prominent Individual
 - Prominent Issue
 - Prominent Interest
- When these all Intersect – you are staring at the potential for a high-profile investigation

Really Must Investigate, High Profile or Not

- Conduct that, if true, would violate institutional policy
- Conduct that, if true, would violate the law (and, almost surely, also violate institutional policy as a result)
- When mandated to do so by external entity/agency (NCAA, NIH, etc.)

But What About ...

- Anonymous complaint?
- Complaint made by someone who has already separated from institution?
- Trustee-driven request?
- Donor-driven request?

Privileged, or Not?

- Threshold consideration – once start in unprivileged way, tough to put genie back in bottle
- Who is the client?
- What are the pros if privileged?
- What are the cons?
- Does the “high profile” nature impact the decision?

What's the Work Product?

- Written report, for internal consumption only
- Written report, would produce in litigation willingly
- Written report, intend to release to the public / post on website
- Longer privileged written report, verbal summary for key constituents
- Verbal report only
- What notification will the subject of investigation receive?
- Obviously regs can impact (i.e., if Title IX matter)

Who's On the Day 1 Team?

- OGC
- President?
- Provost/HR/Dean of Students/Athletic Director/etc.?
- Communications team?
 - Internal?
 - External?
- Board Chair/Committee?
- Others?

Who Outside of Institution May Need to Be Advised?

- Research Misconduct
 - NIH
 - Journals
 - Other co-authors/researchers
- Coaching Misconduct
 - NCAA
 - Safe Sport
- Criminal Misconduct
 - Law enforcement
 - Mandatory reporting obligations

Other “Day 1” Considerations

- Is employee on leave? Should they be, if not?
- High-level assessment of legal risks
- Informing Board/key Board members
- Informing key constituents
- How much to share?
- Data/IT preservation

Who Is Conducting the Investigation?

- Internal vs. external
- Lawyer?
 - Someone familiar with institution?
 - Someone completely new?
- Size of “team”
- Cost considerations
- Demographic considerations

Structure of Investigation

- Engagement Letter
- Work product expectations
- Segregate investigative materials from business records
- Plan for possible waiver from Day 1 (?)
- Public records request awareness
- Insurance available? Communications with insurers

Structure of Interviews

- Where? In person or virtual? Dealing with media on campus
- *Upjohn* warnings
- Allow counsel if policy is silent? Pros/cons
- Record interviews or not? Pros/cons
- Intentionally difficult witness (hoping for P.R. bump)

Other Evidentiary Considerations - Stuff

- Phones/personal devices. What can you demand to see?
- Forensic investigation of devices
- Electronic document vendor
- AI/TAR-assisted document review?

Other Evidentiary Considerations - People

- Method of notifying witnesses
- In-person, or virtual, or both?
- If involves a team or years of alleged conduct – how far back do you go? How broad of a witness net do you cast?
- If not Title IX ... what are you sharing with employee under investigation?

Dealing with the Press

- Proactively announce investigation?
- Talking points for Board / key constituents if they get cold call
- Responding, or not, to public statements from employee/their lawyer
- Mitigating leaks

SO WHAT IF INVESTIGATION
INVOLVES ...

The Institution's President

- Walling off access
- Continuing to function
- Who gets updates?
- Does that impact any privilege/work product/press considerations?

An Attorney in OGC



Well-Known Coach

- In-season, or not. Different impacts. Do you wait if near end of season?
- Do you tell the team? When? What? They may be witnesses
- Retaliation concerns
- Assistants/grad assistants/trainers
- Calls from boosters

Leading Researcher at Academic Medical Center



Thorny Procedural Issues

- “Counterclaim” / retaliation
- Protecting witness identity
- Subject of investigation takes medical leave before or mid-investigation
- Subject seeks disability accommodations
- Subject resigns
- Subject demands that institution pay for counsel
- University witness wants university counsel present at interview

Thorny Collateral Issues

- Subject employee active on social media
- Protests (possibly cross-protests)
- Employee someone regularly in national spotlight
- Elected official involvement
- Hot-button social issues / interest groups



Questions?

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