

MEDICAL SPA LOSES \$300K AFTER BOTCHED WORKPLACE INVESTIGATION: 5 TIPS FOR EMPLOYERS INVESTIGATING POTENTIAL CRIMINAL ACTIVITY OR MISCONDUCT

Insights
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Two vials of Botox went missing at a medical spa, and the employer had a hunch that a new employee had stolen them. After the police got involved, the employee was arrested and indicted for felony theft by a grand jury, but later cleared of the charges. In the end, the employer was held liable for malicious prosecution and required to pay the accused individual more than \$300,000. What happened? We'll explain everything and give you five tips for handling workplace investigations involving potential criminal activity or other misconduct.

The Case of Missing Botox

The owner of a medical spa in Nashville, Tennessee, suspected that a new employee – a registered nurse trained in aesthetics and certified to perform laser treatments and Botox injections – was stealing various inventory supplies. One day, the owner noticed two vials of Botox were missing and decided to check the nurse's purse, which she claimed was hanging open enough to expose the two missing vials. Upon further inspection, she found other supplies and a loaded handgun. She then directed the office manager to call the police.

The police arrested the nurse and charged her with felony theft of property. But after a grand jury indictment, she was acquitted at trial. She then sued the employer for malicious prosecution – and won. A jury awarded the nurse \$325,000 in compensatory damages.

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Where Did the Employer Go Wrong?

At the civil trial, the nurse insisted that the employer's criminal proceedings against her were unjustified for several reasons, and the jury agreed. Here's where the employer went wrong, based on the former employee's version of events (except as otherwise noted):

- **Jumping to conclusions.** On the day of the arrest, the nurse began gathering the necessary supplies, including the allegedly stolen items, because her mother had agreed that morning to host an offsite "Botox party" – a service offering she said she had previously discussed with other staff. She intended to get permission from the spa owner, but she got sidetracked by a walk-in client. Immediately after seeing that client, she was called into the owner's office, where the police were already waiting.
- **Making accusations without proof.** The spa owner accused the employee of stealing additional items, including more than \$13,000 worth of inventory she claimed to have been tracking over several weeks. But she admitted at the trial that she had no tangible proof that the employee had stolen those items. Further, testimony at trial showed that all employees had access to these products for both business and personal use, and that the company did not have any inventory controls at that time.
- **Using coercive tactics.** After the nurse repeatedly denied the theft accusation, the spa owner claimed she had proof on video (which was a lie) and that the employee then confessed to taking the products for the purpose of offsite treatments (it appears the parties disputed the extent of the confession or whether it was made at all).
- **Attempting to frame the employee.** Before the arrest, the police questioned the nurse about some missing cash. She said she saw it in her treatment room that morning, assumed it was a leftover tip for the previous aesthetician, and moved it to a safe spot on a shelf – right where it later was confirmed to be. Eventually, it was revealed that the office manager and the lead aesthetician planted the cash in the treatment room that morning as bait.
- **Continuing criminal proceedings.** While the jury found that the employer had probable cause to call the police after finding the missing vials and a loaded gun in the employee's purse, it found that the spa owner "took an

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active part in the continuation of the prosecution after learning that there was no probable cause for believing [the employee] was guilty of the charges.”

5 Tips for Employers Investigating Potential Criminal Activity or Misconduct

If you know or suspect an employee is engaging in misconduct or potential criminal activity at work, you should follow these five tips:

- 1. Follow written procedures.** When conducting investigations into a workplace matter, you should use trained investigators and follow clear processes. If you can show that you acted promptly and appropriately when you learned of an employee’s potential misconduct, you can significantly reduce your legal risk and maintain a safe, productive, and respectful workplace. [Click here to learn more about Fisher Phillips’ Workplace Investigations Training Program.](#)
- 2. Avoid common mistakes during the investigation.** The investigation is important not only for practical reasons but also because it will be scrutinized by a jury if ultimately the employee is terminated and brings a lawsuit against you that goes to trial. This is especially true when a powerful accusation, such as theft, is involved. At the very least, you must ensure appropriate, well-trained personnel (ideally someone who is not in the employee’s direct line of supervision or consider utilizing a third party) conduct the investigation, and that the accused employee has an opportunity to share their side of the story. What is most important is that the investigator is fair and impartial, and this is conveyed through their words and actions to the accused and anyone else involved in the investigation. Avoid any comments that suggest you have reached a conclusion before the investigation is completed. And you should steer clear of using methods to “catch” or frame the employee. At a minimum, using such methods could be used to show that you were biased against the accused employee. It also could be illegal or lead to claims against you personally. For example, digging through an employee’s purse without their consent could generate invasion-of-privacy claims. [Here’s our step-by-step guide to terminating employees for theft \(part one\).](#)

3. **Tread carefully with confessions.** It is often helpful to have a second company representative present during the interview of the accused to ensure the accuracy of the interview notes in addition to serving as a potential trial witness to corroborate any confessions or incriminating statements made by the accused. [Learn more in part two of our step-by-step guide to terminating employees for theft.](#)
4. **Use discretion if police are involved.** The decision as to whether to notify law enforcement should be made after discussion with appropriate leaders and counsel, but it is often a prudent course of action if the alleged misconduct involves such things as theft, violence, or threats. You should never make a promise to forego contacting the police in exchange for a resignation or admission of guilt by the accused. In many states, such discussions are typically highly scrutinized and can be considered coercive and a violation of procedural due process under certain circumstances. Once the police are involved, stop your investigation and follow the direction provided by the police. In such a situation, it is critical that whoever interfaces with the police does not point the finger at the suspected employee. If the suspected employee is exonerated, or a different employee turns out to be involved, your initial finger-pointing might spur a claim for malicious prosecution under state law. Ultimately, you should fully cooperate with the police and provide them what information you know but avoid sharing your speculation or suspicions. [Read more about police involvement here.](#)
5. **Work with counsel.** Before an investigation even begins, you should notify counsel and work with them throughout all stages of the process. Counsel can help you determine if the investigation should be conducted under the attorney-client privilege and otherwise assist you in making the various judgments that are required during an internal workplace investigation. Our [Workplace Investigations Practice Group](#) attorneys have extensive experience in all types of workplace investigations (including discrimination, harassment, retaliation, workplace violence, threats, fraud, theft, embezzlement/defalcation, substance abuse, and off-duty illegal/prohibited conduct) and can provide effective workplace investigation services tailored to your specific needs and objectives.

Conclusion

By conducting prompt, thorough, and fair investigations, you can reduce your legal risk and maintain a safe workplace where all employees are treated with dignity and respect. Should you have any questions on workplace investigations or want help reviewing your investigation process, training your internal investigators, or assisting in other workplace investigation needs, please reach out to your Fisher Phillips attorney, the authors of this Insight, or any member of [our Workplace Investigations Practice Team](#). We will continue to monitor any further developments and provide updates, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information.