

Fair Employment Practices Investigating a Sexual Harassment Complaint

Once a complaint of harassment has been made to an employer or the employer is otherwise aware that a problem exists, an internal investigation should be promptly conducted by a person familiar with harassment issues and company policy. Delay in investigating the charge can demoralize affected staff and may adversely affect witness credibility. Try to obtain a written complaint to serve as the basis of an investigation.

Initial Steps

1. **Listen attentively and take the complaint seriously**, even if the complaint initially appears questionable. Treat it as valid until the facts have been established otherwise. If the employee quits because she or he felt her complaint was not being taken seriously, liability may be compounded. Avoid comments like "Maybe you're overreacting," or "I'm sure he didn't mean anything by it."
2. **Set a professional tone** for the interview and try to put the complainant at ease. Bringing a harassment complaint is often difficult and stressful for the employee. Acknowledge that fact and try to help the employee understand this is normal. Keep a neutral perspective however, and maintain a professional demeanor.
3. **Gather facts do not make judgments.** At this stage, you are not determining the complaint's validity. The job at hand is to gather the facts. Stay away from comments such as, "Most people would be complimented by that" or "Maybe you shouldn't dress that way for work." Speak in a matter-of-fact, but supportive way, not one in which you appear to be "**cross examining**" the complainant. This may ease the tension that is often present.
4. Get answers to: "**who, what, when, where, why and how.**" Encourage the complainant to be as specific as possible. Find out who did what to whom, when did events happen, why and how did they occur, and were there any witnesses? At this stage, it would also be wise to ask the employee if he or she is concerned about **retaliation**, which is often a concern of harassment victims.
5. Try to **avoid leading questions**, such as "Did he tell offensive jokes?" Instead, ask open-ended questions, such as "What did he say?" or "Where did he touch you?"
6. Getting a sense of what the employee feels would be an acceptable outcome might be important at this stage. What does the employee want to see happen to **resolve** the problem?

General

- While complete confidentiality may not be possible, keep the investigation and the facts under a strict "need to know" basis. Emphasize to all those involved in the investigation, including the complainant, the accused and witnesses, that it is your policy to keep discussions strictly confidential and that disciplinary consequences may result from a breach of this confidence.
- Limit the number of persons who have access to information. Avoid needless disclosure of information to witnesses. For example, instead of asking, "Did you see Joe touching Joan?" ask, "Have you seen anyone at work touch Joan in an offensive way?" The investigation is done to gather facts, not disseminate allegations.
- If there is more than one allegation, treat each incident separately.
- To avoid liability for defamation, never broadcast the facts of a given situation or the results of your investigation to others or as part of a training exercise.
- **Interviewing the Complainant**
- Explain to the complainant that the charges are serious and that you need to complete a thorough investigation before reaching any conclusions. Restate your policy against taking any adverse action against the employee for bringing the charge and ask the complainant to notify you promptly if any such actions occur.
- Elicit specific details regarding the alleged harassment. Include questions on the type and frequency of conduct and what was said or done. Also where it occurred, where the complainant was touched, the dates that the conduct occurred, the time period over which the conduct occurred, whether there was a pattern of previous episodes and whether the complainant is aware of similar behavior by the accused

toward other employees. (Keep in mind that a complainant may have difficulty remembering exact events and dates. The investigator must persist in helping the complainant be as specific as possible.)

- Get the specific context in which the conduct occurred, including the nature and general description of the work area and location. Did the conduct occur at a work-related function, during working time, or after hours?
- Determine the effect of the conduct on the complainant. Try to identify the type(s) of effect (e.g. economic, non-economic, and/or psychological). Was the conduct received as a joke, was it unwelcome, did it embarrass, frighten, or humiliate the complainant? (Often, complainants contend that, while they may have given in to the demands made of them, they did so out of fear or because they felt, threatened. It is important to remember that the real issue is whether the behavior was **unwelcome**.)
- Determine the time relationship between the occurrence of the alleged conduct, its effect on the complainant, and the time when the complainant made the report. If there was a time lag, find out why the complainant waited so long before reporting the situation. A plausible reason might be fear of retaliation. Prepare a chronology of events. Analyze if certain events may have triggered the complaint, for example, a denial of promotion, pay raise, or transfer.
- Find out what the complainant wants and how the situation might be resolved. Can the complainant continue to work for or with the accused? Will productivity be adversely affected? Will it be embarrassing or awkward? Ask the complainant if they might need counseling?
- Make no statements about the Accused's character, job performance or family life. This may result in liability for defamation.

Interviewing the Accused

- Repeat the initial statement made to the complainant about the seriousness of the charge and your concern that no adverse action be taken against the complainant for bringing the complaint. Then, obtain a position statement from the accused.
- Identify the relationship of the accused to the complainant. Was the accused an agent of the company, a supervisory employee, a co-worker, or a non-employee?
- Was there any prior consensual relationship between the parties? How long have the parties known each other? Is there a history of group or individual socializing?
- Determine whether the accused directed, or had responsibility for, the work of other employees or the complainant, had authority to recommend employment decisions affecting others (for example, hiring, firing, promoting), or was responsible for the records of others.
- You can expect the accused to deny the charges. Observe the reaction. Note whether there is surprise, anger, or disbelief. Describe the details of the allegation and note the areas of disagreement between the testimonies of both parties. If the accused denies the allegations, probe further to determine with the accused the background, reasons, and motivation that could possibly have triggered the complaint.

Interview the Accused's Supervisor

- Talk with the supervisor to learn about any discipline problems and behavior patterns of either party and to determine if the supervisor knows anything about the relationship between the parties.
- Did the complainant report the conduct to the supervisor? Was the supervisor in a position to observe the conduct? Should the supervisor have been alerted to the conduct? For example, was the conduct discussed in the presence of the supervisor or were there any rumors circulating?
- Determine if there is any documentation available such as letters, memos, reports or statements supporting the conclusion that the supervisor knew or had reason to know of the conduct.

Interviewing Witnesses

- Obtain statements, from any witnesses that support or deny any of the complainant's allegations. This evidence is very critical to the investigation. Be aware that witnesses are often reluctant to come forward out of fear of reprisal.
- Assure witnesses that their cooperation is important and that their testimony will be kept as confidential as possible. Reaffirm your policy and the law's protection against retaliation against a person who assists in an investigation.

Resolving the Complaint

- Prepare a written report of your findings. Determine steps to be taken based on this report.
- When trying to remedy the conduct, do not “punish the complainant” by moving her or him to less desirable hours or to a less desirable location. If you offer to transfer the complainant, make it voluntary and make sure the position transferred to is equal to or better than the prior position.
- Consider the severity, frequency, and pervasiveness of the conduct when imposing discipline on the harasser. There are several options available, including oral and written warnings, reprimands, suspension without pay, probation and, depending upon the severity, transfer, demotion or discharge.
- Any form of discipline short of discharge should be accompanied with a warning that similar misconduct in the future might result in immediate discharge.
- Conduct follow-up interviews with the parties to inform them of your actions.

Hard to Resolve Situations

1. **No witnesses**-Harassment often happens in private with no witnesses. In such cases resolution often centers on the credibility of the parties. If the complainant's account of the conduct is sufficiently detailed and internally consistent it may be believable. An investigation should look for other evidence to support or disprove a claim. Do co-workers have any knowledge of the conduct? Did anyone observe the employee's behavior shortly after the alleged incident occurred? Did the employee discuss the matter with another person such as a counselor, doctor, or close friend? Did anyone notice any change in behavior of the employee at work or in the way the accused treated the complainant? Were other employees treated in a similar manner by the accused?
2. **Reluctant Complainant**-If a victim tells a supervisor about lewd or sexually harassing behavior, but doesn't want to make a formal complaint, what obligation does the employer have? Even if the victim is reluctant to pursue a complaint, the employer may be held liable for harassment if it fails to investigate and take any appropriate corrective action. The supervisor should explain the company's duty to act and assure the employee that the matter will be handled as discreetly as possible. The investigation will obviously be hindered. Even if insufficient evidence is available, the employer should use this opportunity to reaffirm its harassment policy and its insistence on a harassment free workplace.

This is one in a series of guides for fair employment practices. It is not legal advice. If legal advice or other expert assistance is required, a competent professional should be sought.

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