

Investigating Sexual Harassment Claims

By Karen Sutherland

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Legal Background

Sexual harassment investigations need to be conducted whenever an employer knows or suspects that sexual harassment involving any of its employees or job applicants is occurring or has occurred. The following are some basic guidelines on conducting an investigation. They are guidelines only, however, and will need to be adjusted to take the specific situation that you are dealing with into account.

Different workplaces have different needs, and you should contact an employment attorney for specific advice on how to conduct an investigation in your workplace, as your own policies and any collective bargaining or other employment-related agreements that you may have may affect the investigation. Additionally, the law in this area is changing all of the time, and the employment attorneys at Ogden Murphy Wallace can assist you with any changes in the laws that may affect your investigation.

Under state and federal laws and local ordinances, employers are liable for harassment by their managers or supervisors even if they had no knowledge that the harassment was taking place. Employers are liable for harassment of one co-worker by another if the employer knew or should have known the harassment was occurring. Employers have a legal duty to prevent sexual harassment by adopting effective anti-harassment policies and by investigating any possible instances of harassment, regardless of how the employer learned of the harassment, even if no formal complaint has been made.

The reasoning behind investigating all possible instances of harassment is that some employers may be inclined to ignore harassment by making it difficult to report, or by not noticing that harassment is pervasive in the workplace, thereby creating a "hostile work environment" where employees feel threatened or unable to do their jobs. Investigating all possible instances of harassment, regardless of how they come to the employer's attention, reduces the potential for liability.

Practical Guidelines

When faced with a harassment claim or rumors of harassment, an employer has three choices: (1) Ignore it and hope it goes away (rarely effective), (2) hire an independent investigator (often the most effective solution, but the most expensive and also may require notice and other Fair Credit

Reporting Act compliance measures) or (3) for the employer to conduct the investigation itself. If you, as an employer, choose the latter route, these tips will increase the effectiveness of the investigation:

- Make sure that you have a harassment policy, and that all of the employees have received, read and understand it. Otherwise, employees will not understand why the investigation is being conducted and may be reluctant to participate.
- Designate a qualified disinterested person to promptly investigate the complaint or rumors of harassment. If you are a manager or supervisor and you have been accused of harassment, if you have a personality conflict with the person who made the complaint, if you are close friends with the alleged harasser, or if you have any other conflict or bias relating to the complaint, someone other than you should conduct the investigation. In some circumstances, it may be advisable to hire an independent investigator.
- The investigator should attempt to get as much information as possible. Depending on the circumstances, the information should include:
 - The identity of the person(s) accused of the offensive action and any witnesses to the alleged harassment;
 - What specific conduct is objectionable;
 - How many times and over what period of time the conduct has occurred;
 - Whether any other employees have experienced this type of offensive conduct;
 - Whether there have been any previous complaints to fellow employees, the harasser or others about the offensive conduct; and
 - Whether there is any pattern to the offensive conduct.
- When interviewing any individuals who may have knowledge relating to the complaint (including the complainant), the investigator should generally follow these guidelines, depending on the circumstances:
 - Disclose information only on a "need to know" basis.
 - Ask broad, open-ended questions that are not limited to the specific facts of the complaint. Let the alleged victim know that the employer takes the matter seriously and will promptly investigate it.
 - Take notes and follow up on any leads that the questioning reveals, even if they are not directly or specifically related to this complaint.

- Conduct the interview in a non-threatening environment, in a manner that encourages the interviewee to be forthcoming. If the interviewee appears uncomfortable, probe gently or return to the question or subject later in the interview.
- Remind interviewees that there will be no retaliation for participating in the interview.
- If the accused harasser requests a representative such as a co-worker to be present for the interview, under a recent NLRB decision, it appears that the employer should grant the request.
- If the accused harasser admits the conduct or the investigation reveals that the offensive conduct did occur, the discipline should fit the severity of the conduct and be calculated to immediately put a stop to the offensive conduct. In some cases a verbal or written reprimand may be sufficient. In other cases, the accused may need to be suspended or terminated.
- If the investigation is inconclusive, you may want to inform the accused harasser that, if additional information surfaces later, appropriate disciplinary action will be taken. The accused should also be advised that he/she shall not retaliate against the complaining employee or the witnesses, if any.
- The employer may want to follow up with the complainant, regardless of the outcome of the investigation, to make sure that no other alleged incidents of harassment or retaliation have occurred.
- Retaliation against employees who make a complaint or participate in an investigation is illegal. Make sure that your treatment of an employee who has made a harassment complaint or participated in an investigation cannot be interpreted as retaliation. For example, discipline, a change in shifts, a transfer, the amount of a raise, the lack of a promotion, "cold" treatment or other adverse employment actions following a complaint or following participation in an investigation may be considered retaliatory.

Following these steps will reduce the possibility that workplace incidents of harassment become lawsuits or EEOC complaints. Oftentimes, victims of harassment go to court seeking six-figure damage awards because they feel that their employer turned a deaf ear to their complaint or failed to take it seriously. Effective investigation of all reports or inquiries about possible harassment can prevent lawsuits from happening and save employers thousands of dollars in harassment claims and attorney's fees.

These materials are not intended and should not be used as legal advice or other recommendation. If you need a legal opinion on a specific issue or factual situation, please contact an attorney. Anyone using these materials should not rely on them as a substitute for legal advice.