



Conducting Harassment Investigations to Limit Employer Liability

By Erin E. Byrnes & Barry H. Uhrman

In the October 2007 Employment Law Update, the JS&H Employment Law Group published an article regarding the critical components of harassment policies and procedures. That article discussed providing the mechanisms for promptly and thoroughly responding to complaints of harassment when they arise in the workplace.

This article picks up where the last one left off—what happens when an employee comes to you with a harassment complaint against another employee? The next logical step in preventing harassment lawsuits is to implement an effective investigation procedure to resolve matters internally, and eliminate the need for costly and damaging litigation.

(A) General Guidelines:

Employers must take all harassment allegations seriously. All harassment allegations, regardless of how trivial they may at first appear, must be investigated. Consequently, it is a good idea to have the employee put the complaint in writing. In order to demonstrate to your employees that you do not tolerate harassment and that you take harassment complaints seriously, you must investigate each complaint *as soon as it arises*, and you must do so in a fair and consistent manner, taking the appropriate corrective actions, where necessary.

Employees often understate matters, due to embarrassment and fear of retribution. Cultural differences may also affect the manner in which an employee alleges harassment.

Picking the right investigator is one of the best ways to ensure that the process is objective, and is viewed as such by your employees. Your investigator should be someone who is not involved in day-to-day activities. The company's Human Resources Director is often a good choice. This person should be able to demonstrate sensitivity not only to the employee who raises the harassment allegation, but also to the alleged harasser, as well as to any other parties and witnesses involved.

The investigator should have the demonstrated ability to exercise appropriate discretion. As we discussed in our previous article, while the company cannot promise confidentiality, harassment claims are emotionally charged. Employees must know that when they make complaints, they will not be subject to ridicule and/or retaliation from other employees. Moreover, to the extent confidentiality can be maintained, it minimizes any exposure to your company by ensuring that only the appropriate parties know of, and are involved in, any investigation.

It is also appropriate to involve your counsel before commencing an investigation. Your attorney(s) should be able to assist you in completing the investigation and in determining any appropriate disciplinary action.

(B) Specific Guidelines for Investigating:

The following steps are recommended when conducting a harassment investigation:

- (1) Review all relevant personnel policies. At the close of the investigation, the investigator will have to determine if any alleged conduct violates the company's policies and procedures. The investigator should *refrain* from speculating whether the law has been broken, both with the employees involved and with management.

(2) Define the scope of the investigation. Prior to commencing the investigation, determine who will be involved (i.e. who, if anyone, will assist the investigator in collecting information). Ascertain whether the investigation will impact any other issue involving employer-employee relationships.

(3) Begin by interviewing the employee alleging harassment. This interview should instill confidence in the employee that his/her concerns are being taken seriously and that confidentiality will be maintained, to the extent it is possible to do so. Remind the employee that he/she will not be retaliated against for making the complaint.

(4) The following questions and issues should be addressed with the **complaining employee**:

- What happened?
- When did it happen?
- Where did it happen?
- How did it make you feel?
- Who was there?
- What did they see?
- What have they told you?
- What have you told them?
- Has it ever happened before?
- Who have you told this to and what did they say?
- Have you kept any written records or diaries relevant to the issues?
- Are there any employer documents related to a claim such as personnel file memos, expense reports, payroll records, or the like?
- Ask the employee for any witnesses that he/she believes can corroborate his/her version of events.
- Are there any other issues that the employee wishes to discuss? Any other matters that may be important for the investigator to clear up?
- Make sure that you have a list of *every allegation* before adjourning the interview.
- Explain how long you expect the investigation to take, and *let the employee know that the company will apprise him/her of the outcome of the investigation.*

Remember - Treat each allegation of harassment separately. Be sure to keep the facts straight and determine whether harassment occurred in *each* situation.

(5) The following questions and issues should be addressed with the **alleged harassing employee**:

- Begin by explaining that the company will investigate the allegations thoroughly, that the investigator is neutral, and that the alleged harasser is not presumed guilty.
- Emphasize the importance of being truthful, regardless of any discomfort that may arise regarding the subject matter discussed. Remind the employee that untruthfulness may result in discipline, up to and including termination (assuming that your policies and procedures provide for this type of discipline).
- Start with broad questions. For instance, you might ask the alleged harasser if they have ever engaged in the generally described conduct with any employee.
- Move on to more detailed questions, but avoid leading questions. Open-ended questions allow for an open-ended discussion, which should be the goal of the investigation.
- Inquire about each instance of unwelcome conduct the victim has alleged. Note the areas of agreement and disagreement.
- In the event the accused claims the accuser is lying, ask him/her why he/she believes the accuser is lying. This is another way to ascertain any motivation the complaining employee may have for raising harassment allegations.

- If the alleged harasser admits any of the alleged conduct, he/she should be advised that the conduct was unwelcome, that the company will not tolerate it, and that the company will determine whether disciplinary action is warranted.
- Ask the employee for names of any witnesses he/she believes can corroborate his/her version of events.
- Conclude by advising the employee that he/she should bring forward any additional facts that may come to mind, as well as any additional explanation for the conduct.

(6) How to handle **witnesses**:

- It is very important that witnesses are told from the outset that their cooperation is appreciated.
- Witnesses must be cautioned, however, that they are not to discuss the investigation with anyone else in the company besides the investigator. Often, witnesses will want information about how the investigation has resolved, but they should be told that due to privacy concerns, the company is unable to advise them of the outcome of the investigation. Remind employees that they may be disciplined for failing to maintain confidentiality.
- Bear in mind that these employees may be as nervous about being interviewed as are the complaining employee and the alleged harasser.
- Be aware of, and note, any motivations/biases the witnesses may bring to the table. Employees who are called in to be interviewed may have an axe to grind, and those issues may color their reporting.
- Review the company's anti-harassment policy with each witness and remind them that the interview is part of enforcing this policy.
- Obtain the facts. Evaluate whether the witnesses are providing hearsay, gossip, or actual relevant information.
- Corroborate facts from the accuser. Where the accused provides relevant information that he/she indicates may be corroborated by a witness, make sure to follow up on that information with the relevant witness(es).
- Consider obtaining written statements from employees with critical information. This may be particularly important where the investigator suspects the employee may be leaving the company soon.

Investigator's Materials - Your investigator should keep detailed notes of every interview he/she conducts. Remember, all materials generated during the investigation are likely to become evidence if the employee pursues the matter administratively with the EEOC, the State Civil Rights Department, or in litigation. You must preserve these materials.

(C) Concluding the Investigation:

Once the investigator has interviewed all necessary parties, a report or summary memo should be prepared for the company. The report can be used later, if necessary, to show that an independent investigation was conducted. It also assures the complaining and accused employees that the matter has been handled appropriately and that due process has been afforded.

In the event the investigator determines no harassment occurred, this should be clearly stated in the report. Any such action must be taken consistent with the company's anti-harassment and disciplinary policies.

If the investigator believes a violation has occurred, then each violation should be identified, as well as the policy that the conduct violated. The report should summarize the key facts the investigator uncovered. In identifying the key facts, the investigator should note any inconsistencies, and describe the credibility of the witnesses.

The results should be provided to both the complaining employee and the alleged harasser. Remember, this document is likely to wind up as an exhibit if litigation results, so it should be drafted using the utmost care. You may wish to seek legal advice in finalizing this document.

The company must determine what discipline is warranted in the event the complaint is founded. Discipline must be implemented consistent with your written harassment policy. Appropriate discipline may involve any of the following: verbal warning, written reprimand, suspension with or without pay, attendance at a training session, company wide retraining, transfer, relocation, financial payment to offset the cost of the investigation and/or the damage caused by the alleged harasser's actions.

You may also wish to offer remedies directly to the victim. You might, for instance, offer to transfer the victim to a different department, or another office. Ensure, however, that any such change is made *with the complainant's consent*; otherwise, you may face a retaliation claim. The complaining employee should not face anything that could be viewed as punishment in rectifying the situation.

Place a memorandum in both the complaining employee's and the alleged harasser's personnel files. As to the accuser, make sure any such document does the following: (1) thanks the employee for bringing forward the complaint; (2) states that the matter has been investigated and the outcome of that investigation; (3) informs the employee that the company will continue to enforce its policies in the future, including the anti-harassment policy; (4) advises the employee that he/she should *immediately* advise the company if any future harassing conduct occurs; and (5) reminds the employee to bring forward any issues that appear to involve retaliation for making the harassment complaint. ♦

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Ms. Byrnes joined the firm in 2006 and concentrates her practice on governmental liability, employment law and Indian law. She has extensive experience in representing employers in a variety of cases involving sexual harassment, discrimination, wage and disability claims. She also has handled a variety of employment matters for both municipalities and school clients. Ms. Byrnes specializes in Indian law and has represented clients ranging from tribal council members to grant schools in federal, state and tribal forums. She has assisted tribes in lobbying efforts, has worked with them to revise their tribal codes, and is currently assisting a client in negotiating a contract to provide mental health services to one Arizona Indian community. Ms. Byrnes is admitted in not only Arizona and Oklahoma, but also the Navajo, Hopi, Gila River Indian Community, Pascua Yaqui, Tohono O'odham, Quechan, and White Mountain Apache tribal courts.

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