

Conducting a Sexual Harassment Investigation in the Workplace

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Connie M. Cessante

(313) 965-8329

ccessante@clarkhill.com

Brian D. Shekell

(313) 965-8803

bshekell@clarkhill.com

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AGENDA

- What is sexual harassment?
- Conducting the investigation
 - The incident
 - Why conduct the investigation?
 - The investigative process
 - Reviewing the evidence and reaching a determination
 - Documenting the investigation

WHAT IS SEXUAL HARASSMENT?

- State and federal law prohibit sexual harassment
 - The Elliott-Larsen Civil Rights Act (Michigan law) prohibits unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct under certain conditions
 - Title VII (federal law) prohibits discrimination on the basis of “sex,” which is construed to include sexual harassment. The EEOC has defined sexual harassment similarly to the ELCRA definition.
- Your company should also have a policy that defines sexual harassment
 - Often times this definition is different than the legal definitions
 - Company policies typically provide greater leeway for an employer to determine what conduct constitutes sexual harassment.
 - That is, sexual harassment that may not be illegal may still violate your company’s policies

THE INCIDENT



WHY CONDUCT AN INVESTIGATION?

- An anti-harassment policy alone is insufficient to insulate employers from liability for claims of sexual harassment
- Employers should establish, publicize, and enforce a complaint procedure by which employees can bring the alleged conduct to the attention of the employer
- Failing to promptly investigate a sexual harassment complaint can negatively impact employee morale or suggest that the behavior is acceptable in the workplace, which may lead to future incidents

IT SHOULD BE PROMPT, ADEQUATE AND IMPARTIAL

- What is sufficiently “prompt” when investigating a complaint?
 - Prompt means prompt! The investigation should begin immediately and without delay
 - The amount of time needed to complete the investigation depends on the particular circumstances, but the investigation should go on without delay
- What is an “adequate and impartial” investigation?
 - The adequacy and impartiality of an investigation depends upon the particular circumstances of the complaint
 - While the investigative process may not be the same for all complaints, there are certain steps that an employer should take

THE INVESTIGATIVE PROCESS

- Determine whether any interim measures are necessary to separate the complainant and alleged harasser to prevent further harassment
 - Options include making changes in schedules, transferring the alleged harasser, or placing the alleged harasser on a non-disciplinary leave without pay pending investigation
 - The interim measures sure not burden or negatively impact the complainant

DETERMINE WHO SHOULD INVESTIGATE

- Internal or external
- Whether internal or external, the investigator should possess certain attributes:
 - Objectivity and impartiality
 - The skill set to carry out the investigation, including the ability to interview witnesses, determine the scope of the investigation and evaluate credibility
- Familiarity with the company's sexual harassment policy
- Familiarity or a working knowledge of the legal standards as to what constitutes sexual

PREPARING FOR THE INVESTIGATION

- Review key documents before conducting interviews. These documents may include:
 - The anti-harassment policy and complaint procedure
 - If in writing, the complaint and any notes or other materials associated with the complaint
 - The personnel files of the complainant and alleged harasser
 - Prior complaints
 - Other documents that the complainant may place at issue, including the company's rules, policies, procedures, time cards, etc.

DETERMINE THE ORDER OF THE INTERVIEWS

- Interview the complainant first
- If the complainant refuses to be interviewed, attempt to find out why and document the refusal in writing by sending a letter to the complainant
- Explain that the investigation will go forward based on the information previously provided, and encourage the complainant if he/she changes his/her mind



DETERMINE THE ORDER OF THE INTERVIEWS

- Interview the alleged harasser(s) second
- If the alleged harasser refuses to be interviewed, take an identical approach
- Document the refusal and advise the harasser that the investigation will move forward without his/her side of the story



DETERMINE THE ORDER OF THE INTERVIEWS

- After the initial interviews of the complainant and alleged harasser, interview witnesses to the incident and co-workers identified by the complainant and alleged harasser
- If a witness refuses to participate, find out why
- Often times third parties are hesitant to participate because they fear retaliation
- Explaining the investigative process and answering any questions the witness has encourages participation



DOCUMENTING THE INTERVIEWS

- Determine the means by which information obtained during the interviews will be documented
 - Handwritten notes: Should be legible and contain detailed provided during the interview. Include only information reported by the witness and refrain from noting your conclusions, opinions or reactions.
 - Typed summary: Taken from the handwritten notes that can be reviewed and signed by each witness
 - Statements: Written out by the complainant, alleged harasser, and each witness

INTERVIEWING THE COMPLAINANT

- Explain the purpose of the interview and the company's commitment to the anti-harassment and non-retaliation policies
- Try to put the complainant at ease
- Explain that the information obtained during the interview will only be shared with others on a need to know basis so that the complainant understands that the information will not be held strictly confidential

INTERVIEWING THE COMPLAINANT

- Obtain information about the incident by eliciting the six “Ws” and one “H”
 - Who, what, where, when, why, witnesses, and how
- Ask if the complainant has any notes or documentary evidence
- Obtain information about past interactions between the complainant and alleged harasser
- Ask who he/she thinks should be interviewed, and why
- Ask what action he/she would like the company to take
- Before concluding the interview, ask the complainant if there is any other information that is relevant to the complaint and should be shared

INTERVIEWING THE ALLEGED HARASSER

- At the outset, make the same disclosures that were made to the complainant
- The alleged harasser often reacts with shock, disbelief and immediate concern for his/her employment status. If this occurs:
 - Reiterate that the investigation will be conducted in an impartial and objective manner
 - Reiterate that you have not drawn any conclusions about the allegations
 - Impress upon the alleged harasser that this is his/her opportunity to respond to the allegations

INTERVIEWING THE ALLEGED HARASSER

- Discuss the incidents that form the basis of the complaint, and ask the alleged harasser to respond as you identify each incident
- When discussing the incident, disclose all of the details provided by the complainant and do not omit information
- Obtain detailed information using the six “Ws” and one “H”
- If the alleged harasser claims that the allegations are false, ask why the complainant would lie
- Obtain all documentation or other evidence the alleged harasser has
- Obtain information about past interactions between the complainant and harasser

INTERVIEWING THE WITNESSES

- At the outset, make the same disclosures that were made to the complainant and alleged harasser
- Explain why you have asked to speak with the witness and how the information you obtain will be used
- Ask about the incident using the six “Ws” and one “H”
- There is no need to share all the information reported by the complainant and alleged harasser – share only the information necessary to conduct a thorough interview of the witness
- Let the witness know that he/she can contact you with any questions and reiterate the company’s prohibition against retaliation

REVIEWING THE EVIDENCE

- Review all of the information to determine if any follow-up is necessary
- After concluding the investigation, consider all the evidence obtained to determine whether the incidents reported by the complainant occurred
- If there are conflicting versions of events, you will likely need to make a credibility determination

FACTORS IN ASSESSING CREDIBILITY

- Did witnesses appear to be telling the truth; do they have a reason to lie?
- Do any documents back up the witness' accounts?
- The parties' work history and disciplinary records
- Whether the information provided is based on first hand knowledge or rumor, gossip, or supposition

THE INVESTIGATION REPORT

- Conclude the investigation with a report or at least a summary of the complaint and determination, including any corrective action taken
- The report should include:
 - Background information, including how the complaint was raised
 - How the complaint was investigated, including all witnesses interviewed and documents reviewed
 - The incident as reported by the complainant, the alleged harasser's response, and the witness accounts of the incident
 - Your determination whether the incidents occurred, whether the incidents constitute sexual harassment, and if necessary, the corrective action taken
 - If documentary evidence is relied upon, attached it to the report as exhibits

THE INVESTIGATION FILE

- Create a separate file for the investigation
- The investigation file should include:
 - The complaint
 - Notes of all interviews
 - Evidence of attempts to contact the witnesses
 - Evidence of all contact with the witnesses
 - All documents obtained during the investigation
 - The Investigation Report
 - Evidence that the complainant and alleged harasser were notified on the result, and any corrective action taken

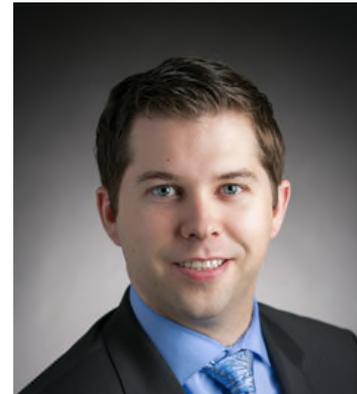
QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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