

Five Key Focus Areas for Internal Investigations of Sexual Harassment

by Raanon Gal, FordHarrison LLP



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A WHITEPAPER
BY RAANON GAL, FORDHARRISON LLP

A claim of sexual harassment can be one of the most challenging issues facing an organization. How you handle the investigation can mean the difference between taking the right actions toward resolution or subjecting the organization to ongoing litigation, liability and loss of workforce morale.

When an incident report involves sexual harassment, it must be taken seriously and investigated with all due diligence possible. In the U.S., there are both federal and state harassment laws that make it the employer's responsibility to investigate such complaints, regardless of any extraneous circumstances.

When an employer doesn't implement an investigation, such failure may be used against the organization to prove that it did not have adequate measures in place to prevent harassment from occurring or even that it disregarded the misconduct. These shortcomings can in turn lead to additional legal action and even punitive damages against the organization.

Conducting an internal investigation, whether paired with a subsequent external investigation or not, can also help the organization establish preventative measures aimed at reducing future risk and liability, not to mention the positive boost to employee relations and the strengthening of your ethically minded culture.

There are many articles, books and guides that provide specific details and even worksheets about the steps involved in an investigation and the actions that should be taken. The five key focus areas presented here look at best practices for internal sexual harassment investigations from the aspect of who is responsible for what and how their input should be administered.

- ▶ **The Investigation Team**
- ▶ **The Witnesses**
- ▶ **The Victim**
- ▶ **The Accused**
- ▶ **Concluding the Investigation**

According to an *AOL Jobs Survey* [2011], one in six persons has been sexually harassed in the workplace. Out of those harassed, 43 percent say it was from a manager and 51 percent say it was from a peer. Only 35 percent of people harassed reported it; women (47 percent) are more likely to do so than men (21 percent).

Pamela Mahabeer
"Sexual Harassment Still Pervasive
in the Workplace,"
AOL Jobs, January 2011

This objective view of an investigation involving harassment is not meant to sound dismissive of the subject. Sexual harassment can be devastating to its victims and leave long-term mental and emotional scars. It is an issue that must be addressed at an even higher level focused on education, awareness and prevention, which for an organization can be found in its policies, training, leadership and culture. Claims of harassment can be equally troubling to those accused, regardless of guilt, and can also damage the organization at large in terms of reputation, standing, turnover and hiring practices, and employee productivity.

When conducting a sexual harassment investigation or any employment related investigation, there are five key focus areas to consider:

The Investigation Team

Those selected will be the primary witnesses for the company. The company should appoint one chief investigator who will interview all witnesses. A second or third person should be selected to assist the chief investigator in taking notes, arranging interviews, to act as a witness to verify what was said during the interviews, and to testify for the company about the investigation.

The investigation team should be individuals with knowledge of the company's policies, procedures and rules, and should be a competent and experienced interviewer who can take thorough and accurate notes. Also, they must be able to gain the trust of those they are interviewing.



The Witnesses (including the complainant/victim and the accused)

Take detailed notes, as close to verbatim as possible, during each interview. Sign and date your notes.

Identify the individual being interviewed at the top of a new page for each witness, and record the names of those present at the interview, the date, time and place of the interview.

Make appropriate disclosures at the commencement of the interview including:

1. State what is being investigated, e.g., “we are investigating an employee complaint of improper conduct.”
2. Tell how the information received may be used, e.g.: “We will review your information, along with the information we obtain from other witnesses and try to make a determination as to whether improper conduct occurred.”
3. Explain that information obtained during the interview will be reported to those within and possibly outside the company who have a “need to know” of it.
4. Explain the importance of accurate information and the individual’s obligation to provide truthful, thorough information.



5. Caution the witness against discussing your interview or any information the witness obtains during the interview with any other persons.

In investigations regarding specific events, cover all events which occurred during the relevant time frame in chronological blocks of time. Do not leave the time block until all details necessary to recreate the scene have been established. For each block of time, cover the following:

1. Exactly what occurred?
2. When and where did it happen?
3. Who witnessed these events or knows of relevant information?
4. Who did or said what, in what order? (Try to determine exact words spoken.)
5. Who is responsible and could it have been avoided?
6. Was this an isolated event or part of a pattern? If so, explore each event.
7. What impact, if any, has the event had?
8. With whom has the witness discussed the event?
9. Are there any notes, recordings, photographs, physical evidence or other documentation?

Pin each witness down to facts: specifically what the witness saw, heard, did, smelled or felt. Distinguish matters of which the witness has personal knowledge from hearsay.

Neither give the impression that you disbelieve any witness nor express an opinion as to whether something inappropriate occurred during this fact-gathering process.

Prior to concluding the interview, ask if the witness has any other information which may be relevant. Ask if there are any questions which were not asked that the witness feels should have been asked. Let the witness know that if he/she has forgotten or later recalls any information or documents, the witness should call you immediately when additional information comes to mind.

Do not include, in your interview notes, your own interpretations, beliefs, assumptions, or conclusions.

At the conclusion of each interview, review with the witness the points contained in your notes to confirm their accuracy and determine whether the interviewee has anything to add. Review and finalize the notes immediately upon completion of the interview or other communication.

FAST FACTS on sexual harassment



7,571

Sexual harassment charges filed with the EEOC in 2012



82.2%

Claims filed by women



2,190

Cases resolved with merit resolutions



\$43 million

Monetary benefits (not including those obtained through litigation)

(Source: U.S. Equal Employment Opportunity Commission, 2012 Statistics on Sexual Harassment)

Generally, tape recording interviews is not advisable. Tape recorders often frighten interviewees and make them hesitant to share the facts they have.

If you will be sending the witness a statement, declaration or memorandum for review and signature, explain what you will be doing and obtain a promise of cooperation.

Stress the importance of not disclosing the questions asked, information given or other information about the interview to others to facilitate a thorough, impartial investigation.

Avoid discussing theories, strategy, assessment or other evidence with the witness.

The Complainant/Victim

When interviewing the complainant/victim, consider asking the individual to write down, either before or at the start of the interview, all incidents of improper conduct and all facts and witnesses which establish what occurred. (A handwritten statement by the complainant/victim is desirable at this early stage before he/she has counsel who may recast the events in a more negative light). You should also ask the complainant/victim the following questions:



1. Did you ever indicate that you were offended or somehow displeased by the act or offensive statement?
2. What did you say to show your displeasure (try to get exact words spoken)?
3. What did you do to show your displeasure?
4. What was the harasser's response to your act or statement (try to get exact words spoken)?
5. When did you indicate your displeasure?
6. Did you ever specifically tell the harasser to stop?
7. Did you ever specifically say that you found the conduct to be offensive or to constitute sexual harassment?
8. Did you speak to anyone else about the offensive behavior or statement?
9. With whom did you speak?
10. When did this conversation take place?
11. What did you and he/she say (exact words used)?
12. Did you ever make any notes or record of this incident?
13. Did you tape record it? When?
14. What do your notes or recordings say?
15. Where is a copy? Can we obtain one?

Among women who have experienced harassment but did not report it, four in 10 were either concerned about the consequences of making a report, or didn't think it would do any good.

ABC News/Washington Post poll,
November 2011

16. What did you do after the offensive statement or incident? (Find out whether the individual was able to return to normal activities.)
17. Did you ever seek any medical treatment or counseling as a result of the incident or offensive statement?
18. When did you first learn of the company's sexual harassment policy and complaint procedure?
19. To whom did you first report the offensive incident or statement? Have you confided in anyone else? Who?
20. If the individual did not use the complaint procedure promptly: why did you wait to use the complaint procedure to report the incident or statement?

Before concluding the interview with the complainant/victim, you should thank the employee for raising the issue, reaffirm that the company does not permit retaliation or reprisal for making an honestly believed complaint, ask the employee to keep the investigation and information provided during the interview confidential, express the company's commitment to conclude the matter in a timely manner, and confirm that all facts, evidence, and persons with potential information have been disclosed to the best of the individual's ability. Avoid making promises about any action you will take.

The investigation must be both prompt and thorough. Legal liability can often be minimized or even eliminated by a prompt and thorough investigation that provides an effective solution for all parties.... An improper or ineffective investigation can result in liability to the alleged victim, the accused, and even to other employees who believe that they also were victims or were retaliated against for participating in the investigation.

*Karimah J. Lamar,
"Investigating Sexual
Harassment Complaints,"
Carothers DiSante
& Freudenberger LLP*

The Accused

When interviewing the accused, identify and give the individual an opportunity to respond to each alleged improper statement or action. You should disclose the incidents/statements in full detail so that the accused has a full opportunity to refute or disprove them. Be sure to check your obligation to offer an ombudsman when discipline may result from your interview. You may even be obligated to inform the accused of that, he/she has such a right.

1. Ascertain the extent and nature of the interactions the accused has had with the alleged victim, i.e., have gifts, cards, or notes been exchanged?
2. Has there been a dating, sexual, social or working relationship?
3. Has the alleged victim initiated or participated in any sexual discussions, jokes, gestures, etc.?
4. Has the alleged victim ever indicated any displeasure with anything the accused has said or done or ever asked the accused to stop?
5. Ask the accused for any facts which show that anyone else may have a motive to fabricate the allegations against the accused. If the accused denies wrongdoing and claims that the person raising the issue is lying, explore possible reasons.
6. Ask why the accuser would make the claim.



7. Ask if anything has happened between the two individuals which would explain why one would make a meritless complaint.
8. Give the accused an opportunity to provide any alibis or mitigating circumstances. Find out whether the accused has signed for receipt of your harassment policy.
9. Ask the accused to identify all persons he/she believes should be interviewed as part of the investigation and what relevant information each is likely to have.
10. Request that the accused provide to you all relevant documents and other evidence.
11. Ask the accused what steps he/she believes should be taken to ensure a thorough investigation.
12. Explain to the accused that the company prohibits any retaliation or reprisal against anyone making a complaint of sexual harassment or anyone who provides information concerning the complaint. Inform him/her that if he/she attempts to retaliate in any way against the complaining party or attempts to interfere with the investigation, he/she will be subject to discharge. Also advise him/her that a false complaint will be subject to discipline as appropriate.

Concluding the Investigation

Once the facts have been gathered as accurately as possible from the appropriate persons, the investigator should again consult counsel and other appropriate management representatives to discuss the investigation.

If the results of the investigation are inconclusive, document that outcome. Do not indicate that the Company concludes that no harassment occurred, because that is tantamount to accusing the complainant of lying. On the other hand, if the results of the investigation are conclusive, avoid labeling the conduct as “sexual harassment” because that term is a legal term and can be taken out of context. Rather, the conclusion should be factual. For example, “we conclude that Jake did try to kiss Sue and that such conduct is inappropriate and unprofessional.” Do not state that Jake “sexually harassed” Sue.

Determine the most appropriate action to be taken in light of the facts available, which may of course, be inconclusive. The employer must take action which is “reasonably calculated to end the harassment.” Among the options to be considered are:

1. Discharge the accused if the investigation reveals that the activity in question occurred and was in violation of federal or state law or company policy, and there are no mitigating circumstances.
2. A strong written warning to the alleged harasser, making clear that any recurrence will not be tolerated, may be appropriate if there are mitigating factors.



3. A written memo to the alleged harasser stating that the Company has not been able to determine whether any unlawful action occurred, but reiterating the Company's policy against whatever action was alleged, and making clear that any such activity in the future, if proven, will result in discharge.
4. If you conclude that the accused should not be discharged, consider transferring one or both of the persons involved to a different job or facility in order to prevent any recurrence. Keep in mind that the determination of which of the two persons should be transferred is often a difficult and sensitive issue with potentially serious legal consequences if either person is transferred against his or her wishes. Labor and employment counsel should be consulted before you transfer either party involuntarily.

Over-reacting when imposing discipline on the accused can create problems as well. An accused who has been severely disciplined based on an incomplete or inconclusive investigation could sue for alleged wrongful termination, slander or defamation. Moreover, if the investigation reveals that the complaint is meritless or that only minor misconduct or "unprofessional" conduct occurred, then imposing severe discipline may suggest that the complainant/victim's allegations of more serious misconduct had more validity than the investigation actually revealed. In short, it is important that the "punishment fit the crime."

ABOUT THE AUTHOR

Raanon Gal focuses his practice on defending employers in employment discrimination, FMLA, wage and hour, harassment and wrongful termination litigation. He has represented clients in a variety of industries and has provided representation under Employment Practice Liability Insurance arrangements. He also has experience in representing clients concerning cases involving non-compete agreements, misappropriation of trade secrets, employment/business torts and wage and hour litigation. His practice also encompasses all areas relating to the counseling, training and representation of management clients in federal and state courts, as well as before state and local agencies.

Raanon frequently writes and lectures on the FMLA, ADA, Record Retention requirements and sexual harassment avoidance. He also drafts employee handbooks, employer policies and executive employment agreements. In 2011, Raanon was selected as the firm's F. Carter "Chip" Tate Legal Aid Fellow for the Atlanta Legal Aid Society's Fellowship Program. He is also the editor of the Georgia Employment Law Letter, a monthly newsletter on employment law developments in the state of Georgia.



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