

Investigating a Sexual Harassment Complaint: An Employer's Guide

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I. Introduction

Sexual harassment complaints are among the most difficult to handle for employers. When an employee has reported sexual harassment to the employer, it is critical to take immediate action to determine whether harassment occurred and to take appropriate action if it is determined that harassment took place.

The immediate and thorough investigation of a sexual harassment complaint is important for several reasons. A prompt investigation complies with both federal and state law; may help to avoid an investigation by the EEOC; demonstrates to employees that the employer takes sexual harassment seriously and is committed to eliminating sexual harassment from the workplace; may defuse a situation before it escalates into a lawsuit; and may provide an affirmative defense that the employer exercised reasonable care to prevent and correct sexual harassment and that the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer.

An investigation of sexual harassment must be prompt. Investigation within one day of a sexual harassment complaint is sufficiently prompt. In one jurisdiction, an employer was absolved of liability because it acted within four days of receiving a complaint. In another jurisdiction, however, an employer that took four weeks to respond to a complaint was not absolved of liability.

II. What Should An Employer Do?

The employer should promptly and thoroughly investigate a complaint of sexual harassment by interviewing the complaining employee, the alleged harasser, and any third party witnesses. The employer should also review any company documents, including E-mail and voicemail, and any documents provided by the parties or witnesses.

A. There are several reasons why a prompt and thorough investigation of a sexual harassment complaint should be conducted. Federal law (and most state laws) requires employers to take prompt and remedial action calculated to end the harassment. Failure to investigate a complaint of sexual harassment can be viewed as evidence of tacit approval of the harassment. Additionally, an incomplete investigation may subject the employer to liability.

B. The employer should begin an investigation of alleged sexual harassment as soon as possible after receiving the complaint. This investigation should be the same day as the complaint is received or at least within 24 hours. The employer should investigate sexual harassment as soon as the employer is aware of it, even if the employee allegedly being harassed has not made a complaint. Employers can have liability even if the employer is not put on notice by the employee of the harassment. In most instances, a supervisor has a duty to investigate instances of sexual harassment that are reported to him, with or without the harassed employee's consent. Even if the harassed employee states that the employer does not have to investigate, the employer nonetheless has a legal duty to examine the circumstances of the alleged harassment.

C. An employer representative or representatives should be designated to investigate complaints of sexual harassment. Ideally it is better to have two representatives conduct investigations for several reasons. One person can take notes while the other can take the lead in the interviews. Two representatives also will provide additional testimony on behalf of the employer, as to the scope of the investigation and the substance of the interviews, should the complaint result in a lawsuit. Additionally, using two representatives protects against claims of improper or inadequate investigations. However, two representatives may be intimidating to some witnesses, so employers should be mindful of this and allow a complaining employee to speak with only one representative if it appears that employee is uncomfortable.

III. The Investigation Itself

A. Meeting with the employee complaining of sexual harassment is the first step toward taking prompt and remedial action as required by law. This gives the employer an opportunity to determine the seriousness of the allegations and the attitude of the employee; allows the employee an opportunity to tell his or her story; lets the employee know that the employer is serious in wanting to resolve the complaint; and allows the employer to determine if the employee has unreasonably failed to take advantage of preventive measures which are in place. This interview with the complaining employee should take place as soon as possible, within 24 hours of receiving the complaint. If there is a delay in conducting the investigation, upon the initial interview with the employee, the reason for the delay should be explained immediately and that reason documented in writing.

B. The employer representatives should review the complaining employee's personnel file prior to the interview. What is the employee's history with the company? Is the employee presently subject to any disciplinary action? Was the employee recently denied a promotion, raise, or other benefit? Has the employee ever made similar allegations? Has the employee ever been involved, in any capacity, in a similar investigation? Did the employee receive and sign a copy of the employer's

sexual harassment policy?

The employer representatives should meet with the employee during work hours in a neutral workplace location. This location should not be near the alleged harasser's work area. The employer representatives should explain the process. The employee should be informed that the interview is being conducted on behalf of the employee as the first step in the employer's investigation. The employee should be advised that this is his or her chance to give an account of the harassment. The employee should be informed that the law requires the employer to conduct a complete investigation, including an interview with the alleged harasser. The employee should be encouraged to provide full disclosure of the harassment. The confidential nature of the interview should be stressed and assurances given that the information will not be disclosed to those who do not have a legitimate need to know of the complaint.

Details to obtain during the interview are as follows: the alleged harasser's name and position in the company; the nature and history of the employee's relationship with the alleged harasser, including any personal or social history or details of the working relationship; and whether prior to the current harassment being complained of, had the alleged harasser engaged in similar behavior about which the employee has not previously complained. The specifics of the alleged harassment should be obtained, including all persons involved, the identity of witnesses, what was said, and by whom; whether the alleged harasser made any physical contact with the employee; when and where each incident of the alleged harassment occurred; and whether this was an isolated incident or the latest in a pattern of behavior. Details should be obtained on whether the employee is complaining of physical or emotional pain or suffering, whether the employee's home life has been affected, and whether the employee's work performance has been affected. The employee should be asked whether others have been subjected to similar conduct, the identity of all persons to whom the employee has spoken regarding the alleged harassment, and whether the employee has any notes or diaries regarding the alleged harasser's conduct. If the employee has any documents, review those with the employee and make a copy for the

investigation. The employee should be asked to submit a written statement describing the harassment.

The interview with the employee should be concluded with an open-ended question such as, “Is there anything else important to this investigation that you have not told us?” The employer representatives should provide an estimate of the length of time the investigation will take and describe the remainder of the investigative process. The employee should be told to report any further harassment or any acts of retaliation resulting from the sexual harassment complaint and should be provided with examples of retaliatory conduct. The employee should be reassured again that the investigation will be kept as confidential as possible.

A written report documenting the employee’s complaint, the interview, and the employer representatives’ impressions of the employee should be prepared immediately after the interview. A determination should be made whether the company should take interim action while the investigation is ongoing. If the allegations are threatening and substantiated by the preliminary evidence, it may be necessary to remove the alleged harasser immediately from the workplace. Transfer to another department or paid administrative leave are options in this instance. The reasons for this transfer or leave should be well documented and should remain confidential to protect the rights of the alleged harasser. If the complaining employee requests an immediate transfer, said transfer should be accommodated if at all possible and should be to an equivalent position with no loss of benefits. That request and transfer should be thoroughly documented to protect the employer from subsequent charges of unlawful retaliation.

C. The alleged harasser should be interviewed. This interview should be conducted within 24 hours of the complaint if possible. The alleged harasser’s history with the company should be reviewed, including

whether the harasser has ever been accused of such behavior before, whether the harasser has ever been involved in any capacity in a similar investigation, and whether the harasser received and signed a copy of the employer’s sexual harassment policy. The interview should take place during work hours in a neutral work location.

The interview should begin with an explanation of the process, that the employer representatives are conducting an investigation on behalf of the employer into charges of sexual harassment, that the investigation is for the legal protection of the employer and the employee accused of harassment, and that cooperation in the investigation will assist in resolving the issue in a timely fashion. The employer representatives should explain that the complaining employee has been interviewed and that this is a chance for the accused employee to tell his or her side of the story. The accused harasser should be told that the employer takes sexual harassment seriously and will not tolerate it in the workplace. The confidential nature of the interview should be stressed, and the employee accused of harassment should be encouraged to be candid.

Each incident of alleged harassment should be described, as explained by the complaining employee. The accused employee should be asked for his or her version of the alleged harassment with as much specificity as possible. The alleged harasser should be asked to confirm or deny the details provided by the complaining employee, and where the details differ, the basis for those differences should be determined. The alleged harasser should be asked if any documents exist that may pertain to the situation, and if so, copies should be obtained for the investigation. The alleged harasser should be asked if the complaining employee has a reason to fabricate the alleged harassment. The nature and history of the personal and working relationship between the two employees should be examined. Finally, the alleged harasser’s role in the business should

be explored, including whether the alleged harasser makes assignments, conducts performance reviews, has the authority to recommend job benefits, or has the authority to take any type of employment action against the complaining employee.

The interview should be concluded with an open-ended question such as, “Is there anything else important to this investigation that you have not told us?” The confidentiality of the investigation should be stressed, and the alleged harasser should be warned not to ask anyone else to testify regarding the alleged harassment – that it is the employer representatives that will be contacting all potential witnesses. The alleged harasser should be cautioned not to retaliate against the complaining employee or any potential witnesses and that such retaliation would be grounds for discipline, even if no sexual harassment occurred. The employer representatives should provide an estimate of the length of time the investigation will take and describe the remainder of the process. A report documenting the interview and the employer representatives’ impressions of the alleged harasser should be prepared as soon after the interview as possible.

As with the interviews with the employee and the alleged harasser, potential witnesses should be interviewed as well. These interviews flesh out the circumstances around the alleged harassment, provide independent evidence confirming or denying the harassment, and show the employer is serious about eliminating sexual harassment from the workplace. The witness interviews should be conducted in the same manner, stressing confidentiality, seeking details regarding the alleged harassment, and attempting to determine if there are other incidents of sexual harassment than are currently being investigated.

IV. Conclusion

Employers must investigate sexual harassment promptly and thoroughly, not only to

stop sexual harassment and prevent future occurrences, but to also protect the employer from litigation. An investigation as outlined above is critical to comply with both federal and state law; to help avoid a lengthy investigation by the EEOC; to demonstrate to employees that the employer takes sexual harassment complaints seriously and is committed to eliminating sexual harassment from the workplace; to defuse a difficult situation before it escalates into a lawsuit; and to provide an affirmative defense that the employer exercised reasonable care to prevent and correct sexual harassment and that the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer.

About Geordie Garatt

Before embarking on a profession in law, Geordie worked in the mental health field for 10 years in urban Connecticut and in the mountains of North Carolina. His wealth of experience within that realm lends itself well to his present-day practice of law.

Geordie's practice has developed in a concentration on real estate transactions, foreclosures, employment law, and workers’ compensation law.

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