

Investigating a Discrimination or Harassment Complaint

Preparing to Investigate

Fortunately, many employers are rarely faced with allegations of harassment or discrimination. But all employers should be prepared to respond promptly upon becoming aware of such claims.

An employer has an obligation to investigate, even if the information about the alleged acts is received from a third party, the complainant does not want an investigation, or the information is old. The investigation should begin promptly upon receipt of the information.

Every organization should have in place an anti-harassment policy that covers not only sexual harassment, but harassment on the basis of other protected characteristics such as race or religion. That policy should set out a procedure for reporting incidents, designating a person or persons to whom the report should be made. In addition, all managers and supervisors should be trained in their responsibilities to immediately bring to an investigator any information they have concerning harassment or discrimination.

All organizations should have employees who are trained how to conduct investigations. Consider training more than one person so there is always an objective and impartial investigator available who is appropriate for the parties involved. It is important for the investigator to be a neutral person and not perceived as siding with one party. Having more than one trained investigator avoids the possibility that the sole investigator is the accused. It is advisable to have trained investigators of both genders. It is appropriate to have an investigator who is the same gender as the complainant handle claims of a sensitive nature.

Appropriate people to train as investigators include lead human resources individuals, managers, supervisors, or in-house attorneys. The employer may want to consider hiring an outside party, such as an attorney or MRA, to conduct certain investigations, such as when the accused is a member of upper management of the organization.

An investigator must be able to take accurate notes, be a good listener, follow-up on leads, and be able to represent the employer should the claim go to litigation. The investigator should also be perceived by the employees as someone who has knowledge about the organization and its policies, has a good rapport with all staff members, and can maintain confidentiality.

The investigator should take these steps to prepare for the investigation:

- Review the complaint to identify the issues and determine what facts need to be gathered.
- Review all records and documents related to the complaint. Contact the direct supervisors of the individuals involved for any documents they may have, but remember to keep the matter confidential and inform only those individuals that absolutely need to know.
- Review the employee handbook and policies for relevant guidelines and review any applicable laws.
- Prepare a list of individuals to be interviewed. This list is likely to grow as witnesses mention others who may have relevant information.
- Prepare a list of questions that need to be answered at the initial interviews.

In most instances, the investigator will meet first with the target of the alleged harassment or discrimination who is usually, but not always, the complainant. During this meeting the investigator will clarify and gather more details about the circumstances that led to the complaint, including obtaining the names of any additional potential witnesses to the behavior being complained about. The complainant should be reassured that the investigation will be conducted as confidentially as possible, but that the employer's obligation to investigate the incident may require certain individuals to become aware of the complaint. The employer's obligation to investigate to prevent further such incidents trumps the complainant's right to privacy regarding the complaint. Therefore, an investigator should not promise an individual that a complaint will be handled with absolute confidentiality.

Conducting the Investigation

After employers have prepared to conduct the investigation, there are many things to consider when conducting the investigation. As employers meet with each individual, be sure to:

- Review the organization's discrimination and/or harassment policy.
- Review the organization's commitment to neutrality and impartiality in the investigation.
- Inform the individual that the complaint is in the investigation stage and that no judgments about the validity of the claim have been made.
- Do not promise confidentiality, but inform the individual that information will only be shared on a need-to know basis.
- Ask open-ended questions. If the investigator suspects that the person is lying, then ask fact-based questions.
- Ask for names of witnesses.
- Document only facts and not opinions.
- Consider having another management representative accompany the investigator in all interviews. This person functions as a witness to the interviews and is able to provide an additional assessment of the credibility of the witnesses.
- Write notes throughout the interview.
- Tell the person that retaliation against the complainant or others is prohibited and not to discuss the interview with anyone.

Also consider the following when conducting interviews:

- Meet with the complainant first.
- Ask the complainant what is expected as the outcome of the investigation.
- When meeting with the alleged harasser, be prepared for an emotional response (i.e., anger, crying).

After interviewing each person, write or type detailed notes documenting the information provided. Then, meet with each individual and review the notes for accuracy. The individual should advise the interviewer of any changes that need to be made. The person should sign and date the notes once it is agreed that what is documented is the information that was provided.

It is important not to file any of the investigation materials in the personnel files. Instead, create a permanent, confidential, investigative file to store the information.

Analyzing the Results of an Investigation

After conducting all the interviews, the investigator must analyze the results of the investigation. This may include reviewing notes, reviewing supporting or applicable documents, comparing stories, and verifying facts. The investigator also needs to assess the credibility of the witnesses and determine whether there is enough information to conclude whether harassment or discrimination occurred.

If the investigator believes discrimination or harassment occurred:

- Assess the severity of the offense. Did the complainant feel physically threatened? Was the conduct malicious or was it the result of ignorance or lack of sensitivity?
- Review applicable labor agreements and policies to determine their effect on the course of action to be taken.
- Compare the action to past organization practices to ensure consistency in employer practices and consistency in the treatment of employees.
- If disciplinary action is warranted, document it and present it to the employee. Store the original signed document in the employee's personnel file and place a copy in the investigation file.
- Meet with the victim to inform the individual that the organization has concluded its investigation and the action taken by the organization. Urge the victim to promptly report any continued prohibited conduct or any retaliatory actions.

If the investigator concludes prohibited conduct did not occur, meet separately with the complainant and the alleged harasser to inform them that the results of the investigation did not show that any prohibited conduct occurred, so no action will be taken. Remind them both of appropriate workplace conduct. Encourage the complainant to contact you if there are additional complaints.

Often there are no witnesses to acts of harassment or discrimination. The investigator may find that there is a “he said, she said” situation where the investigator’s assessment of the credibility of the parties can be the key to resolution. In many “he said, she said” situations, however, the investigation is inconclusive. The complainant and alleged harasser should be notified that no action will be taken because it is not possible to verify either of their versions of the events leading to the complaint. The investigator should review the policy with both individuals and inform them to report any acts of discrimination or harassment immediately. The investigation results should be documented and placed in the confidential investigative file.

Employers should consider providing annual or bi-annual training on discrimination and harassment along with redistributing the policies. For questions on investigating discrimination and harassment claims, contact MRA’s HR Resource Center via phone at 866-HR-HOTLINE (866-474-6854) or e-mail at infnow@mrnet.org.