

## management matters

# Conducting Sexual Harassment Investigations

By Jonathan A. Wexler, Esq.

Last month's column addressed the importance of implementing an effective anti-harassment policy. This article discusses how to conduct investigations of complaints that are made under your policy.

### Who Should Investigate?

The firm should designate someone outside the line of supervision, such as a human resources professional, as the investigator. Whoever is designated should be able to act quickly, remain objective, conduct a thorough investigation, maintain confidentiality, and be authorized to take or effectively recommend prompt remedial measures. An attorney may be the appropriate investigator, especially where the accused is a high-ranking executive.

### How to Conduct the Investigation

Before any interviews, the investigator should review personnel and other files of the accused and the accuser to determine whether other complaints had previously been made.

Both the accuser and the accused should be questioned in order to get both sides of the story as well as identify other individuals who might have knowledge of the situation. Other employees with relevant information, such as those who are identified as witnesses to the harassment, should likewise generally be interviewed. Everyone interviewed should be instructed not to discuss the investigation with any other employee. The firm should not allow any interviewee to be

accompanied by an attorney. Notes and summaries should be kept of all interviews, and interviewees should be asked to sign the summaries. Until a conclusion is reached or discipline imposed on the accused and the complainant should, if appropriate, be kept apart.

### Interviewing the Complainant

When conducting the initial interview, be sure to reassure the complainant that he or she will not suffer any retaliation as a result of making the complaint. Elicit the details of the alleged harassment; specifically, the time and place, the conduct in detail, the persons involved, witnesses, and the complainant's response.

Where appropriate, ask the complainant whether a relationship exists or ever existed with the accused, and whether such conduct was ever welcomed by the complainant.

If the complainant mentions that he or she kept notes or a diary of the incident, try to obtain the original or a copy of the documentation.

After obtaining the facts from the complainant, explain that a thorough investigation will follow and that the investigation will respect his or her privacy. However, under no circumstances should the investigator guarantee to the complainant that his or her statements are afforded absolute confidentiality.

### Interviewing Witnesses

The investigator should interview all witnesses who have been identified and advise them that the purpose of the inter-

view is to obtain their knowledge of events alleged in a sexual harassment complaint.

Witnesses often ask for anonymity or guarantees of confidentiality. While you can say that confidentiality will be maintained to the extent possible, you cannot promise absolute confidentiality because in many cases, it will be necessary to disclose to the accused or other witnesses names or facts that would tend to identify witnesses.

### Interviewing the Accused

Employers should obtain as many facts as possible before interviewing the accused. Inform the accused of the allegations made against him or her and that an investigation is being conducted. Give the accused the opportunity to respond to the information the investigator has gathered.

Explain the company's sexual harassment policy and the disciplinary procedures that will be enforced if the investigation finds that the firm's policy was violated. Direct the accused not to take any retaliatory action against the complainant or anyone else involved in the complaint or investigation, or else face immediate discharge.

### Preserve All Evidence and Make a Determination

After interviewing all persons involved, the investigator should preserve all evidence, including signed statements and documents provided by all involved. Based on the evidence, the investigator

should come to a conclusion on the complaint. Remember, it is not a legal conclusion that is being drawn. It may well be that conduct violating the company's policy has occurred, even if it does not amount to sexual harassment under the law. Both the complainant and the accused should be informed of the investigator's conclusion. If the conclusion is that no violation of policy occurred, the accused may nonetheless be warned or required to attend counseling if inappropriate behavior or insensitivity has been found.

### Appropriate Remedial Action

A company must take prompt remedial action that is reasonably calculated to end the harassment. The following actions, either alone or in combination, may be considered:

- training
- publicizing company policy on sexual harassment
- apology
- oral reprimands or written warnings
- special counseling
- transfer or reassignment of the harasser
- demotion of the harasser
- "fines," that is, lowering the harasser's pay or declining to offer bonus
- suspension or
- discharge. ▀

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