

Live Webinar
on

**2-Hour Virtual Seminar on How to Conduct an Internal
Harassment and Bullying Investigation to Determine
Facts and Minimize Liability**

Presented by: **Dr. Susan Strauss**

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1

How to Conduct Harassment and Bullying Investigations



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2

Dr. Susan Strauss

Dr. Susan Strauss is a national and international speaker, trainer, consultant and a recognized expert on workplace and school harassment and bullying. She conducts harassment and bullying investigations and functions as a consultant to attorneys as well as an expert witness in harassment lawsuits. Her clients are from business, education, healthcare, law, and government organizations from both the public and private sector.

Dr. Strauss has conducted research, written over 30 books, book chapters, and journal articles on sexual harassment and related topics. She has been featured on *20/20*, *CBS Evening News* and other television and radio programs as well as interviewed for newspaper and journal articles such as *Harvard Education Newsletter*, *Lawyers Weekly* and *Times of London*.

Susan is the recipient of the *Excellence in Educational Equity Award* from the Minnesota Department of Education for her work in sexual harassment in education. She has spoken about sexual harassment at international conferences in Botswana, Egypt, Thailand, and the U.S. She consulted with the Israeli Ministry of Education, as well as with educators from Israel, England, Australia, St. Maartin, and Canada. She traveled to Poland and conducted research on sex discrimination and sexual harassment in Polish workplaces with Minnesota Advocates for Human Rights.

Susan has a doctorate in organizational leadership. She is a registered nurse, has a bachelor's degree in psychology and counseling, a master's degree in community health, and professional certificate in training and development. She has been involved in the harassment and bullying arena since 1985.

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Qualities to Look for in an Investigator

1. **Strong management connections** - If possible, investigators should be of a higher rank than the highest level person being investigated.
2. **Credibility with the organization** - should be widely regarded by all employees as fair and trustworthy.
3. **Fact-gathering ability** - skilled in fact gathering and be responsible for that task while being objective and impartial. However, although investigators should make recommendations, final decisions about the resolution of a complaint is often left to upper-level management.
4. **Aptitude for interviewing** – experienced in soliciting information from people because they will be attempting to discover the truth under very trying circumstances.
5. **Impartiality** - should be outside the direct chain of command of either the alleged harasser or the victim. This distance will provide the impartiality necessary to fairly investigate complaints. If possible, investigators should not have a personal relationship with either of the main parties.
6. **Knowledge of harassment legal issues and trained in recognizing sexual harassment** If investigators lack knowledge of applicable laws and agency guidelines, and only dimly understand the organization's harassment policy, the investigation is unlikely to be ineffective, leaving the organization vulnerable to liability.
7. **Ability to handle sensitive information** with minimal embarrassment.
8. **Detail oriented** – able to probe for the details of the allegation, and to write a detailed report.
9. **Available to act promptly** – ability to respond within one work day, if possible.

7

Self-Examination

Self-examination is critical if one is to be conducting investigations. The answers to these questions will influence your ability to conduct an objective investigation.

- How objective are you able to be?
- How do you view men? Women? Blacks? Atheists? Disabled? Arabs? Etc.
- What is your awareness and knowledge of sexism? Feminism? Machismo? Racism? Religiosity? And discrimination based on religion, disability, and other protected classes?
- What are your biases? What stereotypes do you hold?
- What is your knowledge regarding power/abuse of power?
- Take an inventory of your own behavior and attitudes—where do you stand?
- How assertive are you?
- How do you deal with conflict?
- Are your communication skills where they should be?
- What feelings/relationships do you have toward the alleged harasser and/or victim?

8

When Should You Involve Legal Counsel?

Consider involving your organization's legal counsel when:

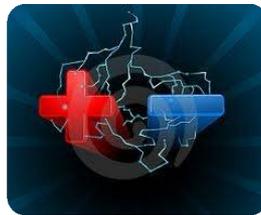
- The complaint involves allegations of actual or attempted assault, sexual assault, rape, or other serious violations
- The harassment does not stop
- The organization considers filing a complaint against one of the parties
- There is a question of the organization's liability for defamation or tort suits by employees claiming invasion of privacy, lack of confidentiality or breach of the organization's own policies
- Certain matters require protection from disclosure by way of the attorney-client or work-product privilege
- There is a need to help develop the record with an eye toward possible future litigation, including the preparation of necessary witness statements
- The incident(s) potentially violate other laws in addition to harassment prohibitions
- Management and/or staff have not followed procedures
- Threats have been made or there is danger of physical harm
- The policy is not clear concerning the particular incident
- Either party has hired an attorney or is considering filing or has filed charges outside the organization
- Incidents have been made public

9

Lawyer as Investigator?

Plusses

- Trained in fact gathering
- Legal understanding
- How it will look in court



Minuses

- Not liked or trusted
- Employees less-likely to confide
- Jurors tend to distrust lawyers who testify
- Creates "lawsuit" thinking

10

Do NOT Use Organization's Attorney



- ⌘ Perceived as too cozy with management
- ⌘ Can't represent organization in court
- ⌘ Attorney client privilege jeopardized
- ⌘ May have to reveal confidential conversations

11

If One Investigator



CHEAPER

BIAS

ENSURES CONSISTENCY

12

If Two Investigators



- ✓ Reality Check
- ✓ Compare impressions
- ✓ Corroboration
- ✓ Jury may like two with same decision
- ✓ M/F Gender parity
- ✓ If difficult interviews
- ✓ Intimidating
- ✓ Time Commitment

13

Internal vs External Investigators

Internal

- ✓ Less Expensive
- ✓ Understands culture, politics, players
- ✓ Quicker
- ✓ Appears pro management
- ✓ Appearance of bias



External

- ✓ Better honed skills
- ✓ Neutral/impartial
- ✓ No HR
- ✓ Complaint against Sr. Manager
- ✓ Extremely serious charges
- ✓ Increased costs
- ✓ Doesn't know culture, politics, players
- ✓ No established credibility

14

Why Investigate?

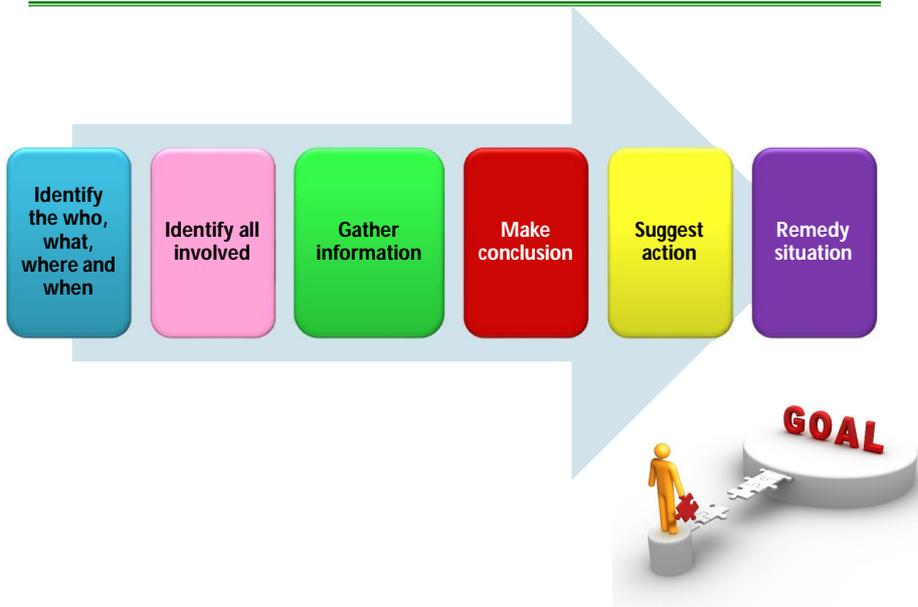
To
reduce
liability



To
restore
harmony

15

Objectives of Investigation



16

When Not to Investigate (generally)

When behavior has stopped
When harasser acknowledges behavior



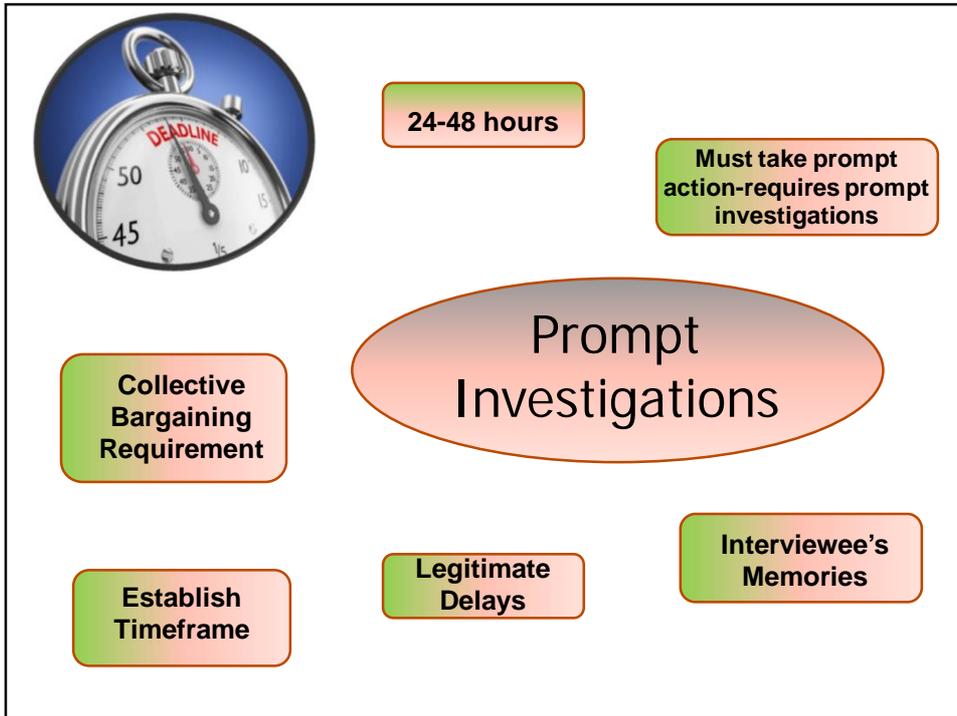
17

What Is a Complaint?



- Verbal
- Written
- Gossip
- Off-handed comment
- Exit interview
- Observation
- Employee opinion survey
- Reasonably 'should' know
- Anonymous

18



19



20

Routine

- Confidentiality
- Retaliation
- Voluntary participation
- Provide policies
- Taking notes—why
- Who “will know”
- Explain process—how they fit
- No conclusions—fact finding
- May need to talk again



21

Should I
record this
interview?



22

When Questioning

- Start with easy questions
- Their background
- Length of time in organization
- Their position
- Who they work with
- Do they like their job?
- Questions about the organization's climate
- Don't give them more info than they need to know
- Differentiate fact from hearsay



23



Questioning Tips

- Use open-ended questions
- Follow – who, what, where, when, how
- Get chronology
- Keep asking – “What happened next?”



24

Clarify



"I don't recall"

Vs.

"I don't recall"



25

The Initial Interview: A Checklist

1. Explain the purpose of the interview and your role.
2. Inform her/him you will take notes and how they will be used.
3. Record in writing this and subsequent conversations.
4. Maintain neutrality and non-judgmental demeanor, but sympathetically acknowledge the person's emotional state.
5. Confirm their voluntary participation in the interview and document it.
6. Inform the victim not to discuss this matter with anyone and document it.
7. Provide assurances of non-retaliation and confidentiality, but do not give unqualified promise of confidentiality.
8. State that reprisal will not be tolerated and give examples of retaliatory behavior.
9. Help her/him clarify and understand the experience by defining harassment.
10. Don't blame her/him or allow the person to assess self-blame.
11. Affirm seriousness of complaint and organization's policy.
12. Urge victim to write an account of the incident(s), including what happened, responses, dates, times, names of witnesses, and other details.
13. Discuss options, e. g. Informal and formal. Explain how you or others in the organization can assist and support.
14. Ask victim what she/he would like to have happen; assess whether this is appropriate and how it can be implemented.
15. If appropriate, inform victim of available counseling.
16. Provide victim with written materials about harassment, particularly the organization's policy.
17. Inform victim to whom the information about the complaint will be given.
18. Encourage victim to call or return if harassment reoccurs or if help is needed.
19. Let the victim know you may need to talk to her/him again.
20. Be sure to follow up to verify that harassment has stopped and is not likely to recur.

26

Sample Interview Questions: The Target

1. "What brought you here?" Or "Please describe the last situation."
2. "Please tell me what happened in your own words. Be as specific and chronological as you can." (*Obtain specific information on each incident, including dates, day of week and time of day, witnesses, etc.*)
 - "When did it happen?" Give a specific date and time, if possible.
 - Y during the month?
 - Y during what week?
 - Y during work time?
 - Y during break?
 - Y during non-working hours?
 - Y during the morning, afternoon or evening?
3. "What was going on before the incident occurred?"
4. "Who was involved?"
5. "What exactly did xx say to you?"
6. "Describe xx's tone of voice."
7. "Where on your body did xx touch you, and in what manner?"
8. "If you don't remember the exact words, to the best of your recollection, what was said?"
9. "Did xx appear to be speaking or acting in a joking manner?"
10. "Where did the behavior take place? In the workplace? A social setting?"
11. "Describe the location in detail. Where were you? Where was xx? Describe movements of both you and xx." (*Have the victims diagram or visit the actual place, if appropriate.*)
12. "How did the behavior make you feel?"
13. "How did you respond to the behavior at the time?"
14. "What did you say to xx regarding xx's behavior? When did you say it? How did you say it? How did xx respond? And then what happened? What do you mean by the word _____? What did xx do or say after that? What else happened? What non-verbal communication occurred?"

27

Sample Interview Questions: The Target, *continued*

16. "What was xx's reaction when informed that his/her behavior was unwelcome?"
17. "Has anything like this happened before? If so, what happened?" (*Get all the details.*)
 - Y "Was it previously reported? To whom? When? Where? What was said?"
 - Y "If it was, what action was taken? If it wasn't, do you know why not?"
 - Y "Have you ever seen xx do or say this to anyone else?"
 - Y "Has anyone else ever told you that xx participated in a similar incident? Who told you? When? Where? What exactly did the person tell you?"
 - Y "What has been your prior contact with xx? Describe your relationship."
18. "How frequently did the behavior occur?"
19. "Did it increase in severity as time went on?"
20. "Were there any witnesses to the encounter(s)? Who? What would they be able to add?"
21. "Did anyone try to break up the incident? Prevent it? Who?"
22. "Did anyone else participate? Who?"
23. "Did a witness say anything during or after the incident?" What did he/she say?"
24. "Were there any witnesses?"
25. "For what portion of the incident were the witness(es) present?"
26. "Was a manager present? Who? What did he/she say?"
27. "Did you talk to any of the witnesses immediately after the incident? Who?"
28. "When and where did you talk to the witness? What did you tell them?"
29. "Is there anyone else who may have information that may be helpful?"
30. "Did you tell anyone else what happened? Who did you tell? What did you tell them?"
31. "Did he/she already know? What did he/she know? How did they find out?"
32. "Can you identify any common themes in the behavior? Any patterns?"
33. "How would you characterize your relationship with xx?"
34. "Have you ever had a social relationship with xx? If so, has it ended, and under what circumstances?"

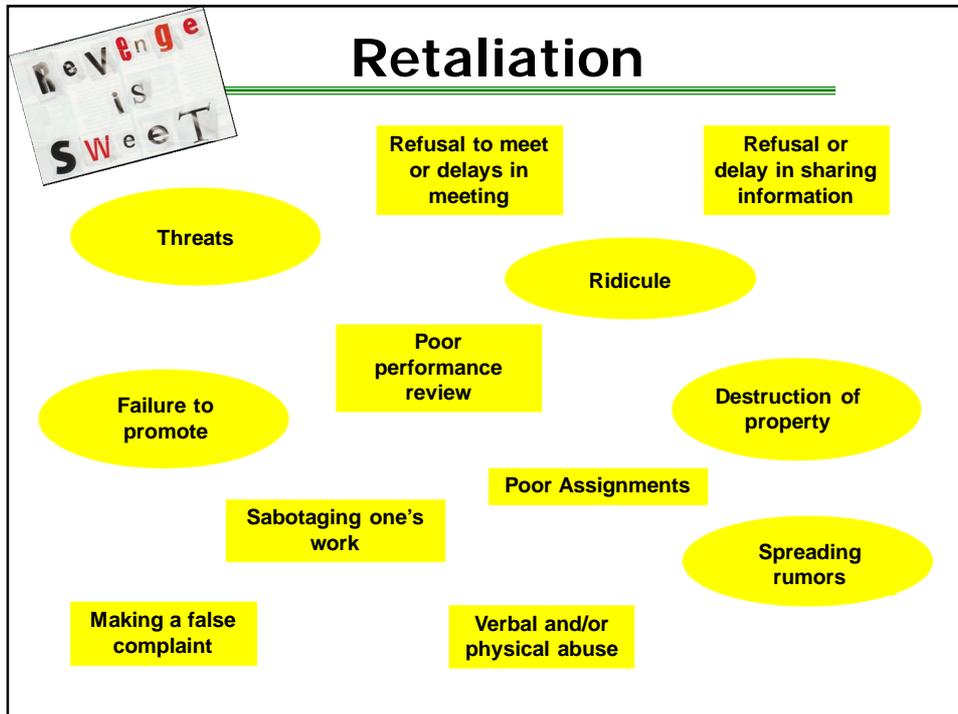
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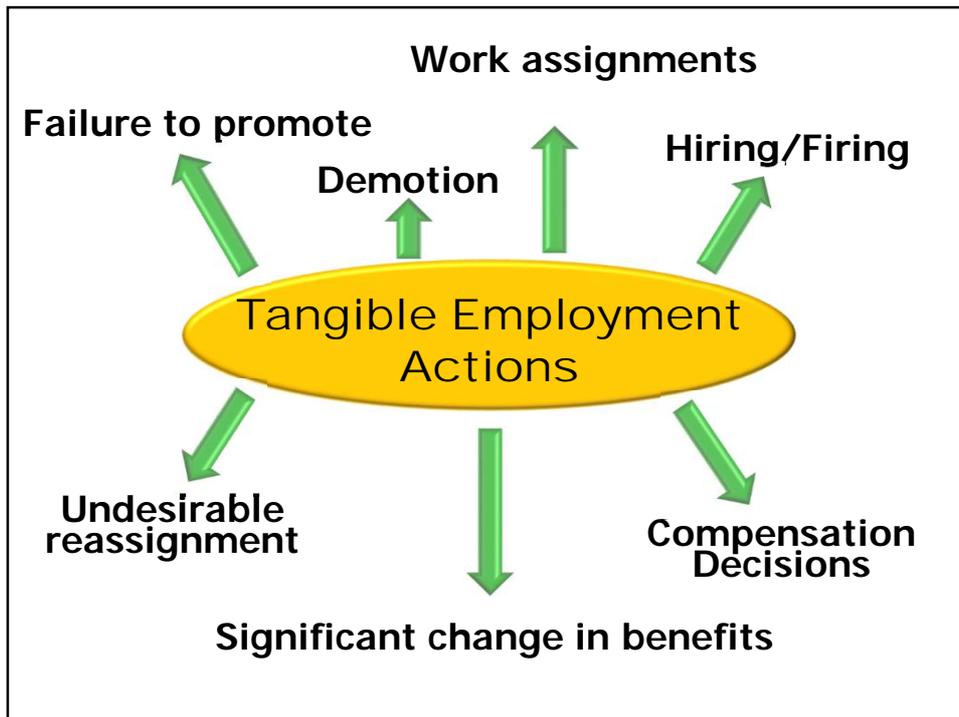
Sample Interview Questions: The Target, *continued*

35. "Did you ever engage in social activity with him/her (e.g., meeting for lunch, dinner, or drinks?)"
36. "Have you reported this incident to anyone else?"
37. "Did they take any action to resolve your complaint?"
38. "How long after the conduct occurred did you wait to report it? Why did you wait?"
(If they did wait.)
39. "Have you suffered any physical or emotional injury as a result of the conduct? Are you currently seeing a physician or receiving counseling?"
40. "Have you suffered any adverse employment actions: bad performance evaluations, demotion, or denial of pay or benefit raises?"
41. "How would you characterize your work unit atmosphere?"
42. "Do you feel that the atmosphere has changed since the incident(s) occurred, or since you filed your complaint? Please describe the changes."
43. "Has xx ever threatened you or made promises based on your reception of his/her sexual advances? What specifically?"
44. "To your knowledge, has xx made similar advances or comments to other employees? Females? Males?" "Blacks?" "Disabled?"
45. "Have you kept notes or diaries regarding the incident(s)?"
46. "Do you have any other documents, notes, e-mails, etc.?"
47. "Is there anything that we haven't talked about that I need to know?"
48. "Is there anything that you need to know now?"
49. "What would you like to see happen as a result of your coming forward?"

At the conclusion of the interview:

- Y Review key points made by the victim to ensure accuracy.
- Y Stress the need for the victim to contact you with any additional information or concerns.
- Y Stress that retaliation is prohibited, and, if she/he feels it is occurring, to report it. Give examples of behavior that may constitute retaliation.
- Y Inform the victim that she/he has the right to seek assistance from other sources, such as EEOC, State's Human Rights Department, an attorney, or, if an assault, the police.





31

Documents to Review

- Policies and Procedures
- Union grievance procedures
- Employee handbook
- Personnel files
- Emails
- Text messages
- Instant messages
- Voicemails/telephone records
- Home computers
- Personal electronic devices
- Documents (electronic and hard-copy)
- Video/audio surveillance
- Social networks

BUT...beware of NLRA surveillance issues and privacy issues

32

Interim Action



33

Tips for Talking to Accused



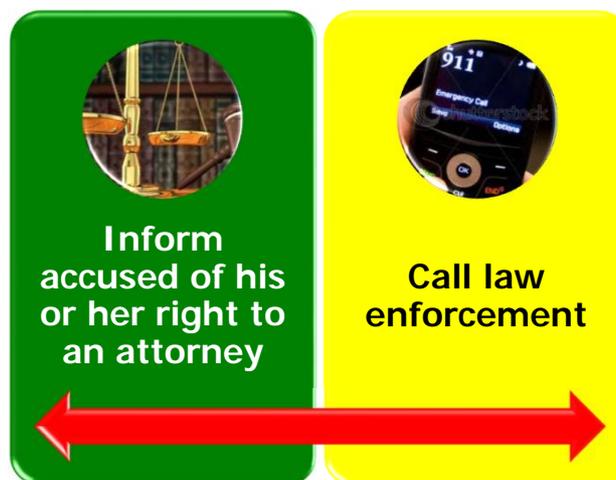
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If Accused Refuses to Meet



35

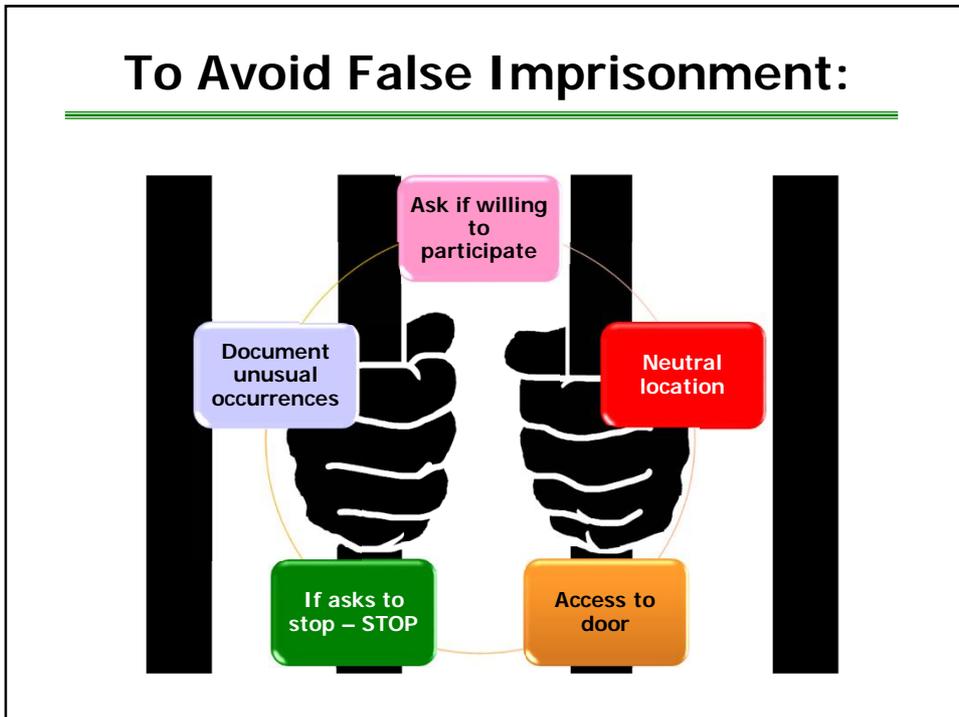
If Criminal Allegation



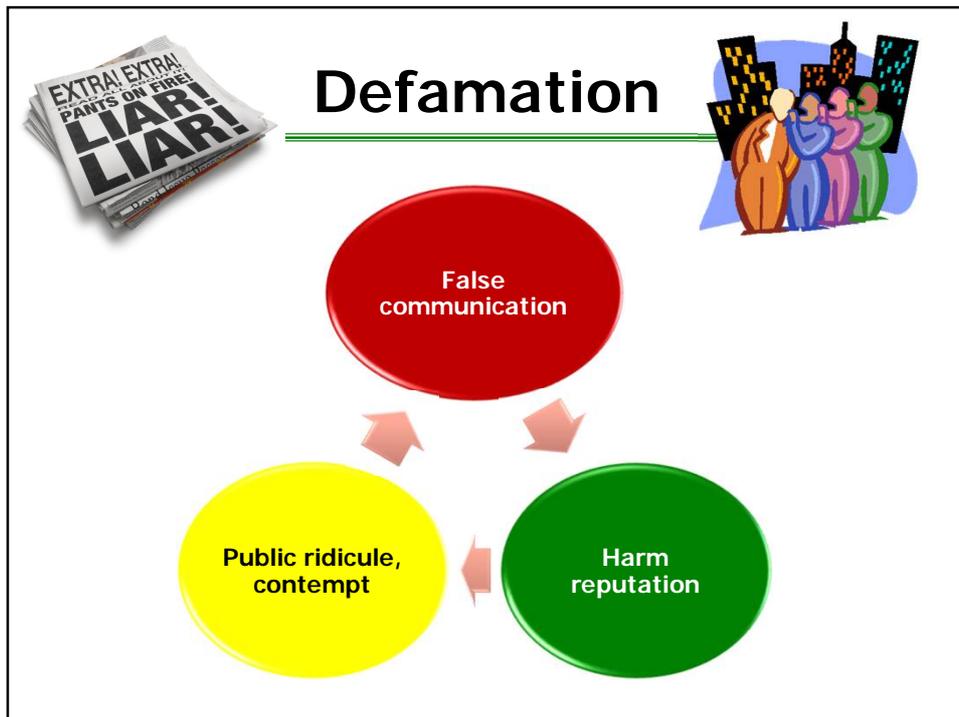
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37



38



39

Tips to Avoid Defamation

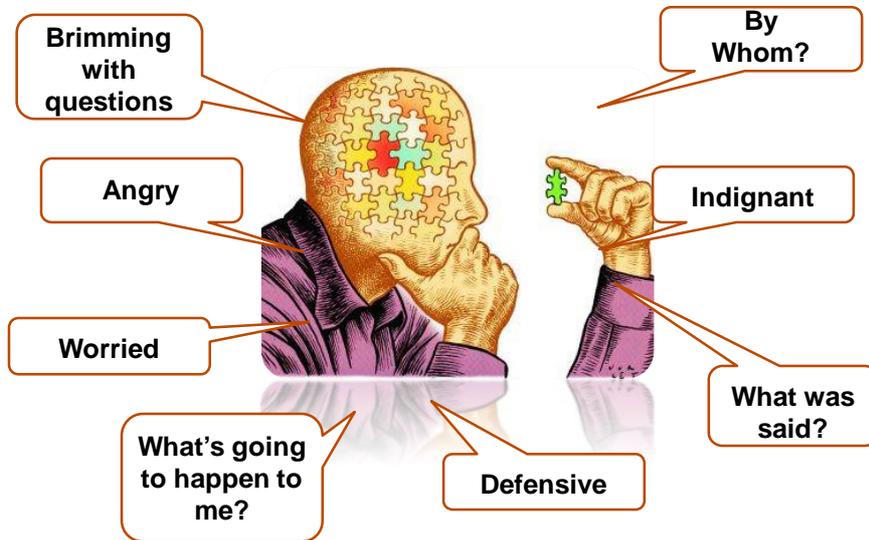
1. Do not unnecessarily disclose details of complaint.
2. Avoid answering employee questions, engaging in gossip or speculation.
3. Tell those being interviewed that confidentiality is required and document it.
4. Don't label the alleged harasser as a harasser.
5. If harasser is found to have engaged in the behavior – any written or oral communication should conclude only that the harasser violated the organization's policy.
6. Do not announce that the alleged harasser has harassed.
7. Tell harasser that he/she is being disciplined for violating the organization's harassment policy – not because he/she harassed.
8. Stick to the facts in the final report.
9. Consider two people for interviewing alleged harasser.

Most common circumstances for a defamation claim include:

- Discussing actions of harasser in a conclusory manner
- Making judgments regarding harasser
- Failing to limit dissemination of information gathered

40

Accused's Mindset



41

When Interviewing

➤ Do not:

- Reveal names of others interviewed
- Discuss personal opinions
- Counsel person being interviewed



42

Tips on Interviewing the Accused

Prior to interviewing the alleged harasser, consider all of the circumstances surrounding the complaint and follow these general guidelines:

1. Inform the alleged harasser that you will be taking notes and how those notes will be used.
2. Use tact in announcing the reason for talking to the alleged harasser. The person should be told there is a serious matter to discuss.
3. Convey your concern for the difficult nature of the meeting in a neutral manner: *"This may be hard to talk about,"* or *"I can see that you're upset,"* *"I'm sorry to have to ask you these questions"*.
4. Tell the alleged harasser they have an obligation to cooperate; have the right to be informed of the accusation and present their side; have the right to be treated fairly.
5. Inform the alleged harasser that the organization has a harassment policy and that you are conducting an investigation in relation to the organization policy. Give a copy of the policy to him/her.
6. If the alleged harasser requests to have a lawyer, a friend, or a family member with him or her during the interview, it is contingent upon the organization's policy. If others are present, they should understand that they cannot advise the individual nor are part of the process.
7. If the alleged harasser is a union employee and requests the presence of a union representative or other employee during the interview, allow this request, but grant only a brief delay (generally no more than 24 hours).
8. Ask if his/her participation in this interview is voluntary and document it.
9. Discuss the need for confidentiality and document it.
10. Reassure the person of due process. He/she will be under stress and possibly frightened. Again, your demeanor should be open, concerned and non-judgmental.
11. Present the alleged harasser with a general allegation of misconduct. Leave out specific details of the alleged activity and avoid labeling him/her as a harasser or the conduct as harassment. Describe the behavior and why it may be a violation of the organization's policy.
12. Get his/her side of the story, including any possible motivation the accuser might have for falsely alleging harassment, if appropriate.
13. Question the alleged harasser about each specific allegation.

43

Tips on Interviewing the Accused, continued

14. Don't ask if he/she harassed the victim. His/her definition of harassment may be inaccurate. Instead, elicit specific responses to each allegation: *"What did you do or say?"* *"What did she/he say?"* *"What did you intend by your actions or comments?"* (Be aware, however, that while courts generally look at the perception of the recipient of the harassment, not the intention of the alleged harasser when assessing liability, this is not always the case. *"Did the [name of person] object?"* *"Did you talk to anyone?"*
15. Be prepared for anger, denials, and defensiveness.
16. Describe the investigative process and review your tentative schedule.
17. Ask the alleged harasser if there are any witnesses or written evidence he or she can offer to rebut the allegation.
18. Inform the alleged harasser that they do not have the right to confront the victim directly, or to know what people are interviewed about the complaint, or to be present at interviews.
19. If additional allegations are made during the investigation, or other information is discovered, the alleged harasser should be informed and given a chance to respond, following the format of the original investigation.
20. Many alleged harassers have not thought through the power they have as it relates to personality, size, position, gender, etc. Thus, they are mystified that they could be perceived as offensive, or that they could not be approached about the effects of their behavior. The common response of the accused is: *"If there was a problem, they could have just told me"*.
21. Although the main goal of the interview is to get the facts from the alleged harasser's point of view, bear in mind that most courts will look at the alleged conduct through the eyes of the victim. Thus, do not let his/her stated "intentions" with respect to his behavior sway you from focusing on the facts.
22. Warn the alleged harasser that retaliation is against organization policy and the law. Reiterate that all parties to the investigation, including witnesses, are protected against retaliation and that any violation of this policy could result in severe disciplinary action. After the interview, compare the accounts of the victim and the alleged harasser to identify areas of disagreement, then formulate follow-up questions for both parties, if necessary.

44

Sample Interview Questions: The Accused

1. *Be serious and to the point. Begin with, "The purpose of this meeting is to talk about an allegation of misconduct or (of a violation of our harassment policy)". Focus on the behavior, not the intention of the alleged harasser.*
2. *If possible, do not initially reveal the identity of the person who brought the complaint. Instead, describe the circumstances surrounding the complaint. For example, "Did you touch the back of a female who was standing by the water fountain around ten o'clock this morning?"*
3. "What is your response to the allegations? Please tell me what happened in your own words. Be as detailed as you can".
4. "What exactly did you say to her/him?"
5. "Did you touch him/her? If so, where and in what manner?"
6. "Where did the situation occur?"
7. "What was her/his response at the time?"
8. "Did you make her/him any threats or promises?"
9. *If the employee refuses to answer, explain that "We cannot make you answer, but when you don't, we assume it's because it's against you".*
10. *When dealing with an alleged harasser who denies the allegation, explain that you have two sides of the story and that you will be doing additional fact finding before making a determination.*
11. "Did you know she/he filed a complaint? When?"
12. "Please describe your office atmosphere".
13. "Did that change in any way after the incident(s)?"
14. "What is your relationship with the victim?"
15. "Have you every dated her/him? When did that relationship end? Under what circumstances?"
16. "Were there any witnesses to the incident(s)? Under what circumstances?"
17. "Were any of the allegations she/he made true? Which ones? Which ones do you disagree with and why?"

45

Sample Interview Questions: The Accused, *continued*

18. "What motivation would she/he have to make this up?" *(If alleged harasser denies complaint).*
19. "Were other people involved in the incident? Who were they? What were their reactions to the incident(s)?"
20. "Can you think of what triggered the incident or caused you to touch her/him?"
21. "Did you talk to anyone inside or outside of the organization immediately after the incident(s)?"
22. "Has anyone, a supervisor, spoken to you previously about your conduct?"
23. "What was your response?"
24. "Have you ever been accused of inappropriate conduct before?"
25. "Do you understand the non-retaliation policy of the organization?"
26. "Do you understand the investigation process and what will happen from here?"
27. "Is there anyone else who should be talked to?"
28. "Do you have any other questions or comments to add?"
29. "I can see you are angry/sad, etc. What do you recall? What is your version?"

46

Informal Resolution

What Is It?



47

Formal vs. Informal

Formal Procedures

Purpose: To determine if harassment has occurred, the culpability of the alleged offender, appropriate sanctions, or remedies.

How Initiated: Generally, charges of harassment are brought by the complainant, manager, or a third party. Usually invoked when the behavior is serious or repeated and not amenable to informal procedures.

Investigation: Always required.

Outcomes: If harassment is found, a variety of actions may be applied.

Advantages: Sanctions may be invoked; more likely to increase institutions' commitment to the issue; may settle credibility issues; creates record in event of future claims.

Comments: May be invoked by complainant or institution at any time.

Informal Procedures

Purpose: To stop the behavior. Should not be used for repeated or serious offenses (e.g., assault).

How Initiated: May be complainant's and/or organization's preference to use informal procedures. Generally do not involve written charges.

Investigation: Complainant and alleged harasser may be interviewed, but usually no extensive investigation is necessary.

Outcomes: Generally, the harassment stops (or formal processing of complaint is launched). Outcomes may include apology, promise not to repeat behavior, transfer of one party, voluntary resignation of the harasser, warning.

Advantages: Less frightening and litigious; confidentiality easier to maintain; less likelihood of negative publicity; no need to challenge motives or behavior; may educate harasser; no issues of definition of sexual harassment or credibility of the parties; complainant may play active role in resolution; provides options for complainant and wide range of sanctions; less costly than formal proceedings; usually less polarizing.

Disadvantages: Less educational value; staff may not learn about resolutions and erroneously believe institution is not handling harassment issues; record keeping may be inadequate; same offender may be part of several informal resolutions without anyone knowing about them.

Record Keeping when Informal Procedures Are Used:

It is often difficult to recognize repeat harassers in many organizations; records of informal complaints are not kept or are scattered throughout the organization, or because those in a position to know—Directors of Human Resources—are no longer in those positions. It is important that organizations develop some system to keep track of complaints, especially information reports of harassment.

Adapted from: Educator's Guide to Controlling Sexual Harassment. Thompson Publishing

48

Who is a Witness?



49

Tips on Interviewing Witnesses

1. Inform the witness that you will be taking notes and how those notes will be used.
2. Have they observed any "misconduct" in the workplace or problems between particular individuals? If so, ask them to identify the individuals involved.
3. If they do not identify the victim or the alleged harasser, be more specific. Bear in mind that your goal is to elicit as much information as possible while divulging only what is absolutely necessary.
4. Ask who, what, when, where and how questions.
5. Remind witnesses to focus on what they observed, but if they heard something from a co-worker or someone else, ask from whom, and interview that individual.
6. Use the witness to discover the parties' relationship with each other.
7. Appear at ease, neutral, and routine. Be supportive.
8. Assure the witness that it is important to tell the truth and not to worry about the consequences of comments. Inform them that no adverse action against them will result, and that no retaliation against him/her will be tolerated.
9. Ask the witness if he/she knows of the behavior that is the subject of the complaint.
10. Reveal only the factual information necessary to your interview. This will, however, include names of the parties and a general description of the complained activity.
11. Solicit specific details, including "What do you know?" "What incidents did you see?" "Where?" "When?" "Have you seen [the alleged harasser] behave this way with anyone else?", etc.
12. Ask if the witness knows of any other potential witnesses.
13. Use open-ended and non-leading conversational questions, which induce the witness to reveal what he or she actually knows.
14. Minimize duplication of witnesses.
15. Stress importance of honesty.
16. Do not promise confidentiality.
17. Get pertinent background information on the witness (position, length of employment, work telephone number and address, etc).

50

Tips on Interviewing Witnesses, *continued*

18. Don't ask if the witness has seen or experienced "harassment". Ask instead about specific behaviors observed. It is all right at the conclusion of the interview to explain the organization's definition of harassment and give a copy of it to the witness.
19. Do not discuss the merits of the allegations or the actions, if any, to be taken following the investigation.
20. Do not reveal the names of other individuals that you will interview.
21. Don't spend excessive time interviewing witnesses with no personal knowledge of the facts.
22. Don't limit your interviews to the individuals identified by the parties.
23. Emphasize confidentiality and document it.
24. Confirm their voluntary participation in the interview and document it.

51

Sample Interview Questions: The Witnesses

1. *If possible, do not initially identify the alleged recipient or the alleged harasser. Say to the witness, "Your name has been given to us as a person who may have observed interaction(s) between several employees, and we'd like to talk to you about your observations."*
 - "Describe the situation and circumstances of the alleged harassment". *For example, "Were you in the hallway by the water fountain this morning?"*
 - *Focus on the witnesses' observations, not assumptions or opinions about the personalities of the people involved in the allegation.*
2. "Have you seen any misconduct or inappropriate action? When?"
3. "Who was involved?"
4. "Where did the incident(s) take place?"
5. "Please describe the conduct as specifically as possible".
6. "What exactly did he/she say? Where did he/she touch him/her? How?"
7. "What was her/his response to the conduct?"
8. "What was his/her attitude during the incident(s)? Joking? Threatening?"
9. "Were you a participant in the incident?"
10. "How did you come to observe the situation?"
11. "How did you feel during the incident?"
12. "Did you speak to anyone about it? Did you report it to anyone in authority? Did you ever speak to the victim or alleged harasser about it?" If so, what did you say?
13. "What was the impact of this behavior on the victim? On you? On the department?"
14. "Have you ever seen him/her act in a similar way with other employees? Females? Males?" Disabled? Jews? Blacks?
15. "To your knowledge, what is the relationship between the two people involved? Have you ever observed any evidence of a social relationship between the two—frequent lunches, after work get-togethers, etc?"
16. "How would you characterize the workplace/department atmosphere?"
17. "Have you observed any change in the atmosphere since the incident(s)?"

52

Sample Interview Questions: The Witnesses, *continued*

18. "Did the victim or the accused talk to you shortly after the incident(s)? What did he/she say?"
19. "Who else besides you and the two people in question were present?"
20. "How would you characterize the victim? The alleged harasser?"
21. "Have you ever noticed any tension or unusually friendly behavior between the two employees? Has their working relationship changed recently?"
22. "What is your relationship with the victim? The accused?"
23. "Are there other people who should be interviewed about this complaint?"
24. "Do you have any questions about this investigation that I might be able to answer?"

53

Taking Statements, *continued*

Occasionally, it is in the investigator's best interest to have the interviewee sign her/his statement, verifying that the information received is accurate. A formal signed statement should be considered if any of the following situations exist:

- ◆ The interviewee will not be available in the future (relocating, changing companies, imminent death, etc.).
- ◆ You have reason to believe the interviewee may change her/his story.
- ◆ The interviewee has a terrible memory or is a bad historian.
- ◆ The interviewee has significant first hand knowledge and evidence relating to the situation under investigation.

Voluntary Statements

Attempt to persuade individuals to provide a voluntary statement. Ask the individual to assist you in providing a written statement. Explain that a written statement will reduce the chance of an individual being misinterpreted or misquoted.

You may write the statement yourself (as dictated by the individual) or have the individual write the statement. In either case, the statement should contain the following:

- The first paragraph should begin as follows:
"I (name) provide the following voluntary statement to (name) who has identified her/himself as (title). This statement is provided without coercion, or receipt of promise of reward and is unconditionally submitted."
- The handwriting must be legible – the statement may be printed or typed if the handwriting is illegible.
- The statement should include the start and finish time at the top of the page.
- The individual's statement should include a recitation of all facts including: who, what, where, when, and how information. You may guide the individual to make sure they cover all pertinent topics.
- Instruct them to not skip lines.
- The individual should sign, date and number **each** page of the statement.
- The individual giving the statement should initial any crossouts or erasures.
- The conclusion of the statement should include the following language:

54

Taking Statements, continued

"I have read this document and have initialed each page and all corrections and deletions. This statement is true and correct to the best of my knowledge."

- The statement should be witnessed by at least one person. The witness should sign and date every page of the statement.
- Provide a copy of the statement to the individual. You should maintain the original in the investigation file.

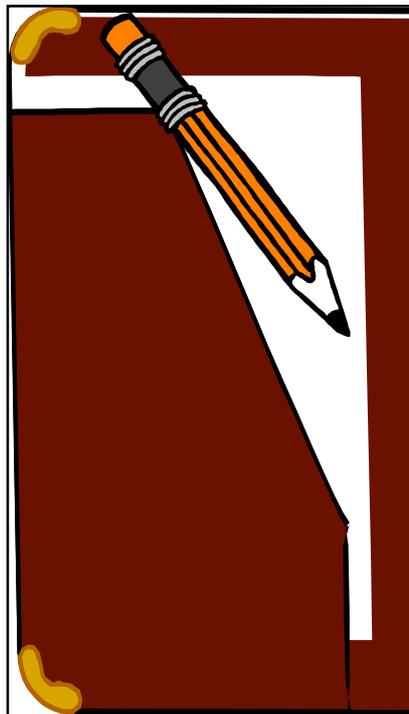
Involuntary Statements:

You may require employees to provide statements, but under no circumstances should you attempt to influence any part of the statement. You may, however, advise individuals to cover certain topics in their statement.

- The involuntary statement should begin with the following paragraph:

"I (name) provide the following statement to (name) who has identified her/himself as (title). This statement is true and correct to the best of my knowledge."
- Follow all guidelines above.

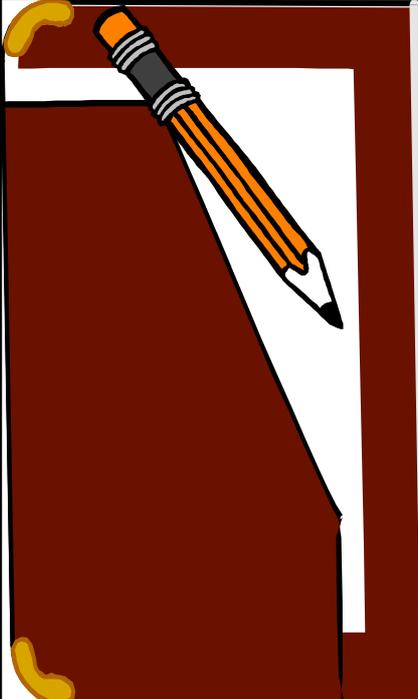
55



After Interviewing:

- ✓ Date and sign all documents/notes of interviews
- ✓ Indicate start and end time of interview
- ✓ Identify name, position in organization, role in interview process of each interviewee
- ✓ Location of interview
- ✓ Document each question asked
- ✓ Document each answer
- ✓ Review for clarity

56



After Interviewing:

- ✓ Interviewee evaluates for accuracy
- ✓ Interviewee signs and dates or
- ✓ Investigator signs for interviewee
- ✓ Document the following after interviewee has reviewed notes of interview:
 - ✓ Relevant observations
 - ✓ Credibility

57

Documentation

- Names(s) of investigator(s)
- Your name
- Date
- Name of person interviewed
- Start and end times of interview
- Each question (open ended) asked
- Interviewee's response to questions
- Identify if interviewee's response is hearsay/rumor or if it was actually seen or heard by interviewee
- Be objective
- Be detailed
- What happened – use verbatim quotes if possible; state specifically where the victim was touched
- Where it happened – whose office, which hallway, etc.
- When it happened – date and time
- Who was involved – victim, alleged harasser/bully, witnesses
- How incident(s) impacted victim personally, professionally, physically
- Statements by witnesses
- Dates investigation began and ended
- Identify documents reviewed and facts contained within
- What organization policies were violated and how
- Your impressions – overall appearance, facial expressions, questions, tone of voice, emotions of each interviewee

58

Documentation, continued

Credibility Assessments: as soon as each interviewee leaves the room, you should assess her/his credibility. On a separate sheet of paper, note the following:

- A. Demeanor
- How did the interviewee react to the allegations (e.g., argumentative, defensive, hostile)?
 - Does the person inspire confidence in the listener?
 - Note body language.
- B. Logic/Consistency of Story
- How does the interviewee's chronology and perception of events relate to that of the other interviewees?
 - Does the interviewee's story make sense?
 - Was the person forthcoming?
 - If the interviewee's version of the facts is completely different from others, ask whether the individual who contradicts this person's version of the facts would have a reason to lie about the interviewee.
- C. Affirmative Statements
- Did the interviewee make any admissions (e.g., say "I said that, but I didn't mean anything")?
 - Did the person specifically deny anything? Was the denial consistent throughout the interview?

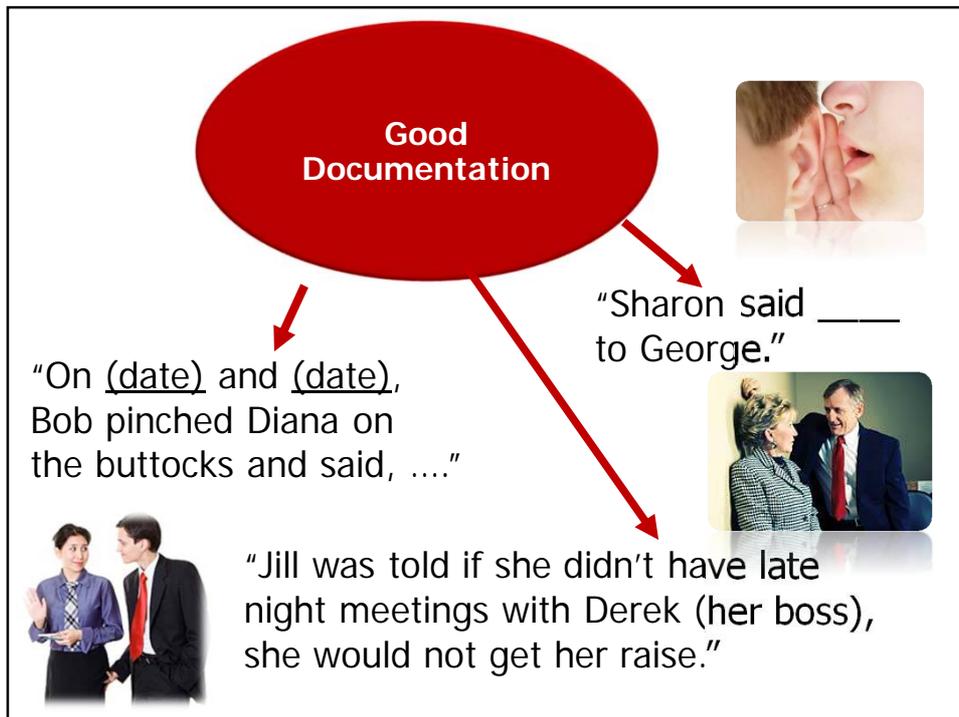
Did the interviewee claim they had no recollection of a particular fact? Clarify, "I don't recall" versus "I recall and deny that allegation."

59

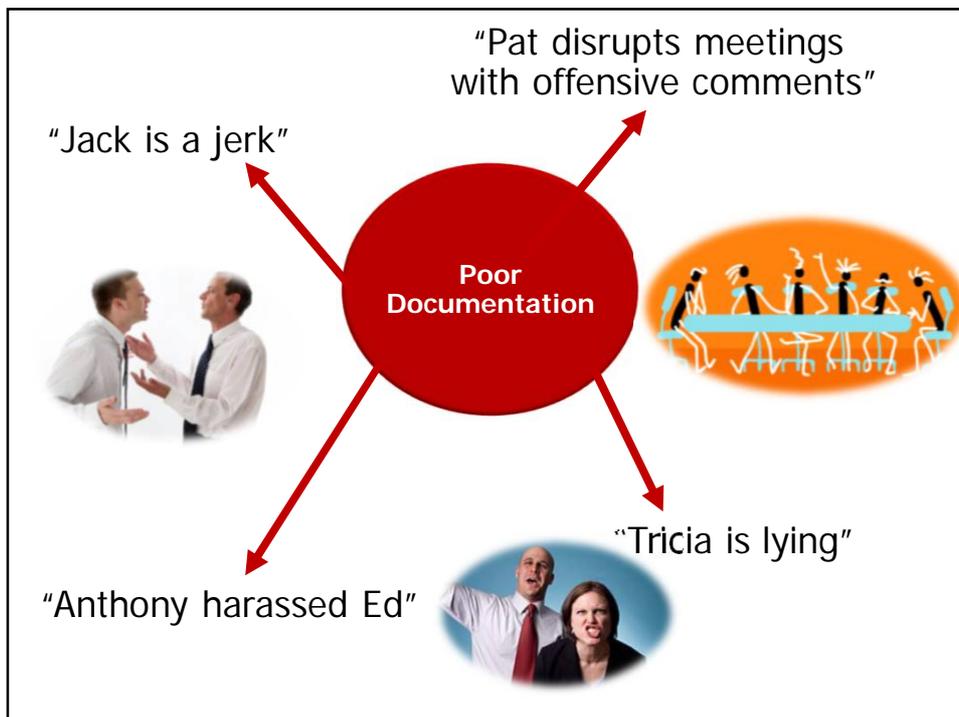
Assessing Credibility

- ◆ Ask yourself – Did I believe the people interviewed? Does the story sound fabricated? Would a jury believe . . . ?
- ◆ Credible impression?
- ◆ Demeanor?
- ◆ Admit or deny?
- ◆ Contradict?
- ◆ Story change?
- ◆ Story makes sense/logical?
- ◆ Reputation?
- ◆ Corroborating evidence?
- ◆ Pattern of conduct?
- ◆ Inconsistent/consistent statements?
- ◆ Writings developed after incident?
- ◆ Biases and motives?
- ◆ Willingness to interview?
- ◆ "Detailed" complaint?
- ◆ Others who report harassment by same individual?
- ◆ Timing – Delay in coming forward to complain
- ◆ Plausible?
- ◆ Change in victim's behavior after the incident(s)
- ◆ Clarify "I don't recall" vs. "I don't remember if it occurred."
- ◆ Mispreceptions and misrecollections exist – not necessarily because someone is lying, but they believe their perception.

60



61



62

Creating Documentation

Don't Create "Bad" Documents

What are "bad" documents? Document that:

- Are ambiguous; easily misinterpreted
- Include factual errors or opinions
- Do not consider consequences of statements made

Creating "Good" Documents

Threshold issue: Does it need to be created?

- What purpose does the document serve?
- Are there possible negative consequences?
- Should the documentation be retained?

Writing Good Documents:

- State facts, not opinions. Where possible, cite specific incidents or behavior rather than making conclusions about the employee.

NOTE: In some cases, it may be impossible to avoid using an opinion to communicate. Where opinions are used, support them with objective facts, tailor the opinion narrowly to the issue involved, do not make assumptions, and clearly identify that it is your opinion only.

63

A Determination is Required

What actually
happened?

Can we
determine
what
happened?

Was there a violation of organization
policy or the law? Yes? No? Probably
yes? Probably no? Not able to
determine?

64

In Reviewing the Evidence, the Investigator will:

- search for corroborative evidence
- determine whether conduct was “welcome”
- consider the absence of corroborating evidence
- make a determination based solely on credibility, if necessary
- consider background
- consider conduct
- distinguish between behavior that was “voluntary,” but coerced, and behavior that was clearly unwelcome, and
- consider whether there was delay in complaining about the alleged behavior

A Determination Needs to be Made Regarding:

- What actually happened? Can we determine what happened?
- Was there a violation of organization policy or the law? – Yes? No? Probably yes? Probably no? Not able to determine?
- What actions need to be taken regarding:
 - the victim
 - the alleged harasser or bully
 - the follow-up training
 - “workplace healing?”
 - communication of harassment policy
- Was behavior:
 - against company policy?
 - inappropriate, but not harassment?
 - subtle harassment?
 - moderate harassment?
 - severe harassment?

If it is determined that harassment occurred, the organization must take immediate and appropriate corrective action by taking the necessary steps to end the harassment and to prevent it from occurring again.

Reaching Conclusions

Did behavior occur?



Severe



Number and frequency of encounters



Effects on victim



Context of harassment/occur in public or private

Was it harassment?



Welcome



Current and prior relationship of parties



Effects on work environment



Adverse employment actions against victim

Reaching Conclusions

- Make a determination based solely on credibility, if necessary
- Distinguish between behavior that was “voluntary,” but coerced, and behavior that was clearly unwelcome
- “Preponderance of evidence” – not, “Beyond a reasonable doubt”
- Credibility of each party
- Documentation
- Observations of investigation
- Witness statements
- Motivation to lie – by anyone
- EEOC Guidelines
- Case law
- Title VII, Title IX, other Civil Rights Law
- Unwelcome
- Gender-based, race-based, disability based, etc.
- Severe/pervasive
- Reasonable person
- Collaborating evidence
- Effects on the Victim
- Number and frequency of incidents
- Relationship of the parties
- Effects on the work environment
- Content of the harassment – public/private
- Retaliation
- If no witnesses, did anyone notice a change in the victim’s behavior?

Don’t be afraid to make a judgment because you could be wrong. Your investigation needs to be thorough, fair and objective.

Usually there are indications regarding the truth with a “he said/she said” scenario.

Generally 5%-10% of investigations are inconclusive

67



Don’t be afraid to make a judgment because you could be wrong.

Usually there are indications regarding the truth with a “he said/she said” scenario.



Generally, 5% - 10% of investigations are inconclusive.

68

What Standard Applies?

Beyond a reasonable doubt?

Preponderance of evidence?

Have obligation to make judgment?

69

Federal & State Laws

"State's" Human Rights Act

Title VII

ADAAA

ADEA



GINA

LGBTQI

Title IX

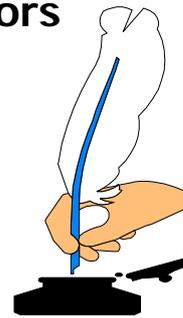
Pregnancy Discrimination Act

70

EEOC Definition of Sexual Harassment



- Sexual advances
- Requests for sexual favors
- Verbal or physical conduct of a sexual nature



1980

71

Factors



Protected Classes

Sexual and/or gender based



Severe



and/or



Pervasive

Reasonable:



Victim



Person



Woman

72

Know the Protected Classes!

Federal

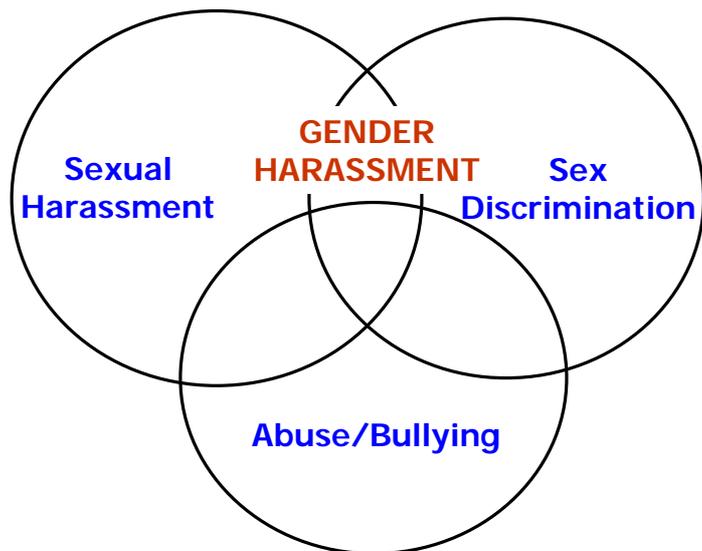
Your State

Local



**Protected
Classes**

73



74

Gender Harassment



- Hostile Work Environment
- Environmental context

- Gender-typing – occupation
- Gender composition – work group
- Organizational Climate



75

Common Law Tort Claims Against Managers & Organizations

- ✓ Aiding & Abetting
- ✓ Assault & Battery
- ✓ False Imprisonment
- ✓ Intentional infliction of emotional distress
- ✓ Negligent hiring or supervision
- ✓ Personal Injury
- ✓ Intentional interference with business relationship
- ✓ Breach of contract



76



77

If Complaint Not Substantiated, Tell Accused:

“The company policy is...and any further complaints will result in...”

“The company considers allegations serious and although the facts are disputed, such conduct is forbidden and will not be tolerated.”

Document the conversation and place documentation in both the victim’s and harasser’s file.



78

Follow up Action

Separately
notify
victim &
accused of
outcome,
including:

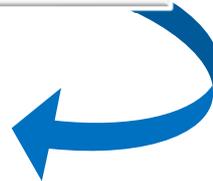
How many were interviewed

Evidence considered

Conclusions reached

Appeal process

Document their
responses



79

What Actions Need To Be Taken Regarding:



- ✓ The victim
- ✓ The alleged harasser
- ✓ The follow up training
- ✓ “Workplace healing”
- ✓ Communication of harassment policy

80



81



82

The question to ask yourself is...

"How will I feel sitting on a witness chair in a courtroom, under oath, explaining my actions?"



83

Disciplining Offenders



Must stop harassment!



- Were company policies, guidelines or practices violated?
- Did harasser commit a serious offense?
- How has organization treated other offenders?
- Do any federal, state or local laws require certain action?
- How long has offender been with organization; what is offender's performance history?
- Any mitigating circumstances?
- What does collective bargaining agreement say?

84



Corrective Action



- Written agreement not to engage in behavior
- Apology
- Transfer
- Suspension
- Termination
- Fines
- Counseling
- Discipline for management
- Altered work schedules or responsibilities
- Verbal warning
- Written warning
- Probation
- Demotion
- Education
- ↑ Supervisory oversight

85

**Do I tell the
victim the
perpetrator's
consequences?**

86

If don't tell:

- Cloak of secrecy
- Lowered morale
- Rumor
- Better closure for victim if informed
- Employees mystified



87

Monitor Environment

- Purposeful meetings with victim
- Ensure misconduct has stopped
- No retaliation
- Purposeful meetings with accused as needed



88



89

Follow Up

1. Separately notify the victim and the accused of the outcome of the investigation:
 - How many interviewed
 - Evidence considered
 - Conclusions reached
 - Appeal process
2. Document their reactions and place with your investigation file.
3. Management should make whatever amends necessary to make the victim "whole" such as back pay, benefits, vacation, and pay damages, if any.
4. Discipline the harasser.
5. Any remedial action taken needs follow up to ensure compliance, e.g., meeting with the victim to ensure the harassing behavior has stopped; meeting with harasser to ensure he is in counseling, etc.
6. If the complaint was not substantiated, tell harasser – "The company policy is . . . and any further complaints will be result in . . . The company considers allegations serious and although the facts are disputed, such conduct is forbidden and will not be tolerated." Document the conversation and place documentation in both the victim's and harasser's file.

There are pros and cons as to whether the victim should be told of the consequences to the harasser.

If you don't tell the victim of the harasser's discipline:

- Decreased morale
- Cloak of secrecy
- People are mystified
- Rumor and problems
- If victim has more information, there will be better closure

90

Appeals

Purpose: Focuses on a specific concern regarding how the investigation was handled (e.g., critical witness/information/documentation missed).

An appeal is not designed to appease workers who are upset regarding the outcome of the investigation.

Explain: If the victim or harasser cannot state why she/he wants an appeal, explain that the organization conducted a fair and thorough investigation and handled the discipline as they saw fit. Remind the victim or harasser that she/he is not privy to all information gathered and that conclusions are based on some facts the victim or harasser is not aware of.



91

The Final Report

The final report is a comprehensive rendition of the investigative process. It documents the complaint, the process, and the outcome. It is recommended that a copy of the report be sent to the legal department (or the organization's legal counsel) for review before being sent to the final decision maker. If the harassment incident was minor, the report does not need to be as in depth and may be no more than a one-page summary. The final report includes the following:

- I. A one-page summary with a general overview
- II. Background information
 - Process of the investigation, including the who, what, where, and when of incidents and the investigator's responses
 - Detail of the complaint in chronological order
 - List of documents reviewed
 - Interview information per party including:
 - questions asked
 - answers given
 - differentiating rumor from fact
- III. Summary of complaint and findings
 - Behavior that occurred and the investigator's opinions, along with the rationale for those opinions
 - Determination as to whether the behavior constituted harassment by comparing the behavior with the organization's policy, EEOC guidelines, and other case law
 - Statement saying whether the organization's policy was violated
 - Other factors involved such as alcoholism, poor work environment, previous discipline, personality conflicts, etc.
 - Identifying conflicting evidence and how that influenced the outcome of the investigation
 - Separating fact from investigator's impressions (and explanation for impressions)
- IV. Recommendations
 - Recommend corrective action designed to stop the harassment and consistent with past discipline; not to be punitive to the victim
- V. Appendix
 - Names of any other victims discovered during the investigation
 - Analysis of interviews
 - Copy of memos to . . .
 - Any investigational concerns such as poor management
 - Typed interviews of all parties

92

Investigation File:

- Interview notes
- Written outline/questions/topic areas
- People interviewed
- Reason key person not interviewed
- Copies of documents
- Written statements
- Not personnel file



93

Appendix

- **Names of other victims**
- **Analysis of interviews**
- **Copies of.....**
- **Investigational concerns**
- **Typed interviews**
- **Investigator's notes**



94

Documentation for Personnel Files



- ✓ On____(date) Suzie informed HR that Billy had xxxxxxxx.
- ✓ An investigation occurred on ____ (dates).
- ✓ It was determined that Billy's misconduct had occurred and was a violation of XXXX policy.
- ✓ Billy was given a written warning.

95

Common Problems and Mistakes

1. Behaving like an ostrich by ignoring a problem; letting a problem slide without recognizing its seriousness
2. Honoring confidentiality requests, thereby letting harassment continue
3. Not talking to the right people when investigating a complaint
4. Harboring preconceived notions about the parties and the complaint
5. Failing to listen carefully to all parties during interviews
6. Failing to keep the person who brought the complaint and the person accused of harassment apprised of the investigation's progress
7. Failing to properly document the investigation
8. Doing nothing in a he-said, she-said situation, rather than assessing the credibility of the parties and deciding what likely happened
9. Not taking the right effective remedial action – ie, taking steps that don't stop the harassment
10. Transferring the victim to a different job, rather than moving the harasser
11. Do nothing ("It'll stop") – denial
12. Making conclusions ("Ole Bill wouldn't have done that")
13. "Finesse" the problem
14. Failing to take corrective measure
15. Requiring formal and/or written complaint
16. Inadequate investigation ("He said/she said" witnesses don't cooperate)
17. Confrontational solution
18. Don't report it to proper authority for investigation
19. Resistance – no training, etc, as too controversial
20. Labeling – "feminist", "militant", and "manipulative"

96

Do's & Don'ts



Do's:

- be respectful
- be neutral
- be empathetic
- be responsive
- expect emotional response
- use appropriate vocabulary based on interviewee's education and intelligence
- be warm and inviting
- paraphrase
- ask follow-up questions
- use active listening
- be flexible

Don'ts:

- identify who you will be interviewing
- discuss merits of completeness
- reach conclusions until after investigation completed
- accuse alleged harasser
- make promises of time and action
- make assumptions
- use word "harassment" to inquire of a specific behavior
- say...
 - "That explains a lot."*
 - "Something will be done about this."*
 - "I have a hard time believing..."*
 - "Why did you do that?"*
- be cold and unemotional
- talk too fast
- promise confidentiality
- state the policy has been violated
- commit to complainant's wishes of remedy
- overreact to emotions

97

20 Key Principles of a Harassment Investigation

1. Take the complaint seriously. Assure the victim her/his complaint is being taken seriously and that the organization will respond to the problem promptly.
2. Be open-minded. Do not presume guilt or innocence prior to the investigation. Avoid making determinations based on the appearance, position, or reputation of the people involved.
3. Determine who should be advised of the investigation and what they (e.g., supervisors, co-workers, management, etc.) will be told.
4. Determine what documents should be studied in addition to the sexual harassment policy (e.g. prior complaints, the handbook, personnel files, and organizational chart, etc.)
5. Study the environment: review the work area and general communication and behavior among staff.
6. Employees have the right to have someone with them during the interview.
7. Identify the questions for interviews of all parties. Use open-ended, generic, non-defamatory questions. Naturally, specific questions must be asked where appropriate.
8. Avoid using dangerous words or phrases, such as "It's just teasing – no big deal."
9. Be fair in the process. Allow sufficient time for interviews. Strenuously attempt to maintain confidentiality but do not promise confidentiality as it is very difficult to achieve.
10. Listen, empathize, and don't judge. Listen to what the victim has to say, empathize but make no judgment or commitment regarding the allegation or how the investigation will be conducted. Reiterate that your organization takes sexual harassment seriously and will not tolerate it.
11. Meet with appropriate management to inform them regarding the obligation not to retaliate, the importance of open lines of communication, the strategies for handling employee discomfort and confusion, etc.
12. Consider whether other issues affect the investigation, such as whether to include union reps, pending lawsuits, etc.

98

20 Key Principles of a Harassment Investigation, *continued*

13. Perform the investigation promptly. It is recommended that the investigation begin within 24 to 48 hours of the time the complaint is made. Case law overwhelmingly supports the conclusion that an employee can do much to minimize its liability by acting promptly. A prompt investigation helps to obtain truthful and complete witness statements before either party has a chance to solicit support from friends in the workplace.
14. Maintain adequate documentation of the investigation. Remember it may be an exhibit in a trial someday. Focus on the facts, avoiding conclusion, speculation and the like.
15. Create a separate confidential file accessible only to the investigators. This should include all notes taken during interviews, copies of corroborating documents, and the final written report. If interview notes are to be typed, someone pledged to maintain the confidentiality of the notes should do this. Notes should be typed directly after each interview so they are more accurate and complete.
16. Respond to concerns. If the victim expresses fear, assure her/him that your organization will do everything to ensure confidentiality (but makes no promises), prevent retaliation, and stop further harassment. Answer any questions about the complaint process.
17. Contact your organization's attorney, if appropriate.
18. Determine what will be told to the victim at the conclusion of the investigation.
19. If appropriate, determine what corrective action will be taken, including discipline and/or termination, training, EAP, etc.
20. Follow up on the complaint. Check with the victim to ensure that she/he is not being retaliated against. Document the conversation and, if necessary, intervene on continued harassment and/or retaliation.

99



100

Questions

- If there are any further questions which we were not able to get to today, please feel free to contact me through Train HR Learning.



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