

INVESTIGATING CLAIMS OF HARASSMENT - PART 2: INTERVIEWING THE COMPLAINANT AND PLANNING THE INVESTIGATION

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You have received a complaint of harassment. What next? In this second part of a six-part series, we focus on interviewing the complainant and planning the rest of the investigation. As always, bear in mind that each harassment investigation is different and must be tailored to fit the particular circumstances.

The interview of the complainant is usually the first and most important interview that will be conducted, and therefore, should be carefully planned beforehand. This interview, and all others, should be conducted in a private, neutral meeting space at your location. The following provides an illustration of the areas that should be covered by the investigator during the interview of the complainant.

At the beginning of the meeting, the investigator should:

- Identify his/her role as investigator (i.e., you are a neutral conducting an investigation on behalf of the company).
- Ask the complainant whether he/she is comfortable with the investigator as the investigator and believes that he/she can conduct an impartial investigation. If the complainant is not comfortable with the investigator or indicates a belief that the investigator cannot conduct an impartial investigation, the investigator should try to identify another person to conduct the investigation. If the investigator is having difficulty with this, an HR supervisor or the company's attorney should be contacted.
- Explain that the company is conducting a prompt and thorough investigation to determine whether inappropriate conduct has occurred and, if it determines that it has, will take appropriate corrective action to stop it.
- Assure the complainant that the company takes harassment claims seriously and that the company prohibits retaliation for making a good faith complaint.

- Explain that efforts will be made to share information on a need-to-know basis only, but do not promise confidentiality.
- Explain the expected investigation procedure and the expected timeframe involved.
- If you have determined that confidentiality is required, consider whether this case might be appropriate for the use of a form, for complainant and witnesses to sign, affirming the need for confidentiality.

During the Interview, the investigator should:

- Find out what happened with (or to) the complainant and/or others (i.e., ask whether anyone else has been harassed), as specifically as possible, by asking open-ended questions (the five “W” questions) for any incident alleged to have occurred.
 - What happened?
 - Where did it happen?
 - Who was present?
 - Do you know why it happened?
 - When did it happen?
- Pin the person down on all events that make up his/her complaint (i.e., do not end the interview until you are clear on what the witness says happened and clear up inconsistencies in the story or parts of the story that do not make sense).
- Ask whether the complainant has told the alleged harasser that his/her conduct is unwelcome or has complained to anyone at the company about the conduct. (It is not required that the complainant do this, but it may be helpful to your investigation to know this information.)
- Determine any prior history the complainant has had with the alleged harasser.
- Determine whether there is any physical evidence (such as e-mails, voicemails, notes, gifts, expense reports, etc.) concerning the harassment.
- Find out who may be involved, including potential witnesses, and make sure to ask the complainant who he/she thinks should be interviewed.
- Review key allegations with complainant. It may be advisable to make a written record of the allegations and ask the complainant to review it, make any changes, and sign it to indicate that it is accurate. If the complainant refuses to sign, note on the document that the

complainant refused to sign and the reason for the refusal. (The investigator still has an obligation to conduct the investigation if the complainant refuses to provide or sign such a statement, but the refusal and reasons for it can be considered and should be documented.)

- Thank the complainant for raising the issue.
- If you have consulted with legal counsel, and have determined that confidentiality is required, tell the complainant to maintain confidentiality within the workplace about the investigation, so the results will be as reliable as possible.
- Ask the complainant for suggestions on how the issue can be best resolved (i.e. what the complainant thinks the company should do) without making any promises.
- Tell the complainant about the company's no-retaliation policy.
- Tell the complainant that you may need to speak with him/her again and, in any event, that you will let the complainant know how the investigation is concluded.

The investigator should be sure to:

- Not make any judgments regarding the allegation until the investigation is concluded.
- Make a credibility determination at the time of the interview and note any behaviors of the complainant affecting credibility (e.g. refusal to answer questions directly, inconsistent responses, etc.).

Evaluate and Plan the Remainder of the Investigation

After the complainant is interviewed and prior to interviewing the accused and other witnesses, the investigator should decide whether to recommend that any immediate action be taken (e.g. separating the accused from the complainant) pending the outcome of the investigation. It is important to remember that, if it is determined that separating the accused from the complainant is advisable, the complainant should not have to work in a less desirable location as a result of raising a complaint. It is usually safest to move the accused to a different location. It may be advisable to place the accused on administrative or investigatory leave during the investigation.

The investigator should now consider next steps; whether (s)he should continue by interviewing the accused, interview a third-party witness or witnesses (particularly if the conduct is recent and public), or gather objective evidence first (performance evaluations, emails, notes, visuals in the work place, travel records, etc.) Typically, in addition to collecting objective evidence, the accused is interviewed next, but this is not always the case. Keep in mind it may be necessary to interview people more than one time depending on additional information that is gathered. Thus, the investigator should consider which of the following should occur next:

- Prior to interviewing the accused, the investigator should review the personnel files of both the accused and the complainant to see whether there are any records that may be relevant to the investigation. Further, are there any records indicating that there have been other similar allegations against the accused or similar complaints by the complainant?
- The investigator also should check to see whether there are records demonstrating that both the complainant and the accused received a copy of the company's no-harassment policy as well as training on this topic.

The next post in this series focuses on interviewing the accused and other witnesses.

Bryan Cave LLP has a team of knowledgeable lawyers and other professionals prepared to help employers assess their policies and procedures for handling harassment complaints. If you or your organization would like more information on best practices for investigating complaints of harassment or any other employment issue, please contact an attorney in the [Retail](#) or [Labor and Employment](#) practice group.

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