

CONDUCTING A HARASSMENT INVESTIGATION, THE DO'S AND DON'TS

CAROLYN HUTNIAK

The issue of harassment in the workplace continues to represent a significant challenge for employers, both from a productivity and a liability perspective. Having a proactive and preventative strategy in place can significantly improve the response time and the ultimate resolution of these sorts of complaints and can also minimize the employer's risk of liability.

One of the most significant aspects of a harassment policy is the investigative process. Not only will that process influence how successful the employer will be in resolving the issues raised by the complaint, the manner in which the employer conducts the investigation will directly affect any liability it may have if the complaint is not ultimately resolved in the employment setting. It is therefore important to take steps to ensure that any harassment investigation is timely, responds to issues raised by the complaint and is fair to both the complainant and the respondent. Some specific Do's and Don'ts follow.

DO'S

- Ensure that a harassment/ sexual harassment policy is in place, that it details the process to be followed in the event of a complaint and that the policy has been communicated to and is available to all employees.
- Follow any harassment/sexual harassment policy that is in place. Having a policy but failing to follow it is poor practice and may attract greater employer liability.
- Respond quickly and seriously to any complaint of harassment. The employer's response is important in assessing employer liability down the road.
- Arrange for an independent investigation by objective and trained investigators, if possible. The investigation in all events should be conducted in good faith and by persons outside of the work area involved.
- Ensure that the respondent is provided with full information regarding the complaint and other information provided in relation to it. An individual accused of harassment is entitled to know the specific allegations made against him or her and to respond accordingly. Where a written complaint has been made, a copy of that statement should be provided to the respondent.
- Provide an opportunity for both the complainant and the respondent to present their version of the events. Ask specific questions and obtain as much detail as possible regarding the allegations and any responses.
- Interview additional witnesses who may not have been specifically referred to by either party. Essentially, interview anyone who may have relevant knowledge.
- Keep the process confidential. Although no absolute guarantee of confidentiality should be given to any of the witnesses or parties to the complaint, advise them that the information received will be held in strict confidence except as necessary to investigate and respond to the complaint and any other legal or administrative proceedings relating to it. Complainants and respondents should likewise be

2000, 10235 - 101 STREET
EDMONTON, AB T5J 3G1
PH: 780.423.3003

400 THE LOUGHEED BUILDING
604 1 STREET SW
CALGARY, AB T2P 1M7
PH: 403.260.8500

201, 5120 - 49TH STREET
YELLOWKNIFE, NT X1A 1P8
PH: 867.920.4542

www.fieldlaw.com

encouraged to maintain confidentiality.

- Emphasize to all witnesses that they will be protected from any retaliation regarding their evidence.
- Obtain written statements or take careful notes of all interviews.
- Document, in writing, the process followed as well as the results of the investigation.
- Discuss the results individually with the complainant and the respondent
- Consider providing a final opportunity for the respondent to respond to any written report of the investigator's findings or recommendations, particularly where discipline may be imposed.

DON'TS

- Prejudge either the allegations or the denial of the allegations.
- Focus only on the specific allegations without getting a good read on the attitude within the organization.
- Simply counsel the complainant on "how to take it" or "not to let it bother them so much" or suggest that the harassment would stop if they simply tried "to fit in better".

In conducting harassment and sexual harassment investigations, there are a number of other important considerations to bear in mind.

- Where required under the provisions of the collective agreement, union representation may be necessary or at least permissible during any meetings or interviews particularly if signed statements are to be given.
- Consider whether, given the circumstances including the severity of the allegations, it would be appropriate and permissible under the terms of any employment or collective agreement to take interim steps to deal with the situation. For example, depending on the circumstances, an employer might consider: changing the reporting structure, redoing or reviewing negative performance evaluations and reinstating lost benefits, transferring the complainant or the respondent, granting a paid leave to the complainant or suspending the respondent pending the investigation.
- Care must be taken to maintain the pay/level of

work of the complainant if he or she is transferred. The complainant must not be penalized for coming forward with a complaint.

- Provide counselling services to the complainant to be paid for by the employer. In some cases, it may be appropriate to extend the benefit of counselling or sensitivity training to the respondent, as well.
- When imposing any interim measures, care must be taken to confirm that such actions do not represent a final finding of wrongdoing.

Finally, if as a result of the investigation it is determined that harassment or sexual harassment has occurred, the outcome may be, but will not necessarily be, the respondent's termination of employment. It is always advisable to consult legal counsel who can provide guidance on the appropriate response to a finding of harassment or sexual harassment.

DISCLAIMER this article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

The Labour and Employment Group
Edmonton 780-423-3003
Calgary 403-260-8500

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