

Chapter Two

Investigating Allegations of Harassment

In the last chapter, we discussed what sexual harassment was and what it was not. Now, we shall turn to what you as a supervisor or manager can or must do when you are confronted with an allegation by a subordinate. What do you do when a person, usually but not necessarily a woman, walks into your office to tell you something happened?

Investigating Sexual Harassment as a Management Function

First, let me repeat and re-emphasize a point that I made in the Introduction: Combating sexual harassment and handling allegations of sexual harassment are primarily a management function, not an EEO office function. Although the employee has the right to file a complaint of discrimination, management still carries the burden of acting regardless of whether the person files a complaint or not.

Much of the reason that most sexual harassment goes unpunished is that when many employees report acts of harassment, their supervisors and managers simply refer them to the EEO office and do nothing else. However, when an employee comes to you with information about possible misconduct, you are obligated to look into the matter, determine what has happened, and take action. And you take action regardless of whether the employee chooses to file a complaint of discrimination.

For example, if an employee came into you and told you that some coworkers had beaten him up, you do not simply advise him to contact the police if he wants. You go out yourself to see what happened, you ask other employees who might have witnessed the event what they had seen, and you confront the other employees. At some point, you might notify your agency law enforcement personnel in case they wanted to take any criminal action against the employee. Or the employee might on his or her own call the police. However, the point is that you do not really care what they do from their end. You have an obligation from your standpoint to find out what happened and to take administrative action as necessary.

Something bad has apparently happened on your job site and you must look into the matter first. Then if you feel that somebody did something wrong, you take corrective action.

Following the comparison we started above between the criminal justice route versus the administrative action route, part of the reason you act independently is that your law enforcement people do not have the authority to discipline employees-only management does. Obviously, you will be cooperating with the police, sharing information with them, and agreeing on a mutually convenient course of action. However, you are the one responsible for making sure that the offenders get the appropriate administrative discipline.

And so it is with an employee coming to you with an allegation, complaint, story, accusation, charge-call it what you will-of possible sexual harassment. You have to look into the matter

regardless of what your EEO office does.

Thus, the first step in handling the matter is to try to find out what has happened. You cannot decide what action to take until you find out exactly who did what to whom. You must do a pre-action investigation to determine the facts. Then you assess what you will and will not be able to prove if the matter leads to a formal disciplinary action. You have to find out what happened and also decide what you can prove.

The Level of Involvement

It is also important that you as a supervisor or manager become personally involved, especially in a complaint or allegation made against the level of employees that you supervise. If you are a first-level supervisor and an employee in your office or shop comes forward, even if you eventually get help from others, you should be one of the first people to talk with the person. If you are a second-level manager and the allegation is against one of your first-level supervisors, make sure that you personally interview the person making the allegations at some early point in the affair.

This is important because, when you eventually have to decide what to do, you are going to encounter some very close calls whose outcome is going to hinge on a simple credibility determination: Which person seems to be telling the truth? And to make this determination, it is important that you have first-hand contact with both sides in the matter so that you can evaluate and weigh their stories.

For example, for those of you who read my book on *Taking Disciplinary Actions: A Federal Supervisors Guide to Corrective Discipline*, you may remember that in the chapter on pre-action investigation, I gave an example from a real Army removal case. In that case, a woman came to her second-level supervisor, an Army Colonel, with a serious allegation of an attempted rape by her first-level supervisor, a GS-14. She went to the Colonel within minutes of the incident and the case boiled down to essentially one person's word against the other's. The Colonel, however, had no problem deciding whom to believe because of the woman's bearing, expressions, and emotional state. A normally calm and reserved person, she was in a physical and mental state of shock that even the best actress could not have faked.

It is also important because your own observations have evidentiary quality should the matter later go to an outside appellate body. Your description of how the employee acted and talked will carry great weight with a judge or hearing examiner.

One word of caution is in order for those of you who are higher-level managers, though. Be careful about getting involved in an allegation that is at a level lower than the one that you directly supervise. It's a procedural problem because you may be the deciding official who has to hear the formal proposed disciplinary action from a lower supervisor. There is nothing wrong with keeping apprised of the matter and making sure that people are doing the right things in investigating and pursuing the matter. However, be careful about becoming too deeply involved so that if you are the deciding official in a disciplinary case, you can show that you were still objective enough to fairly consider all the facts and the employee's reply to the charges.

A Word About Objectivity

One final note before we begin looking at the inquiry in a sexual harassment case: Stay objective. This sounds too obvious to even mention but I commend it to your attention nonetheless. Remember that you are not looking out for only one side in the matter. You are not doing this only for the victim. Your job is to find both damning and exculpatory evidence. You are looking into a matter of concern to the government, not merely the protestations of an employee. I emphasize the point because many of us immediately begin to take sides-usually that of the victim-in such cases and we fail to correctly do our homework. Many agencies are losing disciplinary cases these days because they have failed to do their homework and failed to treat the situation impartially and objectively.

Do not let the fact that it has to do with sex cloud your judgment. Sexual harassment is indeed a serious matter-especially when it involves physical action or the abuse of supervisory authority over employees. However, just because it is about sex does not mean that the same rules do not apply as they do in other cases. You still have to prove the case, and you still have to show that the act is serious by objective standards.

Evidence in Sexual Harassment Cases

Remember, you are responsible for investigating situations-sexual harassment or otherwise-on the job that may lead to a disciplinary action. Although you might seek assistance from professionals to help you with technical matters like lab analyses of objects or advice on courses of action, you as the supervisor are ultimately responsible for seeking out and correcting wrong-doing on the job site. Whether law enforcement authorities or EEO channels choose to involve themselves is up to them. However, you have a course of action you must follow regardless of what they do.

And before you can decide what action to take, you must know what happened. You must do a pre-action investigation to find out the basic facts in the case. Indeed, if the matter leads to a formal disciplinary action and the employee files any type of appeal with a third-party, the matter will probably go to an administrative or legal hearing. If so, the very first part of your burden before a third-party will be to prove the basic facts in the case. Therefore, when you do a pre-action investigation in a disciplinary case, you are doing it for two reasons. First, you are trying to find out for your own satisfaction so that you can decide whether to discipline and whom to discipline. Second, if it does look like the matter may lead to formal discipline, you are building a case that you will ultimately turn over to whomever represents your agency before the third party.

To prove that something happened, you need evidence. In gathering the facts in a pre-action investigation of any disciplinary case, you usually rely upon three types of evidence: Documentary evidence (pieces of paper), physical evidence (objects), and testimonial evidence (what people say). However, in sexual harassment cases, you will rarely find documentary or physical evidence. You will usually have to rely upon what people tell you and will often have to weigh conflicting stories.

Therefore, most of your information is going to come from interviews with the victim, the harasser, direct witnesses, and background sources. The first person you will probably talk to will be the

employee who is making the allegations.

Interviewing the Victim

Again, remember what I said above: Treat an allegation of sexual harassment just like you do any other type of allegation of misconduct. Do not simply tell the employee to contact the EEO office and then wash your hands of the matter. The first step in your inquiry will be to interview the victim to find out exactly what he or she is alleging. (A quick note on terminology: I am not writing a police report or a legal document so I am not going to needlessly clutter this book with the adjective "alleged" in front of every noun that refers to a party or event in the case, i.e., the alleged victim, the alleged harasser, the alleged harassment, etc. Therefore, when I simply use the terms "victim", "harasser", or "act of harassment", I am not making prejudgments about their guilt or innocence. I am simply using those terms as convenient references for the people who are, technically speaking, indeed actually "alleged victims" or "alleged harassers" or for events that are still in dispute.)

It is important to keep in mind that you are acting not merely because an employee is complaining but because something serious may have happened on the worksite. Therefore, when you talk to the victim, your main concern is with finding out what happened, not with determining what the victim wants done about it. As we shall discuss in more detail later, when you decide whether or not to discipline, the least of your concerns is what the victim wants to happen. You will base your action on the seriousness of the matter, not upon the victim's demands. Even if the victim prefers that no action be taken against the harasser, your obligation is to your agency-not to the victim-to make sure that acts of wrongdoing receive the punishment or correction they deserve.

In this connection, you also have an obligation to make sure that the person knows that if you proceed any further, you cannot keep the matter in confidence. Tell the person that you will do your best to avoid gratuitously spreading his or her name about. Tell the employee that you will try to elicit the information without giving away exactly who came forward. However, you may have to use the person's name and you may have to reveal what he or she said. Indeed, if the matter points to the need for formal action, you cannot do anything with confidential information.

Therefore, help the victim by taking some of the burden off. Do not put all the pressure on the victim by giving him or her the impression that he or she has to decide whether to make an issue out of the incident or what should happen now. Be decisive, take control of the interview, and tell the person that the matter is now in capable hands.

When you do the first interview with the victim, you must do two important things: Get detail and get something in writing.

Detail

It goes without saying that anytime you interview somebody to find out what happened, you want to get details about the event. However, in sexual harassment cases, it is much more difficult yet even more important. It is difficult because people are usually reluctant to give details because of the delicacy of the subject. But it is more crucial because people often have different interpretations

of what they saw.

Even when we're discussing sexual matters with people of the same sex, most of us are hesitant to use precise anatomical references. However, it is essential in sexual harassment cases to get disturbing and excruciating detail. You must get an exact clarification from the victim about precisely what he or she means by "private parts" or "fondling" or "obscene gesture". These words all have different meanings to different people and it makes a huge difference what the meanings are when you are trying to discipline somebody.

The detail is also important because when you go to confront the person accused of harassment, they are much more likely to back down and admit guilt when they realize that you know all the gory details. Let me give you a good example from a situation a friend of mine had. He was a manager in a Federal agency and a woman who worked for a subordinate supervisor came to see him about what her direct supervisor was doing.

She told the manager that their offices were divided by those shoulder-high partitions. On several occasions when the supervisor was talking to her from behind a partition that she could see through the gaps in the partitions that he had been "masturbating" while talking to her. That's a difficult topic to discuss and she was understandably reluctant to go into further detail. However, my friend persisted and finally coaxed from her the exact gory details: Exactly what did she see, exactly what was exposed, how much of him was exposed, and exactly what he was doing that made her draw the conclusion that he was masturbating. You may think that this would be needless overkill. However, the importance of the detail came out when he went to confront the supervisor.

When he first told the supervisor that an employee had seen him masturbating behind a partition, the supervisor laughed it off. He tried to bluff his way out by saying that he was always scratching his crotch and that the employee, although sincere in her feelings, had obviously mistaken the gesture. Now, if the manager had not gotten the detail, he probably would have had to back off which might have resulted in the situation becoming worse. However, armed with the details, he confronted the supervisor with details about his priapism (a great euphemism), the color of his underwear, and how the employee figured out that he was not Jewish. The supervisor was stunned and broke down on the spot. The rest was easy.

Documentation

Two last points about interviewing the victim: First, get something in writing immediately. Ideally, it should be a sworn statement. However, if you do not have access to somebody who can administer an oath (law enforcement official, commissioned military officer, etc.), at least get a detailed written statement from the employee. The written statement will not prove anything by itself. However, contemporaneous documentation executed shortly after the incident will greatly enhance the victim's testimony if she has to testify later.

Second, if you are interviewing the victim shortly after the incident, jot down what the person told you and your own observations about his or her demeanor, bearing, and emotional state. Remember the situation I was describing above about the Army Colonel who saw the emotional shaken victim