



What to Say (and Not Say) When Investigating Harassment Claims

When it comes to following up on employees' complaints, knowing the law is not nearly enough

By Christina Folz

June 17, 2018

CHICAGO—A common fear among employees in the #MeToo era is that they will say the wrong words and upset a colleague or get in trouble. HR, it turns out, is afraid of that too.

"One of the most challenging things for me is figuring out the right thing to say" when following up on a harassment complaint, said Donna Stevenson, an HR manager at Roplast Industries Inc. in Oroville, Calif. Stevenson attended a preconference workshop on investigating harassment claims at the SHRM 2018 Annual Conference & Exposition (www.shrm.org/hr-today/news/hr-news/conference-today/pages/default.aspx).

She's not alone. "This may be the hardest task an HR professional does," said Jonathan A. Segal, a partner at Duane Morris LLP in Philadelphia and a member of the U.S. Equal Employment Opportunity Commission's Select Task Force on Harassment. That's because the stakes in resolving a complaint can be so high. "These are people's lives," said Segal, who led the half-day session on June 16.

[SHRM members-only sample policy: Anti-Harassment Policy and Complaint Procedure (www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_000534.aspx)]

Often, HR professionals focus too much on following the letter of the law without remembering that every case—and every person—is different. "In my experience, there is way too much focus on the law," Segal said, and not enough on the human touch. He and the group worked through the following suggestions for what to say in several situations, including:

When employees ask if you can promise confidentiality before they reveal their concerns.



(www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Resources.aspx)

Workplace Harassment Resources

(www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Resources.aspx)

- Case Studies (www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Case-Studies.aspx)
- Compliance Resources (www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Compliance.aspx)
- Training Resources (www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Training-Resources.aspx)

Your first instinct might be to give a flat no, citing your legal duty to report instances of harassment. Unfortunately, that may simply cause workers to shut down.

"Seventy-five percent of employees don't raise concerns when they have them," Segal said, mainly due to fear of retaliation.

Keeping that in mind, Segal led the participants to develop some better options. For example, these responses address the legal reality and employees' possible anxieties:

- "I don't know what you're going to tell me, but I want to make clear we don't tolerate retaliation."
- "I'm here to listen, but I can't promise absolute confidentiality. What I can tell you is that we don't tolerate retaliation."

Avoid interjecting the word "harassment" into the conversation before you know what the problem is.

"Think about your word choices," Segal said, beginning with how you characterize the process. "Sometimes the word 'investigation' ... scares people." You might instead ask if it would be OK for you to "look into it."

When workers tell you they have experienced harassing behavior.

"The first thing you should say is 'Thank you for bringing your concerns to me,'" Segal said. Then: "That's a very serious allegation, and I want you to know that we take that very seriously."

Avoid characterizations like, "That doesn't sound like Jane ..." or "he didn't mean that," which make it sound like you're predisposed toward the accused. Nor should you say, "That's horrible!," which also implies you've drawn a conclusion.

"We don't want to make any judgment on the validity of the concerns," Segal said. "Focus on them, not about how you feel."

When employees ask how long an investigation will last.

While you can't give a definitive timeframe, reassure them you'll stay in touch. "Radio silence is anything but silence," Segal said. Many legal cases have come about when people weren't kept abreast of what was happening with an employer investigation, he said.

Try instead: "I can't give you an answer on that, but I will provide an update no later than Friday on where we are" or "I can't go into detail, but we're almost done with our interviews."

When workers are uncomfortable providing details such as the use of a racial slur.

Often, repeating racist or sexist words or phrases can feel embarrassing and hurtful. Yet you'll need that information to do a thorough investigation.

Start by gently asking: "Are you comfortable sharing what they said?," Segal advised. If the employee isn't, you might try explaining:

relations/Pages/Workplace-Harassment-Training.aspx)

- Tools & Forms (www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Tools-and-Forms.aspx)
- Investigation Resources (www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Workplace-Harassment-Investigation.aspx)
- SHRM's Perspective (www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/SHRM-and-Member-Perspectives-on-Sexual-Harassment.aspx)

Quiz: Is It Sexual Harassment? (www.shrm.org/hr-today/news/hr-news/pages/is-it-sexual-harassment.aspx)

"Without knowing the word, it's hard for me to know what to do." Then give them ideas for how they might share the words in a way that feels safe for them, whether by writing it down, leaving a voice mail or spelling the first few letters.

When your investigation reveals that the complaint does not indicate harassing behavior.

"This is one of the hardest things you're going to have to do," Segal said.

Remember that, in most cases, employees who come forward genuinely felt aggrieved, even if the facts don't bear out an infraction.

For example, suppose an employee complained that he was uncomfortable when his supervisor, Jane, tapped him on his shoulder. Your investigation suggests that Jane simply wanted to get his attention.

One possible response that Segal and the participants developed was:

"I thank you for raising the concern. That's not objectively improper conduct. But we've also asked Jane not to tap you on the shoulder again."

If the worker reacts defensively, perhaps reassure him with phrases like "I understand that was uncomfortable for you," "I believe you shared that in good faith" or "I'm not questioning how you feel."

But do be clear about your conclusion. It's important for employees to understand what is and is not considered harassing behavior, both under the law and your company's policy. Because, at the end of the day, "feelings are not facts," Segal said. "If everything is harassing conduct, then nothing is harassing conduct."

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Investigation: Questions for Accuser

Meeting with: _____ Date: _____

Investigator(s): _____

Introduction:

- . *Thank the employee for his/her time & cooperation*
- . *Address the nature of what is being investigated*
- . *Explain that the matter under investigation is serious and the company has a commitment/obligation to investigate the claim*
- . *Explain that no conclusion will be made until all of the facts have been gathered and analyzed*
- . *State that any attempt to influence the outcome of the investigation by retaliating against anyone who participates, providing false information or failing to be forthcoming can be the basis for corrective action up to and including termination*

Questions:

1. Who committed the alleged inappropriate behavior?
2. What exactly happened?
3. When did the incident occur or is it ongoing?
4. Where did the incident occur?
5. How did you react?
6. Did you ever indicate that you were offended or somehow displeased by the act or offensive treatment?
7. Who else may have seen or heard the incident?
8. Have you discussed the incident with anyone?
9. Did the person who harassed you harass anyone else? If so, who?
10. Do you know whether anyone complained about harassment by that person? If yes, who?
11. How has the behavior affected you and your job?
12. Did you seek any medical treatment or counseling as a result of the incident?
13. Are there any notes, physical evidence, or other documentation regarding the incident(s)?
14. Is there anyone else who may have relevant information?

15. Do you have any other relevant information?
16. What action do you want the company to take?
17. When did you first learn of the Company's Anti-Harassment and EEO Policy? (If not provide a written copy of the policy and note below).

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Investigation Summary Report

Download:

 Investigation Summary Report (www.shrm.org/ResourcesAndTools/tools-and-samples/hr-forms/Documents/Investigation%20Summary%20Report.docx)

Date investigation was opened:

Investigator(s) name(s):

Name, title and department of accused:

Description of the allegation (include names, location of incidents, times, dates):

Name, title, department of accuser(s):

Interview timeline (include dates and times of interview, location of interview, names of everyone present). Attach interview notes.

Summary of evidence that confirms or denies allegation:

Applicable employer policy (or policies):

Recommended actions for employer to take:

Actual actions taken by employer:

Date accuser was notified of actions taken:

Date accused was notified of actions that will be taken:

Other post-investigation follow-up conversation(s) (include dates, names and topics of discussion). Attach relevant meeting notes.

Date investigation was closed:

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