

## **CHALLENGES FACED IN A HARASSMENT INVESTIGATION**

By: Lauren M. Bernardi

This article outlines five of the most common challenges faced during a harassment investigation and provides strategies for responding to each of them.

### **Challenge One: The Reluctant Complainant**

Sometimes victims of harassment feel uncomfortable with what is happening to them but are reluctant to complain about it. There are many reasons for this. For example:

- They may be afraid of losing their job or facing other negative consequences.
- They do not want to be perceived as not having a sense of humour.
- They are afraid of the effect it will have on their long-term career prospects.
- They are afraid of the effect that a formal complaint and investigation will have on themselves and their families.
- They do not want anyone to get in trouble.
- They think they are the ones with the problem.
- They believe they will be told they are overreacting.
- They think if they ignore the behaviour it will go away.
- They are too embarrassed to talk about it.
- They don't want to be accused of not being a team player.
- They may feel they have to accept it, because that's the way things are.
- They don't want to be rejected or singled out by their co-workers.
- Another employee complained and nothing was done or the employee suffered negative consequences.
- They don't want to be labeled as troublemakers.

### **Strategies for Responding**

#### ***(i) Offering Guidance and Reassurance***

The best approach is to discuss the victim's particular concerns with him or her so that you can properly address them. Providing the victim with information about the complaint process and what to expect will go a long way to overcoming his or her reluctance to proceed.

If the victim is reluctant out of fear of the repercussions, outline the protections your organization has in place. This includes ensuring that the victim's job is protected and that you will take steps to prevent him or her from being subjected to negative comments or actions from the harasser or other co-workers.

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Be careful not to “sugar coat” what may happen. From an organizational perspective you will be able to provide some protection, but you won’t be able to provide total immunity. The complainant’s co-workers may behave differently after the investigation either because they are upset about what has happened or because they just don’t know how to react. Fortunately, the strain generally eases over time.

If the complainant is unsure if the incidents constitute harassment or if he or she will be believed, provide support. Let the complainant know that there is nothing wrong with obtaining guidance from you about what is and is not harassment and how to handle it. Obviously the person needs help or they wouldn’t be speaking to you.

### ***(ii) Pursuing the Investigation Without the Complainant’s Involvement***

Sometimes an employee will describe an incident of harassment but will say that they do not wish to pursue a formal complaint. At other times a complainant may want you to investigate and remedy the situation without their identity being disclosed to the alleged harasser.

This is a difficult situation. If you know about an incident of harassment and you fail to deal with it, you can be held liable for failing to provide a harassment free workplace. However, you must also give the alleged harasser an opportunity to respond to the allegations that have been made against him or her.

Some organizations insist on investigating all complaints of harassment, regardless of whether or not the victim wishes to pursue it and implement a strongly worded policy to that effect. Of course, the downside to this approach is that it has a chilling effect and may cause some victims not to complain because they lose control over what is already an intimidating and frightening process.

A preferable approach is to let employees know that you may need to address the matter even if they don’t want to initiate a complaint, but that you will take their concerns into account. In fact you may be able resolve the matter without a formal complaint. For example, if a manager has witnessed the behaviour in question independently, he or she can address the situation as a management issue. Alternatively, or in addition to managerial intervention, you can re-circulate the harassment policy or provide an educational program to help raise awareness and curb the problem.

The victim may also find it helpful to receive guidance on how to respond to the alleged harasser directly. The most effective response is to simply let the harasser know that the victim is uncomfortable and wants the behaviour to stop. It is also wise to conduct ongoing counselling sessions with the victim to see if matters are improving. If they have not improved, the victim may decide that a formal complaint is necessary and be more willing to co-operate in an investigation.

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Sometimes victims don't want to bring a formal complaint because they don't trust the employer to handle things properly or to take their complaints seriously. You may be able to obtain the employee's trust by demonstrating your commitment to addressing the problem and by reviewing the measures in place to protect their rights during and after an investigation.

Of course, no matter what course of action you take, you must document everything very carefully.

### **Challenge Two: Maintaining Confidentiality**

One of harassment victims' biggest fears is that the complaint won't be kept confidential. Harassment often involves some very embarrassing events and victims generally do not want others to know what has happened to them.

#### ***Strategies for Responding***

Obviously you will not be able to maintain complete confidentiality. You will need to reveal some details, but this should be done on a need-to-know basis.

Remind the relevant managers and supervisors about the need for confidentiality and seek their assistance in ensuring that others co-operate. This includes keeping employees from gossiping about the complaint and those involved in it.

When interviewing witnesses, stress the importance of confidentiality and the need to demonstrate respect for both the victim and the alleged harasser. When conducting the interview, provide only that information which is absolutely necessary.

Another powerful strategy is to ask each witness to sign a statement confirming that they will not disclose any details of the investigation and that they understand they may be subject to discipline or termination if they breach confidentiality.

To reassure the complainant, explain what steps you will take to maintain confidentiality but make sure they understand that complete confidentiality cannot be guaranteed.

### **Challenge Three: Non-Discriminatory Harassment**

Many harassment complaints do not centre around one of the protected grounds of discrimination (i.e., race, sex, sexual orientation, religion, etc.). These matters are often described as personal harassment or bullying.

If the harassment does not relate to one of the protected grounds the Human Rights Code (the "Code") does not apply and in some cases, the existing harassment policy may also not apply.

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### ***Strategies for Responding***

Many employers have either incorporated personal harassment into their existing harassment policies or have created separate code of conduct policies. There are good reasons for each approach.

The harassment policy is the one most employees think of when faced with this type of problem. Employees don't make a distinction between racially motivated harassment and just plain ordinary bullying. The underlying cause matters not, it's the effect that concerns them. For that reason, personal harassment is often included with discriminatory harassment.

However, discriminatory harassment is treated in a specific manner under the Code and the legal tests are not always the same. For example, one element of the test for discriminatory harassment is whether the harasser "knew or ought to have known that the conduct or comments were unwelcome". This element is necessary because certain comments may be considered harassment by one individual and yet humorous by another. The same is not likely true of bullying. Accordingly, using a code of conduct policy may be a better approach and it may provide you with greater flexibility in managing the problem.

### **Challenge Four: After a Finding is Made**

Once you have investigated a harassment complaint and determined whether the complainant has in fact been harassed, you will need to decide what steps to take next.

### ***Strategies for Responding***

Even if you decide that the complainant wasn't harassed you will still need to respond to the problem. If an employee is unhappy enough to complain, he or she needs help. This may involve providing counseling, training or education to the complainant and/or alleged harasser, to enable the parties to work together more effectively.

Occasionally an employee will lodge a complaint because he or she is "out to get" someone. If the complaint is truly vexatious and unfounded then you should discipline the complainant, such as through a written warning. But take note: there is a difficult balance to maintain. You want to deter vexatious complaints while also encouraging legitimate ones. For that reason, disciplining the complainant should be reserved for situations in which it is clear that a false complaint has been brought.

So what do you do when you have determined that the victim was harassed? First, choose the right level of discipline. Do not automatically fire someone for harassment unless the circumstances warrant it. If you fire the harasser without sufficient grounds or notice, he or she may be able to bring a successful wrongful dismissal action.

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If the incident is a first offence of a relatively minor nature (for example, an inappropriate joke) then a written warning, an apology to the victim and some education about harassment are probably sufficient. If the case involves sexual touching, then a higher level of discipline or even termination may be appropriate.

Sometimes the employer allows the victim to be away from work with pay during the investigation (if you suspend the harasser during an investigation the suspension should also be with pay). Once the investigation is complete, encourage the victim to return to work as soon as possible. This helps to reduce the anxiety associated with returning to work and prevents co-workers from speculating that the situation is even worse than it is.

One common question is whether the victim and harasser should work together after an investigation. The victim's needs should be respected where possible. Sometimes things return to normal relatively quickly after a complaint has been handled. At other times, the victim feels uncomfortable about working with the harasser. As a result, the two may need to be separated (to different departments or possibly placed on different shifts). Be careful not to automatically move the victim because that may make it seem like you're getting rid of the problem. Consult with the victim. If he or she wants to move then it's fine. Otherwise, you may need to move the harasser.

Finally, you will need to deal with your remaining employees, some of whom may have participated in the investigation.

You do not need to go into detail about what happened but you can let them know that you have investigated the matter and have responded to it. It may also be appropriate to conduct harassment awareness sessions or at least re-circulate the harassment policy to all staff.

### **Challenge Five: The Investigator's Internal Biases**

As an investigator you can't help but bring your own internal biases with you when investigating a complaint. This is particularly true if you know the parties involved, since you will have your own perceptions about their personalities and behaviours.

#### ***Strategies for Responding***

Be conscious of your reactions to what the person is telling you and of your personal biases. Examples of internal reactions that should alert you to your own biases include:

- "Who would be interested in sexually harassing her?"
- "He is obviously hyper-sensitive to racial issues."
- "The respondent is a well-respected member of our organization. She couldn't have done this."

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- “This complainant is a known trouble maker and never seems to get any work done. I can’t wait to hear what she has to say this time.”
- “I don’t know what his problem is. I think that joke’s kind of funny.”

Be open-minded about what the person has to say. Harassers can be quite clever and often harass their victims only when there are no witnesses present. They tend to target vulnerable individuals who are less likely to challenge them. They also know how to be charming, especially to their superiors, making them seem more credible.

Ensure that you objectively assess the facts presented to you and speak to available witnesses to verify the evidence. Ask open-ended questions and do not lead the witnesses’ answers. Do not take sides. Your role is not to be an advocate but to act as an impartial investigator. If a complainant asks if you think he or she has been harassed, state that you cannot form an opinion until you have heard and assessed all of the evidence.

If you are too close to the individuals involved you may wish to refer the matter to another advisor, possibly even referring it to an external investigator. Not only will this help ensure a more independent investigation but also the complainant and alleged harasser will trust the process more, and are more likely to believe that it is fair.

### Conclusion

Conducting a harassment investigation is by no means easy. You will need to be objective and fair to both parties. Although you may face some of the challenges highlighted here, through careful preparation you will be able to successfully manage and respond to them.

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## About Lauren Bernardi

Lauren is a lawyer and human resource advisor with the Mississauga firm of Bernardi Human Resource Law. Lauren's advisory, training and educational services help managers direct their human resources in a strategically sound and legally appropriate manner. She is an accomplished and entertaining speaker on management and human resource issues.

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