



Unit 16 Handling Workplace Harassment

Learning Outcomes

By the end of this unit the learner will be able to:

- ✓ Explain what is acceptable behavior in the workplace and what is not, and why
- ✓ Apply the benefits of harassment training
- ✓ Define the various types of harassment, including sexual harassment
- ✓ Assist in creating a harassment policy
- ✓ State some ways to prevent harassment and understand what role you can play
- ✓ Demonstrate some ways to protect yourself from harassment
- ✓ Know what to do if you are harassed or accused of harassment
- ✓ Understand the complaint process, from the complaint to the reply, to mediation or investigation, to a solution



Unit 16

What is Harassment?

Defining Harassment

Often harassment is based on an individual's view of what is acceptable and what is not. The Oxford Dictionary defines harassment as:

- To torment (someone) by subjecting them to constant interference or intimidation.
- To make repeated small-scale attacks on (an enemy) in order to wear down resistance.

Types of Harassment

There are many types of harassment, including:

- **Verbal:** Where threatening words or phrases are spoken
- **Physical:** Where someone is treated in a physically intimidating manner
- **Sexual:** Where inappropriate sexual advances are made
- **Visual:** Where inappropriate material is visible (such as centerfolds on an office wall)
- **Gender:** Demeaning behavior to another person based on that person's gender
- **Cyber:** Where harassment takes place via digital devices such as computers, tablets or mobile phones.

Throughout this course, we will typically discuss sexual harassment. However, the strategies covered will, in general, work for all types of harassment.

Legal Definitions

Let's look at some legal definitions of sexual harassment.

Eleanor Holmes Norton, commissioner of the U.S. Equal Opportunity Commission, 1980

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such [an] individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(Source: <http://www.eeoc.gov/eeoc/publications/fs-sex.cfm>)

Supreme Court of Canada (Janzen and Govereau v. Platy Enterprises, 1989)

Unwelcome conduct of a sexual nature, which detrimentally affects the work environment, or leads to adverse job-related consequences for victims of harassment.

(Source: <http://www.harassment.uottawa.ca/prevention/en/pages/understanding/index.htm>)

European Commission Code of Practice

Unwanted conduct of a sexual nature, or other conduct based on sex, affecting the dignity of women and men at work. This can include unwelcome physical, verbal, or non-verbal conduct. It is unacceptable if such conduct is unwanted, unreasonable and offensive to the recipient; a person's rejection of or submission to such conduct on the part of employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training or to employment, continued employment, promotion, salary or any other employment decisions; and/or such conduct creates an intimidating, hostile or humiliating working environment for the recipient.

(Source: http://www.stopvaw.org/eu_commission_code_of_practice_on_measures_to_combat_sexual_harassment)



Defining Sexual Harassment

What is Sexual Harassment?

The Three Elements

In order for behavior to be considered sexual harassment, it must contain three elements.

- It is of a sexual nature
- It is unwelcome
- It has detrimental consequences

Types of Harassment

There are two types of sexual harassment.

Quid Pro Quo

The name for this type of harassment is Latin for “this for that.” In essence, this type of harassment occurs when an employer says that they will give an employee this job, this promotion, or this benefit, for that sexual favor.

Hostile Environment

This type of harassment is much more difficult to pin down. It occurs when the harassing behavior creates a hostile, negative work environment for the employee.

Behavior Categories

The U.S. Merit Systems Protection Board states that unwelcome behavior can fall into seven categories.

- Sexual teasing, remarks, jokes, or questions
- Pressure for dates
- Letters, e-mail, telephone calls, or materials of a sexual nature
- Sexual looks or gestures
- Deliberate touching, leaning over, cornering, or pinching
- Pressure for sexual favors
- Actual/attempted sexual assault or rape



Questionable Scenarios

Let's look at some common scenarios that raise questions about harassment.

S/he laughed at my joke. Doesn't that mean that it was welcome?

This often comes up in cases of sexual harassment. This is where communication is key. If a person tells an offensive joke, do not laugh or respond with a joke of your own. It is your responsibility to let people know where your line is. It is their responsibility to respect that line.

Remember, too, that often people feel uncomfortable setting boundaries. In this example, an employee may laugh at the joke because it was told by their supervisor and they feel that they are obligated to participate. The employee may also worry about being judged negatively if they object. The truth is, if you are uncomfortable, someone else probably is too.

It happened on a business trip, so it does not count.

The key word here is "business." If employees are on a business trip together, the same rules that apply in the office apply to the trip.

It was just a compliment.

It can still be harassment.

It only happened once.

That is like saying, "He only broke into my house once, so it is not a crime." If it is unwelcome, of a sexual nature, and causes detrimental effects, then it is still harassment, whether it happened once or 20 times.

The comments were directed at someone else.

If you witness inappropriate comments (such as a colleague speculating about another coworker's sexual prowess in bed, without that person present) you can still file a sexual harassment complaint.

Sexual harassment is all about sex, and sex did not happen.

All forms of harassment are about coercion and power. What differentiates various types of harassment is how the harasser attempts to exert his/her power: obscene images, inappropriate touching, physical threats, or verbal abuse.

This is the way I have grown up; you cannot expect me to change.

If you grew up in a family where nudity was the norm, would you expect your workplace to accommodate that as well? We have all learned some behaviors that are not appropriate in the workplace.

IS THIS HARASSMENT?

Scenario One

Ruth, Charles, and Sharon all work in the same office. Recently, Sharon heard Charles call Ruth "sweetheart." She asked Ruth about it and Ruth said that Charles does it all the time, but it does not bother her.

Is this situation harassment?



Scenario Two

The Acme Pro office includes a sauna and gym. Bob has started going to the gym regularly with two other members of his team. In the locker room, his two friends have been sharing sexual stories and details about particular parts of their anatomy. This makes Bob very uncomfortable.

Is this situation harassment?

Scenario Three

You work on a small advertising team. Your newest member, Jason, has recently switched careers; he used to be a masseuse. He is always telling you that you look tense and rubbing your shoulders.

Is this situation harassment?

Scenario Four

Sam has noticed that one of his co-workers is obviously interested in him. He has told her, "no," several times when she has asked him for a date. Recently she has been sending him letters at home, and it is causing stress in his marriage.

Is this situation harassment?



Scenario Five

Lisa and Bill were on a business trip last weekend. They had dinner together at the hotel, during which Lisa talked openly about her private life and repeatedly touched Bill's hand. He feels very awkward now that they are back in the office.

Is this situation harassment?

The Purpose of Training

Why is Training Important?

Many people feel that they do not need training. Others feel that they do not need to be told how to behave. The truth is, we all need some help with basic skills, especially since the legal aspect of harassment is changing constantly.

Training can help prevent sexual harassment.

Harassers may think twice about their behavior, victims will know how to prevent and confront harassers, and managers will be prepared to prevent and deal with harassing situations. Training is also an excellent opportunity to review your sexual harassment policy, and it is recommended that all companies develop one. Most good training programs also help people identify ways to reduce their risk of harassment and educate victims on what to do if they are harassed.

Training increases morale.

It tells employees that you care about them and their well-being. It also sends the message that you are willing to listen and confront this type of behavior.

Training can reduce your liability if a complaint is filed.

A large part of sexual harassment complaints center around the notion of a hostile environment, an environment that is poisoned against a particular group. If an environment is found to be hostile, the employer will likely be liable for any harassment complaints.

Employees, managers, and those involved in the complaint resolution process should all receive different types of training geared towards the role that they will play. Everyone should know how to protect themselves and others from a harassment complaint, and what to do in the event that a complaint is filed.



Creating a Harassment Policy

Key Policy Points

The best way to prevent harassment from occurring is by setting a clear policy, educating employees about it, and enforcing it. The policy needs to be written by a team of people (typically the Human Resources department), preferably with the input of staff at all levels and some legal advice. This group should also lay out education, follow-up, and monitoring guidelines to ensure that the policy is effective. Writing a policy will take time, resources, and effort, but the end result will be a document that outlines your company's stance on harassment.

WRITING THE POLICY

Your policy needs to have five essential elements. Above all, ensure the policy is clear, up to date, and updated periodically.

The rules.

State clearly that harassment is not acceptable in the workplace and will be dealt with. Then, state what the rules are in the company. Make sure that these rules are in line with the laws in your area.

Specific behaviors, examples, and circumstances.

The document should spell out what behaviors are and are not acceptable. If the company has special circumstances (such as a gym, or if business travel is required) rules for those situations should be spelled out as well.

Safe from reprisal clause.

Make sure the policy clearly states no one will be acted against for bringing a claim to the employer's attention or attesting to details within that claim.

The consequences.

Make sure you include the possible solutions and consequences for a harassment violation, including what disciplinary action may be taken. Also include consequences for false claims.

A complainant's rights.

Make sure victims know what will happen if they file a complaint and what rights they have, including confidentiality, privacy, and the right to a fair hearing. They should also know their avenues of complaint: to the internal Human Resources department, to the appropriate government department, to police, or to the legal system.

THE COMPLAINT PROCEDURE

If an employee decides to file an internal complaint, they need to know what the process is. This part of the policy should also be included in operations manuals and employee handbooks. It should cover the following points.

Who is responsible for each stage of the complaint process?

Let employees know what their options are and what will happen at each stage. For example, you may want to suggest that employees start by consulting with their immediate supervisor.

Who are the sexual harassment advisors in the company?

A sexual harassment advisor is an impartial person who can be consulted by someone who thinks they are being harassed or who has been accused of harassment. (There can and should be more than one advisor in a company.) The advisor must be able to give impartial advice, be familiar with the organization's sexual harassment policy, and have knowledge of sexual harassment issues in general. Their role is to provide information, explain choices, and help an employee with the process. They should not have a role in the investigation or resolution of the complaint. Advisor-employee conversations are confidential and cannot be included in the complaint investigation.

What information needs to be included in the complaint?

It is essential that the complaint is put in writing. The formal complaint should include:

- Name of person accused of harassing
- Details of harassment and incident(s)
- Descriptions of any acts or statements
- Dates, times, locations of incident(s)
- Witnesses to the incident(s)
- Other possible victims
- Date and signature of complainant

EDUCATING STAFF

After the policy has been written, Human Resources (or the immediate supervisor) must review it with all staff. You need to go beyond stuffing a copy of the policy in the employee mailboxes and hope they read it. Have an HR member sit down with a small group and explain every word in the policy. When new employees are hired, make sure they receive the same education. All employees should receive this education again when changes are made to the policy.

In addition, make sure you distribute the policy at least once a year. If changes are made, you will want to do a sit-down review as suggested above. If no changes are made, include the policy in a newsletter or some other official communication.



MONITORING THE POLICY

Many of us have been in situations where a policy is put into place and then forgotten about. Make sure that managers monitor the workplace and follow the policy. Above all, make sure there is no punishment for filing complaints.

Other Prevention Strategies

MAKING CONNECTIONS

We have already talked about two ways to prevent harassment: training and a written policy. There are many other ways that you can help prevent harassment.

Do you have some suggestions for preventing harassment?

Nipping it in the Bud

Your Role as a Manager

One of the most important prevention strategies is for managers to carefully monitor their workplace. Look at who is interacting with whom. Keep an eye on your employees' mental and physical well-being and attendance records. If you sense that something is not right with one of your employees, ask them about it. And keep an ear to the ground; rumors of harassment can be exaggerated or even completely false, but they may direct you to keep a closer eye on a particular situation.

As a manager, it is perfectly within your right to address situations that could develop into harassment. If you observe behavior that could be inappropriate, take the person aside, note what you observed, and explain how it could be interpreted or how it could cause problems. Then, suggest an action plan for change. Even a simple action like saying, "That is not really appropriate for work,"

when someone tells a sexually charged joke, can go a long way towards setting a good example and preventing harassment.

There are some other situations you should keep your eye on and deal with promptly to help prevent situations from escalating into harassment complaints.

ROLE PLAY

Role Plays for Pairs

- A team member has a habit of yelling at co-workers.
- A team member often touches co-workers when speaking.
- The manager is interested in a team member.
- A team member is interested in their manager.
- A team member often wears provocative clothing.
- A team member has a sexually explicit calendar in their cubicle.
- You think a team member has made a decision based on gender.

Role Plays for Trios

- Two people are becoming interested in each other. The manager needs to address the issue.
- Two team members who dated have broken up, but still have to work together. The manager needs to develop a plan to address the issue.
- Person A is interested in Person B, but Person B is not interested and has asked their manager to relay the message.
- Person A is interested in Person B, but Person B is not interested. Person A will not leave Person B alone, so Person B has asked their manager to intervene.



problems it could cause, you can make an extra effort to be professional and not send off mixed signals. Above all, do not share your fantasies in the workplace.

Take care of yourself.

Make sure you are healthy mentally and physically. Often, people who lack social support systems turn to work colleagues as a source of emotional support and sometimes sexual interaction. This is a plan for disaster.

Learn to recognize what is unwelcome and inappropriate.

Pay attention to people's verbal and non-verbal cues. Know when to back off. Know the rules within your organization.

Have common sense.

Before you speak, think, "Is this really appropriate for the workplace?" We are not saying that you censor yourself to the point that you become mute, but make that extra effort to think before you speak.

Apologize.

If you speak or behave in a way that is inappropriate, apologize and make an effort to ensure it does not happen again.



What If It Happens to Me?

What Works and What Does not?

Strategies That Do Not Work

If someone is harassing you, here are some things not to do.

Ignore or avoid the harasser

This is an approach many people take because they think it is the least harmful. It is actually more harmful: the victim suffers in silence and the problem does not get resolved.

Try to appease the harasser

Some people will change their appearance or dress in an attempt to deflect attention from themselves, or they may joke about the harassment. Neither approach works.

Comply with the aggressor

For most harassers, harassing is a power struggle. Once you give into one demand, they will push for more.

Aggression

Cursing, yelling, or otherwise abusing your harasser does not resolve anything. It makes you look out of control and shows the harasser that they do have power over you. It can also put you at risk for violence.

Strategies That Do Work

Verbal confrontation is one of the strategies that has been proven to work. In life-threatening situations, physical confrontation (such as martial arts or self-defense tactics) is acceptable. For most situations, try this seven-part plan.

(Adapted from Dr. Peter Rutter)

Give verbal notice

Tell the harasser what they are doing is not acceptable immediately in a calm, unemotional tone of voice. A statement like, "Get your hands off my butt," is firm, assertive rather than aggressive, and non-negotiable. You should also start keeping a written record of events, times, dates, and people that witnessed the events. Even if the issue is resolved at this first step, you need to document what happened.

Give stronger warnings and notice that you will report the harasser

If the harasser continues his/her behavior, repeat the first step but make it stronger. Something like, "I have already told you to stop touching me. If you do not stop, I will report you for harassment," repeats the original message, and is still assertive and non-negotiable. Make sure you keep your tone of voice calm and unemotional.

Issue written warnings and keep a record

Write the person an e-mail or letter and send it to them. This letter should be done the same way the other warnings were: firm, assertive, and non-negotiable. It should restate the points you made in your verbal warnings. Make sure you do not threaten the harasser; stay as unemotional as possible. Also make sure you keep a copy of these letters for your records.

Make an informal harassment inquiry

If you have been unable to deter your harasser, or if you feel that there is serious risk in confronting your harasser (such as being physically harmed or losing your job), go to your manager, your company's Human Resources department, or the company's harassment officer. They will typically give you their opinion about the claim: whether it is more or less serious than the complainant perceives and what options s/he has next.

Be aware that this step may place your complaint on record. And, no matter what the outcome of this meeting, be sure to record its details and add it to your log of events.

Make a formal complaint in the organization

This step turns the complaint into a formal process. Both parties (the complainant and the alleged harasser) have a lot at stake here: their reputation, their job, and possibly their career. If you have events documented and recorded, you will feel a lot more secure in raising a formal complaint.

However, be aware that this step will probably bring the issue to the attention of your co-workers. Investigators usually try to maintain your privacy as much as possible, but they will likely need to talk to your co-workers to confirm events.

The process of raising a complaint is not always a bitter and prolonged one. Sometimes the harasser and the complainant can meet to discuss the incident(s) and come out with a better understanding of each other and what happened. If your harassment issue has not been resolved by the first four steps, this will be the last opportunity to resolve it in-house.

Make a formal complaint with the government

In most countries, there is an agency that governs against harassment and discrimination. You should consult with an attorney before filing a complaint with this organization or agency. Some areas have time limits; the Equal Employment Opportunity Commission in the United States, for example, requires filing no later than 180 to 300 days after the alleged incident, depending on the state where you live.

Go to court

If your workplace and the governing agency have both been unable to resolve the issue to your satisfaction, the last recourse is a harassment lawsuit. These are often expensive, time-consuming, and emotionally painful. Make sure you have exhausted all options before you take this step.

SAYING NO

Many of us have a tough time saying no. Sometimes, we are not sure how to say no even when we are being harassed or threatened.

There are three steps to a good NO.

- Stay calm. Keep your hands at your sides.
- Speak firmly but at a normal volume.
- Say "No." If possible, add the behavior you want them to stop, but do not add feelings, justification, or padding.

What If It Is Happening to Someone Else?

There will often be situations where a manager thinks or knows that harassment is occurring, but a complaint has not been filed. Or, an employee may come to the manager, and they may determine together that harassment is occurring, but the employee may choose not to file a complaint. The manager may even be hearing repeated gossip about harassment.

There are many reasons why a harassment victim may choose not to file a complaint. They may be afraid of their harasser, they may be worried about career implications, or they may worry about what their co-workers will think. Perhaps they cannot face the stress, or are embarrassed or ashamed.

If a manager knows or thinks that harassment is occurring, they are obligated to face it. Even if the only proof they have is rumors, they must still investigate it.

If the harassment has become known to the manager through gossip or some second-hand means, the manager should speak to the alleged victim. This should not be an interrogation or a meeting specifically about the harassment; it can be a general catch-up, "How are you?" sort of meeting.

If the manager has some sort of evidence that harassment may be taking place, then s/he should initiate a formal complaint. The incident can then be investigated and dealt with under normal procedures. The investigator should send a letter to the victim detailing the complaint and the process that will be followed.

Remember, it is always best to err on the side of caution. Turning a blind eye to a potential harassment problem can open your company up to lawsuits.

Someone Has Filed a Complaint Against Me!

If you are in the situation where someone has filed a complaint against you, do not panic. There are several steps that you can take to deal with the situation appropriately.

Get a lawyer

You need professional advice to help you determine what your workplace rights are and your legal rights. Seek out a lawyer who specializes in employment law or harassment law. (If you are a member of a union, you may be able to receive assistance through this group.) Although this may require an initial investment of time and money, it will likely save you much stress and heartache.

True or false?

Take some time and think about the accusation against you. Most accusations have some grain of truth in them; the conflict lies in the interpretation of behavior. Try to write down the events that may affect this case. Include the date, time, witnesses, and your description of the event.



Do not contact your accuser

Never, ever attempt to speak to your accuser directly. This can make things much worse; you may be perceived as trying to intimidate or silence him/her.

Use the opportunities given to you

Do your best to be professional, unemotional, non-defensive, cooperative, and rational during the process. If mediation is offered, accept it (as long as your attorney thinks it is a good idea). Being angry and vindictive will not accomplish anything, and it may sway the outcome against you.

Get psychological support

Being accused of harassment is not fun for anyone. Make sure you have a system of friends and family that knows what you are going through and who support you. You may also want to consider professional therapy to help you address this situation and the influences that led to it. For some people, a crisis like this forces them to address long-standing issues and in the end, helps them improve their lives and themselves.

Addressing a Complaint

No matter how proactive you are, employers may receive a harassment complaint at some point in time. Most harassment lawsuits result from complainants feeling that their complaint was addressed improperly or unfairly, so it is important that the complaint be dealt with appropriately from the very beginning. There are four key components to this.

Act quickly

It is very, very important that a complaint be dealt with as soon as it is filed. As time goes on, details and evidence may be lost. Worse, the harassment may continue, and the employer may be seen as creating a hostile environment where harassment is acceptable, thereby increasing the employer's liability.

Acting quickly also sets the right tone for the entire process. It shows everyone that the employer takes harassment seriously and that harassment will not be tolerated.

Act fairly

You must resist jumping to conclusions or making a decision. It is very easy to be influenced by past events, personalities, rumors, and personal perceptions. Anyone who is involved in the complaint process must be completely unbiased and fair to both parties.

Set the wheels in motion

Once a complaint is filed, start the process. Make sure that someone is assigned to keep everyone involved informed about what is going on. This is particularly important for the investigation stage. This stage can take days or weeks or even months, and it is important that someone touches base with both the complainant and the respondent to let them know the complaint is still proceeding.

Thank the complainant

Taking the time to say, "Thank you for bringing this issue to my attention," shows that you want to address issues that arise.

Handling False Complaints

We have discussed false accusations a bit throughout this workshop. However, it is worthy of its own small session. First, let's define a false complaint. We are not referring to an accusation that turns out not to be a harassment issue. We are referring to a complaint that is made specifically to harm the respondent: to embarrass them, to damage their career or reputation, to get them fired, or to get revenge for something the respondent did.

If someone comes to you to discuss a harassment complaint or files a formal complaint, it is crucial that you be open-minded and not judge whether the complaint is true or false. It is essential that the process proceed as normal: through filing a formal complaint to the investigation stage.

At the investigation stage, the investigator should be made aware that this is potentially a false claim. Then, they can perform a preliminary inquiry and present evidence to the decision maker, so that a decision can be made whether the complaint appears legitimate or not. It is also recommended that the decision maker and/or investigator consult a lawyer.

You must be very, very careful and very, very sure when determining whether a complaint is false. If the complaint is indeed false, roles are reversed. The complainant will have the same action against them as if they were the harasser. The respondent may be entitled to some of the same compensation as a harassment victim would be: an apology or even damages.

Mediation

Basics of Mediation

About Mediation

What is mediation?

Mediation is a way to resolve conflict. The two parties meet with a neutral third party to discuss issues and come to a resolution.

When is mediation effective?

When the claimant speaks to the advisor, supervisor, or Human Resources person and decides to file a complaint, mediation may be offered as a way to achieve a resolution. Although mediation is typically not recommended for sexual harassment cases, it can be effective for other types of harassment.

What are its advantages and disadvantages?

Mediation can be very empowering for both parties, as they have a say in how the matter is worked out. It can also be less traumatizing than a formal investigation process and much more private. It typically takes far less time and resources to perform mediation than to perform a full-scale harassment investigation. Most importantly, it can be a

learning experience, so that the behavior that caused the issue is addressed and modified. As well, relationships can be preserved and even strengthened, which is typically not the case with a formal investigation.

When should mediation be used?

Mediation can be used when the people involved in the conflict want:

- A quick resolution
- A say in the process and the outcome
- To maintain a working relationship
- To be heard but do not want an investigation

When should mediation not be used?

Mediation can only be effective if both parties are open to it. Therefore, if one party declines mediation or requests investigation, then the process must proceed to that stage.

You should also not use mediation if:

- A clear decision on the matter is more important than a quick solution
- There is an extreme imbalance of power
- There is clear evidence that the complaint is malicious
- Events took place too long ago, with no valid reason for the delay

Who should be involved?

Both the respondent and the claimant need to be part of the mediation. Other people key to the events (for example, a manager who witnessed the harassment and did nothing), union representatives, and company representatives may also need to be present.



CHOOSING A MEDIATOR

There are two types of mediators that you can choose.

Internal Mediator

Advantages	Disadvantages
<ul style="list-style-type: none"> • Cheaper 	<ul style="list-style-type: none"> • May be seen as biased
<ul style="list-style-type: none"> • Quicker 	<ul style="list-style-type: none"> • May be reprisals for mediator
<ul style="list-style-type: none"> • More familiar with company 	<ul style="list-style-type: none"> • Not a professional

If you choose to use an internal mediator, make sure that person has received training. You should also make sure that the company draws up a job description for a mediator, outlining skills and knowledge requirements, as well as key principles such as confidentiality and fairness. And, of course, the mediator that you choose must not have an existing relationship with any of the parties involved in the process, and those parties must accept the mediator.

External Mediator

Advantages	Disadvantages
<ul style="list-style-type: none"> • Typically well-trained 	<ul style="list-style-type: none"> • Can be costly
<ul style="list-style-type: none"> • May be seen as fairer and better accepted by parties 	<ul style="list-style-type: none"> • Unless you have used them before, may be risky (no guarantee of skill)
<ul style="list-style-type: none"> • No risk of reprisal for mediator 	

Choosing an external mediator is a good idea when choosing a fair internal mediator is difficult; for example, when someone high up in the company is part of the harassment complaint. Make sure the Human Resources department interviews the mediator and asks questions about their training and experience. You will want to see an outline of the process that they use. And, make sure that you both have the same expectations for fairness and confidentiality.

The Mediation Process

Step One: Preparation

Before the mediation, make sure both the respondent and the complainant have:

- Received copies of each other's statements
- Agreed to participate in mediation
- Agreed upon a mediator
- Agreed to a set of ground rules (such as confidentiality)
- Agreed upon parties present during the mediation
- Received information about mediation
- Been briefed on the company's harassment policy

The mediator must:

- Review the complaint, the response, and any other documents
- Ensure that mediation is appropriate for this case and these parties
- Ask the complainant and the respondent to sign a mediation contract, laying out the ground rules and confirming their commitment to mediation
- Plan on how to deal with issues that arise (such as power imbalances or breaking ground rules)
- Review past harassment cases that may set precedent
- Arrange a neutral, private, interruption-free location for mediation to be held
- Ensure proper supplies are available (flip chart, refreshment, break room)

Step Two: The Meeting

There are three ways that mediation can take place.

- Face-to-face
- On the telephone
- With the mediator as intermediary, going back and forth between the two parties



Typically, the face-to-face meeting is the most effective. However, if one of the parties expresses interest in mediation but is uncomfortable meeting with the other person face to face, the other options may be investigated or offered.

The mediation meeting usually starts with an opening statement by the mediator. The mediator will:

- Go over the mediation and complaint process
- Explain the purpose of the meeting
- Explain the role of the mediator (neutral party who is there to help reach a solution, not to advise or decide)
- Emphasize the importance of confidentiality
- Review the ground rules

Next, each party will give their version of the conflict. It is crucial that they be allowed to do so without interruption.

Step Three: Resolution

Once all the information has been presented, the mediator should start a discussion of the parties' needs and interests. What do they want to see as a solution? The mediator can also make suggestions for settlement, but s/he should emphasize that this is just a suggestion, not a decision. Through this process of back-and-forth negotiation, hopefully the two parties can arrive at a solution that meets both their needs. (See Session Seventeen for some possible outcomes to a complaint.)

If a solution can be reached, it should be written out in a formal contract. This contract should state that both parties accept this as a resolution to their dispute. It should lay out the steps to be taken, including follow-ups if necessary. Both parties should sign and date the contract.

What if a solution cannot be reached? It does not necessarily mean that the mediator was unskilled, or that the entire meeting is a failure. There are many reasons why mediation may fail. If this does happen, it is important not to blame anyone. Simply explain that this means that the complaint must move to the next stage of the process: investigation.

How to Document Mediation

During the meeting, the various participants may make notes. These should be destroyed once the meeting is over, whether or not a resolution is reached. This is crucial to maintain confidentiality, as parties will not feel very safe if there are written notes about their mediation process. The only record of the mediation in the complaint file should state that mediation was attempted on a particular date, with the names of the participants.



ROLE PLAY

Scenario One

Charles, the office manager, has a habit of calling his female employees “sweetheart.” One of his staff, Sharon, filed a complaint and it has proceeded to mediation.

Scenario Two

Bill has always displayed a sexually explicit calendar on his wall. His secretary, Joan, finds it offensive. Although she has asked him to remove it, he has refused.

Scenario Three

Sarah tends to give instructions to her staff by yelling. Sam, one of her employees, has filed a complaint of verbal harassment.

Scenario Four

Karen was in a meeting with her five employees last week to discuss a new sales plan. Tony, one of her employees, raised a possible issue with the plan. She glared at him and said, “Do you value your balls? What about your job? Because I can remove both of them.”

Scenario Five

Lisa and Bill were on a business trip last weekend. They had dinner together at the hotel, during which Lisa talked openly about her private life and repeatedly touched Bill’s hand. He feels very awkward now that they are back in the office. He has asked for mediation to help resolve the issue.



Investigating a Complaint

Setting up the Investigation

When to Investigate

Once a complaint has been filed, it typically proceeds to the investigation stage, unless mediation has been requested. (If mediation fails, then events proceed to this stage.) It is usually recommended that all complaints are investigated to protect the rights of everyone involved.

There are, however, several situations when it is acceptable to choose not to proceed with a full investigation.

- If a complaint is filed years after the events, as evidence will be very hard to come by and the respondent will have a difficult time making a defense. The reasons for delaying must be looked at carefully.
- If a complaint (even if it were true) is not harassment.
- A complaint that has been clearly made to embarrass, annoy, or cause difficulty for the respondent.

Before choosing not to investigate, the investigator must at least do a preliminary review to see if any of these conditions are met. (It is probably a good idea to seek legal advice as well.) You must consider this decision very carefully; if the complainant does not agree with the decision not to investigate, then the matter may be taken outside of the company.

Choosing the Investigator

Choosing the investigator is crucial to the success of the entire complaint process. The investigator's role is to conduct or supervise a thorough, fair investigation. They must document the investigation and prepare a report summarizing the data gathered.

It is suggested that the Human Resources department identify a pool of competent investigators. In addition to having the qualities listed below, the pool should be composed of a group of both men and women from a variety of age and ethnic groups, and at different levels in the company. This way, when a complaint is filed, someone not related to the investigation can be chosen.

An investigator should have these qualities:

- Competent
- Fair-minded
- Reputation for integrity
- Attention to detail
- Capable of documenting facts and preparing reports
- Good interviewing skills

- Thorough knowledge of harassment issues, procedures, and laws (specialized training may be required)
- Familiar with organization's policies and procedures
- Experience in investigating employee complaints

In some situations, you may need a lawyer or outside consultant to investigate.

The Investigation Plan

Like mediation, the investigation should also have a detailed plan. The plan should include:

- Background of the case
- Positions of the parties
- Issues of the case
- Evidence that needs to be obtained
- People who need to be interviewed
- Places that need to be visited

This plan should be revised and updated as the investigation proceeds to ensure it does not get off track. All documents related to the investigation need to be neatly organized and compiled into one file.

Here is a sample list of some issues often raised in sexual harassment cases (as identified by harassment expert Lynda Ackroyd):

- Was the delay in filing the complaint reasonable?
- Does the evidence indicate that the complainant was subjected to harassment by the respondent?
- Did the respondent engage in the behavior complained of?
- Did the respondent know, or should they have known, that the behavior was unwelcome?
- In the case of alleged solicitation, was the respondent in a position to grant a benefit to the complainant?
- Were there detrimental consequences to the complainant? If so, what were they?
- Does the evidence indicate that those in authority condoned harassing behavior?
- Does the evidence indicate that there is a poisoned environment for women in the department/organization?

THE INVESTIGATION PROCESS

Once the plan is in place, the investigation can begin.

Gathering Evidence

There are several types of evidence that may need to be gathered:

- Witness evidence (direct witnesses and those who may have experienced events similar to the complainant)
- Documents (such as letters, telephone records, and financial records)
- Physical evidence (for example, gifts)

Witness Evidence

Harassment expert Lynda Ackroyd has compiled an extensive list of those people that the investigator should interview. This list includes:

- Complainant
- Respondent
- Witnesses (direct and indirect, as explained earlier)
- Other people who have been in a position to evaluate complainant's work performance
- Someone who can answer questions about standard practice in the workplace
- If delay is an issue, those to whom the complainant spoke about the issue (such as a family member or doctor)

When interviewing witnesses, make sure you record:

- Full first and last name
- Social security number (if applicable)
- Contact information (home address, telephone number, e-mail address)
- Job title
- Representatives present
- Name of interviewer

- Date of interview
- Start and end time of interview
- File name or case number

Anyone who is interviewed during the process (claimant, respondent, or witnesses) has the right to have someone accompany them during the interview. This person can be a friend, a colleague, a lawyer, or a union representative. It should be someone who does not have any personal involvement in the complaint. Note that any legal expenses incurred during the interviewing process are not typically covered by the employer. This should be made explicit to anyone bringing legal counsel.

It should also be made absolutely clear to everyone involved that there will be no consequences for filing a complaint (as long as the complaint is true) or for being part of the complaint process. Many people, particularly witnesses, do not get involved in harassment issues because they feel it is easier to stay out of it. It is important for them to realize how important their part is in the complaint process.

It is crucial that a designated person (such as a close supervisor or Human Resources) monitors those involved with the complaint procedure after a decision has been made, to ensure that their careers and lives have not been adversely affected by the process.

Unfortunately, strict confidentiality cannot be promised to harassment claimants. Information will, of course, be kept as private as possible. However, there are some instances where details will need to come out. The respondent, for example, will need to know who the claimant is and the details of the alleged incident. Otherwise, they would not be able to defend themselves properly. As well, the investigator may need to reveal the claimant's name during the investigation. For example, they may talk to a person who worked with the claimant and respondent, and ask a question like, "Did you witness Bob yelling at Susan at any time?"

All parties in the complaint process must be aware that information can only be distributed on a need-to-know basis. In the example just mentioned, the investigator would want to tell the witness that their conversation is not to be shared with anyone.

Documents

The investigator must review the complaint and the reply from the respondent (if one has been made). The investigator should also review:

- The personnel files of the complainant and the respondent, including discipline records
- Business correspondence that is relevant to the allegations
- Personal correspondence
- Telephone records (if relevant/available)

Location Evidence

If possible, the investigator should visit the site where the alleged incident(s) took place. This will help them visualize the events and take into account the environment of the incident(s). The investigator should try to do this as inconspicuously as possible to help maintain the parties' privacy and confidentiality.

The Manager's Role during the Investigation

Often an investigation takes days or weeks, sometimes months. During this process, time does not stand still. Work continues, and in situations where the respondent and claimant work together, this can be particularly tricky. Above all, stay impartial and do not comment on the process. If either party asks you how the process is going, refer them to the proper individual. It is also essential that you not treat either party differently based on the fact that there is a complaint in process. For example, let's say you manage salespeople and you give the respondent bad leads as punishment. It is later determined that the claim is invalid; the respondent is actually innocent. Congratulations: you have just opened yourself up to a lawsuit.

Above all, do not share information about the process with anyone. Confidentiality is crucial.

Although you cannot treat staff differently based on their involvement in the process, you should be willing to make accommodations. You will need to separate the complainant and the respondent so that they no longer work together and do not have contact during the day. If this is possible, make sure you monitor the health of both employees. You may want to offer counseling and support services (preferably off-site).

If separating employees is not possible, paid time off for both people may be necessary until a decision is made.

THE INVESTIGATION REPORT

Creating the Report

Once the investigation is complete, it is time for the investigator to prepare a formal report. Your report should be concise; its purpose is not to relate all the facts of the case but rather to summarize them. It should also include a conclusion.

Harassment expert Lynda Ackroyd has provided a helpful breakdown of the parts of the investigation report.

- **Introduction:** Summarize allegations, reply, and background information.
- **Background:** Quote portion of company's harassment policy that has allegedly been breached.
- **Overview:** Summarize scope of investigation (length, number of witnesses interviewed, what documents were reviewed).
- **Discussion (main body):** Organized by issues presented in investigation plan. After each issue, detail witnesses and documents that relate to it.
- **Conclusion:** State whether or not the evidence indicates that harassment occurred in violation of the company's policy.

Tips:

- Refer to witnesses by a letter or number (Witness 1, Witness A), rather than by name.
- Some companies also want the identities of the complainant and the respondent shielded. If this is the case, use those terms rather than their names, and identify the parties on a separate page of the report.
- Ensure you stick to the facts and not your feelings or opinions.

The report should:

- Help the decision maker reach a solution
- Provide a description of the nature and significance of the evidence to help the parties understand the outcome
- Provide evidence of how the organization handled the complaint (Competently? Diligently? Timely? Carelessly?)

WHO SHOULD SEE THE REPORT?

The complainant and the respondent both have a right to know the results of the investigation. This can be done verbally or in writing (with either a summary of the results or a copy of the actual report). This decision is typically made by the decision maker.

Verbal Sharing

Advantages	Disadvantages
<ul style="list-style-type: none">• Reduces risk of confidentiality breach	<ul style="list-style-type: none">• Chance that the two sides will receive different information or that a crucial point may be missed
<ul style="list-style-type: none">• More personal	<ul style="list-style-type: none">• Person may not fully understand the information or have time to process it
<ul style="list-style-type: none">• Gives person a chance to ask questions	<ul style="list-style-type: none">• Gives person a chance to criticize process or investigator or messenger

Written Sharing

Advantages	Disadvantages
<ul style="list-style-type: none">• Reduces risk of information overload, missed information, or misinformation	<ul style="list-style-type: none">• Bigger chance for confidentiality breach
<ul style="list-style-type: none">• Recipient has a chance to review information and ask informed questions later	<ul style="list-style-type: none">• Witness reprisal is possible if given full report (witnesses may be identified by statements)
	<ul style="list-style-type: none">• Less personal



What Information Should Be Shared?

It is suggested that unless serious disciplinary action is being considered, the recipients should receive only a summary of the findings rather than the entire report. They should have enough information to help them understand the decision that will soon be made. They should also have enough information to reassure them that the investigation has been fair and complete.

Who Should Share This Information With the Recipients?

There are several options. The investigator can convey the information, as they are most familiar with the evidence. However, this can open the investigator up to criticism and abuse.

The supervisors of the complainant and the respondent can also communicate the information. They may be seen as more objective as they did not perform the investigation. As well, the decision maker can share the details of the report when the decision is made.

Making the Decision

Who Makes the Decision?

Once the investigator has completed their investigation and prepared a report, this report and all documentation is turned over to a sole decision maker.

Like the investigator, the decision maker must be someone unaffiliated with the claimant, respondent, and preferably all witnesses. They certainly cannot be friends with any of these parties, nor can they be a colleague or supervisor of the parties.

The decision maker should also be:

- In a senior position with recognized authority (so that employees see this decision as one made by the organization)
- Knowledgeable about harassment issues and policy within the company
- Demonstrably dedicated to preventing and eliminating harassment

In some organizations, this decision is made by a panel of people.

When Should a Lawyer Be Involved?

It is never a bad idea to obtain legal advice when making a decision about a harassment complaint. However, you definitely must seek legal counsel if:

- You are considering significant disciplinary action, such as demotion or termination
- The complaint has been escalated to a government agency or the police

- Personal safety may be an issue
- A monetary settlement is being contemplated
- Allegations are complex or controversial

If you are in doubt, spend the money and seek legal counsel.

Creating Solutions

To Fix or To Punish?

When deciding on a solution, there are two avenues that one can take. You may decide that **remedial action** (such as harassment workshops or anger management courses) is the best course to take. This route offers the possible benefit of people learning from past mistakes and potentially seeing the experience in a positive light.

The other avenue is **punitive**. In this case, the harasser must pay for their actions via monetary means or disciplinary action. Punitive action alone is typically not sufficient; your goal should be to help the person understand what they did wrong and how not to do it again, rather than simply instituting revenge on behalf of the victim.

Of course, these two routes can be (and often are) combined.

OUTCOMES FOR THE COMPLAINANT

In many harassment cases, there is a set of outcomes that the complainant typically desires. These should be considered during mediation and decision-making processes. They can include:

- Apology
- Counseling
- Leave of absence
- Financial compensation
- Transfer out of the office
- Reversal of decision or reinstatement (for example, if the complainant was not given a promotion because they would not go on a date with the respondent)
- Purging of files (such as negative evaluations or disciplinary records that were impacted by harassment)
- Referral to police



Regardless of the solution decided upon, it is essential that the complainant understands that there will be no reprisal for filing their complaint and following it through. You will probably want the complainant to sign a contract stating that this claim has been resolved to the complainant's satisfaction.

OUTCOMES FOR THE RESPONDENT

As we discussed above, it is crucial that the respondent understand the reasons for the outcome of the case and receives help so that the issue does not occur again. Some ways to do this include:

- Education
- Counseling
- Community service

In some cases, punitive measures may be appropriate, such as discipline or termination. The employee may also need to be assigned a different job or transferred out of the office to avoid contact with the complainant. In any case, they may need to be monitored to ensure the rehabilitation has worked.

CHANGES IN THE ORGANIZATION

Often a harassment complaint can reveal weaknesses in the organization. It is crucial that these issues be addressed and remedied so that the employer is not seen as condoning harassment.

Changes that may result include:

- Policy changes
- Additional workshops for staff
- Revisiting prevention strategies
- Staff surveys to ensure other issues are not being missed

After It Is Over

Once the harassment complaint has been resolved, everyone should try to get back to normal. The managers of the complainant and the respondent should keep an eye on them to make sure they are okay.

The organization also needs to decide what information about the process will be shared with staff. Although you do not want everyone reading the investigative report, staff deserves to know the overall conclusion and outcome. For example, a manager could say to their employees: “As you may be aware, there was a recent incident involving some obscene images in the break room. This issue has been dealt with through our harassment policy and the offending person has been terminated.”

This disclosure accomplishes several things. First, it ensures everyone has accurate information, cutting the rumor mill off. Second, it shows that harassment is nothing to be ashamed of. Third, it shows the organization’s commitment to eradicating harassment.

A file should be maintained with all documents related to the complaint, including the initial complaint, the response, the investigative report, witness statements, evidence, and the outcome of the complaint. It should be kept separate from personnel files in a high-security area. Only those with a demonstrated need should be allowed to access the file. This file does need to be kept in case one of the parties files suit in the future.

If the investigative report concluded that harassment had taken place, the events need to be reflected in the respondent’s personnel file, as well as the action that was taken as a result of the claim. If the investigative report concluded that harassment had not taken place, no mention of the claim should be in their file.

Skill Application

Task Preparation

So far, we have talked about the various things that happen when harassment occurs. For this afternoon, we are going to play out that process. It will consist of four stages:

- The initial consultation with an advisor
- The filing of a formal complaint
- An investigation
- The decision

You will be each provided with a case file detailing the situation and the roles that you each must play.

Further Reading:

- ✓ Benjamin, Susan F. *Perfect Phrases for Dealing with Difficult Situations at Work*. McGraw-Hill, 2008.
- ✓ Crichton, Michael. *Disclosure*. Arrow Books Ltd, 2006.
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- ✓ Kemp, Sid. *Perfect Solutions for Difficult Employee Situations*. McGraw-Hill, 2004.
- ✓ Kohut, Margaret. *The Complete Guide to Understanding, Controlling, and Stopping Bullies and Bullying at Work*. Atlantic Publishing Group Inc., 2008.
- ✓ Stone, Douglas, Bruce Patton, and Sheila Heen. *Difficult Conversations (10th Anniversary Edition)*. Penguin Books, 2010.