



**FREE SEXUAL HARASSMENT INVESTIGATION TOOLKIT**

CREATED BY THE STEPTOE & JOHNSON EMPLOYMENT ESSENTIALS BLOG TEAM

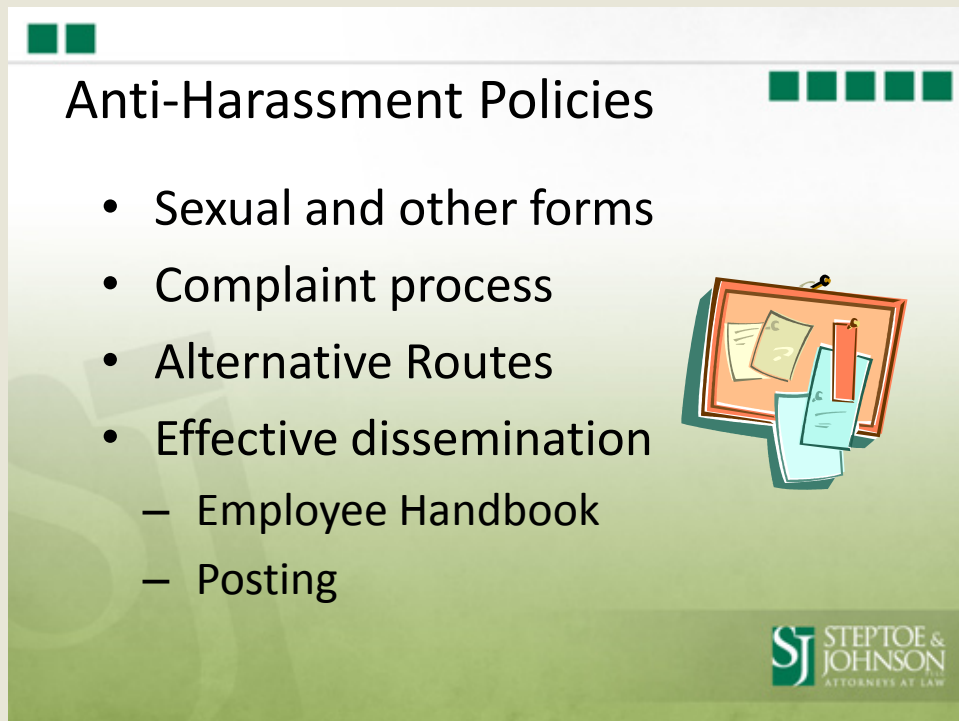


# HOW TO HANDLE A SEXUAL HARASSMENT COMPLAINT

Ah, Valentine's Day! That time of year where our thoughts turn to love. Which in turn makes lawyers think of things like workplace romances turning into sexual harassment. Hopefully, that won't be the case for you and your employees. If, however, you are unfortunate enough to be dealing with such a situation, the following is our gift to you. In lieu of flowers and chocolates, here are a few tips on handling complaints of sexual harassment. These tips can be applied to other forms of harassment or discrimination complaints, so they will stand you in good stead year round.


***Happy Valentine's Day***

From the Employment Essentials Blog Team



**Anti-Harassment Policies**

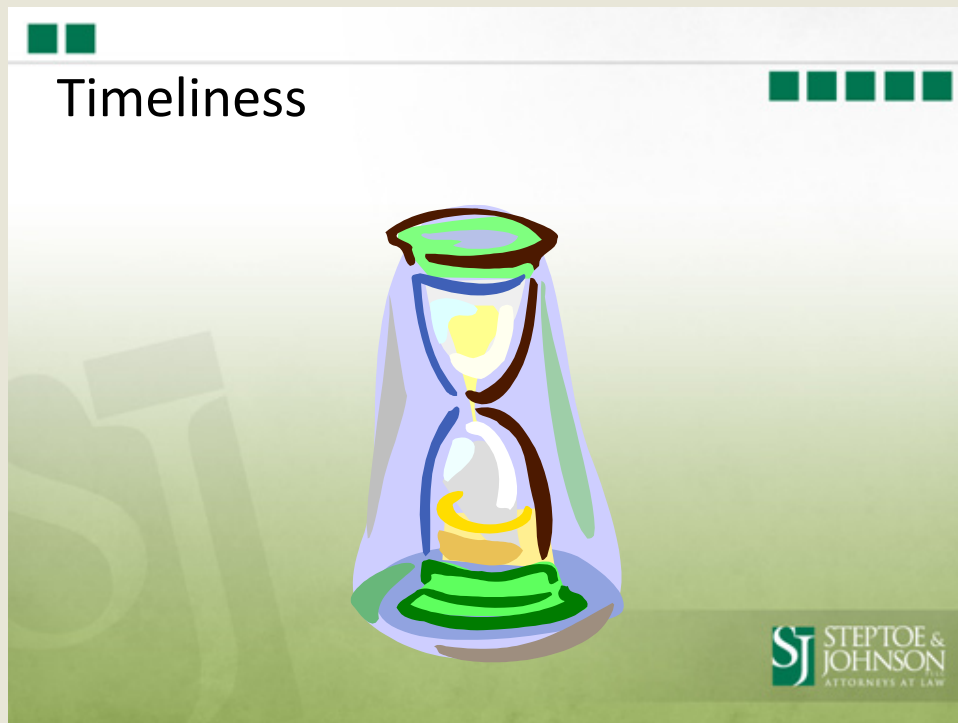
- Sexual and other forms
- Complaint process
- Alternative Routes
- Effective dissemination
  - Employee Handbook
  - Posting



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### Anti-Harassment Policies

- It is important to have a written policy prohibiting harassment and discrimination, not only on the basis of gender, but on other grounds as well (e.g., national origin, disability, etc.).
- The policy should contain a complaint process so that an employee facing harassment or discrimination knows what he or she should do to end it.
- The policy should contain alternate routes for reporting the harassment. If the direct supervisor of the employee is the alleged harasser, your policy should advise employees to seek the assistance of another supervisor/member of management or human resources. Some employers provide 800 numbers that employees can utilize to report complaints.
- Having a policy won't help if your employees don't know about it. Many employers have their employees sign an acknowledgement that they have read, understood, and had the option to ask questions regarding the harassment policy. Posting the policy in a common work area is another method for dissemination. Use of the employer's computer system, whether it be by intranet or email, is another effective mechanism for disseminating the policy and any changes that might be made to it.



## Timeliness

- Again, an employer can create good evidence, although perhaps not always, by jumping on the complaint and doing a thorough investigation. Such an investigation may preclude the plaintiff from alleging that the corporation condoned or ratified the employee's behavior.
- To the extent that the U.S. Supreme Court has recognized an affirmative defense based upon effective remedial programs, an employer must respond as quickly as possible, or it will lose the limited advantage of having appeared to have acted reasonably.
- An employer cannot allow problems to fester. Likewise, memories can grow cold. Moreover, the plaintiff will seek some way by which to get the alleged neglect into evidence.
- While employers should react as soon as possible, steps should be taken to make certain that the investigation is not being conducted in a haphazard fashion. Some supervisor needs to take personal control over the investigation and insure that the rights of all involved are protected.

## Taking the complaint

- Who, What, When, Where
- Witnesses
- Documents
- Outcome / remedy
- Written versus verbal



### Taking the Complaint

- *Who, what, when, where.* At this point, the investigator is acting much as a journalist. He must obtain the essentials of the employee's story. For instance, if the allegation involves sexual harassment, then the investigator should determine who was involved, what was said or done, when the events allegedly occurred and where they occurred.
- While taking the complaining employee's statement, the investigator should inquire of the complaining party as to possible witnesses, whether friendly or con.
- The initial interview with the complaining party may reveal that other individuals have been subjected to the same type of bad behavior. The employer must then follow-up with those employees.
- The investigator should take steps to determine whether any witnesses have been statementized by private or public entities. Also, more generally speaking, the investigator should ask whether there are any documents in existence which would bear upon the employee's allegations.

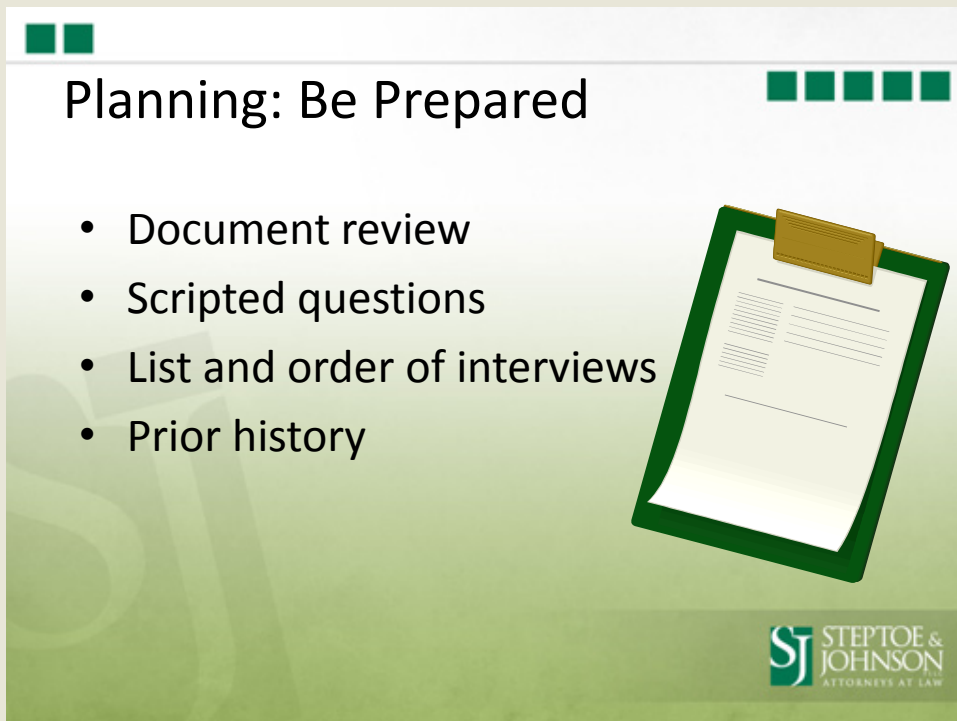
## Selecting the Investigators

- Objectivity and credibility
- Diversity criteria
- Safety in numbers



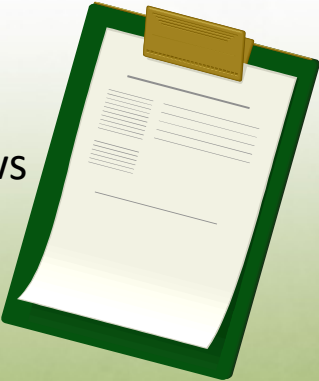
### Selecting the Investigators

- As a general rule, there should be two individuals assigned to do the investigation. The advantage of having at least two investigators is obvious: there will be at least two witnesses in agreement as to what occurred during the interview. Of a two investigator team, one should primarily be the questioner, while the other serves as note taker. The two investigators should be at least equal in rank to the employee being investigated, preferably higher.
- *Gender.* If the composition of the workforce allows, the investigative team should have one male and one female so as to head off arguments of gender bias. It is a common allegation that a male supervisor may not be as sensitive to the plight of a female victim. Likewise, a one male, one female team will preclude arguments of gender bias if the male perpetrator is disciplined. In other words, two females investigating a male perpetrator might give rise to arguments of gender bias. None of this is to suggest that a female could not fairly investigate a male or vice versa.
- Often investigators must interview several witnesses. Those witnesses may even be scattered across several locations. It is important that the continuity of the investigative team be maintained. In other words, investigators should not be rotated on and off of the team. It will be difficult to compare the credibility and stories of several witnesses if there are multiple investigators.
- There are few occasions when an employer has the opportunity to select its witnesses. Often, circumstances do the selecting. In the instance of putting together an investigative team, however, an employer has the opportunity to decide who will take the witness stand to talk about the investigation. Therefore, the employer should give some thought as to whether the investigators will be effective witnesses. Employers should take note of the investigators' poise and ability to communicate.



**Planning: Be Prepared**

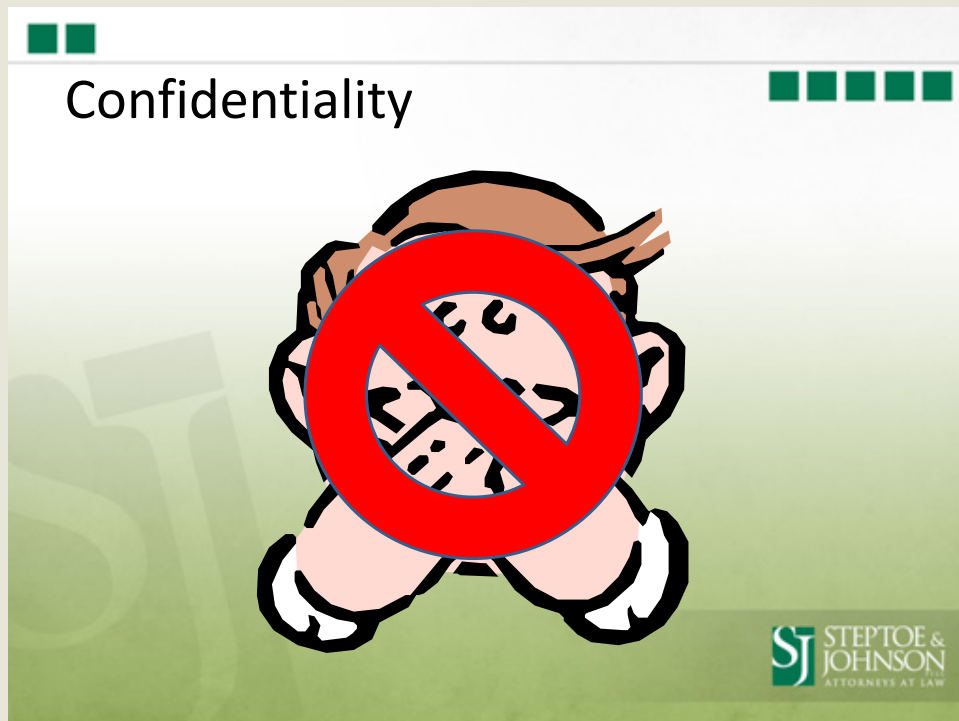
- Document review
- Scripted questions
- List and order of interviews
- Prior history



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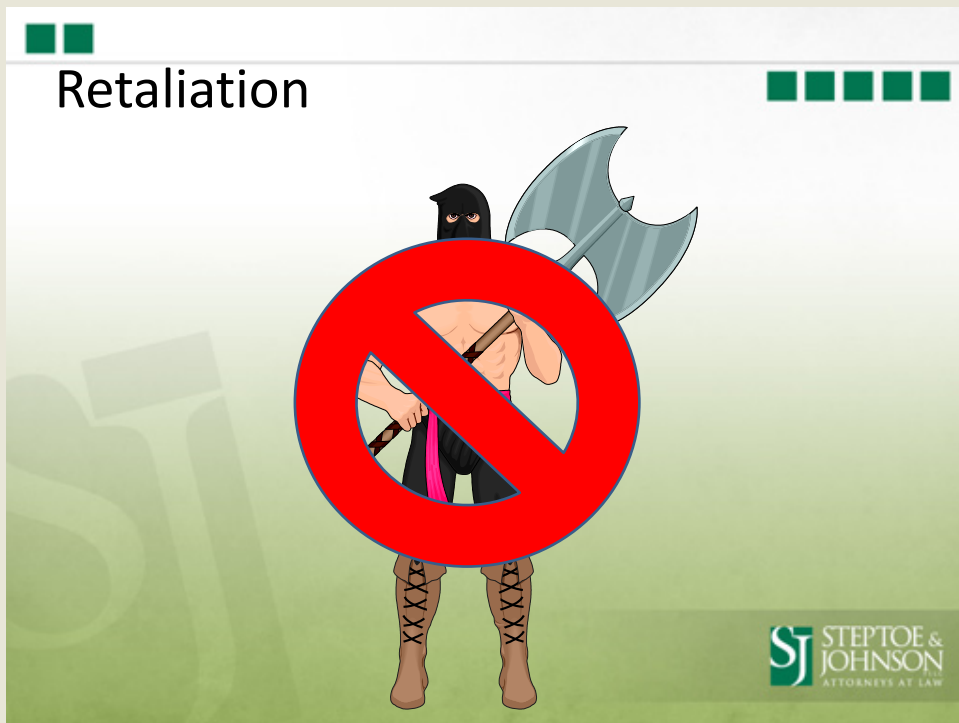
### Planning: Be Prepared

- Get to know the accuser and the accused. Review their personnel files. If your managers keep files, check those out too.
- As a general rule, investigators should refrain from using a script which contains every question written out in detail. Rather, the investigators should be prepared to react to the information provided by the witness. The investigators should maintain the flexibility to ask follow-up questions. Nevertheless, there may be a few questions which are so vital to the investigation that they can be written out to cue the investigators and make certain that the same questions are asked of multiple witnesses.
- *Why would accuser lie?* When relating the allegations to the accused, that simple question should be put to him or her. If there has been a bad history between the two that should be explored by the investigators. Obviously, it is relevant to a charge of sexual harassment that the supervisor has just disciplined the female subordinate. Without suggesting any arguments to the accused, the investigators should probe whether prior history has influenced the accusation.
- *What motive?* If the investigators overlook motive as a factor bearing upon the allegation, they will assuredly hear of that motive at trial. It will not go well for the employer if the accused is exposed as having manipulated the investigators so as to pursue some personal agenda against the accused.



## Confidentiality

- Once an employee makes a complaint, whether it is of sexual harassment or whatever, then that problem is no longer exclusively that of the complaining employee. Rather, the company has a duty to respond to even a hint of a hostile environment. The employer cannot promise, and should not, that a complaining witness will have confidentiality.
- It is a fundamental notion of our due process protections that an accused has a right to face the accuser. Although primarily applicable to a criminal case, the principle has some practical application in a civil case. It is an element of fairness which might influence a jury in a civil case for wrongful discharge.



## Retaliation

- When taking the complaint from a fearful employee, the employer must reassure the employee with respect to retaliation. The employer should instruct the employee that if anyone, at work or away from work, threatens the employee, a prompt report should be made to management.
- It may be that the employer will need to make supervisors aware of the complaint and the remedy provided.

## Interviewing Witnesses

- Outline of Issues
- Introductory Comments
  - Setting Tone
  - Serious Matter
- Witness' Rights and Responsibilities
  - No Retaliation
  - Do Not Discuss





## Interviewing Witnesses

- The investigators should develop a written checklist to use with each witness. This checklist will undoubtedly evolve as the investigation proceeds. There may even be instances when the investigators will have to loop back to earlier witnesses to cover points revealed farther into the investigation.
- The accused should be informed of the allegations against him/her. For one, the accused deserves the opportunity to confront the allegations head on with their own explanation. For another, a jury expects fairness from an employer in an investigation. Much as you've done with the complainant, ask the accused for witnesses or documentation that supports his/her explanation. You should remind the accused that retaliation will not be tolerated.
- Any witness brought before the investigators will undoubtedly be nervous. It is important that the investigators alleviate the anxiety of the witness. One technique is to use verbiage which moves the witness off center stage. "We are here just taking a look at an issue which has arisen." "We will be talking to a number of individuals, and you are just one of them." Another technique is to remove the witness from the role of accuser. "We just want to know what you saw or heard." It is still important to emphasize that the investigation regards a serious matter. If the witness is being difficult, he or she may need to be reminded of his or her obligation to cooperate with management.
- It may be appropriate to remind the witness that they have the right to be free of any retaliation. Typically, this admonition will be given at the end of the interview. Investigators should not open with telling the witness that he or she will be protected from retaliation, as this just introduces the idea to the witness that what they have to say might call for retribution. The thought may not have occurred to them. Likewise, it may not be appropriate to unduly alarm the witness at the conclusion of the interview by reminding the witness of his or her right to complain about retaliation by co-workers or whoever.

## Interviewing Witnesses (cont'd)

- Gossip
- No Retaliation, No Interference
- Other counsel



## Interviewing Witnesses (cont'd)

- Any investigation will stir a lot of gossip and comment within the work place. The investigators should do what they can to reduce the amount of idle talk. While the NLRB has recently come down hard on employers for prohibiting discussions of investigations, telling the witness you would appreciate it if he or she did not discuss the matter, although you will not prohibit it, seems prudent still.
- If the accuser or accused has retained counsel, it may be appropriate to notify the witness that he or she could be approached by an outside agent. If the witness is a management employee, he or she can be instructed not to speak with outside counsel. If the witness is an hourly employee, however, the employer must refrain from putting the witness off limits to an outside counsel. The witness can be reminded of his or her right not to speak with outside counsel, and that it is the company's preference that interviews be conducted with the company's lawyer present.
- Just as the employer cannot promise confidentiality to accusers, nor can promises be made to witnesses. Sometimes a witness will volunteer to speak if information is held in confidence. Investigators should respond that they cannot absolutely promise confidentiality.

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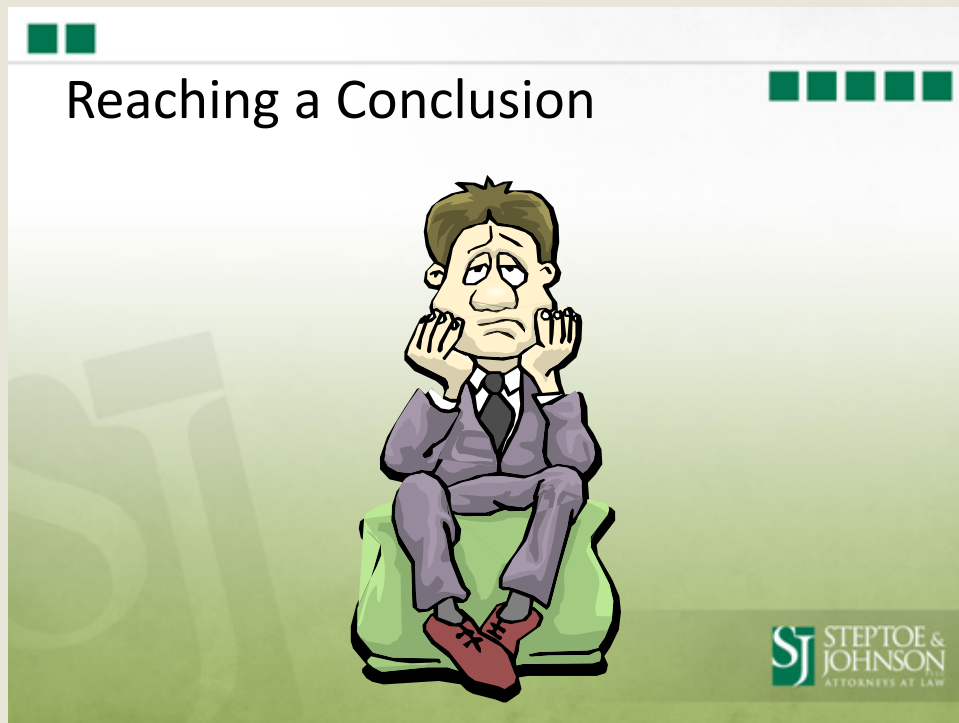
**Assuring Completeness**

- ✓ Additional interviews?
- ✓ Further document review?
- ✓ Full opportunity to respond?
- ✓ Balanced approach?

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### Assuring Completeness

- Make sure you've come full circle and spoken with everyone you need to. At trial, you can be sure that you will be asked why you left someone off your list. The same goes for following up when new questions or issues come up.
- Make sure you've looked at all the documents or other physical evidence necessary to a fair investigation.
- Follow thru with your accused and your accuser. Have they had the chance to respond to everything?
- If someone is looking at this with 20/20 hindsight, does your approach appear fair?



## Reaching a Conclusion

- If you are part of the investigative team, you do need to reach a conclusion.
- It should be supported by the evidence you've gathered and the credibility determinations that you have made.
- You may not be able to corroborate the allegations. Typically, we suggest that you reinforce the policies with the accused and document that you've done so. Then, you go to the accuser and explain that you were unable to corroborate, but if additional evidence arises, or retaliation occurs, or the behavior starts again, to come back to you.
- The investigative team may be charged with suggesting how the matter should be dealt with in light of the conclusion it reaches. The possibilities are many and may not depend entirely on whether the allegations are corroborated. For instance, the team may recommend that the accuser and the accused be separated, regardless of the outcome. Such a decision comes with its own set of risks, so you may want to seek the advice of counsel before considering reassignment of either party. The team should look to past practice and how similar circumstances (if any) have been dealt with in the past if discipline will be meted out.

## Written Report and Analysis

- Summary of Investigation
  - Allegations of Principals
  - Documentation
  - Summary of Interviews
- Assessment
- Recommendation

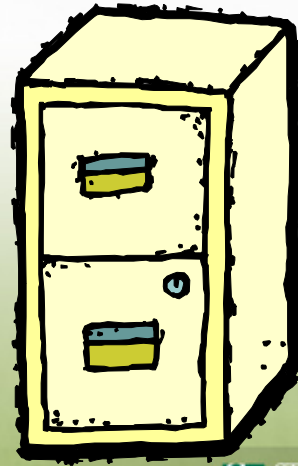


### Written Report and Analysis

- For any involved investigation of alleged serious wrongdoing, there should be a written summary of the investigation. Include the allegations of the principals, describe the documentation pertinent to the allegations and include a summary of interviews. This report will serve as proof positive that the company took the allegations seriously and conducted a thorough investigation.
- *Assessment and Recommendation.* The investigative team is, to a certain extent, judge and jury. It will need to assess the evidence and make a recommendation to upper management. Depending upon the culture of the company, this recommendation may include a proposal on discipline. More typically, the investigative team will issue a conclusion as to whether the charged conduct occurred.
- If they discharge a male employee for “sexual harassment,” they may be admitting liability to a female victim. There is undoubtedly a tension between “this case” and “the next one.” The best that an employer can do is to be honest and play the matter “straight up.” That is, an employer should not become so preoccupied about building a case against the discharged employee that it loses sight of how the alleged victim might utilize that evidence in her own case. Likewise, an employer cannot downgrade the misconduct of a harassing supervisor for fear of inviting a civil suit by an hourly employee.
- In compiling any report, the investigator or human resources’ professional should avoid buzz words. For instance, “sexual harassment” is an often used, quite vague and very little understood concept. Rather than using this generalization, which contains a legal conclusion, the writer should use terms such as “unprofessional,” “inappropriate,” or “in poor judgment.” Likewise, the employer should not confess judgment in the report. The report should not contain language stating that “the company is at fault,” or “clearly liable.” Those matters will be left for a later day and, if necessary, a court of law.

## Final Documentation

- Follow-up with parties
- Assessment of remedial action
- File investigative materials separately



### Final Documentation

- You need to circle back to the complainant to let him/her know that the matter has been handled. You do not need to be completely specific as to the discipline meted out. However, you should tell the complainant to report any recurrences to you immediately.
- The legal goal of the investigation is to have provided effective remedial action. In other words, you addressed the behavior, it stopped, and it never recurred. This means that you should follow up with the complainant some time down the road to make sure no additional problems have surfaced.
- All along you have generated documentation of your investigation, whether you have obtained statements from witnesses, the notes of the investigative team's meetings, or the final conclusions. These materials should be maintained in a separate file should they be needed for future litigation.

## EMPLOYMENT ESSENTIALS

### Labor and Employment Law Blog

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Employment Essentials is a labor and employment law blog written by the Labor & Employment team at Steptoe & Johnson PLLC.

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