



McGrath
SUCCEED



Sexual
Harassment



Bullying



McGrath
CyberSchool

Complaint Management and Investigation: Do It Well or Pay the Price!

By **Mary Jo McGrath, Attorney at Law**
Founder, McGrath Systems, Inc.

It's a whole new day and age. What used to be tolerated is no longer tolerable. The law has stepped in with steel jaws to clamp down on the issues of workplace discrimination that include race, national origin, religion, age, disability, sex, gender, and sexual orientation. Sexual harassment suits alone are now regularly drawing multi-million dollar awards. These are issues whose day has come with a vengeance and you and your organization need to get on the intervention train or prepare to be run over.

Growling's Not Enough

Some old habits die hard and one of them seems to be a belief by a number of managers that if they "bark" loudly enough the problem will go away. I was recently told by a school superintendent that he didn't want to spend the money for an investigation. He intended to call the guy in, look him straight in the eye, and tell him he'd be "dead meat" if he ever did anything "like that" again. The school district and the superintendent were subsequently sued for several million dollars for failure to properly investigate.

Why The Old Ways Don't Work

The old ways don't work in the area of workplace discrimination and illegal harassment (herein "workplace harassment") for two reasons:

- 1) Statistics show that between 70% and 90% of abusers repeat their conduct. Near discovery and threats of discipline are not a deterrent; and
- 2) The law says you have a duty to investigate even if the conduct has stopped or the alleged victim does not request or consent to the investigation. It is your duty to perform a prompt, thorough and objective investigation no matter what the original parties say or do.

How to Shield Your Organization

Numerous cases demonstrate that an employer's failure to take remedial action in response to an employee's complaint of illegal harassment significantly raises the risk of liability to the employer. The good news is that a proper investigation can shield the employer and its supervisors in the most prevalent form of workplace harassment cases. For example, under federal law an employer is not liable for hostile environment sexual harassment unless the plaintiff can show that the employer both:

- 1) knew or should have known that harassment was occurring, and
- 2) failed to take immediate and appropriate corrective action once it learned of the harassment.

This employer liability shield has been applied to very serious occurrences of illegal harassment. An

example is a case in which a co-worker talked about sexual activity, rubbed the plaintiff's thighs, pressed his arm into her breast and grabbed her crotch while driving to a conference. The plaintiff reported the incident to her supervisor. They investigated and placed the co-worker on probation for three months with a warning that future misconduct would result in discharge. The court approved the dismissal of the plaintiff's case against the employer because the employer took prompt and effective steps to investigate and took reasonable disciplinary action to remedy the sexual harassment.

When To Investigate

An employer is obligated to investigate when an aggrieved party or a third person reports that inappropriate conduct is occurring, even if the term "harassment" is not used. The investigation obligation is also triggered by such warning signs as a supervisor's observation of inappropriate commentary or conduct, general office knowledge of harassing behavior or a request that inappropriate conduct cease. Again, it does not matter what the alleged victim wants; the employer must investigate and take appropriate corrective action.

Ferretting out workplace harassment is not an easy task. Experts have stated that failure to report is a typical and reasonable response to illegal harassment. In fact, over 95% of the victims of nonconsensual relationships (both sexual and social) do not complain or report the problem because of their fear of reprisal or loss of privacy. The burden is on the employer to be alert and pursue issues when they receive information through alternate sources, including rumors.

Investigate and Do It Well

Costly jury verdicts against an employer may result from faulty investigations of workplace illegal harassment claims, both by the complainants and by alleged harassers whose punishment is based on insufficient evidence. A case in point involves an employee who was awarded \$1 million dollars because he was terminated from his employment based upon a summary investigation report. The supervisor who made the dismissal decision did not know the actual facts gathered by the investigator because he had only read the summary and not the underlying interviews.

Employers should choose the most appropriate investigator available for a specific case with full knowledge that the investigator may later be called as a witness. It is not a good idea to assign the job to someone who is not specially trained in illegal harassment investigation. The person needs to be highly knowledgeable in illegal harassment laws and know which questions are legal to ask and which are not. They must also be skillful in interviewing techniques that include an ability to establish rapport, to press for admissions, to understand interviewees, and to take detailed notes which can be transcribed and reviewed by the final decision maker.

It is unwise to assume that a school principal, vice principal or counselor innately possesses these qualities. These qualities are skills that are acquired through training and experience. Instead, make sure that your district's investigator or investigation team receives the training necessary to protect you and your district from a costly lawsuit.

(Editors' note: This article is general in nature and is not intended to replace professional, legal advice.)

McGrath Complaint Management and Investigation Training

Awareness Module - Protected Classes, Misconduct and the Law

- Federal legislation;
- Recent Supreme Court rulings;
- Legal liability for the company and the individual;
- Appropriate behavior vs. inappropriate behavior;
- Early warning signs of illegal harassment and/or abuse;

- Five-point criteria for identifying actionable harassment and/or discrimination; and
- Responsibility as a district employee or supervisor.

Complaint Management and Investigation Module

- The basics of complaint intake – dealing appropriately, effectively and cooperatively with victims, alleged perpetrators, parents, colleagues, witnesses, and outside agencies;
- Increased sensitivity to the psychodynamics of victims, perpetrators, witnesses and community members;
- Applying a 4-part logic system when analyzing a complaint that covers all aspects of the situation, leaving nothing to be disputed;
- Following legally sound procedures that include due process and just cause standards at every step;
- Practicing interview techniques appropriate to the sensitive nature of such cases;
- Analyzing and discussing an actual case study in the school setting;
- Utilizing legally sound forms and templates for fact acquisition and report preparation; and
- Preparing for employee or student discipline

This program is available as in-service trainings for your organization. Call **1-800- 733-1638** or Email info@mcgrathinc.com to let us know how we can be of service.

©2005 McGrath Systems, Inc.

 Preview McGrath Training Systems comprehensive legally based curriculum for schools, business, and organizations at www.mcgrathinc.com



McGrath
SUCCEED



Sexual
Harassment



Bullying



McGrath
CyberSchool