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## **Please Don't Say Anything, But . . .! Confidentiality and Sexual Harassment Liability**

By Mary Jo McGrath, Attorney at Law

There you are, sitting at your desk, tending to business. In walks a distraught employee, looks at you with distress in their eyes and says the often heard words, "Please don't say anything, but I just have to tell someone ..."

Many of us who have been trained as good listeners, push back our chairs, and signal it's okay to go on. The person then discloses a gruesome tale of unwanted sexual attention, including touching and sexually oriented comments, that they have been subjected to from a co-worker. Now what? Is your vow of silence a legal sentence for you?

Many policies I've seen encourage what is sometimes called an "informal phase" of complaint resolution. During that stage the policy may promise complete confidentiality to the complainant and authorize the manager who receives the information to resolve the matter at his or her level. Often the manager takes this as license to promise non-disclosure, keeping no record of his or her inquiry into the concerns. This approach is fraught with legal danger.

It is an immensely common practice for people to give their word to another that they will keep a matter to themselves, not only in sexual harassment situations but all sorts of other matters as well. Misplaced offers of secrecy and sympathy often lead to complications the kind-hearted never imagined.

"Confidentiality" is a legal term and absolute confidentiality is rare. The closest the law comes is in lawyer/client and priest/confessional communications, and even there the courts are whittling away. All other communications are subject to the discovery laws of civil court action. What this means is that everything you've been told or said, every note you've made, every "day timer" entry in your journal relevant to the subject matter of the lawsuit, must be disclosed to the requesting party. Any promise of complete confidentiality is nullified by your mandatory compliance.

Saying no to "off the record" communications is difficult. We're all concerned that no one will tell us anything if they can't do it with absolute confidentiality. We're worried we'll be left out of the information pipeline that gossip often serves, because we won't "keep a secret."

What's the alternative? Establish a reputation for swift, fair, and thorough follow up of complaints and for zero tolerance of retaliation. People will come to you for action rather than secrecy.

It is essential to follow the law or risk future liability for yourself and your employer. If it is shown that you had knowledge of a sexual harassment situation and did nothing because of your promise to the person, you may be held liable for your failure to pursue the matter properly.

If another person is hurt by the same perpetrator, and it is shown that you knew of the perpetrator's prior harassing behavior but did nothing, you may be liable to subsequent people hurt by the person. This liability may flow as well to your employer, something not likely to make you very popular with the boss. The legal standard under Title VII is if you knew or should have known that the unlawful sexual discrimination was occurring, and you failed to take prompt, effective, remedial action, you may be liable.

"Please don't say anything...but!"

The best approach to confidentiality is to make it clear that the information will be shared on a "needs to know" basis only. Let the person know that you may be obligated to disclose their name in the process of handling this matter, but that you will do so in a limited fashion. Most importantly, give them this information before they blurt out the issue to you. Once you hear the information, you now know and are obligated to investigate, keep records and possibly disclose information.

If people don't stop the mistreatment by speaking out and being accountable for what they say happened to them, the hurt will continue. If we allow people to swear us to secrecy on matters we are obligated to pursue, their problem may become our nightmare.

Editor's Note: This article is general in nature and is not intended as a substitute for the advice of a professional in education or employment law.

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