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# Five Mistakes Your Nonprofit Doesn't Want to Make When Investigating Sexual Harassment Allegations

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In a former professional role, I served as legal counsel to employers in employment discrimination cases, including sexual harassment matters. While representing employers I learned about many instances of sexual harassment that were not handled well by the employer. Many of the underlying harassment claims were so mishandled that the victims became even more outraged and angry, not only at the harasser but also at their employer. This was particularly likely if their employers were slow to respond to allegations of harassment, allowing it to continue, or if the employer sidelined the victim while trying to “protect” him or her, which had the result of isolating the victim, cutting the victim off from professional development opportunities. Once a smart plaintiff’s lawyer learned of this “response” to their client’s harassment complaint, the lawyer would add an additional count to the complaint: retaliation. In fact, there are far more complaints about retaliation filed and resolved each year than there are cases of employment discrimination alone. Retaliation for filing a complaint of sexual harassment, whether in the form of something obvious, such as termination of employment, or in the form of something more subtle, such as moving the victim to an isolated office on the other side of the

building, is the most common mistake employers make in connection with their response to a complaint of sexual harassment.

What follows are five other mistakes:

**1. Don't wait for a formal complaint or require complaints to be in writing or signed by the alleged victim.**

Nonprofits, like any other employer, are obligated to conduct an investigation when the nonprofit knows or has reason to know that an employee is being subjected to discrimination, harassment, or other unlawful conduct in the workplace, even if the complainant never submits a formal written complaint and no witnesses provide written statements. Harassers may intimidate their victims so much that victims are unwilling to cooperate with an investigation. If an employer learns of potential mistreatment, language, or conduct that sounds as if it could contribute to a hostile environment, the employer should start the process of trying to verify whether those incidents are occurring or have occurred in the past by interviewing a variety of individuals who may be affected by the conduct, or have witnessed it, or may have heard about the conduct, even if they have not experienced the alleged harassment themselves. Even if there is not a direct complaint with an identifiable victim, a prompt investigation is the appropriate response.

**2. Don't focus on the intent or other characteristics of the alleged harasser- focus on the conduct itself.**

Some harassers never intend to be insulting or intimidating and in fact may maintain that they are "innocent" but that does not make their conduct benign. Remember that harassment is subjective: The harasser's conduct and/or language may be "unwelcome" and create a hostile workplace for the victim, even when the harasser fails to recognize that the conduct violated the nonprofit's policy. Be careful not to make any assumptions. A long-term employee is not any more or less likely to engage in harassment. Similarly, gender and sexual preference or gender identity do not make anyone more or less likely to engage in prohibited harassment. Most importantly, keep the investigation focused on the alleged conduct and how it affected the alleged victim.

**3. Silence is not golden: Communicate the results of the investigation.**

When people know there is an investigation they expect to hear about the outcome. When they don't hear about the outcome, they assume that the nonprofit has something to hide. Representatives of the nonprofit may

interview potential witnesses during an investigation, asking them if they observed any objectionable behavior, etc. Those employees and/or volunteers will know that there is an investigation. They need to be told sufficient non-confidential information to assure them that the nonprofit is investigating and taking prudent steps in accordance with the nonprofit's policy. Without such simple communications, those who are aware of the investigation will assume that the nonprofit is keeping quiet about the investigation because the nonprofit did something wrong. In contrast, by being transparent about what steps are being taken or were taken, and by being transparent about the resulting outcomes, the nonprofit can demonstrate it is acting in good faith in accordance with its own policies while still maintaining the confidentiality of those involved.

#### **4. Maintain confidentiality but manage expectations.**

It may not be possible to fully maintain confidentiality since an investigation usually includes testing the victim's credibility, which may pit the victim's word against the alleged harasser's word. The harasser also has a right to confidentiality, since it is possible that the allegations are false. If the nonprofit has a confidentiality policy this is the time to invoke it and remind any individuals involved in the investigation that the details and persons involved are confidential. How can you maintain confidentiality but still communicate that the nonprofit is following its internal investigation process? Examples would include communicating to those who are aware of the investigation: (i) that it is resolved, or not; (2) that the investigation resulted in a finding that the nonprofit's policy was violated, or not; and (3) the alleged harasser was disciplined, or not. There is no need to use names or share details about resulting consequences, short of termination, which is usually obvious to other co-workers.

#### **5. Protect the victim and others involved from retaliation**

"Retaliation" is any adverse action taken by the employer or a supervisor against someone because the person filed a complaint of sexual harassment or participated in an investigation. It is essential to explain to the victim that the nonprofit will not retaliate, and indeed will protect the victim from retaliation. It is also essential for all involved to understand (especially the alleged harasser) that retaliation is a separate and equally serious violation of the nonprofit's policy, whether or not the underlying harassment did in fact occur. Prohibited [retaliation](#) can be against the alleged victim or against anyone participating in an investigation of sexual harassment. It can take the form of leaving someone

out of activities or decision-making that the person would normally participate in or be as direct as refusing to provide a requested accommodation or terminating employment. It can also be unintentional, such as moving the individual's office thinking that by moving the office the employer will be "protecting" the alleged victim. The move may be perceived as retaliatory. Solution? Work out an appropriate solution together with the employee and document the employee's agreement to the changes, whatever they are.