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If employee complains of harassment – What next?

By: Bernadette Starzee April 11, 2018
Comments on An employee complains of harassment – What next?

When an employee comes forward with a sexual harassment complaint, it's important for companies to take immediate action, attorneys and HR pros say.

"It's incumbent on the company to conduct a swift, decisive investigation," said Larry Martinez, partner and co-chair of the labor and employment practice group at Meltzer Lippe in Mineola. Most companies have anti-harassment policies, but many are not adept at responding appropriately to a complaint.

"Words are one thing, but action is another," Martinez said. "Having a policy against harassment is only legitimate if a company protects its employees, and that starts with reassuring employees and giving them peace of mind that their complaint will be investigated vigorously."

The company should also immediately reassure the complainant that retaliation in response to a harassment complaint is illegal and will not happen.

"It's important to remind the employee of the anti-retaliation policy," Martinez said. "Many of the women in the #metoo cases were afraid of retaliation; the [Harvey] Weinstein case is indicative of that."

Investigations are typically handled by the human resources department if the company has one. In some cases, an outside HR or law firm may be called in to fully investigate the allegations.

The Employment Law Alliance in March released the results of its #MeToo/Sexual Harassment in the Workplace Survey, in which 382 employment lawyers were interviewed. When asked how competent they feel in-house HR professionals are in conducting internal investigations involving misconduct complaints, only 14 percent of the respondents said "Very Competent." However, the vast majority, 81 percent, said HR departments are "Somewhat Competent."

"Most HR departments can handle routine complaints but are not well-equipped for more serious complaints or complaints against senior executives," one of the respondents commented. Another said more sophisticated clients are competent while smaller employers are generally not.

The manager or HR professional conducting the investigation should "interview the accuser to get the facts – the who, what, when, where, how, how often – and be very specific," said Orlando Villalonga, director of people and culture at Alcott HR in Farmingdale. "Ask the accuser if there were any witnesses who may have seen it or overheard it, or whether [the accuser] confided in a coworker around the time it happened."

The investigator should take the complaint in writing and try to get a sense of what inspired the individual to come forward at this point.

"What was the most recent event that broke the camel's back?" Martinez said.

In addition, the investigator should find out whether there are texts, emails or other physical evidence of the alleged wrongdoing, he added.

The investigation should be kept as confidential and anonymous as possible, Villalonga said.

"You might ask people who sit in the same area if they noticed any behavior that made them feel uncomfortable, without naming names," he said.

However, names will have to be mentioned to certain witnesses as well as the accused to thoroughly investigate the claims; in those cases, witnesses should be instructed to keep the information confidential.

Depending on the seriousness of the claims, the employer may choose to temporarily remove the alleged wrongdoer from the workplace while the investigation is pending, said Kimberly Malerba, partner and chair of the employment law department at Uniondale-based Ruskin Moscou Faltischek. “If the person is alleged to have engaged in any kind of physical abusive conduct or a severe form of harassment, the company may choose to suspend that individual with or without pay, especially if the company believes this person could engage in further wrongdoing during the pendency of the investigation,” Malerba said.

Alternately, the company could move desks around to separate the accuser from the accused during the investigation, or provide a different reporting structure, if applicable, during the period, Martinez said.

In general, there could be one of three outcomes to the investigation, said Hilary Moreira, a labor and employment law associate at Bond, Schoeneck & King in Garden City. The company may determine the conduct does constitute harassment, or it may find that while there was inappropriate conduct, it does not rise to the level of harassment. In the third scenario, the company may find there is no credible evidence of inappropriate conduct.

“Regardless of the finding, you should inform both the complainant and the accused of the answer, so they don’t think it is still open and ongoing,” Moreira said. “A letter should be written to both parties to give them an overview of the investigation and inform them of the outcome. For instance, it may say, ‘Based on the evidence we have at this time, the conduct does not rise to the level of harassment. Nevertheless, we do find there was inappropriate conduct.’”

Disciplinary action should vary with the severity of the conduct.

“Inappropriate touching, threats, any type of quid pro quo – such as ‘I’ll give you a raise only if you go out on a date with me’ – or comments that are excessively vulgar are grounds for immediate termination,” Villalonga said.

Other possible disciplinary action could include imposing mandatory sensitivity training.

“If someone has an inappropriate picture as their screen saver or on a poster on the wall, and it offends someone, they may be instructed to take it down and apologize,” Villalonga said.

Any such actions should be written up and kept on file, he added.