



Harassment Dilemma: Handling Requests to Do Nothing

By Jon Vegosen

Now, more than ever, the news is replete with disclosures of employees and others who have been victims of sexual harassment. Shining a light on harassment should go a long way toward preventing and addressing this widespread problem. Moreover, responsible employers, if they have not done so already, are implementing critical measures to foster a professional culture with zero tolerance for harassment: prevention; training; investigation; and accountability. While these admirable steps can make a significant difference, sometimes employees thwart managers through “requests to do nothing.”

For example, suppose your firm has adopted a comprehensive anti-harassment policy, thoroughly trained its managers how to prevent and investigate harassment, held employee workshops to emphasize the importance of employees reporting harassment promptly and without fear of retaliation, and taken appropriate action against offenders who have violated the firm’s anti-harassment policy. Then, suppose one day, a female

employee approaches you in confidence and says, “I am being sexually harassed. I am not going to tell you who it is because I do not want to cause trouble. Please do not do anything about it or tell anyone. I just wanted you to know.” Faced with this report, would you know how to proceed? It might be tempting to respond by saying, “Look, there is nothing I can do if you won’t share with me who is harassing you and what has transpired.” That, however, would be an inappropriate way to address the matter. It could endanger the employee and other employees. It would not be consistent with the firm’s obligations under the law and probably under its anti-harassment policy. Ignoring the complaint could also result in a quagmire for the firm if the employee later claimed that she reported the harassment, but the firm did nothing about it. Therefore, you need to be prepared to implement a multi-tiered, responsive strategy immediately, even without knowing the identity of the alleged offender or the details of the alleged harassment. Here are five things to do when an employee – whether female

or male – asks you to do nothing about alleged harassment:

Reinforce Intolerance for Harassment

First, thank the employee for confiding in you and having the courage to come forward. Reinforce that your firm does not tolerate sexual or other harassment under any circumstances. Explain that, under the law and your firm’s anti-harassment policy, it is necessary for you to investigate the matter. Reassure the employee that the firm will not retaliate against her/him for having made the report. Assure the employee that the firm will address her/his complaint discreetly to the extent possible.

Do Your Best to Investigate

Although the employee has expressed an unwillingness to open up, do your best to persuade the employee — in a non-threatening, non-retaliatory manner — to identify who is causing the problem and to permit you to better investigate the matter thoroughly. Share that it is challenging, if not impossible, for the firm to be responsive if the employee

is not forthcoming with additional information – including the nature of the harassment and the identity of the alleged harasser. Point out that co-workers may be having similar difficulties with the offending employee and that, for the sake of all concerned, it is imperative to investigate to prevent the offending employee from harassing her/him and others in the future. If these sentiments are unsuccessful in convincing the employee to be more forthcoming, investigate the best that you can under the circumstances without violating the employee's confidence. For example, consider speaking unobtrusively with some well-regarded employees in the employee's department and other departments simply to get a handle on employee morale and how things are going in general. Perhaps you will glean some valuable information that sheds light on the vague complaint you have received. Another approach might be to engage in casual conversation about some of the recent harassment scandals rocking the nation and see if that leads to a discussion about harassment issues at your firm. Yet another strategy is to walk around your firm's office more frequently to ascertain if employees are having inappropriate conversations.

Schedule Anti-Harassment Training / Update or Republish Your Policy

In light of the unverified complaint that you have received, it would be prudent to schedule a timely and mandatory anti-harassment training for all employees. This is especially so if your firm has never conducted any such training or if it has not recently conducted training. You may also want to re-publish or update your firm's anti-harassment policy. This way, you can reinforce the firm's intolerance of harassment, provide examples of what constitutes harassment, review why it is important for employees to report harassment (should it occur), and underscore that the firm will be responsive and not retaliate if any complaints are made. Educating the firm's employees by providing them with regular training may help to prevent harassment and nip it in the bud. Moreover, by conducting training, you

can put your firm in a better position to defend against harassment charges or lawsuits. For recordkeeping purposes, you should document the attendance of each employee who participates in any anti-harassment training as well as each employee's acknowledgment and receipt of any anti-harassment policy that the firm updates or republishes.

Document the Situation

It is imperative that you prepare a memo to the employee. It should:

- (a) memorialize your unsuccessful efforts to investigate the complaint due to the employee's reluctance to provide you with information;
- (b) reinforce that the firm will not retaliate against the employee for having reported harassment;
- (c) urge the employee to share any additional information or any future problems; and
- (d) recount the steps that you and the firm have taken to address the complaint in a responsive way under the circumstances (e.g., speaking informally and discreetly with other employees in the reporting employee's department, providing anti-harassment training, and republishing the firm's anti-harassment policy).

You should ask the employee to sign the memo acknowledging its accuracy and his/her receipt of it. The memo can provide your firm with valuable evidence to support a credible defense if, down the road, the employee were to change her/his tune and assert that you and the firm did nothing to address the employee's harassment complaint.

Follow Up

There is one more vital step. Periodically, you should check in with the employee to ascertain how things are going and to ascertain if the alleged harassment has ceased. You need to monitor the situation and show the employee that you care. If the harassment has not stopped, you will want to inquire if the employee would like to make a formal complaint. Perhaps the employee will be more willing to share more information.

Whether or not the harassment has stopped, it is essential that you document your follow-up efforts.

Summary

If you or your firm experiences a "request to do nothing" with respect to sexual or other harassment, you cannot do nothing. Doing nothing ignores potential harassment that may affect not only the employee but also other employees. It also may expose your firm to possible liability if an employee claims in the future that she or he reported harassment, but the firm did nothing about it, contrary to its written policy against harassment as well as its legal obligation to investigate. Encourage the employee to provide details. Investigate the allegations as reasonably permitted by the employee's disclosures and request for confidentiality. If the investigation unearthed harassment, counsel or discipline the harassing employee, as appropriate. Reinforce and consider updating and/or republishing the firm's anti-harassment policy and schedule mandatory anti-harassment training as a reminder of the firm's commitment to providing a workplace that fosters respect among employees and compliance with applicable law. These initiatives will well serve both employees and your firm. Employees will appreciate that your firm is committed to preventing and eliminating harassment. Your efforts will promote a professional working environment in which sexual or other forms of harassment is not tolerated. In addition, if the employee subsequently files a harassment charge or lawsuit, you can affirmatively show that you and your firm have taken reasonable steps to address and remedy the situation. ▲



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