

# Think a harassment claim is false? Investigate anyways.

An employee who suspects she is about to be disciplined for poor performance may cook up a bogus harassment complaint in a last-ditch attempt to avoid trouble.

But sometimes an employee's performance may suffer because she is being harassed. In cases like that, the employee may be reluctant to complain, and may not say anything until right before or during a dismissal meeting.

## **Don't assume every last-minute harassment complaint is a lie.**

Instead, investigate.

Take this recent case: Veronica worked as a paralegal for a law firm for about six months.

A day before she was terminated for alleged poor performance, she claimed she had contacted the office manager to lodge a sexual harassment and hostile work environment complaint.

After she was fired, she sued, alleging that from the first day on the job and throughout her brief tenure with the firm, she endured almost daily harassment. She said she kept track of incidents.

She even offered as evidence a note from one of the lawyers at the firm that said, "Apple is delicious. I wonder how you taste."

The court said that was enough to order a trial. A jury will decide whether Veronica was discharged for poor performance or in retaliation for reporting sexual harassment. (*Fortunato v. Zarwin Baum*, ED PA, 2019)

Remember, you can be liable for sexual harassment even if you had an unrelated reason for termination. Always investigate harassment complaints or you won't know what evidence the worker may have to use against you.

## **Don't use fear of false accusations to not investigate**

With the rise of the #MeToo movement, many employers worry that alleged victims will falsely accuse someone of sexual harassment. It's a realistic fear, but you should never use that as an excuse not to investigate sexual harassment complaints when they surface.

Make sure your investigation is fast, thorough and fair. Even if the accused quits and sues, chances are the truth will prevail in the courtroom.

Recent case: Carlos worked as a deputy fire chief for the city of Pharr, Texas. The city opened an investigation into allegations that Carlos sexually harassed a former employee.

The investigation was launched after the city received letters from co-worker bystanders reporting what they

perceived as sexual harassment. All told, three different co-workers wrote letters asking that Carlos' behavior be investigated as sexual harassment.

About a year later, the city received another letter accusing Carlos of sexual harassment.

Carlos then complained to the city manager that it was he who was being harassed "by two deputy chiefs who were creating a negative and hostile work environment through further statements and commentary" about the original alleged harassment. Carlos would also later claim that the fire chief told him he was going to be found guilty of sexual harassment.

Carlos quit and sued, alleging he had been constructively discharged. He apparently wasn't willing to wait to see what the outcome of the investigation would be.

The court dismissed his lawsuit. It reasoned that nothing in what had allegedly transpired was enough to compel a reasonable employee to quit. (*Mandujano v. City of Pharr*, 5th Cir., 2019)

**Final note:** The EEOC takes the position that it's everyone's responsibility to prevent and stop harassment; enlisting bystanders will help identify harassment even when the harassed worker may be reluctant to come forward.

## **Remember: prevention key to cutting harassment liability**

The best way to avoid liability for sexual harassment is to prevent it from occurring in the first place. Reason: If a manager or supervisor offers someone a job or promotion only on the condition of receiving sexual favors, that's classic quid pro quo sexual harassment. There is literally no legal defense against those charges.

That's why it's so important to educate supervisors on your sexual harassment policy. Take these steps to prevent harassment:

Make abolishing and preventing sexual (and other) harassment a key HR policy. It cannot be an afterthought. The initial policy rollout should come from your top leadership.  
Require bystander reporting. Don't make it voluntary; mandate it. Add teeth to your policy by making failure to report harassment a disciplinary violation. Make bystander reporting a performance measure, too.  
Make it easy to report harassment. Provide several methods, including an anonymous hotline.  
Promise fast, complete and neutral harassment investigations, using outside experts if necessary.  
Require termination decisions—especially those involving low-level, low-wage workers—to undergo an independent review before they are finalized.  
Here's a case that illustrates the peril of quid pro quo harassment.

Recent case: The EEOC sued New York's Foodtown after two female workers complained they had been fired for resisting a supervisor's sexual advances. The women said the man frequently commented on their appearance, propositioned them for sex, forcibly kissed them and touched them without their consent.

When they were fired, the EEOC filed suit. That's prompted the employer to settle for \$285,000. It also agreed to adopt new policies to prevent and report sexual harassment. It must also train all managers and staff to identify and prevent sexual harassment and retaliation. (*EEOC v. Foodtown*, ED NY, 2019)