Investigating Claims of Harassment

Insights
8.01.09

(Dealership Update, No. 3, August 2009)

Your human resources director has brought you a tough one: one of your sales employees has complained that her Sales Manager harassed her sexually, and had made disparaging racial remarks about a customer. You're stunned because the manager has been a good performer, generating good numbers and seems like a real straight arrow guy. What do you do?

Nothing, without investigating first. And in any tricky situation, you're going to want to get help to guide you through that investigation. Not every checklist will fit every scenario, of course, but in most typical cases, these are the kinds of steps you'll need to take.

1. Interview the complaining employee

1. Use a private location. Only one or two managers should be present to avoid intimidating the employee. In a sexual harassment case, it's advisable to have at least one female manager present. Ask the employee to describe the incident in his or her own words. Then ask follow up questions as necessary to determine exactly what happened. At a minimum, you will want to know:

1.
   - Exactly what was said or done. If it involved an offensive comment, ask for the exact words used. If it involved physical conduct, ask the complaining employee to describe exactly what happened, how and where he or she was touched, etc.
   - Specific details about when it happened and how often.
   - Where it happened (in the showroom, in an office, off-premises, etc.)
   - Whether there is any hard evidence such as letters or cards, e-mails, text messages, gifts, receipts, etc.
   - Names of witnesses and what they might be able to tell you.
   - Whether the offending employee has done anything else offensive to this employee or other employees, with details.
   - Whether the complaining employee has reported these matters to any co-worker or manager in the company before this, and if so, to whom.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

- What action the employee would like to see the company take to address and resolve the problem.

1. In some cases, you may want the employee to write out his or her version of events. If an employee is reluctant to provide a written confirmation, go back through your notes and confirm the responses to the questions listed above, noting that you reviewed the information with the employee and the employee confirmed its accuracy.

1. Reassure the employee that he or she did the right thing in reporting a concern and that someone from the company will be back in touch to report the results of the investigation and the action taken. Tell the employee that you will make every effort to keep the investigation as confidential as possible and that he or she should do the same.

1. Finally, remind the employee that your policy prohibits anyone from punishing or embarrassing anyone who reports a problem (your policy does state that, doesn't it?). So they should report any problems directly to you.

2. Interview each of the witnesses the complaining employee identified

1. Conduct the interviews in a private location. Normally only one manager need be present. Explain that you have received a harassment complaint from a co-worker and that the company is obligated to look into the matter, and that you would appreciate his or her cooperation.

1. Ask the witness if he or she has experienced any offensive conduct or language directed at them and if they have witnessed such conduct or language directed at a co-worker. Don't rush these interviews. Listen for responses like "Not really" or "I haven't seen anything..." as they may indicate the employee knows something that he or she is reluctant to tell you.

1. Explain the general nature of the allegation and the names of the complaining and accused employees. Find out if they know anything about the reported incident, as well as how the complaining and accused employees have interacted with one another in the past. (e.g., have dated, have been friends, never got along, etc.) It's best to have such statements in writing.

1. If the investigation involves someone in the sales department, interview the receptionist. She will generally have first-hand knowledge of which employees say what kinds of things.

1. Ask the witness to keep this matter strictly confidential.

3. Interview the accused employee.

1. Conduct the investigation in a private location. Identify the complaining employee and explain the nature of the allegation. Ask the individual to explain in his or her own words exactly what happened from his or her perspective.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

1. Be sure to get a definite response to each of the complaining employee's allegations. For example, if the complaining employee stated that the accused employee called her at home, you would want to ask if he ever called her home or her cell phone *for any reason*. Then ask if the employee has a cell phone and if he would be willing to bring in his cell phone bills to show that he did not call her.

1. If the accused employee defends his or her actions by claiming that the complaining employee engaged in similar conduct, ask for specific details as well as the identity of any witnesses who might confirm that.

1. Determine if there is any hard evidence which would tend to prove or disprove the allegations, e.g., letters or cards, e-mails, text messages, gifts, etc., received from the complaining employee.
2. Tell the accused employee that the investigation is still ongoing and that you expect him or her to keep the matter strictly confidential and not to discuss it with any coworkers. Remind the employee of your no-retaliation policy, especially if the accused is a manager.

1. In some cases, you might want to suspend the accused employee with or without pay while you complete your investigation. Sometimes having the accused employee out of the dealership makes it easier for other employees to come forward.

4. Interview any witnesses the accused employee has identified

Conduct the interview in a private location. Using the same procedures as with the witnesses identified by the complaining employee (See paragraph 2, above), again, asking that the witness keep the matter confidential.

5. Review all of the facts turned up in the investigation

- examine any inconsistencies in each parties' versions of events;
- watch for any witness with an "axe to grind" against either the complaining employee or the accused employee;
- examine any documentary or other physical evidence;
- consider whether the complaining employee gave the accused employee any reason to believe the conduct was "welcome";
- visit the location where the incident took place to see if the description of events "fits";
- determine what most likely happened.

6. Take appropriate action

Consider the seriousness of the allegations and whether there are any mitigating factors such as whether the complaining employee's conduct may have caused the accused employee to honestly believe the conduct or language would not be considered offensive. Take into account the position

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

held by the accused employee (supervisors can and should be held to a higher standard than rank-and-file employees) and his or her prior record with the Company.

Appropriate action doesn't always mean termination. It can include any number of non-termination options including sensitivity training, a written apology from the offending employee, a written warning, probation, transfer to another location, demotion and suspension.

While options such as transfer, demotion and suspension are lawful, they have a number of employee relations concerns that generally make them less effective. Similarly imposing a "fine" or monetary penalty has wage-hour implications, and may well be unlawful under state or federal law.

Document your actions fully, and follow up with both the complaining and accused employee regarding the actions taken. Written memos to both employees will provide indisputable proof that you did conduct an investigation and that you did take appropriate action based on that investigation.

7. Closure and follow up

After a week or two, make it a point to meet with the complaining employee to find out how things are going. Do this in person in a location where the employee will feel free to talk. Ask if the employee has had any further problems or experienced any different treatment following the complaint. If you learn of any further problems or unfair or retaliatory treatment, deal with it immediately.

A Final Thought

Always keep in mind that the investigation of an employee's complaint is serious business and may have far reaching – and expensive – consequences. The investigation that you conduct and document will in large part determine the action that the company takes. Therefore, it is critical that you conduct your investigation in a professional and thorough manner and determine all of the relevant facts before making any final decision.

This article was reprinted in the September 16, 2009 issue of *Open Road*.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.