



TARPEYGROUP

HOW TO CONDUCT A HARASSMENT INVESTIGATION



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By law, remedial action to end harassment must be taken promptly. According to the Equal Employment Opportunity Commission (EEOC) Guidelines, a duty to investigate arises when an employer receives a complaint or otherwise learns of alleged harassment in the workplace. The EEOC Guidelines further provide that after remedial action, the employer has a duty to make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation. Additionally, state statutes often place an affirmative duty on the employer to investigate and remedy harassment, and a company-disseminated harassment and discrimination policy should specifically provide that:

- › Any employee who experiences, witnesses, or learns of harassing conduct should report the conduct.
- › All such complaints of harassment will be investigated promptly and thoroughly.

When a complaint is made, the employer's duty to investigate arises without regard to whether the complainant wants an investigation, even if the complainant has agreed that certain reported incidents need not be investigated. This duty arises whether the complaint was written or verbal.

Even if a claim appears to be fabricated by the complainant, the claim should be thoroughly and seriously investigated. Responsive action (such as an instruction to the alleged wrongdoer to avoid contact with the complainant) is no substitute for an investigation.

In appropriate cases, interim measures (for example, temporary transfer or nondisciplinary leave of absence with pay) should be utilized to prevent continued serious misconduct prior to concluding the investigation.

Choosing an Appropriate Investigator

Choosing the wrong investigator may discourage employees from reporting inappropriate workplace conduct. In addition, an investigator who is not properly trained may cause the employer to make a decision based on faulty or incomplete information. The investigator should have a high level of personal integrity, the backing of employees and upper-level management, and a sufficient amount of time available in order to conduct a thorough investigation. Finally, it is important the investigator be a credible and effective witness should litigation result.

First-level supervisors may be a poor choice for investigators because they may be too intimately involved with the persons being investigated. Additionally, such supervisors are often not properly trained to conduct harassment investigations.

The person designated to investigate workplace conduct might, on some occasion, be implicated in the allegations or might be someone whom the complainant might find intimidating. In such cases, an alternate investigator should be provided. Persons of both genders should be designated to avert claims that a complainant was too embarrassed to report details to an investigator of the opposite sex.

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Employers should consider utilizing an outside investigator because an independent fact-finder may allay suspicion that the employer was biased in its investigation. An outside investigator may also be particularly appropriate if a high-level executive is the alleged wrongdoer and there is concern that the company investigator may feel constrained to protect the executive or where the company wishes to assure that there is no appearance of bias. An outside investigator may also be desirable when the alleged wrongdoer is perceived to be violent and/or retaliatory (for example, an outside investigator retains more privacy and thereby may be safer from a violent and/or retaliatory employee because the employee being investigated may not know where the outside investigator lives).

Preparing for the Investigation

Investigations should be conducted in a thorough and detail-oriented manner. Investigators should develop detailed, factual evidence of the circumstances and nature of any complaints or protests by the individual alleging the harassment.

Standardized Procedure

In conducting an investigation, procedural steps should be standardized. The following steps are an example of a standardized procedure:

- › Identify documents for review.
- › Identify potential interviewees.
- › Evaluate the need for supplementary interviews.
- › Determine interview order.
- › Determine format.

Identifying Documentation

The following documents should be identified for review:

- › The complaint and notes regarding the complaint.
- › Relevant company rules, policies, procedures, and instructions, including any employee handbooks or manuals, antiharassment and workplace violence policies, and any grievance procedures or progressive discipline policies.
- › Memoranda or notes about the incident(s).
- › Managers' notes and files.
- › Prior investigation files.
- › Records of prior complaints against the alleged wrongdoer.
- › Records of prior complaints by complainant.
- › Personnel files of individuals involved.
- › Statements written and obtained from witnesses.
- › Relevant business records such as timecards, calendars, diaries, tape recordings, photographs, logs, or others.
- › Physical evidence.

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Identifying Interviewees

The following individuals, and their relationship to the matter under investigation, should be identified and subsequently interviewed:

- › The complainant.
- › Person(s) identified by the complainant.
- › The alleged wrongdoer.
- › Person(s) identified by the alleged wrongdoer.
- › Observers of the incident(s).
- › Other persons who have reportedly been subject to similar activity by the alleged wrongdoer.
- › Any other persons with relevant information.

Supplementary Interviews

The need for a thorough investigation should be balanced against the risk of excessive publication. Consequently, supplemental interviews of the following individuals should be evaluated and, if deemed necessary, conducted:

- › Supervisors of persons involved.
- › Authors of relevant documents.
- › Co-workers of persons involved.

Interview Order

When determining the order of the interview, the following questions should be considered:

- › Is there any reason not to interview the complainant first?
- › Should the alleged wrongdoer be interviewed second, last, or in some other order? Generally, eyewitnesses named by the complainant should be interviewed before the alleged wrongdoer.

Determine Format

When recording witness-provided information, the format for such recording must be determined and the following options should be considered:

- › Contemporaneous handwritten notes of key points.
- › Dictated, typed notes of key points prepared based on contemporaneous handwritten notes.
- › Signed declarations by witnesses.
- › Statement written out by witness in the witness' own words.
- › Contemporaneous shorthand/virtually verbatim notes of words spoken by each witness.
- › Transcript of interview prepared by court reporter.
- › Tape-recorded or videotaped interview.

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Note: Generally, recording of interviews is not advisable. Recordings often frighten interviewees and make them hesitant to share their knowledge. If an interview is to be recorded, employers should check with counsel to review applicable laws for restrictions. If used, a recorder should be placed in plain view, in front of the witness and the witness' consent to use the recorder should be obtained prior to use. As soon as the recorder is turned on, the date, time, place, and participants must be indicated and the witness should affirm on tape the witness' knowledge of and consent to the recording.

Conducting the Investigation

Effective Documentation Practices

Employers should know how to effectively document interviews during the investigation. When taking notes, an interviewer **should**:

- › Start a new page for each interview.
- › At the top of the page:
 - ✓ Indicate the names of those present at the interview and the date, time, and place of the interview.
 - ✓ Indicate the author of the notes and sign and date the notes.
- › Take detailed notes, as close to verbatim as possible.
- › At the conclusion of an interview, review with the interviewee the points contained in the notes to confirm their accuracy and determine whether the interviewee has anything to add.
- › Review and finalize the notes immediately upon completion of the interview. The notes should be free from grammatical errors and misspellings so that the interviewer is not discredited in the course of litigation.

Additionally, when taking notes interviewers **should not**:

- › Include their own interpretations, beliefs, assumptions, or conclusions. Rather than guess at reasons or intentions, interviewers should ask the interviewee the reason and record the response.
- › If the interviewer notes information during an interview that impacts a credibility determination, those observations should be recorded only on a separate document. Factors to consider include evasiveness, contradictions in statements, blushing, other facial expressions, potential signs of anxiety such as shaking or perspiration, defensiveness, or other demeanor.

General Rules for Interviewing Witnesses

When interviewing witnesses, the interviewer **should**:

- › Prepare an outline of questions to ask.
- › Maintain a professional demeanor.
- › Determine the extent of personal, as opposed to hearsay, knowledge.

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- › Ask open-ended questions rather than leading questions. For example, do not ask the leading question, “Did he tell offensive jokes?”; instead, ask the open-ended question, “What did he say?”
- › Ask follow-up questions to ensure sufficient detail is gained from the interview.
- › Ask for supporting evidence (i.e., photos, emails, calendar entries).
- › Note whether a witness refuses to review or sign a written statement and reasons given for refusal.
- › Consider sending witness a follow-up “thank you” letter stating that the employer intends to maintain privacy and enforce its antiharassment policy, which simultaneously creates a documented record of the employer’s intent.

Interviewers **should not**:

- › Intimidate witnesses.
- › Promise absolute confidentiality. Witnesses should not be told that their statements will be kept off the record because complete confidentiality can never be assured and a written record of the recollection of witnesses may be essential in any resulting proceedings.
- › Ask leading questions, because leading questions do not allow the witness to provide their own facts. Rather, the interviewer should ask open-ended questions, such as, “How did you respond to his statement?”; not, “Did you tell him that his statement made you uncomfortable?”

Complainant Interview

At the outset, the complainant(s) **should** be advised of the following:

- › The company takes reports of wrongdoing seriously and will investigate thoroughly.
- › Confidentiality will be observed to the extent practical to protect everyone’s privacy.
- › Retaliation for making a report of misconduct or harassment is forbidden by the company.
- › The complainant must immediately advise the investigator or human resources (or any other alternative) of any perceived retaliation or of further incidents of misconduct or harassment.

During the interview, the interviewer **should**:

- › Be sensitive to the issues being raised.
- › Get a description of each incident, including date, time, place, and nature of conduct.
- › Identify any witnesses to the alleged incident(s).
- › Identify any other persons who may claim to have been harassed.

For each incident, the interviewer **should**:

- › Ask whether there is any documentation that constitutes or records the harassment.
- › Ask whether the complainant has discussed the incident with anyone else.
- › Determine and record limits, if any, of the complainant’s cooperativeness.
- › Determine the complainant’s reason for delay, if any, in reporting the alleged harassment.
- › Consider asking what the complainant would like to see done to ensure that problem does not recur.
- › Determine if the conduct has any effect on the complainant, but do not suggest any effects such as emotional damage, trouble sleeping, or other effect.

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- › Explore need for any interim action while the investigation is pending.
- › Consider whether to prepare and ask (not demand) the complainant to review, correct, and sign a written account of the allegations after the interview, bearing in mind that asking for statements can be risky and can backfire. (Make a note if the complainant refuses to review or sign a written statement and the reason(s) given for refusal.)
- › Consider whether to document procedural aspects of initial interview to make record of employer's policy, concerns, and commitment to follow through.
- › Provide the complainant with a record of the interview upon request.

Alleged Wrongdoer Interview

At the outset, the alleged wrongdoer **should** be advised of the following:

- › The purpose of meeting is to ask about allegations of workplace conduct.
- › Prior to the meeting, no conclusions have been reached.
- › The interview is the alleged wrongdoer's opportunity to provide their version of the facts at issue.
- › Full, truthful cooperation is expected of everyone involved in the investigation.
- › The alleged wrongdoer is prohibited from interfering with the investigation (for example, by talking with other employees about the allegations or the subject matter of the complaint).
- › Any retaliation is forbidden, regardless of whether the allegations under investigation are proven false. Alleged wrongdoers should be informed that all types of retaliation are forbidden, including the following:
 - ✓ Demoting, transferring, or dismissing the complainant or any employee involved in the investigation.
 - ✓ Providing negative evaluations of the complainant or any employee involved in the investigation.
 - ✓ Verbal misconduct.
 - ✓ Denial of overtime or any other job benefit to the complainant or any employee involved in the investigation.
 - ✓ Rebuking or rebuffing the complainant or any employee involved in the investigation.

Interviewers should be mindful that the source of the information about the alleged wrongdoer need not be disclosed. During the interview, interviewers **should**:

- › Begin with general description of allegations and ask open-ended questions to obtain narrative responses.
- › Identify each alleged improper statement or action in detail and allow the alleged wrongdoer the opportunity to respond to each incident.
- › Explore any working and personal relationship between complainant and alleged harasser.
- › Identify the relationship of the alleged wrongdoer to the complainant, for example, whether the alleged wrongdoer is an agent of the company, a supervisory employee, a co-worker, or a nonemployee.

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- › Ascertain the extent and nature of the interactions the alleged wrongdoer had with the alleged victim. For example, determine whether:
 - ✓ Gifts, cards, or notes have been exchanged.
 - ✓ There has been a dating, sexual, social, or working relationship.
 - ✓ The complainant initiated or participated in any sexual discussions, jokes, or gestures.
 - ✓ The complainant ever indicated any displeasure with anything the alleged wrongdoer said or did, or whether the complainant asked the alleged wrongdoer to end such behavior.
- › Inquire about behavior of complainant and alleged wrongdoer during time surrounding the alleged incident(s).
- › Inquire about any other potential witnesses.
- › Explore any reasons the complainant may have to be untruthful, for example, a soured romance, work disappointment, job performance, or personal problems outside work.
- › Provide the alleged wrongdoer with an opportunity to provide alibis or mitigating circumstances.
- › Consider whether to ask for written responses to the allegations.
- › Note if alleged wrongdoer refuses to provide or sign a written statement and reasons given for refusal.
- › Consider whether to document the initial interview in order to make a record of employer's advisory against retaliation and other aspects of employer's desire to be fair and preserve privacy while taking complaints of harassment seriously.

Interviewing Witnesses

At the outset, interviewees **should** be advised of the following:

- › The purpose of the interview is to investigate a complaint of misconduct.
- › Full, truthful cooperation is expected of everyone involved in the investigation.
- › There will be no retaliation for cooperating in the investigation.
- › The witness has the right and duty to report any perceived retaliation.

Follow-Up Interviews

Those conducting follow-up interviews **should**:

- › Obtain responses by complainant, alleged wrongdoer, or witnesses to any significant observation.
- › Decide whether to contact and interview persons, including former employees, who likely may have information (for example, they worked in the relevant vicinity during the relevant time to the alleged harassment) even if they were not identified by others.

Additional Investigation Information

According to the EEOC, investigators should question the complainant and the alleged wrongdoer in detail. Moreover, supervisory and managerial employees, as well as co-workers, should be questioned about their knowledge of the alleged harassment.

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Quid Pro Quo Cases

During the investigation of quid pro quo cases, where an employee alleges that they were a victim of an adverse employment action (such as termination, demotion, reassignment, or denial of a raise) because they refused a supervisor's advances, an investigator must determine the validity of the supervisor's stated reasons for the adverse employment action.

Verbal Harassment Cases

During the investigation of verbal harassment cases, employers should ascertain the nature, frequency, context, and intended target of the allegedly harassing remarks. The EEOC also suggests the following questions for consideration in such a case:

- › Did the alleged wrongdoer single out the complainant for the verbal abuse?
- › Did the complainant participate in the verbal banter?
- › What was the relationship between the complainant and the alleged wrongdoer?
- › Were the remarks hostile and derogatory?

Defamation

Employers must be mindful of the potential liability for defamation when disseminating information about specific allegations. Alleged wrongdoers have brought lawsuits against employers for defamation, discrimination, wrongful discharge, breach of contract, and negligent investigation following claims of harassment.

Note: While truth is a defense to defamation, a false complaint of workplace violence or harassment (or statements of any witness who unnecessarily "exaggerates" the truth) may lead to a possible defamation suit by the alleged wrongdoer.

Qualified Privilege

Allegations of misconduct are inevitably shared, to some extent, during the investigation of a harassment charge. However, statements made during investigations may be protected by a qualified privilege. A **qualified privilege** generally protects company investigators and witnesses who make defamatory statements in good faith and for a proper purpose to another person who has a legitimate interest in, or duty to receive, the information.

To maximize the availability of qualified privilege, employers should:

- › Aim to protect the reputation of both the complainant and alleged wrongdoer.
- › Be mindful of potential liability for defamation on the part of the investigator, witnesses, and the parties directly involved in the investigation.
- › Keep investigative file separate from personnel files and limit access to those persons required to have access.
- › Discuss allegations and information only with those directly involved parties with a need to know such information.

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Avoidable Mistakes

During an investigation, employers **should not** make the following avoidable mistakes:

- › Search the alleged wrongdoer's desk or locker without consulting with counsel first. For public employers, such searches may violate the First Amendment and for private employers there may be possible privacy tort liability.
- › Secretly tape record interviews, telephone calls, or intercept emails without first consulting with counsel. Such actions may expose an employer to liability under federal or state electronic or wire-tapping communications laws.
- › Use polygraph testing in any investigation without consulting counsel first. Most private employers are prohibited from using polygraph testing under the Employee Polygraph Protection Act (EPPA).
- › Attempt to keep interviewees at an interview site (in a room, building, or other site) against their will. Detaining employees for even a short time may expose an employer to liability under state tort law for false imprisonment or intentional infliction of emotional distress.

Procedural Considerations

Employers **should** take into account the following procedural considerations:

- › Whether the investigative record will be discoverable should litigation follow.
- › Utilization of a management witness at all interviews.
- › Maintaining investigatory reports and interview notes separate from individual personnel files.
- › If the employer is unionized, honoring any request to have a union representative present during an interview.

Concluding the Investigation

After all interviews have concluded, an investigative report should be prepared by the investigator. This report should:

- › Provide a summary of the facts.
- › Include the interviewer's assessment of the credibility of each person interviewed and a basis for such assessment.

According to the EEOC, factors to consider in regards to determining credibility include:

- › Inherent plausibility.
- › Demeanor.
- › Motive to falsify.
- › Corroboration.
- › Past record.

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The investigator should then present the investigative report to the relevant company personnel. This may include:

- › Company executives.
- › Specific management personnel.
- › Director of human resources.
- › Company counsel.

Reaching a Decision

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. This determination may be made by the investigator or by a management official; however, it is recommended that this decision be made by someone other than the investigator

Informing the Parties

Once a determination has been made, the employer must inform the parties.

When informing an **alleged wrongdoer** about the harassment claim and investigation, employers should:

- › Make certain the wrongdoer is treated with dignity and not embarrass the employee in front of co-workers or family.
- › If the tentative finding of an investigation is that a violation occurred, employers should consider giving opportunity to respond to that finding.
- › Reaffirm company antiharassment and violence policies and obtain acknowledgment of same.
- › Put any disciplinary actions in written form or at least document contemporaneously.
- › Reiterate the company's policy against retaliation.
- › Place a summary of the actions taken, but not allegations, in the alleged wrongdoer's personnel file. Due to defamation concerns, investigation conclusions and allegations should not be in the personnel file.

When informing a **complainant** about the harassment claim and investigation, employers should take the following steps:

- › If the tentative finding of the investigation is that there was no violation of policy or that the evidence is insufficient, the employer should consider giving the complainant an opportunity to respond.
- › If there was a basis for discipline, the employer should notify the complainant that appropriate action has been taken and the employer fully expects that no problems will recur.
- › Reveal specifics of the disciplinary action that was taken to the complainant only after carefully balancing the complainant's perceived need to know against the alleged wrongdoer's privacy rights.

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- › If there was a basis for discipline, employers should consider providing psychological counseling or other help to the complainant.
- › Reiterate the employer's interest in being immediately notified should any further problems occur (including retaliation).
- › Document the notice provided in a letter or memo or at least document conversation.

Post Determination Actions

A harassment investigation may or may not end with a determination that harassment occurred. The following is a discussion of the actions employers should take under certain conditions.

Inconclusive Investigation

Where the employer cannot determine if a violation of company policy has occurred, employers should take the following actions:

- › Assure the complainant that although no finding could be made on the claim, the employer intends to protect the complainant and all employees against unlawful harassment and retaliation.
- › Advise the complainant to immediately report any further instances of harassment.
- › Advise the alleged wrongdoer that although the truth of the claim has not been determined, all employees are expected to comply with the company policy, including policies against harassment and retaliation.
- › Consider nondisciplinary steps such as:
 - ✓ Republishing and distributing the company's discrimination, antiharassment, and workplace violence policies to all employees.
 - ✓ Obtaining acknowledgment from the alleged wrongdoer that the conduct alleged would violate the company's policy.
 - ✓ Sensitivity training.
 - ✓ Physical relocation of either the complainant or alleged wrongdoer to eliminate interaction (provided that relocation does not diminish duties of either so as to constitute a real or imagined demotion).

Investigation Determines Harassment Has Occurred

In determining the appropriate level of discipline where an investigation determines a violation has occurred, an employer should consider all of the following:

- › The severity of the conduct.
- › The pervasiveness of the conduct.
- › The wrongdoer's overall record of employment and employment history.
- › The complainant's employment history.
- › The type of notice provided to the wrongdoer of the employer's policies.
- › The discipline imposed for previous violations of company policies.
- › Other company policies, such as any progressive discipline policy.

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An employer's options for disciplinary action may range from a verbal warning to termination of employment. However, regardless of the disciplinary option selected, employers must ensure the discipline is adequate and that each disciplinary act must be calculated to deter future misconduct. If the discipline has not been effective, the employer is required to impose harsher sanctions.

Verbal and Written Warnings

A warning is required for any misconduct, no matter how minor. Even if there is only a verbal warning, employers should make and retain a record in the alleged wrongdoer's personnel file, as well as in the investigative file, of having administered the warning.

Employers should consider whether to establish a company policy that requires every warning be a written warning, rather than verbal warning. Such written warning should also include a declaration stating that if similar conduct violating the company policy continues, then further disciplinary action will be taken, up to and including discharge. A written warning creates a record of the employer's action. The warning should not only notify the employee that the conduct engaged in is improper, but also provide guidance to the employee so as to avoid any future violations of company policy.

However, if a warning does not deter further misconduct, then the employer must increase the severity of the discipline. In situations in which violence is a possibility, employers should consider more innovative measures such as psychological counseling or sensitivity training.

Suspensions and Demotions

Although incidents of workplace misconduct may not warrant immediate discharge, employee suspension or demotion may be the appropriate level of discipline, rather than a mere warning.

Transfers, Reassignments, and Restructuring

Where an investigation finds a violation has occurred, an employer may choose to transfer or reassign the wrongdoer or complainant, restructure the workplace, or make other such arrangements as an interim/temporary or permanent step to remedy the harassment. However, employers must beware of transferring a complainant to a less desirable position, in that the transfer, however well intended as a remedial measure, may itself result in a charge of unlawful retaliation.

Termination of Employment

Dismissals for workplace violence and harassment following thorough investigations have frequently been upheld by courts. Before dismissing an employee, the employer must also consider the risk that a court or jury will find the employer liable to the wrongdoer if the discipline is excessive, the investigation is inadequate, or the results are too broadly disseminated. However, after discipline has been imposed, employers should promptly notify the complainant that action has been taken to remedy the situation.

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Employers may also consider whether the wrongdoer should be disciplined on ancillary matters, such as lack of cooperation with or interference with the investigation. As to employees employed under a collective-bargaining agreement, any discipline of the alleged harasser must conform to the collective-bargaining agreement and arbitral standards of fairness.

Note: An effective employer policy should note that harassment may occur and be in violation of company policy even in the absence of a violation of law. For example, conduct may have been unwelcome and on the basis of sex but not sufficiently severe or pervasive to be unlawful.

Investigation Determines False Accusations

Any discipline of a complainant for false reporting may intimidate or discourage employees from making justified complaints in the future. Even though an internal investigation may indicate that the complainant has lied about the incident, employers must proceed with great caution in imposing any discipline, lest the company incur liability for retaliation. Employers should review the situation with legal counsel before making any decision to discipline the complainant for making a false accusation.

Employers should also distinguish between instances where the employee knowingly makes a false report and one where there is an honest difference of interpretation about the incident that gave rise to the claim.

Following Up

At the conclusion of a harassment investigation, employers should consider:

- › Periodically checking with the complainant to see if their work environment is free of problems and documenting the steps taken to follow up on the employee's initial response.
- › Where disciplinary action was taken, making a further plan of action for the alleged wrongdoer and periodically reviewing the alleged wrongdoer's compliance with the plan.
- › Reviewing the company's harassment policy in light of any lessons learned.

Conclusion

While no employer wants to be accused of harassment, all employers should be armed with the knowledge of how to proceed should they be in the position to defend against a harassment charge. Knowing the risks of improperly handled harassment investigations is the first step to creating policies and practices for harassment investigations. Employers must ensure proper preparation at the outset of an investigation, care and sensitivity when conducting the investigation, and a thorough understanding of procedure when making a determination and remediating a harassment situation. Attention to detail and documentation throughout the procedure create the best defense against harassment liability.