



The Best Defense is a Good Offense

**The Necessity of Conducting an Effective
Workplace Investigation and the Difficult
Hurdle of Determining Credibility**

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In today's legal climate, two short words strike fear into the hearts of employers: Me Too. Those words mean that an employer may be faced with a sexual harassment claim. But sexual harassment claims are just the tip of the iceberg when it comes to dangerous claims involving hostile work environments. Hostile environment claims may be asserted based upon harassment of an individual or group because they are part of any class protected under the New Jersey Law Against Discrimination, which has broad protections for such claims.

What is an employer to do? The good news is that if an employer takes the necessary steps, it may have an affirmative defense to harassment claims. In *Aquas v. State of New Jersey*,¹ the New Jersey Supreme Court held that an employer is entitled to assert an affirmative defense to a hostile work environment claim based on the employer having exercised reasonable care to prevent and correct any harassing behavior. To invoke this affirmative defense, an employer must prove that it exercised reasonable care to prevent and promptly address and correct the alleged behavior, and that the plaintiff employee failed to avail him or herself of preventive or corrective opportunities available, or to otherwise avoid harm.

The *Aquas* Court set forth the requirements for asserting an affirmative defense to a claim of harassment, as follows:

- Create an anti-discrimination/anti-harassment policy with an effective mechanism for complaints that makes it the employee's obligation to report problems.
- Document problems and have accurate evaluations.
- Circulate the policy; provide training on discrimination and harassment as well as the policy.
- Answer any questions about the policy.
- Follow the policy; conduct appropriate (prompt and thorough) investigations.²
- Not retaliate against the complaining employee or witnesses, including through constructive discharge.
- Take appropriate remedial action.

An example of how the affirmative defense was successfully employed is *Endries v. Quick Chek Food Stores, Inc.*³ In *Quick Chek*, the plaintiff alleged she had been sexually harassed in violation of her employer's employment handbook. The plaintiff repeatedly asked the employee to stop his comments, but he refused. The plaintiff then completed an anonymous survey for her employer, mentioning the sexual comments. After reviewing the surveys, Quick Chek immediately ordered an investigation. The investigation included speaking with the plaintiff's supervisor, speaking to human resources, and meeting with Quick Chek's general counsel.

Quick Chek issued the supervisor a formal "constructive advice" letter that made his continued employment conditional. The conditions stipulated he must refrain from making inappropriate comments, must not retaliate against the plaintiff, must attend a harassment program, and must decline assignments that would put him in contact with the plaintiff. The plaintiff then went on disability leave and asked for



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the accused to be demoted or moved to a different region. She never returned from disability leave, and instead filed a complaint alleging a hostile work environment and retaliation in violation of the New Jersey Law Against Discrimination.

The trial court dismissed the case, concluding that Quick Chek had effective procedures for reporting and responding to complaints of harassment. It further stated that Quick Chek “did, in fact, respond in an effective way to [plaintiff’s] complaint of harassment.” On appeal, the court concluded that summary judgment was properly granted because of the effective anti-harassment policy in place and Quick Chek’s prompt investigation and response to the complaint. Further, after receiving the notice of corrective action, the employee never harassed the plaintiff again, or any other employee, for that matter.⁴

The Investigation

As shown by the *Quick Check* case, investigations are an essential offensive component to a defense against harassment claims involving hostile work environments. However, the investigation often is one of the most difficult steps in the *Aguas* offense/defense. The Equal Employment Opportunity Commission’s (EEOC’s) *Promising Practices for Preventing Harassment* states a “fully resourced” reporting process allows organizations to respond promptly, thoroughly and effectively to complaints.⁵ Being fully resourced requires investigators to have the authority and independence to investigate appropriately.

Investigators must:

- Be neutral, objective and well trained.
- Act promptly.
- Weigh credibility—failure to follow up on relevant evidence by corroborating witnesses and make credibility

assessments can result in a jury determining that the investigation was ineffective.⁶

- Understand the parameters of confidentiality of an investigation (including the limitation on requiring employees to maintain privacy.⁷ Such a confidentiality provision can be overridden on a case-by-case basis if there is a legitimate and substantial business justification that outweighs the National Labor Relations Act, Section 7 rights, such as: witnesses needing protection, evidence being destroyed, testimony being fabricated or confidentiality being needed to prevent a cover-up.
- Remind witnesses of the prohibition against retaliation.
- Prepare a written report documenting the investigation, and any recommendation and disciplinary action and/or any correctives/preventive action necessary.

The investigation is the foundation for the appropriate remedial action. The first step is to determine what matters need to be investigated and the scope of the investigation. Investigators should specifically consider:

- Who is going to be interviewed?
- Can/should the witnesses bring someone to the interview?
- Can the witness, or the party accompanying the witness, object to questions?
- Can an investigator prohibit the recording of the interview?
- Can/should an investigator request documents from an employee’s work email?
- Should the investigator prepare a written statement for each witness to sign?
- Should an employer provide the report to the employees?
- How is the evidence, if any, going to be preserved?

- If there is no documentary evidence, how will the investigator make a credibility assessment?

Virtually every harassment allegation involves a ‘he said/she said’ situation. Rarely do alleged harassers perform such acts in public or document them. As a result, the most difficult task, by far, is assessing credibility in the he said/she said scenario. However, assessing credibility is a must. It is not an option to say “I can’t decide because it’s he said/she said.”

So how does one assess credibility in harassment cases? It requires experience, not just with employment issues, but with people of all backgrounds, educational levels and personalities. It requires having the skills to understand why people behave the way they do.

The Threshold Issues

As an initial matter, the investigator must be experienced, objective and open minded, and the process must be fair, thorough and timely. Credibility determinations are critically important with respect to harassment allegations. It is imperative that the investigator clearly be neutral. The investigator cannot have any professional or personal stake in the matter, or bias or preconceived notions.

Questioning the Witnesses

The first step in assessing credibility is to conduct a proper interview. Below are some suggestions for effective interviews:

- Initially, use open-ended questions; saving more direct and specific questions for later. Do not ask leading questions or cross-examine the complainant or the accused (or any witnesses). One may want them to open up, speak freely, and forget the discussion is ‘an investigation.’ But just as in a deposition, one needs to ‘fun-

nel' questions from broad opening questions, gradually narrowing them until all remaining answers have been elicited. Then follow up with more specific questions tailored to the witness's prior responses.

- It is extremely important to listen carefully to the witness's answers. Do not lose track of what the witness is saying by becoming too focused on sticking to an outline.
- Press the witness for clear and definite responses; do not permit ambiguous, evasive, or vague responses. If a witness says "I don't remember" or "I don't recall," clarify whether the witness does not remember *if* something happened, or whether the witness is saying he or she does not recall something happening. To avoid answers like these as much as possible, do not begin questions with phrases like "do you recall" or "do you remember."
- Do not ask questions using ambiguous terms the witness can define according to his or her own personal view. For example, never ask questions that require the witness to draw a legal conclusion, such as "Did Jack sexually harass Jill?" Instead, initially ask open-ended factual questions, such as "Did you ever hear Jack say anything sexual in the workplace?" Then, follow up with questions regarding the specific allegations, such as "Did you ever hear Jack tell Jill that she had 'a nice ass'?"
- Beware when the witness answers a question with another question, such as "Why would I do that?," one must follow up, because the witness is evading the question. Watch for answers that hedge. Answers that include phrases such as "not really" require follow up.
- One also must follow up if the witness answers a question by describing what he or she usually does. This most likely means the witness did not

follow his or her usual course of action on the occasion in question. Press for an answer about that particular occasion.

- Pin the witness down by asking global closing questions at the conclusion of each subject area, such as: "Is that everything that John said about that?" Do not use compound questions, because it will be unclear which question the witness is answering.
- Generally, ask questions chronologically. Reserve particularly embarrassing or hostile questions for the end of the interview. Do not express any opinions. Do not make any factual statements. Do not make any representations about potential conclusions of the investigation. Do not make any representations about potential actions that may be taken as a result of the investigation.
- The complainant and/or the accused pose particular issues as witnesses. With reluctant complainants and/or witnesses, the investigator must be empathic and understanding. He or she must build trust and ease into different topics. With combative accused parties or witnesses, the investigator needs to establish control. He or she should inform them that they are required to cooperate with workplace investigations as a condition of employment, and that they may suffer adverse employment consequences as a result of their failure to cooperate. Of course, the investigator must avoid engaging in combative behavior. If stonewalling is encountered, the investigator should not stop until he or she gets an answer to the question. Similarly, as to evasion, the witness should not be allowed to answer a question other than the one asked.
- Follow-up questions should be used to clarify or eliminate ambiguities. The investigator should make it apparent to the witness that his or

her attempt to claim lack of knowledge is not believable. It may be helpful to come back to the difficult topic later, after more trust has been established.

Ten Credibility Tips

An investigator can assess credibility through:

1. **Inherent plausibility:** Create a timeline with a specific chronology. Then ask: Does the story make sense? Is it logical that the events described could have occurred the way the alleged victim or the accused described them? If not, a red flag should be raised.
2. **Inconsistencies:** One of the most effective ways to evaluate a witness's credibility is to examine whether there are inconsistencies in or with the witness's account of what happened. Internal inconsistencies in the witness's own account virtually destroy the witness's credibility. External inconsistencies between the witness's account and other evidence (if any) also are very damaging. Ask for details and look for contradictions in the alleged facts.
3. **Motive to lie:** In a harassment scenario, one party often will claim the adverse party has a motive to lie. The accused may claim he or she had a voluntary relationship that is now falsely portrayed by the complainant as sexual harassment or, in a racial harassment case, that the complainant/subordinate only claimed harassment (falsely) because he or she knows his or her performance is unsatisfactory and his or her job is in jeopardy. Conversely, of course, the complainant often will claim the alleged harasser must lie to protect his or her job, reputation, and/or personal life.
4. **Past history of engaging in similar behavior:** Although generally not permissible in legal

proceedings, the use of past history of engaging in similar behavior to establish that a person acted the same way on a particular occasion in the context of an investigation is common. However, the investigator must be careful about according too much significance to such patterns. Guilt on one occasion does not always translate into guilt on another occasion.

5. **Reputation for dishonesty:** A witness's reputation for dishonesty may come into play. However, the investigator should be wary of relying too heavily on such a reputation, unless it is widely known and supported by credible and proven examples.

6. **Demeanor:** A witness's demeanor is probably the least reliable basis for evaluating his or her credibility, and the investigator must be careful not to accord too much weight to physical cues. Although many experienced investigators still use body language, eye contact, and tone of voice to assess credibility, others warn against making assessments based on these cues. For example, while not looking someone in the eye traditionally was viewed as evidence of guilt or lying, the prevalence of social disorders, and other reasons for such behavior, has made investigators cautious in using this as evidence of bad conduct. However, the words chosen by a complainant or accused harasser, including avoiding a straight answer, combined with physical cues, may make the assessment of dishonesty easier.

7. **Contemporaneous notes/statements:** Did the complainant keep contemporaneous notes while the alleged harassment was occurring? Obviously, this is not the same as writing it all down later, after he or she has consulted an attorney. Like

the evidence rules dealing with 'fresh complaints,' there are reasons for giving credence to statements or notes made at or close to the time of the incident. While not fool-proof, such evidence can be very persuasive.

In addition to notes, if the complainant talked to relatives, friends, therapists, confidantes, coworkers, or others at the time, these statements to others may make credibility easier to determine. Obviously, if the accused made notes or statements during the events complained of that show the complainant's actions are not as he or she describes them, or evidence of other issues leading the investigator to question the motivation for the complaints (such as poor performance reviews, rejection of advances, pursuing a relationship after it has ended, etc.), those contemporaneous documents/notes may be equally persuasive.

8. **'Witnesses':** Although there often are no eye-witnesses to harassment, 'witnesses' come in other forms. Who (if anyone) does the complainant or the accused say he or she spoke to about the events? Who does the complainant or accused tell the investigator will support their version of the events? What do those "witnesses" say? Are their statements consistent with what the investigator was told they would say? Assess whether their information is first-hand knowledge or third-hand rumor and/or innuendo, and decide on the weight to be given accordingly. Also assess any motivation to lie. With 'fact' witnesses, whether a witness has a motive to lie becomes a crucial factor if there are no significant internal or external inconsistencies that impair the witness's credibility and the basis for the witness's account is

not inherently unreliable. Of course, this objective review will not be possible when assessing credibility as between the complainant and the accused in a he said/she said situation.

A motive to lie can manifest itself in a myriad of forms. However, the most common motives to lie are bias and interest.

Bias is a relationship between one person and another that causes the first person to be unreasonably favorably or negatively disposed toward the second person. For example, the account of a witness who has a personal relationship with either the accused or the complainant may not be reliable. Similarly, the account of a witness who was professionally advantaged or disadvantaged by one of the parties also may not be particularly reliable.

A person with some interest in the outcome of an investigation likely will not be particularly objective. Thus, for example, a witness who stands to obtain a promotion if the accused is fired may be inclined to make false negative statements about the accused.

9. **Corroborating documentation/witnesses:** If indications are the complainant is falsely claiming harassment because of a poor performance review, he or she is angry about not getting a promotion or the like, review all documentation and interview all witnesses with relevant information about any such contention. If a complainant claims the alleged harasser booked only one hotel room on a business trip, obviously check the expense report. Again, he said/she said does *not* mean there is no corroboration possible, even where there are no direct witnesses.

10. **Common sense, experience, and understanding of human**

nature: At the end of the day, the investigator must draw on his or her expertise as an objective, experienced observer of human nature, and combine common sense with a mastery of investigative technologies. These characteristics are not easily achieved, and often difficult to maintain, but are critical for the most sensitive and difficult task of investigating workplace harassment claims.

Conclusion

The proposed EEOC guidance states that any investigation is “effective” if it is sufficiently thorough to “arrive at a reasonably fair estimate of the truth.” In the end, it is not an option for an

employer to do nothing simply because the employee denies the harassment, and an employer may take remedial action even where the claim is uncorroborated.⁸ It is the investigation that provides the foundation for the final required step of appropriate remedial action. It is an employer’s obligation to ensure an investigation is conducted promptly and thoroughly. To do so, an employer must rely on an effective investigator to be the quarterback of the offense and conduct an investigation that buttresses the defense to a hostile work environment claim. ☞

Endnotes

1. *Aguas v. State of New Jersey*, 220 N.J.

494 (2015).

2. *Payton v. New Jersey Turnpike Authority*, 148 N.J. 524 (1997).
3. *Endries v. Quick Chek Food Stores, Inc.*, 2017 WL 244100 (N.J. Super. App. Div. Jan. 20, 2017).
4. EEOC, Promising Practices for Preventing Harassment, available at <https://www.eeoc.gov/eeoc/publications/promising-practices.cfm>.
5. *Endries v. Quick Chek Food Stores, Inc.*, 2017 WL 244100, p.6 (N.J. Super. App. Div. Jan. 20, 2017).
6. *Lightbody v. Walmart Stores*, 214 U.S. Lexis 148 (U.S.D.C.D. Mass. 2014).
7. *Banner Health Systems*, 362 NLRB No. 137 (June 26, 2015).
8. *Hathaway v. Runyan*, 132 F.3d 1212, 1224 (8th Cir. 1997).

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