

Notes about
options
in addition
to reporting S-h.

" My Counsel wants mandatory reporting "
" My complainant then will not talk " DRAFT 1992

**My General Counsel vs. My "Customer:"
Is there an Effective Dispute Resolution System for Sexual Harassment?**

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The most common call to my office, since the October 1991 Thomas Hearings, has been from a manager somewhere around the country who has just discovered that present interpretations of civil rights law do not help most sexual harassment complainants¹.

"Can I tell you my story?" says my caller. "I came in early to the office, and I overheard a secretary talking on the phone about a fellow manager. She said she was being brushed against, crowded, and stared at. She said that my colleague is deliberately trying to make her blush or cry, and laughs at her when he can get a rise out of her. She said that he is very careful to do it only when they are alone together. She keeps asking him to stop it. But yesterday he put out his hand to take a paper from herand put both hands around her breasts. She was crying on the phone and told her friend that she was going to try for a transfer."

"I am going crazy", says my caller. "I called the General Counsel's office, though fortunately I did not mention anybody's name. They said I am required immediately to call the EEO Office and that EEO in turn is required by the company to institute a fair, prompt and thorough investigation. So I went back to the secretary to talk with her. She pleaded with me to keep my mouth shut. She said it would be 'his word against hers.' She is very much afraid that somehow he will get back at her. She is desperately worried about anyone else hearing about this, especially her husband.

"We talked about it again at lunchtime. She said she did not want to get anyone in trouble, she did not want an investigation, all she wants is to be able to work here free of harassment. She was extremely upset with me for eavesdropping. She says there is absolutely nothing that anyone can do, and that I have to keep quiet about this until she can try to get out. She was unhappy about the idea of going to talk with some strange EEO officer she doesn't even know. She is really worried about getting a reference so she can transfer, and she is beside herself about what her husband might say if he knew. I am worried that she might hurt herself or sue me for invasion of privacy. And what happens if there is an investigation, it turns out there is not enough evidence, my secretary's life is ruined, and my colleague hates me or sues me?"

"Our Total Quality Management program instructs me to think of our employees as one group of the company's 'customers'. And plainly complainants are in any case an important group of 'customers' for our internal complaint procedures. So here I am required to ignore the wishes of a 'customer'! Can you help me? Should I just try to get my fellow manager transferred?"

Research shows that most people who feel harassed have five important characteristics². They fear retaliation. They fear loss of privacy. They believe they do not have enough evidence to prevail in a formal grievance because—this is true in 90% or more of all the concerns that have been brought to me—their evidence is "just my word against his". They believe there is no good solution, and that they do not have the skills to handle the situation. When asked what they want, they say they do not want anyone punished; all they want is for the harassment to stop. They therefore do not want

¹I have been a general ombudsman for nineteen years and consult quite widely in North America. I have been consulted on about 8000 separate concerns about harassment, about half concerning sex and gender. Dr. Freada Klein, (possibly the most experienced surveyor of this topic in the US), and I estimate that, on the average, some 15% of all women and some 5% of all men in a given workplace will feel seriously—that is disruptively—sexually harassed each year. My research indicates that 25-40% of those who feel seriously sexually harassed may choose to express their concerns in a workplace with a variety of available options and choice. This article is drawn from what we know about characteristics of this latter group; little is known about the significant group of people who feel harassed who do not come forward even to an ombudsman.

²Rowe, Mary, "People Who Feel Harassed Need A Complaint System With Both Formal and Informal Options," *Negotiation Journal*, April 1990, vol 6, no 2.

to bring a formal grievance. In addition, many people do not want to have to talk about sexual questions with someone they do not know and/or someone of the opposite gender.

Of course, people differ, and some people do want to bring a grievance. In fact, in my experience, a small percentage of sexual harassment complainants will only be satisfied by a formal investigation and formal complaint. And some people prefer to talk with someone that they do not know, and will not have to see again.

Employers also have problems because the law appears to tilt them toward mandatory reporting and mandatory investigations. A more precise statement of what the law requires is that the employer must maintain a workplace free of sexual coercion, but some counsel, in trying to protect their clients, interpret this to mean that there must be an investigation of any concern of sexual harassment. This interpretation, which might work with a different kind of problem, creates difficulties with respect to this kind of problem, which often happens behind closed doors, which is delicate in nature, and where the offense is in part perceptual because it is partially defined by its "unwelcomeness". (This interpretation, by itself, also does not touch a different, serious problem, which is that in order to maintain a workplace free of sexual coercion, the employer needs to follow up, where there has been a complaint, to see that harassment has not recurred and that there has been no retaliation for the complaint).

If the company does require an investigation of every sexual harassment concern, the problem of evidence is a very serious one, and it is exacerbated by the fact that most employers cannot subpoena witnesses or compel the truth under oath. The problem of evidence is further exacerbated by the fact that a thorough investigation usually would mean talking with many associates of the alleged offender. Doing a really thorough investigation—which most employers actually do not do, because they do not know how, or do not wish to do so, or because they are trying to protect the privacy of everyone involved in the case, and protect themselves against charges of defamation—also does not necessarily help. This is because, contrary to common belief, quite a number of offenders appear not to harass more than one person.

In theory, an employer can make decisions, even where the evidence is "his word against hers", on the basis of whether the complaint is more likely than not to be justified. However, in most such cases there is not sufficient evidence for the typical employer to feel comfortable taking action against the alleged offender. On the basis of "he said/she said" evidence, the employer also may be reluctant to clear the name of the alleged offender. The employer often feels it is close to impossible to protect the rights of everyone involved in a case, and to protect itself. In short, many investigations turn out to hurt everyone involved, produce no satisfactory outcome—and the employer may find itself vulnerable to suit by both parties.

Options and Choice for People Who Feel Harassed

Every honorable employer wants harassed people to be able to get the harassment to stop, and therefore wants to help harassed people to raise their concerns. If the employer and its counsel do want people to raise their concerns, they must offer options—and choice—to most people who feel harassed. These options will work best where the employer has a clear policy about harassment and about retaliation, and offers training to everyone in the workforce on preventing harassment. These options also work best where supervisors are taught how to handle complaints. Finally, a dispute resolution system is likely to work better for each different kind of concern if it handles all kinds of concerns; I do not recommend a complaints system just for sexual harassment.

Creative solutions may be added to this list; here are the most common responsible options:

- Offering confidential support to the complainant to draft a private letter to the alleged offender, (see box). (Writing a letter is more than just one option for action. Drafting a letter to an offender is

typically the best preparation for pursuing any other option, and is usually the best first step for offended people, to help them figure out what they want to do next.)

- Offering confidential support for the complainant to go back directly to the alleged offender, with or without the private letter, *and with or without a trusted friend.*
- Offering the option that a supervisor or human resources officer or ombudsman could accompany the complainant in a relatively low-key discussion with the alleged offender. (A letter to the personnel file may or may not ensue; the ombudsman choice will not leave a record).
- Offering the possibility for a human resources officer or supervisor or ombudsman to meet separately with the alleged offender and the complainant for a relatively informal resolution. (A letter to the personnel file may or may not ensue; the ombudsman choice will not leave a record).
- Offering the possibility of formal mediation with an impartial person, if both parties voluntarily agree. (There may be a written settlement, on the record, or kept only by the parties).
- Offering formal investigation and formal adjudication of a signed grievance written by the complainant to a supervisor or appropriate EEO or HR manager. (There will be a formal written record).
- Offering the chance for the complainant to ask for a "generic" approach, whereby the appropriate department head would bring in a training program, and discuss the employer's policy at the next department meeting, policy would be re-posted on the bulletin boards, etc., without mention of the individual complaint. (There will usually be no written record of the individual complaint).

All of these approaches require follow-up, if a supervisor knows of the alleged harassment, to be sure that the harassment is reported to have stopped and that there has been no retaliation.

All of these options offer some protection for the rights of the alleged offender, as well as for the offended person. There are other options, for example "trying to get the fellow manager transferred out," which probably do not fairly protect the rights of the alleged offender (and may create a hazard for other people). Many employers take the point of view that there should be no adverse administrative action without a fair process.

How To Provide Options and Choice

Contemporary theory and practice suggest that organizations should design and build dispute resolution *systems*—rather than just one or another dispute resolution structure—in circumstances where people will be working together or dealing with each other over time. This is especially true for organizations with a very diverse (or increasingly diverse) work force. An effective dispute resolution system for sexual harassment, as for all other problems, includes all of the following functions:

- **Expressing respect for feelings:** especially rage, fear of retaliation and grief. Confidential help for the secretary to deal with her feelings,—so she will be able to make responsible decisions and be able to deal effectively with her complaint—may be the most cost-effective element of the dispute resolution system. This is true in part because providing respect and dealing with feelings cost very little. It is also because respect is a parent of productive work relations, and because humiliation is a parent of destructive behavior. In my experience, expressing respect for feelings is the function most likely to fail in a dispute resolution system. In this example, reporting the secretary's conversation to the EEO office will probably be seen by her as very disrespectful of her feelings (despite the fact that it would appear as a reasonable act to many people).

- **Giving and receiving information** on a one-to-one basis. The secretary should be able to find confidential advice as to how the complaint system works and who can support her, for example, an ombudsman or Employee Assistance. Many people overestimate how much information disputants have. Nearly everyone overestimates how much information top managers have, especially when things are going wrong. The manager in this situation also needs confidential advice;

- **Confidential Consultation to help people help themselves:** counselling with the secretary, listing options for her to choose, inventing new options, consulting and coaching on how she might deal with the problem directly if she wishes to explore these possibilities (commenting on successive drafts of a letter, role-playing, anticipating possible outcomes, etc.);

- **Shuttle diplomacy** by a trained, impartial third party, back and forth between the secretary and the alleged offender. Shuttle diplomacy and mediation both may include offering advice as to what may happen if informal problem-solving fails;

- **Mediation:** *if and only if chosen by both parties* having a trained, impartial third party bring together the secretary and the alleged offender so they reach their own settlement. The settlements of mediation may be formal or informal, and on file or kept only by the parties and not discoverable;

- **Fact-finding or investigation:** The secretary should be able at any point to write and sign a formal grievance and know that it will be investigated promptly, fully and fairly;

- **Decision-making, arbitration or adjudication:** the secretary should be able to appeal to a formal complaint-and-appeals procedure³.

- **Generic solutions, dispute prevention, and systems change:** the secretary should be able to choose a generic address to the individual problem, (bringing a training program into the department, discussion of company policy and procedures). In addition, the single most important option for every employer is to prevent harassment. Harassment is profoundly painful and disruptive to individuals and to the workplace; the only really good option is to stop this kind of behavior from happening in the first place. To this end, the system should be able to study *promptly* patterns of complaints in order to plan appropriate change.

An effective sexual harassment complaint system also has the following characteristics:

- **The system is taken seriously.** It has strong support from top management. It is widely publicized. Managers and employees hear discussion and receive training about sexual harassment and about conflict resolution. The system reports back aggregate statistics, to top management and to the workplace, as an integral part of the organization's TQM or management information system.

- **The system provides significant evidence of change,** (including firing offenders in appropriate cases), as a result of a complaint.

- **Policies against retaliation are taken seriously by all.** Managers are not punished for decisions they made in good faith; employees and managers are not punished for *good faith* complaining about harassment.

³ There are three, excellent, recent books which discuss internal grievance procedures: (Ewing, David, Justice on the Job, Harvard Business School Press, 1989; McCabe, Douglas, Corporate Non-Union Complaint Procedures and Systems, Praeger, 1988; Westin, Alan F. and Alfred G. Feliu, Resolving Employment Disputes Without Litigation, BNA, 1988).

- **The system provides multiple options for pursuing most complaints**, and as much choice as possible for complainants, rather than requiring that a problem may be pursued in only one way, or with only one possible complaint-handler. The system has many different access points so that complainants can raise concerns about harassment either with people they know or people they do not know.

- **The system provides *loopsback***, from adjudicative options to problem-solving options, **and also *loopsforward***, so that a complainant can at any stage choose investigation and adjudication of his or her complaint, so long as this is done in good faith⁴.

- **The system is available to everyone**, managers and employees alike. It will work better for sexual harassment, in my opinion, if it carries all types of concerns.

if asked

- **The system provides confidential neutrals** or impartial persons (ombudsmen) to help people to deal with the system, to legitimate the idea of raising concerns, to minimize retaliation against those who complain, to provide consultation on drafting a letter and on other options, to mediate, to review how conflicts have been handled in the past, (especially patterns of conflict), to be alert for new problems, to be available for bizarre, delicate, distasteful or frightening complaints, to provide individualized coaching to anyone involved in a sexual harassment case, to work on appropriate systems change.

- **The system provides, if possible, more than one designated neutral (ombudsman)**, so that complainants—and alleged offenders—have a choice. Ideally, people should have the choice of dealing with an impartial complaint-handler or mediator of the same gender and race as themselves. Providing more than one neutral or impartial person also helps in cases where the first such person is no longer appropriate or available.

- **The system guarantees confidentiality** to those who approach an ombudsman (or employee assistance counsellor) off the record, e.g., for consultation, counselling, and mediation, except in the rare case where there is a duty to protect. The practice and perception of absolute confidentiality by ombudsmen is essential to building trust in a system that is going to handle delicate and difficult disputes like sexual harassment⁵.

and follow up

So, back to my caller. If this company will offer realistic options, including problem-solving options, this secretary will probably choose one of them, and the harassment will probably get stopped.

⁴ Ury, Brett and Goldberg (Ury, W. L., Brett, J., and Goldberg, S., Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict, San Francisco, Jossey-Bass, 1988) have given the name *loopsback* to the process whereby a dispute can be taken from a rights-based, adjudicative process, to an interests-based, problem-solving process. Because a small proportion of the population is only comfortable with and satisfied by adjudicative processes, I argue that *loopsforward* are also an important characteristic of an effective internal dispute resolution system, and that people complaining of sexual harassment should not necessarily be required to go through informal steps in a grievance procedure.

⁵ My research indicates that an employer must choose between: 1) guaranteeing confidentiality (and the choice of the complainant about whether and how to pursue a complaint), which will produce a relatively high reporting rate of complaints and concerns, and 2) no effective confidentiality, (and therefore no reliable choice for complainants about what will happen), and a much lower rate of reports. This is true for all costly and difficult problems such as safety, ethics, harassment, misconduct, etc. (Rowe, op.cit) Whether an ombudsman can be subpoenaed and forced to testify, and thus break confidentiality, is a topic now being tested in various ways, but there is an emerging professional consensus that ombuds practitioners must not break confidentiality. A few courts have upheld this principle for ombudsmen as they have for other kinds of mediators, and the 1990 Administrative Dispute Resolution Act for Federal Agencies affirms this principle for neutrals working in Federal agencies. (Rowe, Mary, Mary Simon and Ann Bensinger, "Ombudsman Dilemmas: Confidentiality, Neutrality, Testifying, Record-Keeping," Proceedings of the Annual Conference of SPIDR, 1989, SPIDR, 1990, pp. 282-293.)

If the company constructs a dispute resolution system, and offers choice to all complainants, some complaints will still be taken to court. For example, an occasional person may choose an informal approach and then later accuse the company of not having done an investigation. Thus it is important for the employer who builds a dispute resolution system to be sure that every employee knows that she or he has the right at any stage of a complaint process to request a formal option. And the employer should make public its policy that a signed complaint written to a supervisor or human resources officer must and will be investigated formally.

Civil rights laws, and company complaint procedures should not require mandatory reporting and investigation of every sexual harassment concern, except for cases where a life may be at stake. Mandatory investigation does not meet what we understand to be the needs of most complainants as they specify their own interests, let alone the needs of people alleged to be harassers and of employers. Mandatory investigation will not produce a workplace free of sexual coercion. A dispute resolution system — which offers options and choice — encourages more men and women actually to seek help and to seek help early, and is more likely to prevent sexual harassment.