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The Case of the Reluctant Complainant

Created by John D. Thompson, Security Executive Council Subject Matter Expert Faculty

*Misconduct allegations are an unfortunate fact of corporate life. Security is not always the first department contacted with allegations of this type, but it's usually the department whose staff has the necessary investigative skills. Attorney John Thompson provides help for non-security colleagues in handling complaints effectively in his book *The Human Resources Response to Misconduct Allegations* (published by The Security Executive Council). Here he summarizes key tips for human resources professionals approached with misconduct concerns.*

"I need to tell you about this guy who's been harassing me, but I won't tell you unless you promise not to do anything about it." The employee who tells you this seems very upset, yet very insistent that you promise not to act upon the information she wishes very much to tell you. How do you handle this as a Human Resources professional?

If you don't agree to keep quiet, you may never learn the information necessary to stop what could be illegal or even criminal activity committed in your workplace. The legal ramifications—not to mention the effect upon your employment status—could be tremendous. On the other hand, if you make the promise and keep it, you could be complicit in that same illegal or criminal activity. What if you make the promise, then break it, and the harasser finds out the woman complained and assaults her? These sound like lose, lose and lose propositions.

There are other approaches to the above dilemma, but they often require sophisticated interviewing and counseling skills.

Let's begin with the end in mind: The complainant has put the company on notice, and you must resolve the problem. Your failure to obtain the facts and prevent future harassment would create an enormous risk of legal liability for the company and possibly yourself. For example, if the harassment is sexual harassment under the law, the company would be liable because you knew or should have known about the harassment and failed to take prompt and appropriate corrective action.

Of course, there is no cookie-cutter solution to this dilemma because complainants come in a variety of shapes and sizes. Let me suggest several approaches, in order of preference, that might allow you and your company to obtain the information you need without running inappropriate risks.

The first approach is to convince the complainant to withdraw her (in my example) demand for inaction on your part. Consider the following techniques:

- Ask her what her goal is; she probably will say she wants the behavior to stop. Explain that you cannot help her achieve that goal unless you are free to take appropriate action.
- Explain that, legally, she has put the company on notice and you must act. If she knows that her promise would put the company and you in a tough spot, she might be more inclined to provide information.
- Explain that if you cannot stop the harasser, he (in my example) could hurt others. Most harassers are "serial" harassers, and there will be other victims unless she helps you stop this person. In other words, appeal to her desire to protect and help others.
- Explain that you will do everything you can to protect her privacy, consistent with the needs of your investigation. Make sure she knows that you understand her desire for privacy and assure her that you will limit disclosure of information to those who truly need to know.
- Ask her why she doesn't want you to do anything; she probably will express a fear of retaliation by the harasser. Explain that she has a legal right to be free from retaliation and that you can help protect her from any type of retaliation.

If the above techniques do not work, a second approach is to analyze how serious the situation is by asking the complainant questions like:

- Has this person physically harmed or threatened to harm you?
- Can you at least tell me whether the harasser is an employee?
- Can you give me an example of the type of harassment you are talking about?
- How long has this been going on?
- Is this still going on?

Frequently, once the complainant begins answering these questions, she becomes less reluctant about providing more details. At worst, you might obtain sufficient clues to conduct an investigation without her cooperation.

A third approach is to promise the complainant that you will not take any action. This approach might become necessary if the complainant insists that she wants to handle the matter herself. Your promise, however, must have two conditions. The first condition is that she provide enough information for you to conclude that there is no risk of imminent harm to the complainant or others. This reduces the risk that your inaction would contribute to any harm. The second condition is that the complainant agrees to check in with you after an agreed-upon period of time and allow you to take action if the harassment has not stopped. You must follow up with the complainant even if she does not follow up with you!

A fourth approach is to refer the complainant to an employee assistance counselor or similar mental health professional. Explain to the complainant that she may talk to that professional in confidence. This approach must be combined with the third approach (i.e., you must determine there is no imminent danger and you must act if she does not later advise you that the harassment has stopped). Ideally, that professional will attempt the first approach discussed above and encourage the complainant to come back and discuss the matter with you. Again, you must follow up with the complainant.

A fifth and unappealing approach is to plow ahead with an investigation without the complainant's cooperation. This will be more or less difficult depending upon how much information you have been able to glean from the complainant. The scope of the investigation should begin as narrowly as possible and expand only as necessary to ensure—as well as you can—that the complainant is free from harassment in the workplace. You probably should begin with the complainant's immediate supervisor, who is most likely to know about the complainant's work environment. Things get tricky, of course, if the harasser turns out to be the supervisor! No one said human resources investigations were easy.

The good news is that this last approach seems never to be necessary. Ultimately, after lots and lots of persuasion and discussion and empathy, even the most reluctant complainant will provide the information you need. Because, after all, she came to you in the first place because she wanted help.

For more information about the Security Executive Council or Mr. Thompson's book series, please visit https://www.securityexecutivecouncil.com/secstore/index.php?main_page=index&cPath=78_106.

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Contact us at: contact@secleader.com

Website here: <https://www.securityexecutivecouncil.com/>