



Hearing Hoof Beats: Is It a Horse or a Zebra?

An Employer's Guide to Deciphering Employee Complaints

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Agenda

- Difficulties Interpreting Employee Complaints
- Employee Complaints: What Do They Really Mean?
- Best Practices for Receiving and Evaluating Employee Complaints



Difficulties Interpreting Employee Complaints



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Difficulties Interpreting Employee Complaints

- Reporting is often subjective.
- Reporting may be unclear or incomplete.
- Employee can be emotional.
- Complaints often involve many issues – both legal and non-legal.
- Employee may use buzzwords incorrectly.



Difficulties Interpreting Employee Complaints

- Managers are people, too. To be prepared for and skilled at responding to complaints, they need:
 - Training
 - Guidance
 - Confidence
 - Support



Employee Complaints: What Do They Really Mean?



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Frequent Employee Complaint #1

**My supervisor is
discriminating
against me!**

When you hear this, you'll imagine
the worst!



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But What Is She Really Saying?

I'm being required to follow the rules and my co-worker isn't!

I'm being held accountable for my conduct and my co-worker isn't!



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But Is It Really “Illegal Discrimination?”

- Does the employee belong to a protected class?
- Has she experienced an adverse employment action?
- Was that action taken because of the employee’s protected class?



Discrimination? Not Exactly.

- Plaintiff worked at a family business.
- Discovered brother (VP) was having an affair with a subordinate.
- Plaintiff began to complain of favoritism:
 - Brother was overlooking girlfriend's poor performance.
 - Girlfriend took “unlimited vacation” and other time off without notice.



Discrimination? Not Exactly.

- Her specific complaint?
 - The relationship was having “a detrimental effect on [the company]” and was a “conflict of interest,” that was having an “adverse effect” on her employment.
 - “Harassment and discriminatory environment created by widespread sexual favoritism” toward the girlfriend, causing her duties and responsibilities to be “substantially reduced, and her leadership duties removed.”



Discrimination? Not Exactly.

- Plaintiff resigned after 28 years with the company.
- Court rejected “paramour preference” claims.
- Discrimination claim requires disparate treatment because of one’s gender, not because of a preference based on romantic relationship.



Discrimination? Not Exactly.

- Lessons learned?
 - Courts love soap operas
 - When an employee claims discrimination, tease out whether:
 - ☐ They are truly being treated differently than others;
 - ☐ And, if so, is that differential treatment because of the their protected status?



Frequent Employee Complaint #2

My boss has
created a
hostile work
environment!

I'm being
bullied by my
co-worker.



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But What Is He Really Saying?

- My boss is a jerk! He's
 - Type A
 - Too critical
 - Abrasive
 - Too demanding
 - Ruling with an iron fist



But What Is He Really Saying?

- My co-worker is a pain in the...neck! We don't get along and I can't work with him.
- My co-worker:
 - Teases me
 - Monitors my work
 - Gossips about me



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Title VII

- Is not a “general civility code”
- Doesn’t prohibit ‘the ordinary tribulations of the workplace’
- For example:
 - Sporadic use of abusive language
 - Occasional teasing
 - “Boorish conduct”



But Is It Really A “Hostile Work Environment?”

- Was employee subjected to verbal or physical conduct because of status in protected class?
- Was the conduct unwelcome?
- Was the conduct sufficiently severe and pervasive to alter the condition of employment?



But Is It Really A “Hostile Work Environment?”

Conduct does not need to be so bad as to force someone to quit.

- But it must be “***so objectively offensive*** as to alter the conditions of the victim’s employment”

- Look at:

“...frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.”



Hostile Work Environment? Nope!

- Plaintiff was an auditor for the DOJ.
- He was assigned an audit, which was supposed to take five months.
- After 12 months, the audit was still not completed.
- Plaintiff was placed on a PIP.
- After failing to meet the benchmarks for his PIP, the employer gave him a pre-dismissal notice. But plaintiff resigned and filed suit.



Hostile Work Environment? Nope!

- Plaintiff blamed his work problems on discrimination and a hostile work environment. He claimed his supervisor:
 - “Nitpicked” his work
 - Checked in frequently about his progress
 - Put him on a PIP
 - Assigned him to clean the office kitchen



Discrimination Claim Rejected

There was no adverse employment action!

- Written warnings and PIPs are not adverse actions if they don't materially affect things like responsibilities, pay, hours, or other benefits
- Minor disruption in the tasks employee prefers -- not discrimination



Hostile Work Environment Claim Rejected

Criticisms of a subordinate's work, expressions of disapproval, negative performance reviews & undesirable work assignments DO NOT rise to the level of hostile work environment.

“[N]ormal strains that can occur in any office settingdo not demonstrate a work environment that was pervaded by discrimination.”



But Wait....

The emerging issue of microaggressions:

That's so
gay...

That's
retarded...

Handicapped

He looks like
a terrorist...

Are you
deaf?

That's so
ghetto...

He got off
the short
bus...

Typical
woman
driver...



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Frequent Employee Complaint #3

I'm being sexually
harassed by my
co-worker!



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But Is It Really “Sexual Harassment?”

A “hostile work environment”:

- Unwelcome sexual advances
- Requests for sexual favors
- Other verbal or physical conduct of a sexual nature

“Quid pro quo”

- When submission to sexual demands is a term or condition of employment (or when refusing sexual demands is a basis for employment decisions)



Questions to Ask

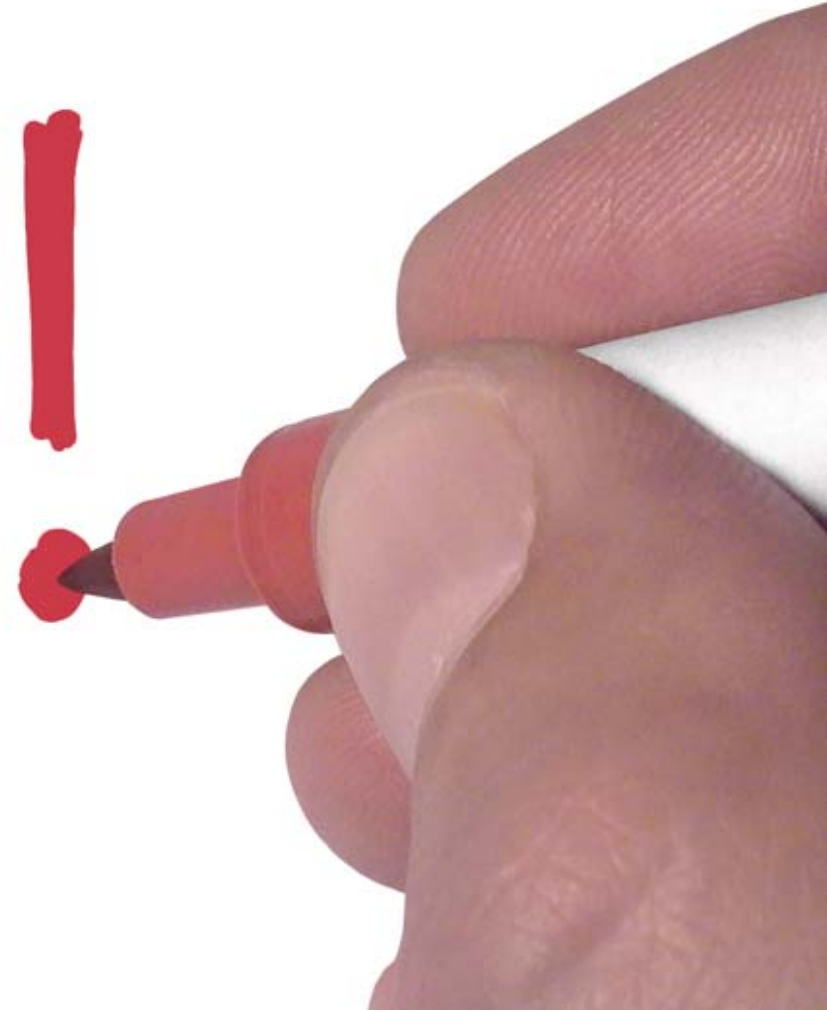
- Was the employee subjected to verbal or physical **harassment** that was **sexual** in nature?
- Was the **harassment** unwelcome?
- Was the **harassment** sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment?



**Not all propositions for
romance, or more, are unlawful
“sexual harassment.”**



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But What Is The Employee Really Saying?

- My co-worker asked me out.
- My co-worker gave me a gift after I helped him out.
- My co-worker commented on my appearance and tells me “smile!”



Flirting: Harmless or Hurtful

Female employee started flirting with male co-worker (plaintiff).

- First love note - she was “turned on” and wanted to “go out”
 - Plaintiff interpreted note as a “basic flirtatious come-on” and an “unwanted flirtatious advance,” and told her he was not interested.
- Second love note – “I’m serious. Give me a chance!”



Flirting: Harmless or Hurtful

- Advances continued and became more sexually aggressive:
 - More notes about bubble baths
 - Cat-calling
 - Sexual gestures and facial expressions
- Co-workers started noticing and plaintiff became stressed, which resulted in decline of his performance



When It Goes Too Far...

“People spend most of their waking hours with other people at their workplaces, so that is where many meet and begin social relationships, and someone has to make the first overture. Some people have more social finesse than others, and many might suggest coffee or a trip to an art exhibition rather than sex, but mere awkwardness is insufficient to establish the ‘severe or pervasive’ element.”



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When It Goes Too Far...

- Although first and second note were unwelcome, they were not sufficiently severe and pervasive to create an abuse work environment
- But the conduct continued....



Severe and Pervasive

Look at all the circumstances to determine whether a working environment is objectively “abusive”:

- Frequency of the conduct and its severity?
- Physically threatening or humiliating?
- Mere offensive utterance?
- Unreasonably interferes with an employee's work?



Frequent Employee Complaint #4



Human
Resources
violated my
HIPAA rights!



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But What Is He Really Saying?

- Someone learned about my private information.
- I want a workplace accommodation but I don't want to involve my doctor.
- My supervisor asked for a doctor's note after I took sick leave.



But Is It Really A “HIPAA Violation”?

Generally, HIPAA does not apply to employers simply because they collect health information.

- HIPAA’s Privacy Rule covers:
 - Health plans
 - Health care clearinghouses
 - Health care providers



But Is It Really A “HIPAA Violation”?



HIPAA will affect how employers obtain medical information, because HIPAA usually applies to the health care entity from which the employer is seeking the information.



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But Is It Really A “HIPAA Violation”?

No, but, ADA and FMLA/OFLA have confidentiality requirements

- Keep health records separate from personnel records
- Limitations on employer’s communication with health care provider
- Limitations on sharing employee’s medical information with others



What About Elected Officials?

- Are they “employers” and therefore entitled to see all employees’ medical records, leave requests, etc.?



Best Practices for Receiving and Evaluating Employee Complaints



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Best Practices

- Have you looked at your policies lately to see what kinds of messages you are sending employees about what kinds of complaints you want to hear and to whom they should be made?
- Do complaints have to be in writing? NO!



Goals

Identify who in your organization will likely receive complaints, and who in your organization should be the person/office to receive them

Communicate with the employee

Hear his/her concerns

Identify the concerns that need to be addressed



Goals (Cont'd)

Gathering information to determine best next steps

Evaluating risks to organization associated with those concerns



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Taking the complaint

Focus on the facts:

- Ask the right questions:
 - What do you mean by that?
 - Why is that a problem?
- Get specific
 - Who? What? Where? When?
- Make sure you understand
- Follow up on unexpected comments



Documenting The Complaint

- When the employee uses buzzwords, document underlying facts, not the buzzwords
- Make note of quotations
- Avoid legal conclusions
- Think in terms of policies implicated, violated



Before the meeting ends:

- Ask if there are any documents that support the complaint.
- Ask if there are any potential witnesses to the complaint.
- Find out what the employee would like you to do about the concern.



Evaluating The Complaint

- Take employee concerns seriously. Even if:
 - This employee is a serial complainer
 - It is “just a rumor”
 - It comes from a third party



Evaluating The Complaint

- Investigation needed?
 - Are the facts disputed?
 - How serious is the alleged misconduct?
 - Are legal or non-legal issues at play?
 - How have similar complaints been handled in the past?
- Consider both informal or formal investigation techniques



Assumptions: You Know What They Say!

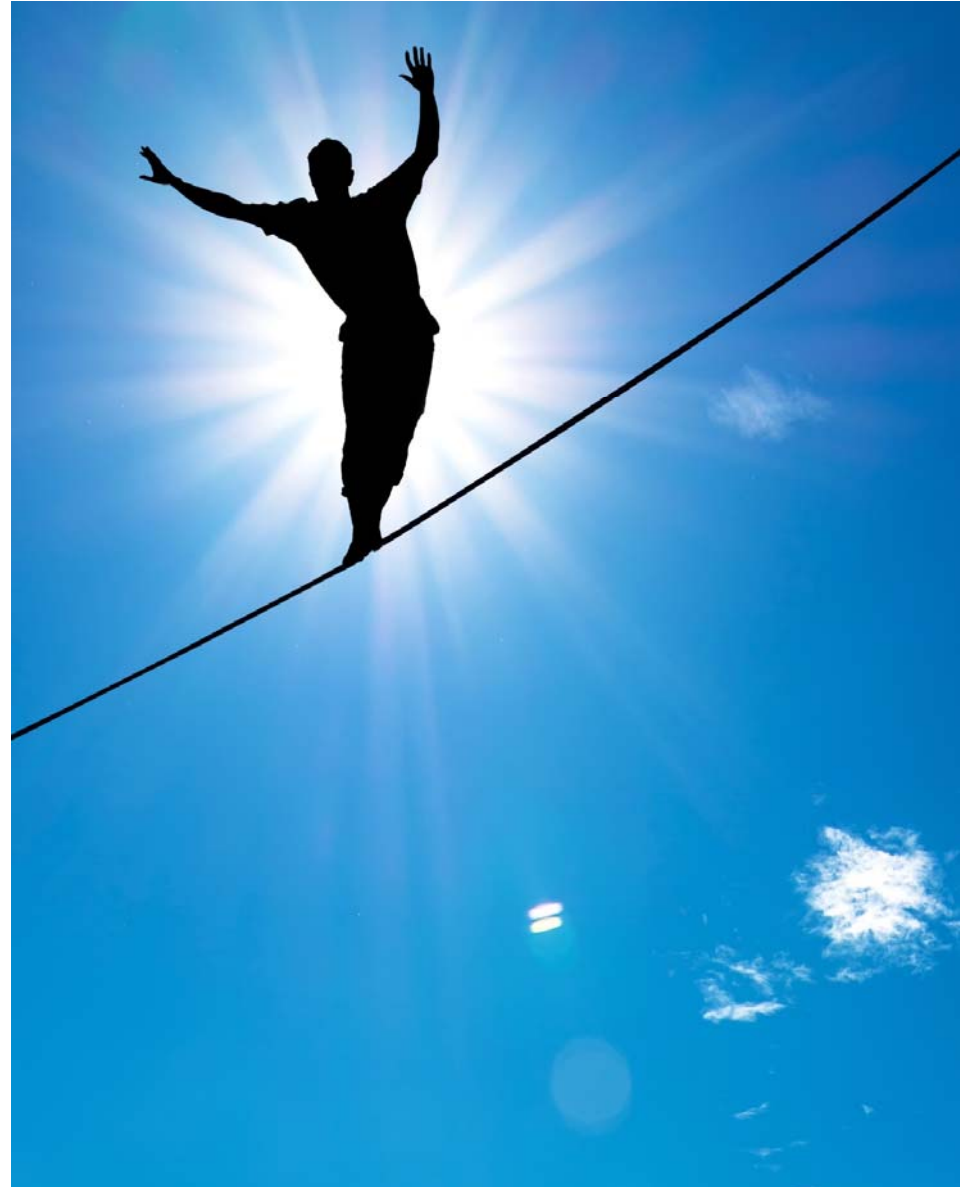
- Watch for biases (even if unconscious)
- Don't form an opinion or a judgment at the early stages
- Don't take sides
- Don't joke about the situation with others



**Even if it's lawful,
it may still be
awful.**



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ANY
QUESTIONS
?



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