

Chapter 3

Making Discrimination and Harassment Complaint Systems Better

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SUMMARY

For decades, employers have used formal grievance procedures to handle both discrimination and harassment complaints. The system seems straightforward: If an employee believes they were subject to harassment or discrimination, they file a formal complaint with human resources. The employer promises an investigation followed by disciplinary action if the investigators find a violation of company policy. But in practice, complainants often face career-ending retaliation and the investigation is often inadequate. Procedures that provide confidentiality

for the accused can prevent serious investigation and protect serial abusers. To avoid the pitfalls of the formal complaint system, employers should adopt a menu of alternatives, including ombuds programs and dispute resolution systems. The formal grievance system can then be reserved for cases where the misbehavior is particularly egregious. In addition, employers need to address the systemic factors in the workplace that lead to discrimination, harassment, and retaliation for publicizing misbehavior.

KEY FINDINGS

- Half of discrimination and harassment complaints produce retaliation.
- Workers who complain of harassment have worse careers, mental health, and physical health than those who experience similar levels of harassment but do not complain.
- Accused harassers are more likely to be struck by lightning than to be transferred or lose their jobs.
- Managers accused of discrimination are rarely sanctioned in any way.
- Grievance procedures carry confidentiality clauses that permit serial abusers to carry on.
- After employers create grievance procedures they see significant decreases in the representation of minority men and women in management.
- Employee assistance plans, ombuds offices, and transformative dispute resolution systems promise to solve some of these problems.

The Civil Rights era raised awareness of systemic discrimination across society—in education, transportation, housing, and employment. In response, by the late 1960s, many American employers had developed civil rights complaint systems based on union grievance procedures, complete with quasi-judicial boards to hear complaints, due process protections for the accused, and representation for both parties. Employers created parallel processes for handling harassment complaints after federal courts recognized sexual harassment as a form of sex discrimination under Title VII of the Civil Rights Act of 1964, in decisions handed down after 1975. By 1998, when two Supreme Court decisions suggested that having grievance procedures could protect employers against certain harassment complaints, over 70 percent of medium and large employers had discrimination grievance procedures and over 90 percent had harassment procedures. With guidance from the Department of Education, universities have created similar procedures for handling student sexual assault and harassment complaints brought under Title IX of the Higher Education Amendments of 1972, which outlaws sex discrimination in education.

On the surface, these procedures seem like a reasonable approach to detect and deter discrimination and harassment. However, evidence from many quarters suggests that these legalistic complaint processes frequently incite retaliation and rarely resolve problems. Half of the 80,000 or so discrimination and harassment complaints filed annually with the U.S. Equal Employment Opportunity Commission (EEOC) from workplaces across the country include a charge of retaliation against the initial complainant.¹ Large random-sample studies of women who experience harassment show that those who file complaints have worse mental health, physical health, and career outcomes than women who experience similar levels of harassment but do not complain.² Filing a harassment complaint appears to take a toll on women. Studies of discrimination complaints more broadly show that a vanishingly small number are resolved, internally in firms or through the courts, to the satisfaction of the complainant, and that complainants frequently have to leave their jobs.³

Furthermore, our research suggests that formal grievance procedures for discrimination and harassment actually slow workforce integration by decreasing representation of minority men and women in management.⁴ This appears to happen because the use of formal procedures leads to backlash against those who were discriminated against in the first place, which causes accusers to leave their jobs and thereby interrupts the careers of many minority women and men.

1 "Retaliation-Based Charges, FY1997–FY 2018," U.S. Equal Employment Opportunity Commission, accessed January 23, 2020, <https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm>.

2 Heather McLaughlin, Christopher Uggen, and Amy Blackstone, "The Economic and Career Effects of Sexual Harassment on Working Women," *Gender & Society* 31, no. 3 (2017): 333–358; U.S. Merit Systems Protection Board, "Sexual Harassment in the Federal Workplace: Is It a Problem?" (Washington, D.C.: U.S. Merit Systems Protection Board, 1981); U.S. Merit Systems Protection Board, "Sexual Harassment in the Federal Government: An Update," (Washington, D.C.: U.S. Merit Systems Protection Board, 1988); U.S. Merit Systems Protection Board, "Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges," (Washington, D.C.: U.S. Merit Systems Protection Board, 1995).

3 Ellen Berrey, Robert L. Nelson, and Laura Beth Nielsen, *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality* (Chicago: University of Chicago Press, 2017); Lauren B. Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (Chicago: University of Chicago Press, 2016); Vincent Roscigno, *The Face of Discrimination: How Race and Gender Impact Work and Home Lives* (New York: Rowman and Littlefield, 2007).

4 Frank Dobbin and Alexandra Kalev, "The Promise and Peril of Sexual Harassment Programs," *Proceedings of the National Academy of Sciences* 116, no. 25 (2019): 12255–12260; Frank Dobbin, Daniel Schrage, and Alexandra Kalev, "Rage Against the Iron Cage: The Varied Effects of Bureaucratic Personnel Reforms on Diversity," *American Sociological Review* 80, no. 5 (2015): 1014–1044.

Grievance procedures pose several problems beyond that of retaliation. One is that the process is usually confidential in order to protect both the complainant and the accused. Individuals submitting complaints are asked not to mention it to anyone else, thus word does not get out about a problem employee. Confidentiality also often prevents investigators from looking for a pattern of harassment or discrimination because a behind-the-scenes investigation would expose the identity of the accused. Even the resolution to an investigation is usually confidential, thus the process protects the accused even if they are found guilty. Complainants sometimes quit because they think their harasser has faced no consequences even when discipline has been handed down.

Another problem with the current formal grievance system is that the standard of proof prevents companies from taking action early to prevent future misconduct. In the case of discrimination claims, proof of intent to discriminate is often required. Intent is hard to prove when the complaint is that person X, who got the promotion, or a raise, or avoided layoff, is actually less qualified than person Y. In the case of hostile environment harassment, evidence of “persistent” and “serious” harassment is usually required. People who complain about a single instance of harassment are often rebuffed and left to wait for the situation to deteriorate. In consequence, people accused of harassment face an infinitesimal risk of being transferred, much less fired.⁵ Those accused of discrimination rarely face any consequences.⁶ And the standard of proof delays action, preventing the employer from taking immediate steps to fix the problem.

Finally, the legalistic, adversarial process leads employers to think of complaints not as opportunities for change and improvement, but as threats to the organization that need to be put down quickly.⁷

Alternatives to Legalistic Grievance Mechanisms

Alternatives to the legalistic grievance mechanism have been experimented with for decades but have yet to be widely adopted. While we need more research on these alternatives, some of them promise to replace the broken formal grievance procedure with a system that incorporates a menu of alternatives that is better able to stop discrimination and harassment.

One alternative is the ombuds office, which acts as a neutral party in hearing complaints. The system is common in Scandinavia and in U.S. universities, although few places use it regularly to address

5 Lisa D. Bastian, Anita R. Lancaster, and Heidi E. Reyst, *1995 Sexual Harassment Survey* (Arlington, VA: U.S. Department of Defense, 1996); Lilia M. Cortina and Jennifer L. Berdahl, “Sexual Harassment in Organizations: A Decade of Research in Review,” in *Handbook of Organizational Behavior*, ed. Julian Barling and Cary L. Cooper (New York: Sage Publications, 2008): 469–497.

6 Vincent Roscigno, *The Face of Discrimination: How Race and Gender Impact Work and Home Lives* (New York: Rowman and Littlefield, 2007); Ellen Berrey, Robert L. Nelson, and Laura Beth Nielsen, *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality* (Chicago: University of Chicago Press, 2017).

7 Ellen Berrey, Robert L. Nelson, and Laura Beth Nielsen, *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality* (Chicago: University of Chicago Press, 2017); Lauren B. Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (Chicago: University of Chicago Press, 2016).

harassment and discrimination.⁸ The classic ombuds is an independent party, located outside the chain of command, whose role is to listen to the victim's story and provide confidential advice. The ombuds has substantial freedom in how they help employees resolve problems in the workplace. They may advise an employee on how to speak with the person who has discriminated against or harassed them, what to do if it happens again, or how to move to another job. In some systems, they may address the accused directly, or talk with human resources about modifying work conditions, assignments, or team configurations.

A second alternative is the Employee Assistance Plan. These benefit programs provide free, confidential support to workers on issues in and outside of work that might be affecting their health, wellbeing, or work performance. Like the ombuds, however, they are rarely used to handle discrimination or harassment complaints. EAPs are typically run by outside vendors who make experts in counseling and mediation available to employees, usually by phone. They can play a role similar to that of the ombuds, but they do not typically intervene in the organization.

A third alternative is a dispute resolution office, an approach that currently has been adopted primarily by employers in the public sector. The dispute resolution office is available to workers who have complaints of almost any sort about coworkers or supervisors. These offices, which can be either internal or external to the firm, use the tools of arbitration and mediation to arrive at a remedy that satisfies both parties. Because of this, they may not be the best path when there is a big power differential between the accuser and the accused, or when termination is the only reasonable remedy. These are very different from the mandatory arbitration systems employers require new recruits to agree to at the point of hire, which put complainants at a disadvantage by ruling out the option of appealing to the courts.

A fourth alternative that some employers use is a transformative model of dispute resolution that is designed to change the workplace. The emphasis is on hearing both parties' voices to generate an attentive and responsive dialogue.⁹ This model holds the promise of overcoming the adversarial nature of the legalistic model, increasing complainant satisfaction, and reducing retaliation. The United States Postal Service has such a system, and a long-term study showed that 90 percent of participants were satisfied.¹⁰ Supervisors reported that the process improved their conflict management and listening skills. In addition, exit interviews showed that 30 percent of complainants received an apology—an outcome unknown to complainants in formal grievance systems, where an apology amounts to an admission of guilt.

Implementing one or more of these four alternative processes is now easier than ever because tech start-ups have developed virtual versions for companies. For example, tEquitable (tequitable.com) has built a virtual ombuds system, which provides a large repository of suggestions for how to handle a

8 Mary P. Rowe, and Michael Baker, "Are You Hearing Enough Employee Concerns?" *Harvard Business Review* 62, no. 3 (May-June 1984): 127-138.

9 Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994).

10 Lisa B. Bingham, "Mediation at Work: Transforming Workplace Conflict at the United States Postal Service" (Arlington, VA: IBM Center for The Business of Government, 2003), Human Capital Management Series, <http://www.businessofgovernment.org/sites/default/files/Mediation.pdf>.

variety of problems as well as live ombudspersons who are available by phone. tEQuitable will report aggregate statistics about complaints to employers by department or business unit to alert them to problem areas. Online reporting systems promise to address a problem frequently brought up by the #MeToo and #WhyIDidntReport movements: confidentiality clauses prevent victims from learning that their abuser has done it before. There is an escrowed complaint system from Callisto (projectcallisto.org), which employers and universities can subscribe to. The system allows college students and employees to register a time-stamped complaint about harassment or assault, which is put in “escrow.” The complainant can then decide later about whether to go forward with a formal complaint. Individuals can time-stamp multiple allegations before filing a formal charge, and they can be notified when someone else registers a complaint about the same person.

The alternative systems described here make many improvements to the formal grievance system that exists at most employers today. However, the effectiveness of any system ultimately depends on the attitude of the organization’s leaders. No system will foster change if companies continue to view complaints as threats to the organization that must be resolved as quickly as possible rather than as well as possible. Complaint systems can help to prevent workplace discrimination and harassment only when they spark a transformative process within the organization. The ideal complaint system should encourage workers to voice their grievances and should communicate the organization’s commitment to fair and non-retaliatory resolution. It should also increase bystander awareness of harassment, discrimination, and retaliation. Plenty of employers know that their current systems don’t work. While we need more research about the efficacy of these alternatives, employers shouldn’t wait for the research to introduce new options.

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