



Unit 2

Mediation Process

Learning Outcomes

By the end of this unit the learner will be able to:

- ✓ Describe appropriate solutions for a harassment incident
- ✓ Know what to do if a complaint is false
- ✓ Help your workplace return to normal after a harassment incident

Unit 2

Mediation Process

Basics of Mediation

About Mediation

What is mediation?

Mediation is a way to resolve conflict. The two parties meet with a neutral third party to discuss issues and come to a resolution.

When is mediation effective?

When the claimant speaks to the advisor, supervisor, or Human Resources person and decides to file a complaint, mediation may be offered as a way to achieve a resolution. Although mediation is typically not recommended for sexual harassment cases, it can be effective for other types of harassment.

What are its advantages and disadvantages?

Mediation can be very empowering for both parties, as they have a say in how the matter is worked out. It can also be less traumatizing than a formal investigation process and much more private. It typically takes far less time and resources to perform mediation than to perform a full-scale harassment investigation. Most importantly, it can be a learning experience, so that the behavior that caused the issue is addressed and modified. As well, relationships can be preserved and even strengthened, which is typically not the case with a formal investigation.

When should mediation be used?

Mediation can be used when the people involved in the conflict want:

- A quick resolution
- A say in the process and the outcome
- To maintain a working relationship
- To be heard but don't want an investigation

When should mediation not be used?

Mediation can only be effective if both parties are open to it. Therefore, if one party declines mediation or requests investigation, then the process must proceed to that stage.

You should also not use mediation if:

- A clear decision on the matter is more important than a quick solution
- There is an extreme imbalance of power
- There is clear evidence that the complaint is malicious
- Events took place too long ago, with no valid reason for the delay

Who should be involved?

Both the respondent and the claimant need to be part of the mediation. Other people key to the events (for example, a manager who witnessed the harassment and did nothing), union representatives, and company representatives may also need to be present.

Choosing a Mediator

There are two types of mediators that you can choose.

Internal Mediator

Advantages	Disadvantages
• Cheaper	• May be seen as biased
• Quicker	• May be reprisals for mediator
• More familiar with company	• Not a professional

If you choose to use someone internal as your mediator, make sure that the mediator has received training. You should also make sure that the company draws up a job description for a mediator, outlining skills and knowledge requirements, as well as key principles like confidentiality and fairness. And, of course, the mediator that you choose must not have an existing relationship with any of the parties involved in the process, and those parties must accept the mediator.

External Mediator

Advantages	Disadvantages
Typically well-trained	Can be costly
May be seen as fairer and better accepted by parties	Unless you have used them before, may be risky (no guarantee of skill)
No risk of reprisal for mediator	

Choosing an external mediator is a good idea when choosing a fair internal mediator is difficult; for example, when someone high up in the company is part of the harassment complaint. Make sure the Human Resources department interviews the mediator and asks questions about their training and experience. You will want to see an outline of the process that they use. And, make sure that you both have the same expectations for fairness and confidentiality.

The Mediation Process

Step One: Preparation

Before the mediation, make sure both the respondent and the complainant have:

- Received copies of each other's' statements
- Agreed to participate in mediation
- Agreed upon a mediator
- Agreed to a set of ground rules (such as confidentiality)
- Agreed upon parties present during the mediation
- Received information about mediation
- Been briefed on the company's harassment policy

The mediator must:

- Review the complaint, the response, and any other documents
- Ensure that mediation is appropriate for this case and these parties
- Ask the complainant and the respondent to sign a mediation contract, laying out the ground rules and confirming their commitment to mediation
- Plan on how to deal with issues that arise (such as power imbalances or breaking ground rules)
- Review past harassment cases that may set precedent
- Arrange a neutral, private, interruption-free location for mediation to be held

- Ensure proper supplies are available (flip chart, refreshment, break room)

Step Two: The Meeting

There are three ways that mediation can take place.

- Face-to-face
- On the telephone
- With the mediator as intermediary, going back and forth between the two parties

Typically, the face-to-face meeting is the most effective. However, if one of the parties expresses interest in mediation but is uncomfortable meeting with the other person face to face, the other options may be investigated or offered.

The mediation meeting usually starts with an opening statement by the mediator. The mediator will:

- Go over the mediation and complaint process
- Explain the purpose of the meeting
- Explain the role of the mediator (neutral party who is there to help reach a solution, not to advise or decide)
- Emphasize the importance of confidentiality
- Review the ground rules

Next, each party will give their version of the conflict. It is crucial that they be allowed to do so without interruption.

Step Three: Resolution

Once all the information has been presented, the mediator should start a discussion of the parties' needs and interests. What do they want to see as a solution? The mediator can also make suggestions for settlement, but s/he should emphasize that this is just a suggestion, not a decision. Through this process of back-and-forth negotiation, hopefully the two parties can arrive at a solution that meets both their needs. (See Session Seventeen for some possible outcomes to a complaint.)

If a solution can be reached, it should be written out in a formal contract. This contract should state that both parties accept this as a resolution to their dispute. It should lay out the steps to be taken, including follow-ups if necessary. Both parties should sign and date the contract.

What if a solution cannot be reached? It does not necessarily mean that the mediator was unskilled, or that the entire meeting is a failure. There are many reasons why mediation may fail. If this does happen,

it is important not to blame anyone. Simply explain that this means that the complaint must move to the next stage of the process: investigation.

How to Document Mediation

During the meeting, the various participants may make notes. These should be destroyed once the meeting is over, whether or not a resolution is reached. This is crucial to maintain confidentiality, as parties will not feel very safe if there are written notes about their mediation process. The only record of the mediation in the complaint file should state that mediation was attempted on a particular date, with the names of the participants.

Role Play

Scenario One

Charles, the office manager, has a habit of calling his female employees “sweetheart.” One of his staff, Sharon, filed a complaint and it has proceeded to mediation.

Scenario Two

Bill has always displayed a sexually explicit calendar on his wall. His secretary, Joan, finds it offensive. Although she has asked him to remove it, he has refused.

Scenario Three

Sarah tends to give instructions to her staff by yelling. Sam, one of her employees, has filed a complaint of verbal harassment.

Scenario Four

Karen was in a meeting with her five employees last week to discuss a new sales plan. Tony, one of her employees, raised a possible issue with the plan. She glared at him and said, “Do you value your balls? What about your job? Because I can remove both of them.”

Scenario Five

Lisa and Bill were on a business trip last weekend. They had dinner together at the hotel, during which Lisa talked openly about her private life and repeatedly touched Bill’s hand. He feels very awkward now that they are back in the office. He has asked for mediation to help resolve the issue.

Investigating a Complaint

Setting up the Investigation

When to Investigate

Once a complaint has been filed, it typically proceeds to the investigation stage, unless mediation has been requested. (If mediation fails, then events proceed to this stage.) It is usually recommended that all complaints are investigated to protect the rights of everyone involved.

There are, however, several situations when it is acceptable to choose not to proceed with a full investigation.

- If a complaint is filed years after the events, as evidence will be very hard to come by and the respondent will have a difficult time making a defense. The reasons for delaying must be looked at carefully.
- If a complaint (even if it were true) is not harassment.
- A complaint that has been clearly made to embarrass, annoy, or cause difficulty for the respondent.

Before choosing not to investigate, the investigator must at least do a preliminary review to see if any of these conditions are met. (It is probably a good idea to seek legal advice as well.) You must consider this decision very carefully; if the complainant does not agree with the decision not to investigate, then the matter will be taken outside of the company.

Choosing the Investigator

Choosing the investigator is crucial to the success of the entire complaint process. The investigator's role is to conduct or supervise a thorough, fair investigation. They must document the investigation and prepare a report summarizing the data gathered.

It is suggested that the Human Resources department identify a pool of competent investigators. In addition to having the qualities listed below, the pool should be composed of a group of both men and women from a variety of age and ethnic groups, and at different levels in the company. This way, when a complaint is filed, someone not related to the investigation can be chosen.

An investigator should have these qualities:

- Competent
- Fair-minded
- Reputation for integrity
- Attention to detail
- Capable of documenting facts and preparing reports
- Good interviewing skills
- Thorough knowledge of harassment issues, procedures, and laws (specialized training may be required)
- Familiar with organization's policies and procedures
- Experience in investigating employee complaints

In some situations, you may need a lawyer or outside consultant to investigate.

The Investigation Plan

Like mediation, the investigation should also have a detailed plan. The plan should lay out:

- Background of the case
- Positions of the parties
- Issues of the case
- Evidence that needs to be obtained
- People that need to be interviewed
- Places that need to be visited

This plan should be revised and updated as the investigation proceeds to ensure it doesn't get off track. All documents related to the investigation need to be neatly organized and compiled into one file.

Here is a sample list of some issues often raised in sexual harassment cases (as identified by harassment expert Lynda Ackroyd):

- Was the delay in filing the complaint reasonable?
- Does the evidence indicate that the complainant was subjected to harassment by the respondent?
- Did the respondent engage in the behavior complained of?
- Did the respondent know, or should they have known, that the behavior was unwelcome?
- In the case of alleged solicitation, was the respondent in a position to grant a benefit to the complainant?
- Were there detrimental consequences to the complainant? If so, what were they?
- Does the evidence indicate that those in authority condoned harassing behavior?

- Does the evidence indicate that there is a poisoned environment for women in the department/organization?

The Investigation Process

Once the plan is in place, the investigation can begin.

Gathering Evidence

There are several types of evidence that may need to be gathered:

- Witness evidence (direct witnesses and those who may have experienced events similar to the complainant)
- Documents (such as letters, telephone records, and financial records)
- Physical evidence (for example, gifts)

Witness Evidence

Harassment expert Lynda Ackroyd has compiled an extensive list of those people that the investigator should interview. This list includes:

- Complainant
- Respondent
- Witnesses (direct and indirect, as explained earlier)
- Other people who have been in a position to evaluate complainant's work performance
- Someone who can answer questions about standard practice in the workplace
- If delay is an issue, those to whom the complainant spoke about the issue (such as a family member or doctor)

When interviewing witnesses, make sure you record:

- Full first and last name
- Social security number (if applicable)
- Contact information (home address, telephone number, e-mail address)
- Job title
- Representatives present
- Name of interviewer
- Date of interview
- Start and end time of interview
- File name or case number

Anyone who is interviewed during the process (claimant, respondent, or witnesses) has the right to have someone accompany them during the interview. This person can be a friend, a colleague, a lawyer, or a union representative. It should be someone who doesn't have any personal involvement in the complaint. Note that any legal expenses incurred during the interviewing process are not typically covered by the employer. This should be made explicit to anyone bringing legal counsel.

It should also be made absolutely clear to everyone involved that there will be no consequences for filing a complaint (as long as the complaint is true) or for being part of the complaint process. Many people, particularly witnesses, do not get involved in harassment issues because they feel it is easier to stay out of it. It is important for them to realize how important their part is in the complaint process.

It is crucial that a designated person (such as a close supervisor or Human Resources) monitors those involved with the complaint procedure after a decision has been made, to ensure that their careers and lives have not been adversely affected by the process.

Unfortunately, strict confidentiality cannot be promised to harassment claimants. Information will, of course, be kept as private as possible. However, there are some instances where details will need to come out. The respondent, for example, will need to know who the claimant is and the details of the alleged incident. Otherwise, they would not be able to defend themselves properly. As well, the investigator may need to reveal the claimant's name during the investigation. For example, they may talk to a person who worked with the claimant and respondent, and ask a question like, "Did you witness Bob yelling at Susan at any time?"

All parties in the complaint process must be aware that information can only be distributed on a need to know basis. In the example just mentioned, the investigator would want to tell the witness that their conversation is not to be shared with anyone.

Documents

The investigator must review the complaint and the reply from the respondent (if one has been made). The investigator should also review:

- The personnel files of the complainant and the respondent, including discipline records
- Business correspondence that is relevant to the allegations
- Personal correspondence
- Telephone records (if relevant/available)

Location Evidence

If possible, the investigator should visit the site where the alleged incident(s) took place. This will help them visualize the events and take into account the environment of the incident(s). The investigator

should try to do this as inconspicuously as possible to help maintain the parties' privacy and confidentiality.

The Manager's Role During the Investigation

Often an investigation takes days or weeks, sometimes months. During this process, time does not stand still. Work continues, and in situations where the respondent and claimant work together, this can be particularly tricky.

Above all, stay impartial and do not comment on the process. If either party asks you how the process is going, refer them to the proper individual. It is also essential that you not treat either party differently based on the fact that there is a complaint in process. For example, let's say you manage salespeople and you give the respondent bad leads as punishment. It's later determined that the claim is invalid; the respondent is actually innocent. Congratulations: you've just opened yourself up to a lawsuit.

Above all, do not share information about the process with anyone. Confidentiality is crucial.

Although you cannot treat staff differently based on their involvement in the process, you should be willing to make accommodations. You will need to separate the complainant and the respondent so that they no longer work together and do not have contact during the day. If this is possible, make sure you monitor the health of both employees. You may want to offer counseling and support services (preferably off-site).

If separating employees is not possible, paid time off for both people may be necessary until a decision is made.

The Investigation Report

Creating the Report

Once the investigation is complete, it is time for the investigator to prepare a formal report. Your report should be concise; its purpose is not to relate all the facts of the case but rather to summarize them. It should also include a conclusion.

Harassment expert Lynda Ackroyd has provided a helpful breakdown of the parts of the investigation report.

- Introduction to summarize allegations, reply, and background information.
- Quote portion of company's harassment policy that has allegedly been breached.
- Summarize scope of investigation (length, number of witnesses interviewed, what documents were reviewed).

- Body organized by issues presented in investigation plan. After each issue, detail witnesses and documents that relate to it.
- Refer to witnesses by a letter or number (Witness 1, Witness A), rather than by name.
- Some companies also want the identities of the complainant and the respondent shielded. If this is the case, use those terms rather than their names, and identify the parties on a separate page of the report.
- Ensure you stick to the facts and not your feelings or opinions.
- Conclusion to state whether or not the evidence indicates that harassment occurred in violation of the company's policy.

The report should:

- Help the decision maker reach a solution
- Provide a description of the nature and significance of the evidence to help the parties understand the outcome
- Provide evidence of how the organization handled the complaint (Competently? Diligently? Timely? Carelessly?)

Who Should See the Report?

The complainant and the respondent both have a right to know the results of the investigation. This can be done verbally or in writing (with either a summary of the results or a copy of the actual report). This decision is typically made by the decision maker.

Verbal Sharing

Advantages	Disadvantages
• Reduces risk of confidentiality breach	• Chance that the two sides will receive different information or that a crucial point may be missed
• More personal	• Person may not fully understand the information or have time to process it
• Gives person a chance to ask questions	• Gives person a chance to criticize process or investigator or messenger

Written Sharing

Advantages	Disadvantages
• Reduces risk of information overload, missed information, or misinformation	• Bigger chance for confidentiality breach
• Recipient has a chance to review information and ask informed questions later	• Witness reprisal is possible if given full report (witnesses may be identified by statements)
	• Less personal

What Information Should Be Shared?

It is suggested that unless serious disciplinary action is being considered, the recipients should receive only a summary of the findings rather than the entire report. They should have enough information to help them understand the decision that will soon be made. They should also have enough information to reassure them that the investigation has been fair and complete.

Who Should Share This Information With the Recipients?

There are several options. The investigator can convey the information, as they are most familiar with the evidence. However, this can open the investigator up to criticism and abuse.

The supervisors of the complainant and the respondent can also communicate the information. They may be seen as more objective as they did not perform the investigation. As well, the decision maker can share the details of the report when the decision is made.

Making the Decision

Who Makes the Decision?

Once the investigator has completed their investigation and prepared a report, this report and all documentation is turned over to a sole decision maker.

Like the investigator, the decision maker must be someone unaffiliated with the claimant, respondent, and preferably all witnesses. They certainly cannot be friends with any of these parties, nor can they be a colleague or supervisor of the parties.

The decision maker should also be:

- In a senior position with recognized authority (so that employees see this decision as one made by the organization)
- Knowledgeable about harassment issues and policy within the company
- Demonstrably dedicated to preventing and eliminating harassment

In some organizations, this decision is made by a panel of people.

When Should a Lawyer Be Involved?

It is never a bad idea to obtain legal advice when making a decision about a harassment complaint. However, you definitely must seek legal counsel if:

- You are considering significant disciplinary action, such as demotion or termination
- The complaint has been escalated to a government agency or the police
- Personal safety may be an issue
- A monetary settlement is being contemplated
- Allegations are complex or controversial

If you're in doubt, spend the money and seek legal counsel.

Creating Solutions

To Fix or To Punish?

When deciding on a solution, there are two avenues that one can take. You may decide that remedial action (such as harassment workshops or anger management courses) is the best course to take. This route offers the possible benefit of people learning from past mistakes and potentially seeing the experience in a positive light.

The other avenue is punitive. In this case, the harasser must pay for their actions via monetary means or disciplinary action. Punitive action alone is typically not sufficient; your goal should be to help the person understand what they did wrong and how not to do it again, rather than simply instituting revenge on behalf of the victim.

Of course, these two routes can be (and often are) combined.

Outcomes for the Complainant

In many harassment cases, there is a set of outcomes that the complainant typically desires. These should be considered during mediation and decision-making processes. They can include:

- Apology
- Counseling
- Leave of absence
- Financial compensation
- Transfer out of the office
- Reversal of decision or reinstatement (for example, if the complainant was not given a promotion because they would not go on a date with the respondent)
- Purging of files (such as negative evaluations or disciplinary records that were impacted by harassment)
- Referral to police

Regardless of the solution decided upon, it is essential that the complainant understands that there will be no reprisal for filing their complaint and following it through. You will probably want the complainant to sign a contract stating that this claim has been resolved to the complainant's satisfaction.

Outcomes for the Respondent

As we discussed above, it is crucial that the respondent understand the reasons for the outcome of the case and receives help so that the issue does not occur again. Some ways to do this include:

- Education
- Counseling
- Community service

In some cases, punitive measures may be appropriate, such as discipline or termination. The employee may also need to be assigned a different job or transferred out of the office to avoid contact with the complainant. In any case, they may need to be monitored to ensure the rehabilitation has worked.

Changes in the Organization

Often a harassment complaint can reveal weaknesses in the organization. It is crucial that these issues be addressed and remedied so that the employer is not seen as condoning harassment.

Changes that may result include:

- Policy changes
- Additional workshops for staff
- Revisiting prevention strategies
- Staff surveys to ensure other issues are not being missed

After It's Over

Once the harassment complaint has been resolved, everyone should try to get back to normal. The managers of the complainant and the respondent should keep an eye on them to make sure they're okay.

The organization also needs to decide what information about the process will be shared with staff. Although you don't want everyone reading the investigative report, staff deserves to know the overall conclusion and outcome. For example, a manager could say to their employees: "As you may be aware, there was a recent incident involving some obscene images in the break room. This issue has been dealt with through our harassment policy and the offending person has been terminated."

This disclosure accomplishes several things. First, it ensures everyone has accurate information, cutting the rumor mill off. Second, it shows that harassment is nothing to be ashamed of. Third, it shows the organization's commitment to eradicating harassment.

A file should be maintained with all documents related to the complaint, including the initial complaint, the response, the investigative report, witness statements, evidence, and the outcome of the complaint. It should be kept separate from personnel files in a high-security area. Only those with a demonstrated need should be allowed to access the file. This file does need to be kept in case one of the parties files suit in the future.

If the investigative report concluded that harassment had taken place, the events need to be reflected in the respondent's personnel file, as well as the action that was taken as a result of the claim. If the investigative report concluded that harassment had not taken place, no mention of the claim should be in their file.

Skill Application

So far, we have talked about the various things that happen after harassment occurs. For this afternoon, we are going to play out that process. It will consist of four stages:

- The initial consultation with an advisor
- The filing of a formal complaint
- An investigation
- The decision

You will be each provided with a case file detailing the situation and the roles that you must play.

Further Reading:

- ✓ *Dobrich, Wanda, Steven Dranoff, and Gerald Maatman. The Manager's Guide to Preventing a Hostile Work Environment. McGraw-Hill, 2002.*
- ✓ *Field, Tim. Bully in Sight: How to Predict, Resist, Challenge and Combat Workplace Bullying. Success Unlimited, 1996.*