

# A GUIDE TO SEXUAL HARASSMENT IN EDUCATION AND EMPLOYMENT

## I. GENERAL<sup>1</sup>

- A. Sexual harassment is a form of sex discrimination, in violation of Title VII of the Civil Rights Act of 1964 (enforced by the U.S. Equal Employment Opportunity Commission) and Title IX of the Education Amendments of 1972 (enforced by the Office for Civil Rights of the U.S. Department of Education).
- B. Charges of sexual harassment filed with the EEOC and parallel state agencies have increased from 7,000 in fiscal year 1991 to 15,000-16,000 in fiscal years 1997-2001, and then gradually declining to 12,000 by fiscal year 2006. Roughly one-third of the 300-400 complaints of sex discrimination filed each year with the Office for Civil Rights of the U.S. Department of Education allege sexual harassment, and more are filed with state agencies and in state and Federal courts.
- C. Some survey statistics:
  - 1. 1994 survey by U.S. Merit Systems Protect Board of 8,000 Federal Government employees: 44% of women and 19% of men experienced some form of unwanted sexual attention during the preceding 2 years.
  - 2. 1992 survey by *Working Woman* Magazine of 9,000 readers: 60% said they had been sexually harassed, but only one out of four reported the harassment.
  - 3. In a 2001 survey by the American Association of University Women Educational Foundation, 83% of girls and 79% of boys in 8<sup>th</sup> through 11<sup>th</sup> grades said they had experienced some form of sexual harassment. A 1993 survey by the same organization, a 1997 survey by the Texas Civil Rights Project, and a 1996 survey by USA Today/Weekend reported similar results.

(Note that the definitions of harassment used in these studies are often different than the legal definitions set out below.)

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<sup>1</sup> While this outline discusses sexual harassment, the same general principles apply to harassment based on race, national origin, or disability. For information on race and national origin harassment in education, see "Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance." For information on sexual harassment in education, see "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties." For information on disability harassment in education, see July 25, 2000, "Dear Colleague" letter from Secretary Riley to schools, colleges and universities. These documents are all available on the Department of Education's web site at <http://www.ed.gov/offices/OCR>. For more information on harassment and hate crimes generally, see "Protecting Students from Harassment and Hate Crime: A Guide for Schools" at <http://www.ed.gov/offices/OCR/archives/Harassment/index.html>. More information on harassment in the employment context can be found on the web site for the U.S. Equal Employment Opportunity Commission at <http://www.eeoc.gov>.

## II. ELEMENTS OF SEXUAL HARASSMENT CLAIM

- A. The challenged conduct must be **unwelcome**.
- B. The complainant must have been subjected to the conduct **because of his or her gender**.
- C. The challenged conduct must have resulted in a **tangible consequence** or a **hostile or abusive environment**.
- D. There must be a legal basis for holding the employer or school **responsible** for the harassment.

## III. UNWELCOMENESS

- A. Sexual harassment is unlawful only if it is unwelcome to the complainant. "Unwelcome" means that the employee or student did not solicit or invite the conduct and regarded it as undesirable.
- B. The critical inquiry is whether the complainant explicitly or implicitly communicated to the alleged harasser that the conduct was unwelcome.
  - Submission to sexual demands does not mean that the demands were welcome, but active participation in the challenged conduct would likely defeat a claim.
- C. For younger students, welcomeness may not be an issue, especially as to harassment by an older student or adult.

## IV. BASIS

- A. Harassment based on sex violates Title VII and Title IX whether or not sexual conduct is involved.
- B. In most sexual harassment cases, there is no question that the complainant was subjected to the conduct because of that person's sex.
- C. If the harasser and the target are of the same sex, a violation can still be found as long as the victim was targeted because of his or her sex. According to the Supreme Court, will be considered sexual harassment as long as is "because of sex" or "on the basis of sex." See *Oncale v. Sundowner Offshore Oil Services*, 523 U.S. 75 (1998). Case law on this is developing.
- D. Harassment based on race, color, religion (employment), national origin, age (for employment, over 40), disability, or retaliation also violates federal anti-discrimination laws.

## V. HARASSMENT BY TEACHERS AND OTHER EMPLOYEES<sup>2</sup>

- A. **Definition in employment:** When a supervisor undertakes a tangible employment action (e.g., firing or denial of promotion) based on an employee's response to (or rejection of) unwelcome sexual demands. See *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).
- B. **Definition in education:** A school generally provides its services to students through the responsibilities it gives to its employees. When a teacher or other employee engages in sexual harassment in the course of carrying out these responsibilities, and the harassment denies or limits a student's ability to participate in or benefit from the services on the basis of sex. This includes, but is not limited to, those situations where a teacher or other employee makes an educational decision based on the student's submission to unwelcome sexual demands.
- C. Only a supervisor, manager, teacher or other such individual can commit this form of harassment.
- D. The demand for sexual favors in return for tangible benefits can be implicit.
- E. One instance of a decision/tangible action being based on submission to conduct of a sexual nature is sufficient to violate the law/make the school responsible for the conduct. For other situations, the conduct has to be sufficiently severe to create a hostile environment (see VI below).
- F. Employer responsibility under Title VII: An employer is *automatically* liable for this type of harassment, regardless of whether upper management knew of it. *Burlington and Faragher*.
- G. School responsibility under Title IX: Same, at least as to enforcement of Title IX by OCR (but see VI.E below).

## VI. HOSTILE ENVIRONMENT HARASSMENT

### A. **Definition:**

Employment: Unwelcome sexual comments or conduct that unreasonably interferes with an employee's work performance or creates an intimidating, hostile, or offensive work environment.

Education: Unwelcome sexual comments or conduct that denies or limits a student's ability to participate in or benefit from his/her education program.

- B. *Anyone* can commit this type of harassment -- a supervisor, co-worker, teacher, residential advisor, another student, or a visitor.

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<sup>2</sup> Certain forms of this type of harassment were formerly known as "quid pro quo" harassment. However, based on several Supreme Court decisions, the term is now of limited use.

- C. Standards governing whether unwelcome sexual conduct creates an unlawful hostile environment:
1. The key issues are frequency and severity: the more severe the conduct, the less frequent it must be to create a hostile environment; the less severe, the more frequent it must be.
    - O Both objective and subjective standards apply: How would a "reasonable person" in the individual's position/situation have reacted? How did the individual actually react?
  2. Nothing tangible about the individual's job or education need be affected.
  3. Severe psychological harm is not necessary to establish a violation.

D. **Employer responsibility under Title VII:**

1. **Hostile environment harassment by supervisors:** Under Supreme Court decisions in *Burlington* and *Faragher*, the employer is liable even if higher management did not know of the supervisor's harassment, unless the employer can prove that:
  - a. it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
  - b. the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
2. **Hostile environment harassment by co-workers:** The employer is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action.
3. **Hostile environment harassment by non-employees:** The employer is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action within its control.

E. **School responsibility under Title IX:**

1. According to the Supreme Court in *Davis v. Monroe County Schools*, 526 U.S. 629 (1999), and *Gebser v. Lago Vista Independent School District*, 524 U.S. 279 (1998), a school will not be liable for damages in a private lawsuit unless there is actual notice to someone with authority to take corrective action, and the school responds with "deliberate indifference."
2. However, in a complaint filed with OCR, OCR would hold the school responsible for **hostile environment harassment of a student by a teacher** or other employee if that person conducted the harassment in the context of carrying out the responsibilities given to him or her by the school – regardless of whether the school knew of the harassment. As to **hostile environment harassment by teachers or other employees in other contexts, harassment by other students or**

**harassment by third parties**, the school would be responsible if it knew of the harassment and failed to take immediate and appropriate corrective action. **If a responsible school employee knows of the harassment but is not in a position to take corrective action him/herself, he or she should report it to someone who can.**

#### **VII. REMEDIES UNDER TITLE VII FOR SEXUAL HARASSMENT**

- A. Injunctive relief to stop the harassment and prevent any further harassment.
- B. Reinstatement and back pay, if a job or promotion was lost due to the harassment.
- C. Compensatory and punitive damages ranging from \$50,000 for employers with 15-100 employees to \$300,000 for employers with more than 500 employees.
- D. Attorney's fees.

#### **VIII. REMEDIES UNDER TITLE IX FOR SEXUAL HARASSMENT**

- A. Injunctive relief preventing further harassment.
- B. Reinstatement in or opportunity to retake course/program, reimbursement of lost tuition, counseling, other relief necessary to put the student in the same position he or she would have been in had the harassment not occurred.
- C. In private lawsuits for damages, no limit on amount, but only if actual notice to someone in authority to take corrective action who responds with deliberate indifference.
- D. In private lawsuits, attorneys' fees.

#### **IX. PREVENTIVE AND CORRECTIVE MEASURES**

##### **A. Anti-Harassment Policy and Complaint Procedure**

- 1. Under both Title VII and Title IX, employers and schools should establish and disseminate to all employees and students a policy that defines sexual harassment and other forms of unlawful harassment, as well as a prompt and equitable procedure for complaining of harassment. The policy and procedure should make clear that such conduct will not be tolerated.
- 2. An anti-harassment policy should make clear that employees and students will be protected against retaliation for making complaints or for assisting in investigations.
- 3. The complaint procedure should designate multiple officials to receive complaints, since a designated official might be the alleged harasser.
- 4. Supervisors, teachers, residence staff, administrators, and other responsible staff should be instructed to take immediate and appropriate corrective action whenever they are aware of harassment, including reporting the matter to appropriate officials.

## B. Investigating Allegations of Harassment

1. The investigation should be **prompt, thorough, and impartial**. Someone with appropriate training in investigative procedures and the law should carry it out.
2. Confidentiality should be protected to the extent possible. Information should be shared only with those who have a need to know.
3. All persons interviewed should be told that employees who complain of alleged harassment or participate in the investigation are protected against retaliation.
4. **Questions to Ask the Complainant** (list is not exhaustive):
  - a. Who, what, when, where, and how: Who committed the alleged harassment? *What* exactly occurred? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur? *How* did it affect you?
  - b. Did you communicate that the conduct was *unwelcome*? If so, how?
  - c. Are there any persons who have relevant information? Has this happened to others? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you visibly upset after episodes of alleged harassment?
  - d. How would you like to see the situation resolved?
5. **Questions to Ask the Alleged Harasser** (list is not exhaustive):
  - a. Give the individual an opportunity to respond to the allegations.
  - b. If s/he claims that the allegations are false, ask why the complainant might lie.
  - c. Are there any persons who have relevant information?
6. **Questions to ask third parties** (list is not exhaustive):
  - a. What did you see or hear? Describe the alleged harasser's behavior toward the complainant. Describe his/her behavior toward others.
  - b. What did the complainant tell you?
  - c. Are there other persons who have relevant information?

## C. Reaching a Determination

Credibility assessments can be critical in determining whether the alleged conduct in fact occurred. Factors to consider include:

1. **Consistency:** Is the person's testimony consistent with that of others?

2. **Inherent plausibility:** Is the testimony believable on its face?
3. **Age of parties:** With younger children, memory and understanding of what happened may change with time.
4. **Demeanor:** Did the person seem to be telling the truth or lying?
5. **Motive to falsify:** Did the person have a reason to lie?
6. **Past record:** Did the alleged harasser have a history of similar behavior in the past? Did the complainant have a history of making false complaints?

**D. Rights of the Accused**

1. The rights established under Title VII and Title IX must be interpreted consistently with any federally guaranteed rights involved in a complaint proceeding.
2. Schools and employers should be aware of these and any other rights created for employees or students by State law, institutional regulations/policies, faculty or student handbooks, and collective bargaining agreements. While Titles VII and IX generally do not protect the rights of the accused, procedures that ensure the rights of the complainant while at the same time according due process to all parties will lead to sound and supportable decisions. However, steps to accord due process rights to the accused should not restrict or unnecessarily delay the protections provided by Titles VII and IX to the complainant.

**E. Corrective Action**

1. If it is determined that harassment occurred, corrective action should be undertaken immediately. In any event, the parties should be informed of the outcome of the complaint.
2. Corrective measures should be designed to end the harassment and ensure that it **does not recur**.
  - O The severity of disciplinary action should depend on factors such as the severity and frequency of the misconduct, the impact on the complainant, the age of the individuals involved, and whether the harasser previously engaged in similar misconduct.
  - O Steps should be taken to correct any discriminatory effects on the complainant and others, if appropriate. This can include age-appropriate training and other educational measures as to the nature of harassment, its effects, and how to report it.
3. If unwelcome sexual conduct occurred, but it was not sufficiently severe or pervasive to constitute unlawful harassment, steps should still be taken to ensure that no further such conduct occurs in order to **prevent** it from reaching that level.
4. Corrective measures should *not* adversely affect complainant (*e.g.*, if the harasser and the target must be separated, harasser should be moved).

## **F. Other Preventive Measures**

1. Routinely educate all employees and students (in age-appropriate ways) about what constitutes unlawful harassment and about the anti-harassment policy and complaint procedure.
2. Train supervisors, administrators, teachers, and others responsible employees on how to identify and respond to harassment.
3. Monitor enforcement of the anti-harassment policy.

## **X. FIRST AMENDMENT**

- A. The protections of the First Amendment must be considered if issues of speech or expression are involved.
- B. Free speech rights apply in the classroom (e.g., classroom lectures and discussions) and in all other education programs and activities of public schools (e.g., public meetings and speakers on campus, cultural events, student publications). The protections apply to both students and teachers, although not necessarily in the same way and to the same extent.
- C. Where speech is involved that is sufficiently severe or pervasive to constitute harassment, the employer/school must respond so as to protect academic freedom and free speech rights. For example, while the First Amendment may prohibit a school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard.