706 Preventing Harassment in the Workplace

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Faculty Biographies

Robbin S. Page

Robbin S. Page is senior counsel for FedEx Express in its labor and employment law group in Memphis, Tennessee. In this capacity Ms. Page is responsible for training, briefing, and advising management concerning a broad range of employment-related issues including ADA, FMLA, Title VII, ADEA, harassment, employee discipline, interpretation of policy, and drug testing. She is also responsible for developing policies and procedures.

Prior to joining the labor and employment law group, Ms. Page was a senior attorney in the company's employment litigation group. As a member of the employment litigation group, Ms. Page was primarily responsible for handling the company's employment litigation throughout the West and Midwest. Before joining FedEx Express, Ms. Page was an associate with Baker, Donelson, Bearman & Caldwell where she was a member of the firm's labor and employment group.

Ms. Page is an honors graduate of Michigan State University and the University of Tennessee College of Law. At the University of Tennessee College of Law, Ms. Page was a member of the National Moot Court Team and was an editor on the Tennessee Law Review.

Faye R. Rosenberg

Faye R. Rosenberg is the corporate counsel for Bruno's and Bilo supermarkets in Birmingham, Alabama. Ms. Rosenberg is the head of the labor and employment law department and her responsibilities include providing legal counsel on all employee matters such as terminations, company policies, handbooks, employment related contracts, labor grievances, employee training, EEOC (U.S. Equal Employment Opportunity Commission) charges, compliance, and employment litigation.

Prior to joining Bruno's, Ms. Rosenberg was in private practice litigating on both the plaintiff and defense side working on a several ERISA (Employee Retirement Income Security Act) class actions and individual employment law suits.

Ms. Rosenberg does volunteer work with the Collat Jewish family services, National Organization of Women, and the local high school mock trial program.

Ms. Rosenberg received her B.A. from the University of Rochester and she is a graduate of Emory Law School.

ACC Association of Corporate Counsel

Session 706
PREVENTING HARASSMENT IN THE WORKPLACE

Robbin Page & Faye Rosenberg

ACC's 2005 Annual Meeting: Legal Underdog to Corporate Superhero—Using Compliance for a Competitive Advantage

October 17-19, Marriott Wardman Park Hotel

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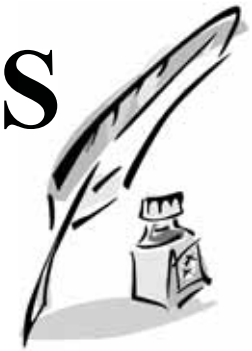
WRITTEN POLICIES



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Why Have A Written Policy?

- Ensures uniformity
- Defines harassment
- Proactive
- EEOC recommendation
- Possible defenses

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LIABILITY FOR SUPERVISOR HARASSMENT

- An Employer can be held automatically liable for unlawful harassment committed by a "supervisor."
- Managers can be sued individually for unlawful harassment or for failing to follow Company process when they are put on notice of a harassment complaint.
- If harassment by a supervisor results in a "tangible" employment action, the Employer will be barred from offering the affirmative defense that it has a complaint process.

Affirmative Defense For Alleged Supervisor Harassment

- The Employer exercised reasonable care to prevent and promptly correct any harassment.
- The Employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

Liability For Non-Supervisor Harassment

- Employer is only liable if it knew or could have known of harassment - actual or constructive knowledge

and

- Failed to take prompt and appropriate remedial action

WHAT SHOULD BE IN AN EFFECTIVE POLICY

The Policy Should Define

- Harassment
- Who is protected/covered
- What activities are prohibited
- What activities are protected
- Reporting mechanisms & contacts

Examples of Different Types of Policies

- Anti-harassment
- Fraternization
- Marriage and Dating
- Internet

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TRAINING

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Why Have Training?

- Ensure uniform understanding and meaning of the policies terms and protocols
- Good business sense
- To utilize the affirmative defense
- To ensure protocol for dealing with a complaint
- To safeguard your investigations
- Appropriate discipline
- To meet state requirements

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Four States Require Training

- California
- Connecticut
- Maine
- New Jersey

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CALIFORNIA

- By January 1, 2006 an employer having 50 or more employees shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005, and to all new supervisory employees within six months of their assumption of a supervisory position.

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CONNECTICUT

- An employer having fifty or more employees must provide two hours of training (concerning the illegality of sexual harassment and remedies available to victims of sexual harassment) and education to all supervisory employees within six months of their assumption of a supervisory position.

MAINE

- In workplaces with 15 or more employees, employers shall conduct an education and training program for all new employees within one year of commencement of employment that includes, at a minimum:
  - The illegality of sexual harassment;
  - The definition of sexual harassment under state and federal laws and federal regulations;
  - A description of sexual harassment using examples;
  - The complaint process available to the employees;
  - The protection against retaliation.

NEW JERSEY

- The New Jersey Supreme Court made supervisor and management anti-harassment training mandatory if an employer hopes to use its policies and procedures as an affirmative defense to vicarious liability for harassment by a supervisor. The decision established standards for imposing vicarious liability that are far more onerous than the standards articulated by the United States Supreme Court in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth.*

HOW DO YOU EFFECTIVELY TRAIN YOUR WORK FORCE ON COMPANY POLICIES AND APPLICABLE STATE AND FEDERAL LAWS?

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Options for Training

- Postings
- Company Website
- Handbooks
- New Hire Packet
- Live Seminars
- Computer Based Training
- Quizzes and Tests

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How to Deal With a Complaint

- Investigation
- Mediation
- Discipline
- Documentation

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What to Document and Where to Keep It

- Disciplinary documents
- Investigative documents

COMMUNICATE!

COMMUNICATE!

Did I Mention Communicate?

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The Cost of not Actively Preventing Harassment

- Loss of good employees and turnover
- Loss of productivity and morale
- No affirmative defense
- Labor grievances
- State and federal litigation
- Non- compliance of applicable state regulations/laws
- EEOC charges

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EEOC Statistics

- In Fiscal Year 2004, EEOC received 13,136 charges of sexual harassment. 15.1% of those charges were filed by males.
- EEOC resolved 13,786 sexual harassment charges in FY 2003 and recovered $37.1 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation).

ASSOCIATION OF CORPORATE COUNSEL
PREVENTING HARASSMENT IN THE WORKPLACE

INDEX

Anti-Harassment Policy

The Company strictly prohibits discrimination and harassment in any form, including sexual harassment. This policy covers conduct by, or directed towards, any teammate or non-teammate, such as an independent contractor, vendor, teammate, or customer.

Sexual harassment mean unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

Examples of misconduct which might constitute harassment if severe or persuasive enough include, but are not limited to, vulgar language or gestures, sexual jokes or innuendoes, sexual propositions, sexually oriented "kidding" or "teasing", grabbing teammates, uninvited bodily patting or touching, offensive brushing against or rubbing another's body, blocking or impeding, sexually suggestive pictures or objects, or any other unwelcome sexually motivated conduct even if initially welcomed or initiated by the other person.

The Company also prohibits any verbal, visual, or physical harassment that denigrates or shows hostility or aversion towards a person because of that individual's race, color, national origin, gender, religion, age, disability, or pregnancy (or that of the individual's relatives, friends, or associates).

The Company is committed to taking all steps necessary to prevent harassment from occurring. That is why the Company has established this policy and developed a procedure for the reporting and investigation of such claims.

If you believe you or someone else is being harassed, sexually or otherwise, you should immediately report the matter to your Store Manager or, if you prefer, a Human Resources Director. While your Store Manager and/or Human Resources Director will most likely be able to work out a solution that is in the best interest of all concerned, your complaint also deserves the attention of a higher level of management. Thus, the Company asks that you also report the conduct directly to the Company by calling the BEARLINE at 1-800-473-7857. Following this two-step reporting procedure will better ensure that the Company is aware of the conduct so it can immediately investigate your complaint and take appropriate corrective action. If harassment has occurred, the Company will make every reasonable effort to ensure that no further harassment occurs. No teammate will be disciplined, harassed, or retaliated against for making a legitimate complaint.

Sexual or other harassment is serious misconduct. No one has the authority to engage in this kind of behavior and the Company does not tolerate it. Anyone found to have violated this policy will be subject to disciplinary action, up to and including termination.

TEAMMATE ACKNOWLEDGEMENT FORM

(Please Print)

_____ _____ _____
Last Name First Name Middle Initial

Social Security Number_____

Position Title_____

Location _____Dept_____

I hereby acknowledge I have received a copy of the _____ (the "Company") Anti-Harassment Policy, and have reviewed it on the date indicated below.

I understand that is its my responsibility to read and abide by the policy and the two-step reporting procedure described therein. I also understand I should consult my Store Manager or Human Resources Director regarding any questions I have regarding this policy.

I understand that nothing in this policy, in any way, creates an express or implied contract of employment or warranty of benefits.

_____ _____
Teammate's Signature Date

_____ _____
Witness's Signature Date

_____ _____
Witness Name (Please Print) Witness's Position Title

ANTI-HARASSMENT

POLICY

In accordance with our Equal Employment Opportunity Policy, is committed to providing its associates with a work environment free of all forms of harassment, including but not limited to harassment based on sex, race, religion, national origin, sexual orientation, age, disability or military status, or harassment based on opposition to discrimination or participation in complaint proceedings. Conduct by any manager, associate or non-associate such as a customer or vendor, that harasses, intimidates, unreasonably interferes with an associate's work performance or creates an offensive or hostile environment for associates will not be tolerated. Examples of such conduct include but are not limited to:

- Unwelcome remarks or conduct concerning a person's sex, race, color, religion, national origin, sexual orientation, age, disability or military status
- Unwelcome or unwanted advances, including sexual flirtations, advances, or propositions. patting, pinching, brushing up against, hugging, cornering, kissing, fondling, putting one's arm around another or any other similar physical contact considered unwelcome or intimidating
- Unwelcome requests or demands for sexual favors as a term or condition of employment, advancement, training, scheduling, or other preferential treatment, including unwelcome propositions, subtle expectations, pressures or requests for any type of date or sexual favor
- Verbal abuse, jokes, kidding or conversation containing sexual, racial or ethnic slurs, unwelcome sexual comment or negative stereotypes. This includes jokes, whistling or offensive comments about race, sex or gender that are unwanted and considered offensive, or comments about an associate's body or appearance, where such comments go beyond mere courtesy
- Offensive conduct or visual displays such as leering, gestures, pranks, displaying of objects, pictures, cartoon, letters, notes or posters that are obscene or sexually suggestive
- Inquiries or comments about a person's sex life
- Electronically sending jokes that are sexist, sexually suggestive, racist or otherwise discriminatory in nature
- Visiting of sexual or other inappropriate websites that are not related to business

recognizes that harassment can come from managers, fellow associates, customers, or vendors. There are no stereotypical harassers or victims. The victim or the harasser could be a man or a woman. The victim could be someone of the same gender as the harasser. Additionally, the victims may include not only the person to whom the harassment is directed, but also anyone affected by the offensive conduct.

considers the following conduct, especially by supervisory personnel, to be as or more serious than the discrimination or harassment itself:

- Ignoring or concealing discrimination or harassment or treating it as a joke
- Failing to report discrimination or harassment
- Retaliating against any associate who reports or complains about discrimination or harassment or who participates in an investigation of these complaints
- Being dishonest or failing to cooperate with a discriminator or harassment investigation

RETALIATION

Retaliation bears special mention. Any act of retaliation against an associate for reporting or otherwise opposing discrimination or harassment, if substantiated, will result is disciplinary action up to and including separation of employment.

REPORTING AN INCIDENT OF HARASSMENT

Each associate is responsible and encouraged to immediately inform any perceived harassment or acts of harassment to his/her supervisor, a Human Resource Specialist, the Vice President of Associate Relations, or call our confidential Hot Line (800 , before harassment becomes severe or pervasive. The supervisor/ manager to whom such conduct is reported should strive to respond within 48 hours to the complaint by contacting the Human Resource Specialist or the Associate Relations Department for guidance.

PROCEDURE

Any reported allegations of unlawful harassment will be investigated promptly, thoroughly, and impartially. The investigation may include individual interviews with the parties involved and, where necessary, with individuals who may have observed the alleged conduct or may have other relevant knowledge. Confidentiality will be protected through the investigative process to the extent possible, consistent with adequate investigation and appropriate disciplinary action. If the associate is unsatisfied with the outcome of the process of the investigation, the associate may bring the matter to the attention of the Executive Vice President of Human Resources. An associate who sincerely feels he or she has been discriminated against or harassed unlawfully, or who in good faith reports harassment of another associate will not suffer any adverse consequences for reporting such conduct.

Any manager or associate who is found, after appropriate investigation, to have engaged in harassment will be subject to appropriate corrective action, up to and including separation of employment. may also take any legally allowable action against any non-associate who has been found to engage in the harassment of an associate.

5-55 Anti-Harassment

(Last Revised 23 Nov 03)

Policy

The Company condemns any acts in its work environments that create the potential for illegal harassment, both in terms of individual employee morale and in violation of applicable federal, state, and local laws. The Company will not tolerate harassment of any employee because of that employee's sex, sexual orientation, gender, race, color, religion, national origin, age or disability.

Scope

This policy applies to all personnel and facilities and extends to those with whom the Company conducts business, internally or externally, including clients, customers, and vendors.

Guidelines

Definition

It is impossible to provide a precise definition of "harassment" in the legal sense. Whether or not inappropriate behavior constitutes illegal harassment depends upon many factors. Thus, the descriptions below are intended to provide a general outline of the types of behavior that are inappropriate in the workplace. This policy prohibits all inappropriate language and conduct—regardless of whether that behavior would legally constitute "harassment."

Sexual harassment

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature may constitute sexual harassment when

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual.
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating a working environment that is intimidating, hostile, or offensive to the individual.

Sexually inappropriate behavior can take many other forms including, but not limited to repeated propositions or requests for dates, leering or ogling, innuendos, flirting, or unwanted physical contact.

Other inappropriate harassment
Examples of behavior which is not sexually provocative but is inappropriate, and depending upon the circumstances unlawful harassment, include the following:

- Gender-based comments, or other demeaning conduct directed at an employee because of his or her gender.
- Jokes or insults relating to religious beliefs, nationality, age, or disability.
- Racial epithets or derogatory comments based on race, color or national origin.

Prohibited Conduct

All employees should avoid any inappropriate action or conduct that might be viewed as harassing behavior. Approval of, participation in, or acquiescence in such conduct will be considered a violation of this policy. Inappropriate behavior and harassment is not tolerated and may result in discipline up to and including discharge.

Complaints

If any employee believes that he or she has been subjected to harassment by anyone, including supervisors, coworkers, vendors, or customers, he or she must immediately report this to management, Human Resources, or the HR Compliance Department in Memphis, Tennessee. Any employee who observes conduct that could be perceived as sexual or other harassment should immediately report that conduct to management, Human Resources, or the HR Compliance Department in Memphis, Tennessee. Any member of management who receives a report or complaint of sexual or other harassment must immediately report the complaint to Human Resources or the HR Compliance Department in Memphis, Tennessee even if the complaining employee asks that no action be taken. Any manager who fails to take action upon receiving a complaint of harassment may be subject to discipline, up to and including discharge. Complaints of sexual or other illegal harassment will be treated as internal EEO complaints and follow the internal EEO procedure as outlined in **5-5 Guaranteed Fair Treatment Procedure/EEO Complaint Process**, **Table 2, Internal EEO Discrimination or Harassment Complaint Procedure**. All complaints will be promptly investigated in as confidential a manner as is possible while still conducting a thorough investigation.

Retaliation Prohibited

There will be no retaliation against any employee who reports a claim or incident of sexual or other harassment or against any employee who participates as a witness in a harassment investigation. Any employee who feels that he or she has been subjected to retaliation must immediately make a report to management, Human Resources, or the HR Compliance Department in Memphis, Tennessee.

Outside Regulatory Agency Complaints

If a complaint is filed via an outside regulatory agency,

REFER TO **5-15 External EEO Complaint Investigation**.

FRATERNIZATION and DATING AND MARRIAGE POLICIES

Fraternization Policy

While _____ does not wish to interfere with the off-duty and personal conduct of its associates, certain types of off-duty conduct and relationships may interfere with the Company's legitimate business interests. To prevent uncomfortable working relationships, morale problems among other associates, potential liability, and the appearance of impropriety, managers and supervisors of the Company should not directly or indirectly have a reporting relationship with any associates wherein consensual romantic or sexual relationships exist.

In the event any _____ associate becomes romantically involved with any other associate in the same store or where a reporting relationship exists, both associates are required to disclose the relationship within 14 days of the relationship commencing. The disclosure should be reported to the District Manager, Store Manager, Regional Vice President, or Vice President of Human Resources.

Failure to disclose as described herein and/or violation of this policy may result in discipline up to and including termination. The restrictions of this policy apply to any and all associates concerning consensual romantic or sexual relationships. This policy applies to opposite and same sex relationships.

This policy is intended to supplement our existing anti-harassment policy. This policy only applies to consensual romantic or sexual relationships. Unwanted sexual attention is strictly prohibited and is addressed in our Anti-Harassment Policy.

If there are any questions concerning the intent of this policy or its application to any existing or contemplated relationship, please consult your District or Store Manager, respective Regional Vice President, Vice President of Human Resources, or Human Resources Specialist. All such inquiries will be treated confidentially.

COMPANY POLICY

Title: Prohibition on Fraternization **Number of Pages: 2**

Effective Date 4/15/97 **Revision Date: 4/30/97**

is committed to providing a workplace free of sexual harassment, to minimizing the disruption of the workplace by personal relationships, to protecting the Company from potential liability, and to ensuring that all decisions reflect the best business interest of the Company. To further these goals, and to avoid any inference of impropriety, the Company adopts the following policy:

1. The Company strictly prohibits romantic or sexual relationships between any supervisory employee and any other employee of the Company, who are not married to each other.

2. For purposes of this policy "supervisory employee" includes, but is not limited to store managers, co-managers, grocery managers, assistant grocery managers, department managers, front-end managers, lead stockers, and any other person who is responsible, from time to time, for managing store employees in whole or in part.

3. An "employee" includes without limitation all supervisory employees, non-supervisory employees, and other persons, such as independent contractors or temporary help, who work at the same store or location.

4. Violation of this policy is grounds for the discipline of both persons involved, up to and including immediate discharge.

5. This policy applies to any romantic or sexual relationship between any two supervisory employees as well as any such relationship between a supervisory employee and a non-supervisory employee who are not married to each other, regardless of when that relationship began.

6. Allegations of violations of this policy shall be brought to the attention of the store manager, without fear of reprisal. If the store manager is unavailable or the employee believes it would be inappropriate to contact that person, the employee should immediately contact the Human Resources Director or the District Manager. If the concern is not settled, the matter should be submitted to the General Manager of the format, or the Vice-President of Human Resources. These persons shall investigate alleged violations of this policy as they deem appropriate, including giving the accused employee an opportunity to respond to the allegations. They shall take action where appropriate or recommend action to the appropriate person if otherwise required.

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7. This policy is in addition to and does not supplant the Company's policy on sexual harassment which remains in full effect.

8. An employee who alleges a violation of this policy or who provides information about an alleged violation shall be free from any adverse action because of their participation and cooperation in the investigation.

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PROHIBITION ON FRATERNIZATION

is committed to providing a workplace free of sexual harassment, to minimizing the disruption of the workplace by personal relationships, to protecting the company from potential liability, and to ensuring that all decisions reflect the best business interest of the firm. To further these goals, and to avoid any inference of impropriety, the company adopts the following policy:

1. strictly prohibits romantic or sexual relationships between any supervisory or nonsupervisory employee and any other employee of the company, who are not married to each other.

2. For purposes of this policy, an "employee" includes, but is not limited to all supervisors, staff members, and other workers. An "employee" is any person who receives compensation from the company on a regular basis or whose income is reported by the company to the Internal Revenue Service.

3. Violation of this policy is grounds for the discipline of the employee, up to and including termination.

4. This policy applies to any romantic or sexual relationship between any two employees who are not married to each other, regardless of when that relationship began.

5. **In the instance two employees legally marry, they shall both be allowed to continue employment; however, a husband or wife shall not be under the direct supervision of his or her spouse. /OR STRIKE THIS PROVISION AND ADD TO PROVISION NO. 1 ", who are not married to each other at the time of the enactment of this policy."**

6. Allegations of violations of this policy shall be brought to the attention of either _____ or _____. Both persons shall investigate alleged violations of this policy as they deem appropriate, including giving the accused employee an opportunity to respond to the allegations. They shall take action where appropriate or recommend action to the appropriate person if otherwise required.

7. Any employee or attorney who alleges a violation of this policy or who provides information about an alleged violation shall be free from any adverse action because of their participation and

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cooperation in the investigation.

8. This policy is in addition to and does not supplant the company's policy on sexual harassment which remains in full effect.

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FRATERNIZATION POLICY

1. **General**

has adopted this policy in recognition of its responsibility to provide guidelines on and caution teammates of the potential problems posed by romantic and sexual relationships with other teammates. These problems include conflicts of interest, interference with the productivity of co-workers, and potential charges of sexual harassment. These problems can be particularly serious in situations in which one person has a position of authority over the other, such as in a supervisor-subordinate relationship.

2. **Restrictions on Employee Conduct**

Rule #1— strictly prohibits a supervisor from dating or engaging in or pursuing any romantic or sexual relationship with any subordinate teammate (whether supervisory or non-supervisory). Anyone found to have engaged in such conduct will be subject to discipline up to and including immediate termination (after the 60 day grace period set forth below).

Rule #2—In addition, strongly discourages all teammates from dating or engaging in or pursuing any romantic or sexual relationships with other teammates (whether supervisory or non-supervisory). All romantic or sexual relationships between teammates must be disclosed so any detrimental consequences of these relationships can be mitigated. In the stores, disclosure must be made to the Store Manager or to the next highest individual in the supervisory chain of command if one of the parties is the Store Manager, or to the Director of Human Resources. In the Corporate Offices and Distribution Center, disclosure must be made to the Department Head or Director of Human Resources. Failure to make required disclosures or to comply with a recommendation to resolve a conflict with this policy can result in discipline up to and including immediate termination of employment.

This policy is not intended to discourage friendship between co-workers or between supervisory and non-supervisory teammates. The restrictions on romantic or sexual relationships apply regardless of the sexual orientation of the persons involved. Thus, this policy applies equally to opposite-sex and same-sex relationships. This policy shall be implemented in a nondiscriminatory manner and shall take any steps necessary to avoid disparate impact on either sex.

This policy applies only to consensual romantic or sexual relationships between teammates. Unwanted sexual attention (including verbal statements or physical contact) and sexually oriented behavior with the purpose or effect of creating an hostile or offensive environment is strictly prohibited. See Anti-harassment Policy.

3. **Terms**

The terms used in this policy are defined as follows:

- "Dating" or "romantic or sexual relationship" includes but is not limited to casual dating, serious dating, casual sexual involvement where the parties have no intention of carrying on a long-term relationship, cohabitation, and any other communication,

conduct or behavior normally associated with romantic or sexual relationships or otherwise of a sexual nature.

- "Subordinate teammate" includes anyone who directly or indirectly reports to the supervisor in question. This includes but is not limited to any teammate beneath the supervisor in the same supervisory chain of command as well as any teammate whose terms and conditions of employment may be influenced or decided by the supervisor.

4. **Mitigation Guidelines**

Once a romantic involvement is disclosed to him or her, the Store Manager or Department Head must mitigate any potential detrimental consequences of the relationship, considering its impact on both persons involved and on as a whole (including its business image). In consultation with a Director of Human Resources, the Store Manager or Department Head must make recommendations for remedies, which may include but are not limited to:

- Requiring that the teammates work different shifts;
- Transferring one teammate to another department;
- Assigning one of the teammates to another store or location; or
- Requiring the dating couple to decide which partner will resign.

5. **60 Day Grace Period**

Rule #1 prohibiting supervisory-subordinate romantic or sexual relationships will go into effect after a 60 day grace period from December 1, 1998 through January 31, 1999. During this grace period all such relationships (including but not limited to dating, marriages, co-habitation, etc.) between a supervisor or subordinate must be disclosed by one or both parties to the Department Head or Store Manager or to the next highest individual in the supervisor chain of command if one of the parties is the Store Manager or higher, or to a Director of Human Resources. If possible, one of the partners will be given the opportunity to transfer to another department or location subject to job availability. If such a transfer is not possible, the dating couple must decide which partner will resign. If they cannot reach a mutual agreement within an allotted time period, the Company will decide for them based on business needs. The supervisor-partner is prohibited from having any involvement in the professional decision-making affecting the partner who transfers.

Revision: 4/8/04

4-50 Employment of Relatives

(Last Revised 22 Jul 85)

Policy

The Company hires and promotes the best qualified individuals for every job opening. Blood-related and marriage-related employees may be hired and be permitted to work at the same locations, providing no direct reporting or supervisory relationship exits.

Scope

All employees related by blood or marriage

Guidelines

General

The Company expects its employees to act as professionals and remember their individual commitment to the Code of Business Conduct. See **2-70 Code of Business Conduct**. No special considerations are given to married couples or relatives with regard to work assignments, vacations, shift schedules, days off, or other business-related decisions.
Employees are not allowed to fill positions that would result in an immediate relative reporting to or managing another immediate relative. An immediate relative includes spouse, parents, mother-in-law, father-in-law, sister/brother, son/daughter, grandparents, and grandchildren.

Decision

Unless directly involved, managers are responsible for determining whether a direct reporting or supervisory relationship exists among relatives in their area. If the manager is one of the relatives involved, the next level of management renders this decision.

Hiring

Management is prohibited from hiring or influencing the hiring of their immediate relatives and from having their relatives reporting within their direct or immediate chain of command.
Officers who report directly to the chief executive officer or chief operating officer are prohibited from hiring their relatives within their respective division for which they are responsible.

Marriage

If two employees marry and are in conflict with this policy, one employee must find alternate employment consistent with this policy within 90 days. If the employees cannot agree as to which employee must find alternate employment, the Company does not make that determination and both employees are terminated. If the employee who elects to be transferred fails to find other employment within the established time period, that employee is terminated.

Officers Dating and Marriage Policy

Officers of _____ are vested with a great deal of authority and are privy to confidential information. An Officer who dates or marries another employee may cause serious conflicts and problems with favoritism, employee morale and confidentiality. Because of these concerns, effective May 2001, the Company has adopted a policy prohibiting Officers from dating or marrying another employee of the Company, regardless of the other employee's rank or position.

Officer Defined: For purposes of this policy, an Officer is defined as the Chairman of the Board, the Chief Executive Officer, the President, any Executive Vice President, any Senior Vice President or any Vice President of the Company.

Dating Relationship Defined: For purposes of this policy, a dating relationship is defined as a relationship that may reasonably be expected to lead to the formation of a consensual romantic or sexual relationship. This policy applies to all employees without regard to the gender or sexual orientation of the individuals involved.

Officer's Responsibility: If for any reason an Officer desires to commence a dating relationship or enter into marriage with another employee of the Company, the Officer must inform the Senior Vice President of Human Resources. One of the employees involved in the prohibited relationship must then resign his or her employment. This decision will be made by the individuals involved and the resignation must be effective within 30 days after the dating relationship is disclosed. If an Officer fails to disclose a prohibited relationship, he or she will be subject to discipline up to and including discharge. Nothing in this policy shall be construed as preventing the Company from terminating the employment of any employee.

Conflict of Interest: Violations of the Company's Conflict of Interest policy may arise out of the employment of an Officer's spouse or person whom the Officer is dating.

ELECTRONIC COMMUNICATIONS POLICIES

10-3 Computer Resources

(Last Revised 23 Nov 2003)

Policy

The Company expects all employees using its computer resources, including internet access, Intranet access, E-mail, (whether through EMC/TAO or other E-mail programs), software, hardware, etc., to follow specific guidelines and show the utmost respect for Company employees, systems, and resources.

Scope

All employees.


The effective date of the changes to this policy is June 15, 2003 as published online.

Guidelines

General

Company computer resources, including EMC/TAO, internet or Intranet access, software, hardware, and other programs, are intended for legitimate Company business purposes. Limited personal use of computer resources is permissible, provided such use does not interfere with the employee's job duties, the business needs of other employees, or with serving customers. In addition, computer resources other than EMC/TAO bulletin boards may not be used for an employee's personal gain, political purposes, or solicitation of any kind.
E-mail bulletin boards are maintained for use by the Company and by employee groups. Employees wishing to establish an electronic bulletin board should contact the E-mail Group.
Employees should have no expectation of privacy regarding FedEx Express computer resources. The Company reserves the right to access and disclose without notice all information stored on Company computers, including examining all messages sent or received via Company provided computer resources, at any time for any reason.
Employees using Company computer resources may encounter business related requests for information or services. All such messages, even if improperly delivered, must be immediately forwarded to the appropriate department within the Company responsible for handling such requests.

Misconduct

The Company expects its employees to act responsibly and with respect toward the Company and others. Violations of this policy or the following general guidelines may constitute misconduct which may result in disciplinary action up to and including discharge:

- Using Company provided computer resources to intentionally solicit, print, forward for electronic distribution, or indicate further interest in graphic, vulgar, violent or racially or sexually offensive materials, including but not limited to pictures, stories or jokes.
- Using Company computer resources to send, solicit, indicate further interest in, publish, or disseminate non business related opinions or statements about race, color, national origin, sex, religion, disability, age, veteran status, or political position. This also includes, but is not limited to, any offensive, false, disparaging or defamatory statement.
- Using Company computer resources to communicate business related opinions when the individual is not authorized to do so.
- Receiving, disclosing, or disseminating any information or records confidential to the Company, including but not limited to HR files, business records, customer account information, rate and billing information, customer lists, technical data, and source and object codes, without the written permission of management and only then if the appropriately encrypted as determined by Information Security.

Internet Specific Guidelines

Individuals using the Internet may encounter offensive material. This material may be in the form of web sites, unsolicited electronic mail, or downloaded files. The Company cannot control these encounters and in no way assumes responsibility for this material or holds responsible any employee that, without intent to solicit or indicating further interest, receives offensive web site links, unsolicited electronic mail, or downloadable files.


Managers must promptly take action in response to any violation of this policy.

No one may use Company provided Internet or Intranet access to become a moderator of a news group or mailing list appearing on the Internet without the written approval of management.

Intranet Specific Guidelines

No one may store or place non-business related or personal information on the Intranet.
No one may allow non-Company personnel to view or access the Intranet without specific written permission from Information Security and their matrix Human Resources manager.
All intranet web sites must be registered with home.fedex.com. Instructions for registration may be found at _____.

Software and Protected Information Guidelines

No one should obtain or attempt to obtain pirated, stolen, copyrighted, trademarked, or protected information such as software, credit card numbers, papers, graphics, video, audio, etc. using Company computer resources or attempt to use or place this information on Company computers.
All users should understand that copyright exists in almost all materials as soon as they are created.
Copyrighted software programs and materials may only be downloaded, copied, or printed with the permission and according to the instructions provided by the copyright owner. Evidence of permission must be readily available for inspection by management. All software downloads must also comply with the Software Standards in the Information Security Standards provided in the following URL_____.
Employees using the Internet for limited personal reasons may not store software or other downloaded material that is inconsistent with this policy on Company computers.

Security and Access

Remote and internet access to Company computer resources must be through means approved and secured by Information Security. The preferred method of Internet access is always via the corporate firewall protected connection.

Manager's Obligations

Managers whose employees use Company computer resources for business or personal use are responsible for ensuring compliance with this policy and all other corporate policies, including but not limited to the Acceptable Conduct, Sexual Harassment, Solicitation and Distribution and the User ID and Data Access policies. An employee's failure to comply with any of the provisions of this policy, or a manager's failure to appropriately act on policy infractions, may result in disciplinary action, up to and including termination.

PROTECTING COMPANY INFORMATION & PROPERTY

Protecting our Company's information is the responsibility of every employee and we all share a common interest in making sure it is not improperly or accidentally disclosed. Do not discuss the Company's confidential business with co-workers, unless appropriate, or with anyone who does not work for us.

All Company equipment including desks, computer systems, computer software, diskettes, electronic mail, voice mail and other physical items are for business use only. No equipment, files, diskettes, software or other Company property should be removed from the premises without the expressed permission of your supervisor.

The Company at all times retains the right to access and search all directories, indices, diskettes, files, databases, E-mail messages, voice mail messages, internet pages and any other electronic transmissions contained in or used in conjunction with the Company's computer, electronic and voice mail systems and equipment with no prior notice. This right applies both during employee's employment by the Company and after its cessation for any reason, including whether the cessation is voluntary or involuntary, for any reason or no reason, or by death or disability (the "cessation of employment").

Employees should keep personal records and personal business at home, as the Company cannot guarantee privacy for information contained on computer, electronic or telephone systems or in Company furniture such as desks and filing cabinets.

Passwords are designed to give employees access to all or part of the Company's computer, electronic and/or telephone systems; they are not designed to guarantee the confidentiality of any message or document. The Company retains the right to enter these systems at its sole discretion. By the same token, passwords are keys to the Company's information systems and should be guarded and not given to any unauthorized persons. You should not use your name or any other easily guessed word or number for your password, nor should you write your password down where someone else could easily find it. You should also

periodically change your password for security. Please ask the IT department for assistance or advice on these matters.

Computer, electronic and voice mail deleted or erased by employees may remain stored in the Company's computer or telephone system. Accordingly, the Company retains the right to access computer, electronic and voice mail messages for as long as the information may be obtained from any source, even after the employee has deleted or erased it.

Employees will not send offensive or discriminatory computer, electronic or voice mail messages. Employees will be subject to discipline, up to and including discharge for violating this rule and, thus, must consider before sending a computer, electronic or voice mail message if the communication is in violation of this policy. Employees must keep in mind that computer, electronic and voice mail messages can usually be printed, saved and/or forwarded to anyone else in the office or elsewhere. Please do not send any messages or data that you would not want seen by an unintended recipient.

In the event of the cessation of employment, employees will deliver to the Company all files, diskettes or other Company property including any passwords to access documents, diskettes, computer, electronic or voice mail systems.

ELECTRONIC AND TELEPHONIC COMMUNICATIONS

Electronic mail ("e-mail"), voicemail, and Internet access are important resources and tools of communication for Company employees. In order to ensure the proper use of these tools and to avoid any misunderstandings, the Company has instituted the following policies:

1. All electronic and telephonic communications systems and all communications and information transmitted by, received by, received from, or stored in these systems are the property of the Company.

2. All e-mail messages and other electronic document transmissions are subject to review from time to time by the Company and may be subpoenaed or subject to

SPECIFIC STATE LAW HARASSMENT REQUIREMENTS

California
Connecticut
Maine
New Jersey

California

*2004 Cal ALS 933, *; 2004 Cal AB 1825*

2004 REGULAR SESSION
CHAPTER 933 (Assembly Bill No. 1825)

BILL TRACKING SUMMARY FOR THIS DOCUMENT

2004 Cal ALS 933; 2004 Cal AB 1825; Stats 2004 ch 933

Approved by Governor September 29, 2004. Filed with Secretary of State September 30, 2004. Urgency legislation is effective immediately, Non-urgency legislation will become effective January 1, 2005

To view the next section, type .np* and TRANSMIT.
To view a specific section, transmit p* and the section number. E.g. p*1

DIGEST:

AB 1825, Reyes. Sexual harassment: training and education.

Existing law makes certain specified employment practices unlawful, including the harassment of an employee directly by the employer or indirectly by agents of the employer with the employer's knowledge. Existing law further requires every employer to act to ensure a workplace free of sexual harassment by implementing certain minimum requirements, including posting sexual harassment information posters at the workplace and obtaining and making available an information sheet on sexual harassment.

This bill would require employers with 50 or more employees to provide 2 hours of training and education to all supervisory employees, as specified, within one year of January 1, 2005, unless the employer has provided sexual harassment training and education to employees after January 1, 2003. The bill would require each employer to provide sexual harassment training and education to each supervisory employee once every 2 years, after January 1, 2006. The bill would require the state to incorporate this training into the 80 hours of training provided to all new supervisory employees, using existing resources. The bill would provide that a claim that the training and education did not reach a particular individual does not automatically result in the liability of an employer for sexual harassment and that an employer's compliance with these provisions does not insulate the employer from liability for sexual harassment of any current or former employee or applicant. The bill would specify that the statute establishes a minimum threshold for training and education and that employers may provide training and education beyond that required by the statute to prevent and correct sexual harassment and discrimination.

SYNOPSIS:

An act to add Section 12950.1 to the Government Code, relating to employment practices.

NOTICE: [A> Uppercase text within these symbols is added <A]
* * * indicates deleted text

TEXT:

The people of the State of California do enact as follows:

[*1] SECTION 1. Section 12950.1 is added to the Government Code, to read:

§ 12950.1.

(a) By January 1, 2006, an employer having 50 or more employees shall provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees who are employed as of July 1, 2005, and to all new supervisory employees within six months of their assumption of a supervisory position. Any employer who has provided this training and education to a supervisory employee after January 1, 2003, is not required to provide training and education by the January 1, 2006, deadline. After January 1, 2006, each employer covered by this section shall provide sexual harassment training and education to each supervisory employee once every two years. The training and education required by this section shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.

(b) The state shall incorporate the training required by subdivision (a) into the 80 hours of training provided to all new supervisory employees pursuant to subdivision (b) of Section 19995.4 of the Government Code, using existing resources.

(c) For purposes of this section only, "employer" means any person regularly employing 50 or more persons or regularly receiving the services of 50 or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities.

(d) Notwithstanding subdivisions (j) and (k) of Section 12940, a claim that the training and education required by this section did not reach a particular individual or individuals shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant.

(e) If an employer violates the requirements of this section, the commission shall issue an order requiring the employer to comply with these requirements.

(f) The training and education required by this section is intended to establish a minimum threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination.

Cal Gov Code § 12950.1

*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
*** THROUGH 2005 CH. 45, APPROVED 7/11/2005 ***

GOVERNMENT CODE
TITLE 2. Government of the State of California
DIVISION 3. Executive Department
PART 2.8. Department of Fair Employment and Housing
CHAPTER 6. Discrimination Prohibited
ARTICLE 1. Unlawful Practices, Generally

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Gov Code § 12950.1 (2005)

§ 12950.1. **Training** and education regarding sexual **harassment**

(a) By January 1, 2006, an employer having 50 or more employees shall provide at least two hours of classroom or other effective interactive **training** and education regarding sexual **harassment** to all supervisory employees who are employed as of July 1, 2005, and to all new supervisory employees within six months of their assumption of a supervisory position. Any employer who has provided this **training** and education to a supervisory employee after January 1, 2003, is not required to provide **training** and education by the January 1, 2006, deadline. After January 1, 2006, each employer covered by this section shall provide sexual **harassment training** and education to each supervisory employee once every two years. The **training** and education required by this section shall include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual **harassment** and the remedies available to victims of sexual **harassment** in employment. The **training** and education shall also include practical examples aimed at instructing supervisors in the prevention of **harassment,** discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of **harassment,** discrimination, and retaliation.

(b) The state shall incorporate the **training** required by subdivision (a) into the 80 hours of **training** provided to all new supervisory employees pursuant to subdivision (b) of Section 19995.4 of the Government Code, using existing resources.

(c) For purposes of this section only, "employer" means any person regularly employing 50 or more persons or regularly receiving the services of 50 or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities.

(d) Notwithstanding subdivisions (j) and (k) of Section 12940, a claim that the **training** and education required by this section did not reach a particular individual or individuals shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual **harassment.** Conversely, an employer's compliance with this section does not insulate the employer from liability for sexual **harassment** of any current or former employee or applicant.

(e) If an employer violates the requirements of this section, the commission shall issue an order requiring the employer to comply with these requirements.

(f) The **training** and education required by this section is intended to establish a minimum threshold and should not discourage or relieve any employer from providing for longer, more frequent, or more elaborate **training** and education regarding workplace **harassment** or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct **harassment** and discrimination.

CONNECTICUT

Regs., Conn. State Agencies § 46a-54-204

REGULATIONS OF CONNECTICUT STATE AGENCIES

THIS DOCUMENT IS CURRENT THROUGH THE 07/19/05 ISSUE OF THE CONN. LAW JOURNAL

TITLE 46a HUMAN RIGHTS
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
SEXUAL HARASSMENT POSTING AND TRAINING REQUIREMENTS

Regs., Conn. State Agencies § 46a-54-204 (2005)

Sec. 46a-54-204. Posting and training requirements for employers having fifty or more employees

(a) An employer having fifty (50) or more employees shall comply with the posting requirements set forth in sections 46a-54-200 through 46a-54-207, inclusive.

(b) An employer having fifty (50) or more employees must also provide two hours of training and education to all supervisory employees of employees in the State of Connecticut no later than October 1, 1993 and to all new supervisory employees of employees in the State of Connecticut within six months of their assumption of a supervisory position. Nothing in these regulations shall prohibit an employer from providing more than two hours of training and education.

(c) Such training and education shall be conducted in a classroom-like setting, using clear and understandable language and in a format that allows participants to ask questions and receive answers. Audio, video and other teaching aides may be utilized to increase comprehension or to otherwise enhance the training process.

(1) The content of the training shall include the following:

(A) Describing all federal and state statutory provisions prohibiting sexual harassment in the work place with which the employer is required to comply, including, but not limited to, the Connecticut discriminatory employment practices statute (section 46a-60 of the Connecticut General Statutes) and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. section 2000e, and following sections);

(B) Defining sexual harassment as explicitly set forth in subdivision (8) of subsection (a) of section 46a-60 of the Connecticut General Statutes and as distinguished from other forms of illegal harassment prohibited by subsection (a) of section 46a-60 of the Connecticut General Statutes and section 3 of Public Act 91-58;

(C) Discussing the types of conduct that may constitute sexual harassment under the law, including the fact that the harasser or the victim of harassment may be either a man or a woman and that harassment can occur involving persons of the same or opposite sex;

(D) Describing the remedies available in sexual harassment cases, including, but not limited to, cease and desist orders; hiring, promotion or reinstatement; compensatory damages and back pay;

(E) Advising employees that individuals who commit acts of sexual harassment may be subject to both civil and criminal penalties; and

(F) Discussing strategies to prevent sexual harassment in the work place.

(2) While not exclusive, the training may also include, but is not limited to, the following elements:

(A) Informing training participants that all complaints of sexual harassment must be taken seriously, and that once a complaint is made, supervisory employees should report it immediately to officials designated by the employer, and that the contents of the complaint are personal and confidential and are not to be disclosed except to those persons with a need to know;

(B) Conducting experiential exercises such as role playing, coed group discussions and behavior modeling to facilitate understanding of what constitutes sexual harassment and how to prevent it;

(C) Teaching the importance of interpersonal skills such as listening and bringing participants to understand what a person who is sexually harassed may be experiencing;

(D) Advising employees of the importance of preventive strategies to avoid the negative effects sexual harassment has upon both the victim and the overall productivity of the work place due to interpersonal conflicts, poor performance, absenteeism, turnover and grievances;

(E) Explaining the benefits of learning about and eliminating sexual harassment, which include a more positive work environment with greater productivity and potentially lower exposure to liability, in that employers--and supervisors personally--have been held liable when it is shown that they knew or should have known of the harassment;

(F) Explaining the employers's policy against sexual harassment, including a description of the procedures available for reporting instances of sexual harassment and the types of disciplinary actions which can and will be taken against persons who have been found to have engaged in sexual harassment; and

(G) Discussing the perceptual and communication differences among all persons and, in this context, the concepts of "reasonable woman" and "reasonable man" developed in federal sexual harassment cases.

(d) While not required by these regulations, the Commission encourages an employer having fifty (50) or more employees to provide an update of legal interpretations and related developments concerning sexual harassment to supervisory personnel once every three (3) years.

MAINE

26 M.R.S. § 807

Maine Revised Statutes Annotated by LexisNexis(R)

*** THIS DOCUMENT IS CURRENT THROUGH ALL 2004 LEGISLATION ***
*** ANNOTATIONS CURRENT THROUGH MARCH 21, 2005 ***

TITLE 26. LABOR AND INDUSTRY
CHAPTER 7. EMPLOYMENT PRACTICES
SUBCHAPTER IV-B. SEXUAL **HARASSMENT** POLICIES

GO TO MAINE REVISED STATUTES ARCHIVE DIRECTORY

26 M.R.S. § 807 (2004)

§ 807. Requirements

In addition to employer responsibilities set forth in rules adopted under Title 5, section 4572, all employers shall act to ensure a workplace free of sexual **harassment** by implementing the following minimum requirements.

1. WORKPLACE POSTING. An employer shall post in a prominent and accessible location in the workplace a poster providing, at a minimum, the following information: the illegality of sexual **harassment;** a description of sexual **harassment,** utilizing examples; the complaint process available through the commission; and directions on how to contact the commission. The text of this poster may meet but may not exceed 6th-grade literacy standards. Upon request, the commission shall provide this poster to employers at a price that reflects the cost as determined by the commission. This poster may be reproduced.

2. EMPLOYEE NOTIFICATION. Employers shall provide annually all employees with individual written notice that includes at a minimum the following information: the illegality of sexual **harassment;** the definition of sexual **harassment** under state law; a description of sexual **harassment,** utilizing examples; the internal complaint process available to the employee; the legal recourse and complaint process available through the commission; directions on how to contact the commission; and the protection against retaliation as provided pursuant to Title 5, section 4553, subsection 10, paragraph D. This notice must be initially provided within 90 days after the effective date of this subchapter. The notice must be delivered in a manner to ensure notice to all employees without exception, such as including the notice with an employee's pay.

3. EDUCATION AND **TRAINING.** In workplaces with 15 or more employees, employers shall conduct an education and **training** program for all new employees within one year of commencement of employment that includes, at a minimum, the following information: the illegality of sexual **harassment;** the definition of sexual **harassment** under state and federal laws and federal regulations, including the Maine Human Rights Act and the Civil Rights Act of 1964, 42 United States Code, Title VII, Sections 2000e to 2000e-17; a description of sexual **harassment,** utilizing examples; the internal complaint process available to the employee; the legal recourse and complaint process available through the commission; directions on how to contact the commission; and the protection against retaliation as provided under Title 5, section 4553, subsection 10, paragraph D. Employers shall conduct additional **training** for supervisory and managerial employees within one year of commencement of employment that includes, at a minimum, the specific responsibilities of supervisory and managerial employees and methods that these employees must take to ensure immediate and appropriate corrective action in addressing sexual **harassment** complaints.

Education and **training** programs conducted under this subsection by the State, a county or a municipality for its public safety personnel, including, but not limited to, law enforcement personnel, corrections personnel and firefighters, may be used to meet **training** and education requirements mandated by any other law, rule or other official requirement.

NEW JERSEY

GAINES V. BELLINO

A-47 September Term 2001

SUPREME COURT OF NEW JERSEY

173 N.J. 301; 801 A.2d 322; 2002 N.J. LEXIS 1083; 89 Fair Empl. Prac. Cas. (BNA) 886

March 25, 2002, Argued
July 24, 2002, Decided

PRIOR HISTORY: **[***1]** On certification to the Superior Court, Appellate Division.

DISPOSITION: Reversed and remanded for further proceedings not inconsistent with this opinion.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employee sued appellee supervisor and county in the trial court for sexual harassment. The trial court dismissed the employee's complaint, and the Superior Court, Appellate Division (New Jersey), affirmed. The employee sought further review.

OVERVIEW: The employee's supervisor subjected her to unwanted kissing, but she did not file a formal complaint due to her perception that she would not be believed. The supreme court held there were genuine factual issues concerning whether the employer had implemented an anti-sexual harassment workplace policy that provided realistic preventative and protective measures for employees in the event harassment occurred, making summary judgment inappropriate. The employee raised factual disputes using more than mere assertions about her subjective perception of the workplace policy and complaint mechanisms, which were material to the question whether, based on agency principles, the employer could be held vicariously liable for an alleged sexually hostile workplace. The employee's failure to file a formal complaint did not entitle the employer to an affirmative defense insulating it from liability for an alleged hostile work environment caused by a high-ranking officer. Genuine issues existed concerning whether the supervisor was aided by his agency relationship with the employer, so the employee's cause of action should not have been summarily dismissed.

OUTCOME: The judgment of the appellate division was reversed.

CORE TERMS: harassment, supervisor, anti-harassment, sexual harassment, workplace, effective, captain, jail, anti-sexual, training, hostile work environment, vicarious liability, summary judgment, midnight, kissing, warden, employer liability, effectiveness, preventative, kissed, monitoring, sensing, sergeant, sexually, hostile, afraid, rape, affirmative defense, aided, ineffective

The opinion of the Court was delivered by
[*303]
LaVECCHIA, J.

In this case we must consider whether an employer implemented an effective anti-sexual harassment workplace policy such that the employer should be insulated from vicarious liability in a discrimination claim based on hostile work environment. The employer **[***11]** asserted below that although it had an anti-harassment policy and procedure in place, the aggrieved employee never filed a formal complaint. Accordingly, the employer was dismissed from the action on a motion for summary judgment.

Our review of the motion record, allowing the plaintiff employee all reasonable inferences in her favor, reveals that at trial a fact-finder could conclude that the employer had in place an anti-harassment policy in name only. Because there are genuine factual issues concerning whether this employer had implemented an anti-sexual harassment workplace policy that provided realistic preventative and protective measures for employees in the event that harassment occurred, summary judgment should not have been granted. The factual disputes plaintiff raises, using more than mere assertions about her subjective perception of the workplace policy and complaint mechanisms, are material to the question whether, based on agency principles, the employer may be held vicariously liable for an alleged sexually hostile workplace.

We adhere to the principle that HN1 if an employer has exercised due care in acting to prevent a sexually discriminatory hostile work environment, **[***12]** vicarious liability should not attach. The establishment of an effective anti-sexual harassment workplace policy and complaint mechanism evidences an employer's due care and may provide affirmative protection from vicarious liability. However, in this matter plaintiff has put into issue the effectiveness of this employer's anti-harassment policy and procedures and, thus, that issue is not determinable on the motion record.

I.

Because this matter was resolved on motion for summary judgment granted to the defendant employer, we consider the **[*304]** facts in a light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 666 A.2d 146 (1995). However, we note that several key factual assertions are sharply disputed.

In August 1989, plaintiff, Maria Gaines, was hired by Hudson County as a Corrections Officer at the County Jail. The parties do not dispute that plaintiff received a **[**324]** copy of the County's Sexual Harassment Memorandum, dated December 9, 1988, upon commencing employment and received updates on the policy issued in the 1990 and 1994 Employee Handbooks. This case implicates those policies.

In 1998, plaintiff filed a verified complaint **[***13]** against her shift supervisor, Captain Joseph Bellino, and the County of Hudson Correctional Facility, alleging among other things violations of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to 10:5-49 (LAD), arising from sexual harassment constituting a hostile work environment. For purposes of this appeal only plaintiff's LAD claims are pertinent, all other claims having been abandoned. The following events are alleged.

In December 1990, plaintiff was assigned to the midnight shift in the section of the Hudson County Jail known as Modular One South. One evening while plaintiff was attending to her duties, Captain Bellino and Sergeant Montenez entered the room where she alone was working. Shortly thereafter, Montenez left to check another area of the jail. Plaintiff and Bellino conversed, but after awhile plaintiff rested her head down on her desk. Bellino called out her name and as plaintiff raised her head Bellino grabbed her face and kissed her, forcing his tongue into her mouth. Plaintiff pushed him away and tried to bite his tongue to make him stop. She screamed, "what the f--- are you doing," and he responded, "I just wanted a kiss." Montenez **[***14]** then re-entered the room and Bellino left.

Immediately after the incident, plaintiff told Lavara Howard Ladson, another corrections officer working that night, about what had transpired. Ladson testified that plaintiff was shaking and **[*305]** crying as she described the incident. Officer Ladson advised plaintiff to "write up" Bellino.

Later during that same shift, plaintiff also talked about the incident to Senora Williams, another corrections officer. Williams testified that plaintiff told her that Bellino forcibly kissed her and that plaintiff looked like she had been crying. Williams did not advise plaintiff to report the incident, but she did encourage plaintiff to "watch herself." Williams also testified that she heard rumors around the jail that Bellino was "connected to the mafia."

In addition, Officer Minnie Perez testified that plaintiff telephoned her at home on that same night and recounted the incident to her. Perez described plaintiff as "hysterical." Perez also recommended that plaintiff "report" Bellino, but plaintiff responded that no one would believe her and that she was afraid for her safety because she feared Bellino. Perez stated in her testimony that if plaintiff **[***15]** had reported the incident, the allegation would not have been credited.

The next workday, believing that Montenez and Bellino had arranged the incident that occurred at Modular One South, plaintiff confronted Sergeant Montenez. He denied any involvement and told plaintiff that if Bellino forcibly kissed her, she should report him.

Plaintiff also informed Sergeant Pedro Arroyo that Bellino forcibly kissed her. Although Arroyo advised plaintiff to "write it up," he testified that he did not inform anyone about the incident. He did not consider plaintiff's recitation of the event to him to be a complaint. However, Arroyo did testify that he was worried that he would be charged for failing to report the incident. When asked whether in retrospect he thought that he should have reported the incident, he responded, "I wasn't trained, right, I wasn't trained." According to Arroyo, he had not had any anti-sexual harassment training as of the **[**325]** time that he was told by plaintiff about her incident with Bellino. **[*306]**

In January 1991, plaintiff and Bellino had a second encounter. While both were working the midnight shift, Bellino instructed plaintiff to accompany him to the construction site for **[***16]** a new jail facility. The site was dark and Bellino used a flashlight to illuminate their path. During their walk to the site, Bellino brought up the kissing incident and assured plaintiff that he "would not force himself" on her again and that he would protect her. Plaintiff stated that she appreciated the offer, but she declined his "protection." Plaintiff informed Bellino that she wanted to return to her post. However, Bellino blocked her exit with his arm, repeating his message that he did not want her to be afraid.

Although plaintiff perceived Bellino's actions in January 1991 at that time as a form of an "apology," he continued to bring up the kissing incident. In 1993, Bellino raised the incident with another high-ranking officer, Captain Kelly, in plaintiff's presence. Plaintiff testified that Bellino was remarking about her red lipstick and then proceeded to tell Captain Kelly what had occurred in Modular One South. Bellino told Kelly that he kissed plaintiff and that her body "shivered" in response. Plaintiff testified that "Captain Kelly laughed . . . and he started covering his ears like he always does."

According to plaintiff, Bellino also raised the kissing incident **[***17]** in 1995 with Captain Joseph Flynn, again pointedly in plaintiff's presence. Flynn was the Tour Commander on the midnight shift from 1993 to 1995, rendering him the top-ranking officer during the time that both he and Bellino served as captains on the midnight shift. According to plaintiff, Bellino told Flynn about kissing plaintiff, and that when he kissed her her body "shivered." Plaintiff angrily responded, telling Bellino that if he did that again, she was going to "kick [his] a--." Flynn laughed. Then Bellino said, "what if I rape you, you know nobody will believe you." Flynn told Bellino to stop, but he continued. Bellino said, "it is true, who will believe her . . . . What about me and you [Flynn], if we raped her." Plaintiff was visibly angry, so Flynn again told Bellino to stop. At that point, Lieutenant Dave Krusznis entered the office and Bellino continued, "what about **[*307]** me, [Krusznis] and [Flynn]" raping plaintiff. Krusznis agreed, stating "well, Gaines, nobody would believe you." Plaintiff attempted to exit the room, but Bellino blocked her exit. Flynn told Bellino that plaintiff was "serious" and he should "stop playing."

Plaintiff went to the lavatory to put cold **[***18]** water on her face. She then encountered another officer. Without explaining to that officer the details of what had just transpired, plaintiff stated, "if something happens to me inside that tour commander's office, I want you to know that it's all Bellino's fault." Plaintiff walked back into the office to retrieve her belongings and she heard Bellino continuing to discuss the "rape." Plaintiff asked Flynn and Krusznis how they could tolerate Bellino's behavior. Plaintiff threatened that if Bellino raped her, she would kill him.

According to defendants, in mid- to late 1993 Warden Green began receiving anonymous calls from a female caller regarding activities that allegedly were occurring during the midnight shift at the jail. When he was seeking information about the anonymous caller, Warden Green was advised by Sergeant Montenez to contact plaintiff. Thus, Green became aware sometime in 1994 of plaintiff's allegations against Bellino.

However, Green did not contact plaintiff until March 1995. In that interview, plaintiff told the warden that she believed that **[**326]** she was being retaliated against in that she was being moved from post to post because she had had a "sexual

encounter" **[***19]** with Bellino in the late eighties or early nineties. Although plaintiff informed the warden that she believed she was being retaliated against because "she was not cooperating," she did not detail further any instance of sexual harassment. Green asked plaintiff if she wanted to file a complaint, but plaintiff refused stating that she was afraid for her safety. Green testified, "at that point, she said she did not want to file, so I had to pretty well leave that alone until I could talk with her at a later date, she appeared to be highly upset at the time."

Later in 1995, plaintiff and Warden Green had another conversation. Green informed plaintiff that the Employee Handbook **[*308]** had a complaint form in it and he advised her to file a complaint. Again she refused. Following his conversations with plaintiff, Green issued a "cease and desist letter" against Bellino and Flynn. Green explained that a "cease and desist letter" is issued anytime someone complains of sexual harassment. The letter instructed the other parties to cease and desist any communications or action that had been taking place prior to the letter. Despite Green's issuance of the letter, he could not recall its precise terms. **[***20]** Green also testified that an Internal Affairs Investigation had begun, but he could not provide any details about the results because the State had taken over supervision of the facility and he "wasn't there."

No further events took place until June 1996 when plaintiff's allegations of sexual harassment were brought to the attention of Lawrence Henderson, Hudson County's Director of Personnel. Mike Dermody, Assistant Hudson County Counsel, reported to Henderson that plaintiff testified in a deposition in a separate matter that she had been sexually harassed. Soon after learning of the allegation, Henderson contacted plaintiff.

Plaintiff told Henderson about the Modular One South incident. Plaintiff stated that she wanted Henderson to meet with Bellino and to tell him to leave her alone, and to stop spreading false allegations that she was going to be brought up on charges. Nonetheless, she remained uncertain whether she wanted to file a complaint. During August and September 1996, Henderson interviewed various individuals that plaintiff said had knowledge of her allegations.

In December 1996, the County filed disciplinary charges against Bellino for his harassing behavior. A **[***21]** hearing was held on February 26 and March 6, 1997. The hearing officer concluded that although the "kissing incident" had been proven, that charge as well as the other charges against Bellino should be dismissed because the charges as a whole "only involved one touching incident" and Bellino had no prior disciplinary convictions. As an "alternative" to dropping the charges, the hearing officer recommended **[*309]** that the County suspend Bellino without pay for thirty days. The County suspended Bellino. Shortly thereafter, Bellino retired.

Although the County asserted that an "anti-sexual harassment workplace policy" was in place throughout the period of time encompassing plaintiff's allegations, numerous employees, including Bellino, testified that they never received any training concerning that policy. Nonetheless, Henderson testified that beginning in 1990 managerial staff was responsible for assuring that employees attended sexual harassment seminars.

The County's Employee Handbooks issued in 1990 and 1994 stated that an employee could report allegations of sexual harassment to another supervisor if his or **[**327]** her supervisor was the alleged harasser. The policy statements instructed that, **[***22]** in pertinent part, "employees who believe it would be inappropriate to discuss the matter with their supervisor should report it to another supervisor or County official." Notwithstanding that "bypass" mechanism, Henderson testified that if any employee on the midnight shift experienced sexual harassment, the employee was to report that behavior to Captains Flynn or Bellino because they were responsible for ensuring that there was no sexual harassment on that shift.

Also, conflicting testimony was presented on anti-harassment policy notification to employees. Henderson testified that anti- sexual harassment signs were placed in the jail at least as early as 1990. However, Warden Green testified that he first posted a sign that said "Sexual Harassment equals zero tolerance" in the lobby of the jail in the early part of 1997. Montenez testified that the only anti-sexual harassment sign he observed in the jail was the 1997 sign. Further, Ladson, Conti, and Williams testified that although they recalled receiving the 1990 and 1994 Employee Handbooks that included a section containing a statement of the anti-sexual harassment policy, no one directed their attention to that specific section. **[***23]**

Finally, plaintiff presented evidence that the County's policies were loosely enforced in the jail. According to Officer Williams, **[*310]** "the whole policy and procedure book is not enforced on everyone." She testified that the supervisory staff enjoyed freedom from restrictive or prohibitory policies, especially Bellino. Even Warden Green testified that although it was prohibited for an employee to have another employee work his or her shift for him, Bellino was known to hire others to work his shift. Green also stated that Bellino violated the dress code by coming to work in civilian attire instead of wearing his uniform as required. Moreover, Green testified that if an employee wanted outside employment, the employee was required to make a written request for approval of such employment. Green acknowledged that Bellino had outside employment, but he was not sure whether permission had been granted; he assumed that Bellino was granted permission before Green arrived at the facility, but did not act to verify that assumption.

As noted, defendants moved for summary judgment on plaintiff's complaint. Defendants asserted three arguments, but only one is significant for purposes of this **[***24]** appeal: that the County had taken sufficient preventative steps in respect of sexual harassment such that no material issues of fact existed on the issue of its vicarious liability. For purposes of its motion, the County did not contend that plaintiff failed to prove a prima facie case of hostile workplace sexual harassment. Defendant Bellino, on the other hand, maintained that plaintiff's complaint against him individually had to be dismissed because only employers may be directly liable under LAD, and that if the County is not liable he could not be held individually liable on an aiding and abetting theory.

The trial court granted defendants' motions and dismissed plaintiff's complaint in its entirety against the County and Bellino. The trial court stated:

The policy was known to the plaintiff. The policy was known to the superior officers on the midnight shift.

The fact that somebody violated a policy doesn't mean the policy was wrong. You can't go by hindsight and say the policy is ineffective because somebody violated the policy.

They have a policy here that goes all the way back to 1988 . . . its pre-

[Lehmann]. **[*311] [**328]**

The plaintiff knew the policy. She didn't choose **[***25]** [sic] to report it. When it was brought to the attention of higher authorities, they acted.

I agree with the language used by [defense counsel], that the employer is immunized in these circumstances. I don't know that anybody who does violate the policy should get a medal for it, but you can't use hindsight to determine the policy as being effective.

If you bring something to the attention of the authorities and they correct it, fine. We have here a handful of incidents over a period of years from 1990 to 1995.

And to say that the County did not have a policy in place is wrong. You cannot say because somebody claims harassment that the policy was ineffective.

The person who allegedly violated the policy knew the policy, so I don't see how the County can be responsible.

That Nordstrom case makes sense to me. The federal cases make sense. So, I have to grant summary judgment for the County on this situation.

With respect to Mr. Bellino, there's no individual liability under the statute, unless you can get into the aiding and abetting type situation, which I do not see here. So, he is not responsible in that sense.

Plaintiff appealed only the dismissal of her LAD

claims **[***26]** against the County and Bellino, and the Appellate Division affirmed, applying Lehmann v. Toys ' R' Us, Inc., 132 N.J. 587, 626 A.2d 445 (1993). n1 The court assumed in its review of the summary judgment motion that plaintiff established a claim of hostile workplace harassment under the LAD and that Bellino was plaintiff's supervisor. With those assumptions in mind, the court considered whether the County should be held liable as plaintiff's employer for Bellino's harassment. The panel noted that defendant had a policy, publicized it through posters, promulgated it through successive editions of employee handbooks, conducted training, and acted when facts were brought to its attention. Moreover, the court observed that once the County learned of the alleged harassment, it disciplined Bellino. Accordingly, the court held that the County was insulated from vicarious liability for plaintiff's alleged harassment. We granted certification, 170 N.J. 388 (2001).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The court acknowledged that defendants withdrew their defense based on the statute of limitations for LAD claims.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*312] [*27]**

II.

In Lehmann, we considered what standards should apply HN2 when assessing employer liability under the LAD for various forms of relief, including equitable relief, compensatory damages, and punitive damages. Supra, Lehmann, 132 N.J. at 616. Although an employer is strictly liable for equitable relief, we concluded that different standards should apply when assessing employer liability for compensatory and other damages. Lehmann, 132 N.J. 587 at 617.

We determined that principles of agency law should control employer liability for compensatory damages in cases of supervisory hostile work environment sexual harassment claims. Lehmann, 132 N.J. 587 at 617-619. We adopted section 219 of the Restatement (Second) of Agency as the fitting construct for the agency analysis. Ibid. Section 219 recognizes that: **[**329]**

HN3 (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) **[***28]** the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

section 219(2)[Restatement (Second) of Agency, § 219 (1958).]

Thus, we explained that HN4 if a supervisory employee is acting within the scope of his or her employment, an employer will be liable if the supervisor's conduct creates a hostile work environment. Lehmann, supra, 132 N.J. at 619. Even if a supervisor were to act beyond the scope of his or her employment, the employer may be liable for that supervisor's discriminatory behavior under one of the exceptions identified in . Lehmann, 132 N.J. 587 at 619-20.

HN5 If an employer delegates to a supervisor the authority to control the work environment and the supervisor abuses that authority, vicarious liability may be found to exist under section 219(2)(d). Lehmann, 132 N.J. 587 **[*313]** at 620. The question whether a supervisor, who creates a hostile work environment, was aided by delegated power to control the day-to-day work environment is a fact-sensitive inquiry. **[***29]** Ibid. We posited several questions as relevant to the inquiry:

1. Did the employer delegate the authority to the supervisor to control the situation of which the plaintiff complains?

2. Did the supervisor exercise that authority?

3. Did the exercise of authority result in a violation of [the LAD]?

4. Did the authority delegated by the employer to the supervisor aid the supervisor in injuring the plaintiff?

[Ibid. (citation omitted).]

If those questions are answered in the affirmative, the employer may be vicariously liable under section 219(2)(d) for the hostile workplace environment created by the supervisor. Ibid.

In Lehmann, we also identified section 219(2)(b) of the Restatement (Second) of Agency as an alternative basis in negligence for employer liability. Id. HN6 Although a bright-line rule was not established for the standard of negligence required in sexual harassment claims, several factors were identified as being relevant to determining whether an employer had acted negligently in failing to establish an anti-harassment policy in its workplace. Ibid. Those factors included the existence of: (1) formal policies prohibiting harassment **[***30]** in the workplace; (2) complaint structures for employees' use, both formal and informal in nature; (3) anti-harassment training, which must be mandatory for supervisors and managers, and must be available to all employees of the organization; (4) the existence of effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) an unequivocal commitment from the highest levels of the employer that harassment would not be tolerated, and demonstration of that policy commitment by consistent practice. Ibid. HN7 We stated that the absence of effective preventative measures would present strong evidence **[**330]** of an employer's negligence in respect of the duty of due care to prevent harassment in the workplace. Lehmann, 132 N.J. 587 at 622. Although **[*314]** the existence of effective preventative mechanisms may provide evidence of due care on the part of the employer, we refused to hold that the absence of such mechanisms, or any part of them, automatically constituted negligence, and we similarly rejected the converse proposition that the presence of such mechanisms categorically demonstrated the absence of negligence. Lehmann, 132 N.J. 587 at 621-22. **[***31]** See also Payton v. New Jersey Turnpike Auth., 148 N.J. 524, 535-38, 691 A.2d 321 (1997) (discussing employer liability generally and stressing importance of effective anti-sexual harassment policy; stating "while the effectiveness of an employer's remedial steps relates to an employee's claim of liability, it is also relevant to an employer's affirmative defense that its actions absolve it from all liability"). The efficacy of an employer's remedial program is highly pertinent to an employer's defense. Id. at 537.

In Cavuoti v. New Jersey Transit Corporation, 161 N.J. 107, 120-21, 735 A.2d 548 (1999), we further acknowledged that HN8 employers who promulgate and support an active anti-harassment policy should be entitled to a form of safe haven from vicarious liability from an employee's harassing conduct of others. We underscored that for an employer to enjoy the benefit of that protection, the following circumstances would be relevant: periodic publication of the employer's anti-harassment policy, the presence of an effective and practical grievance process for employees to use, and training for workers, supervisors, and managers concerning **[***32]** how to recognize and eradicate unlawful harassment. Id. at 121. Since Cavouti, this Court has not elaborated further on an employer's affirmative defense to a LAD claim based on the alleged existence of an effective anti-harassment policy. See Mancuso v. City of Atlantic City, 193 F. Supp. 2d 789, 796-807 (D.N.J. 2002) (examining employer's defense to vicarious liability in context of LAD claim); Newsome v. Administrative Office of the Courts, 103 F. Supp. 2d 807, 821-22 (D.N.J. 2000) (observing that agency analysis employed in Lehmann continues to govern LAD claims).

[*315]

III.

A.

Plaintiff contends that the Appellate Division misapplied Lehmann's principles. Specifically, plaintiff argues that the court failed to recognize that material issues of fact implicate at least two of the factors relevant to the question of employer liability under section 219(2)(b) of the Restatement (Second) of Agency: (1) training, which must be mandatory for supervisors and managers and must be offered for all members of the organization; and (2) effective sensing or monitoring mechanisms to check the trustworthiness of the prevention **[***33]** and remedial structures available to employees in the workplace.

Concerning the first issue, training, plaintiff points to the testimony of defendant Captain Bellino, as well as Officers Lavara Howard Ladson, Senora Williams, and Rosemarie Conti, all of whom unequivocally stated that they did not receive any sexual harassment training from the County. Other officers who tentatively recalled participating in a training program did not receive such training from the County. Although plaintiff raises factual issues concerning what training, if any, ever was provided by the County to reinforce its espoused anti-harassment policy, we need not decide whether that alone should prevent defendants from being dismissed from this action on a motion for summary **[**331]** judgment. Plaintiff also raises serious factual issues about the County's monitoring and sensing of its workplace anti- harassment policy that, in our view, require submission of the effectiveness of that policy to jury scrutiny.

Plaintiff challenges the legitimacy of defendant's anti- harassment policy when she states that she did not report the kissing incident because she was afraid of Bellino and perceived that her allegations would **[***34]** not be credited. Although the Appellate Division recognized that plaintiff was afraid to report Bellino's actions and that a more effective policy might have eliminated her concerns, the panel regarded plaintiff's fears as unsubstantiated and **[*316]** therefore unable to provide a basis on which to declare the anti-harassment policy ineffective. We perceive this motion record as clearly not supporting the summary disposition granted to defendant.

Notwithstanding plaintiff's verbal reporting of the kissing incident to several superior officers, those informal reports of harassment failed to result in any remedying of plaintiff's vulnerability to Bellino, whom she feared. Plaintiff explained her reasons for being reluctant to file a formal harassment complaint. She perceived the formal reporting of the incidents to be of no avail because she believed that nothing would change for her and she feared some form of retribution from Bellino, one of the supervisors on her midnight shift. Importantly, this record is not based solely on plaintiff's subjective perceptions of the value of resort to the County's anti-harassment policy and procedure. The record reflects that although Officer Perez initially **[***35]** encouraged plaintiff to report Bellino's behavior, she too testified that if plaintiff had filed a formal report about the incident, she would not be believed. Thus, a complaint also was perceived to be of no avail by others in pre-trial testimony. Accordingly, plaintiff did not present only her own unsupported subjective perceptions of the efficacy of reporting an instance of sexual harassment.

Moreover, as noted, although plaintiff did not file a formal written complaint, she did protest orally to several co- workers and superior officers immediately after the incidents of harassment took place. The response by higher level officers, and the reaction of co-officers, fails to support any workplace confidence in the existence of a meaningful anti-sexual harassment policy. Indeed, the record here could support a jury finding that the supervisors placed in responsibility for the jail, and for the shift to which plaintiff was assigned, had been permitted to create an atmosphere where such allegations were brushed aside, ridiculed, or viewed as cause for retribution. Plaintiff testified that when Bellino described the "kissing incident" to Captain Kelly back in 1993, Captain Kelly covered **[***36]** his ears. The message to plaintiff **[*317]** and others was that supervisors and management did not want to hear about and have to act on sexually harassing behavior in the workplace.

Plaintiff's argument that the County failed to employ a meaningful sensing and monitoring mechanism to assess the soundness of its anti-harassment policy is further supported by her testimony, if believed, that Flynn and Krusznis actually participated in the 1995 "rape" discussion. Both Bellino and Krusznis reinforced the notion that no one would believe (and, implicitly, no one would act on) plaintiff's claims of harassment. Flynn and Krusznis were high-ranking employees of the County and although Flynn attempted to discourage Bellino's comments, neither Flynn nor Krusznis reported the alleged outrageous "rape" discussion. Thus, the Appellate Division's conclusion that Flynn attempted to put an end to Bellino's harassing **[**332]** conduct by telling him to "stop" is a weak reed on which to base summary dismissal of plaintiff's cause of action.

Further, Krusznis participated in the discussion by adding, "well, Gaines, nobody would believe you." Not only is the subject of the conversation (a suggested multiple rape) highly **[***37]** offensive, the implicit point being made to plaintiff was that the higher-up officials would bond together to prevent the truth from being disclosed. That evidence, albeit contradicted by Flynn's and Bellino's sworn statements, raises an issue of fact concerning the County's sensing and monitoring of its asserted anti-harassment policy. Resolution of that factual dispute will fundamentally affect the fact-finder's conclusion concerning whether the employer exercised due care to prevent sexual harassment and the creation of a hostile working environment.

In sum, defendants' claim to an anti-harassment policy is contradicted by the facts plaintiff has put in issue. Although Bellino's harassment was known to many high-ranking officials at the corrections facility (Arroyo, Montenez, Flynn, and Krusznis) because of plaintiff's informal complaints about Bellino's behavior, no apparent action was taken to address those complaints. The **[*318]** County's defense to this cause of action has been to focus attention on plaintiff's failure to file a formal complaint. That alone is insufficient to entitle defendants to an affirmative defense insulating the County from liability for an alleged hostile work **[***38]** environment caused by one of its highest ranking officers.

Plaintiff's failure to file a formal complaint must be considered in the context of whether the County had been negligent in combating the creation of a sexually discriminatory hostile work environment by failing to establish meaningful and effective policies and procedures for employees to use in response to harassment. Plaintiff's co-officers have provided testimony disputing the County's assertion that its complaint mechanism provided meaningful assistance to an employee who sought to complain about harassment from Captain Bellino. The County's failure to monitor the effectiveness of its asserted anti-harassment policy and mechanisms is further brought into question by Warden Green's indecisive reaction following his first discussion with plaintiff. And finally, plaintiff's and Officer Williams's assertions that defendant's anti-harassment policy was ineffective is bolstered by Warden Green's testimony that supervisors generally, and Bellino notoriously, had violated numerous County policies in the past. According to the proofs adduced by plaintiff in the motion record, the County had little basis for assuming employee **[***39]** confidence in the steadfastness of its anti-harassment policy.

Defendants argue that plaintiff's proofs are thin. That noted, on a motion for summary judgment plaintiff is entitled to have all reasonable inferences in her favor. Her complaint should not have been summarily dismissed. Plaintiff is entitled, on the basis of the material facts that she has shown to be disputed, to have a fact-finder determine whether the County's anti-harassment policy provided effective and practical anti- harassment preventation and protection mechanisms that shield the County from liability for the alleged wrongdoings by Bellino, or whether it was an anti-harassment policy that existed in name only. **[*319]**

As expressed in Lehmann, HN9 an employer's sexual harassment policy must be more than the mere words encapsulated in the policy; rather, the LAD requires an "unequivocal commitment from the top that [the employer's opposition to sexual harassment] is not just words[,] but backed up by consistent practice." Lehmann, **[**333]** supra, 132 N.J. at 621. The "mere implementation and dissemination of anti-harassment procedures with a complaint procedure does not alone constitute evidence of due care--let **[***40]** alone resolve all genuine issues of material fact with regard to due care." Newsome, supra, 103 F. Supp. 2d at 822. In Lehmann, this Court recognized that although the "existence of effective preventative mechanisms provides some evidence of due care on the part of the employer[,] . . . given the foreseeability that sexual harassment may occur, the absence of effective preventative mechanisms will present strong evidence of an employer's negligence." Lehmann, supra, 132 N.J. at 621-62. Because plaintiff has presented factual issues that pertain to whether the County had an effective policy, the County's alleged negligence under section 219(2)(b) cannot be resolved on summary judgment. Plaintiff is entitled to a jury's evaluation of the alleged facts.

B.

Plaintiff also has not abandoned her argument that the County should be held vicariously liable for the alleged hostile work environment under section 219(2)(d) of the Restatement (Second) of Agency because defendant Bellino's sexually harassing conduct was aided by his agency relationship with the County. Plaintiff contends that she was under Bellino's control when working on the midnight shift. Further, **[***41]** although Bellino's power was subject to Flynn's authority as tour commander, plaintiff asserts that Bellino nonetheless had unquestionable authority over all lieutenants, sergeants, and officers in the jail during his shift. Plaintiff highlights that in January 1991, Bellino instructed her to accompany him to the construction site for the new jail, an **[*320]** instruction that she felt compelled to obey. Furthermore, plaintiff claims that Bellino "bounced her from post to post" and threatened to have her written-up for procedural violations after the kissing and other incidents occurred.

Notwithstanding those claims, it is apparent that the record contains conflicting

assertions. The scope of Bellino's alleged authority is sharply disputed by both Bellino and Flynn.

Because genuine issues exist concerning whether Bellino was aided by his agency relationship with the County, plaintiff's cause of action should not have been dismissed on a motion for summary judgment. Whether brought under a section 219(2)(d) theory, or under a section 219(2)(b) theory, her claim should have survived a motion for summary judgment and the factual disputes presented to the trier of fact.

IV.

HN10 A defendant **[***42]** is entitled to assert the existence of an effective anti-sexual harassment workplace policy as an affirmative defense to vicarious liability; however, material issues of disputed fact in the context of a motion record can deny a defendant summary dismissal based on that defense. Here, the record contains numerous factual disputes, based on plaintiff's perceptions and other evidence, that raise serious questions concerning the effectiveness of the County's policy. Having presented colorable material issues, plaintiff should have the opportunity to prove that the County may be liable vicariously for sexual harassment in the workplace because the County's anti-harassment policy was no more than words, its effectiveness at preventing harassment and protecting employees undermined to the point that the County should not be protected from liability. Summary judgment should not have been granted to defendants. **[**334]**

The judgment of the Appellate Division is reversed and the case is remanded for further proceedings not inconsistent with this opinion. **[*321]**

CHIEF JUSTICE PORITZ and JUSTICES STEIN, COLEMAN, LONG, VERNIERO, and ZAZZALI join in JUSTICE LaVECCHIA's opinion.

MATERIALS FOR TRAINING

Key Things to Remember About Sexual Harassment

1. The complainant and alleged harasser may be of either sex or the same sex.

2. The alleged harasser does not have to be the complainant's manager; he or she can be a co-worker, vendor, or customer.

3. The complainant does not have to be the person toward whom the sexual behavior is directed.

4. The complainant does not have to complain to the alleged harasser or inform the employer for liability to arise.

5. The complainant does not have to suffer a "concrete" economic injury as a result of the harassment.

6. Even consensual affairs between a Manager and a subordinate can subject an employer to liability.

7. Even if an investigation into a sexual harassment complaint is inconclusive, the Company must take some sort of remedial action.

8. Sexual conduct occurring "off-the-clock" can still subject the Company to liability.

9. Even if an employee wears provocative clothing, it is no excuse for sexual harassment.

10. Even if workplace behavior (such as sexual joking) is only unwelcome to one employee, it could constitute unlawful sexual harassment.

11. Managers can be personally sued for failing to act on complaints of sexual harassment, even if they are not the alleged harasser.

EXAMPLES OF SEXUAL HARASSMENT

VERBAL:

- Referring to an adult as a girl, hunk, doll, babe, or honey.
- Whistling at someone.
- Cat calls.
- Sexual comments.
- Turning work discussions to sexual topics.
- Sexual innuendoes or stories.
- Asking about sexual fantasies, preferences, or history.
- Personal questions about social or sexual life.
- Unwanted sexual teasing, jokes, remarks, or questions.
- Sexual comments about a person's clothing, anatomy, or looks.
- Kissing sounds, howling, and smacking lips.
- Telling lies or spreading rumors about a person's personal sexual life.

NON-VERBAL:

- Unwanted sexual looks or gestures.
- Unwanted letters, telephone calls, or materials of a sexual nature.
- Unwanted pressure for sexual favors.
- Unwanted pressure for dates.
- Looking a person up and down (elevator eyes).
- Staring at someone.
- Giving personal gifts.
- Sexually suggestive visuals.
- Facial expressions, winking, throwing kisses, or licking lips.
- Making sexual gestures with hands or through body movements.

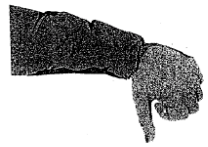
PHYSICAL:

- Neck massage.
- Touching an employee's clothing, hair, or body.
- Hanging around a person.
- Hugging, kissing, patting, or stroking.
- Touching or rubbing oneself sexually around another person.
- Standing close or brushing up against a person.
- Unwanted deliberate touching, leaning over, cornering, or pinching.
- Actual or attempted rape or sexual assault.

What do you think?

Two minority workers are always telling each other racial jokes. Even though they do not tell the others in their dept., the jokes are often heard by others. One of the other workers is a woman who is offended by the jokes.

Intent vs. Impact



The **IMPACT** that the behavior has on others determines whether or not it is harassment. You may not have **INTENDED** to harass but you may unknowingly harass another employee, depending on how that person interprets your actions.

How can you help identify if your behavior may be perceived as harassment?

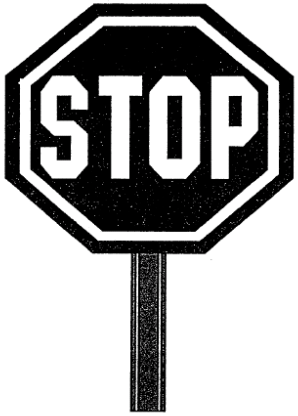
Ask yourself the following questions:

a. Would I want any of these behaviors to appear on the evening news or be the subject of a column in *The Greenville News?*

b. Would I behave this way if my "significant other" were standing next to me?

c. Would I want someone to act this way toward my significant other, parent, spouse, sibling, or child?

If you cannot *HONESTLY* answer yes to these questions, then



DON'T DO IT
OR
SAY IT!!!

RECOGNIZING AND PREVENTING HARASSMENT IN THE WORKPLACE

Participant Guide

Facts

Harassment in the workplace has been illegal for many years, yet it still continues to exist. The EEOC recently published information that stated that "Harassment remains a pervasive problem in American workplaces. The number of harassment charges filed by the EEOC and state fair employment practices agencies have risen significantly in recent years.

- The number of sexual harassment charges has increased from 6,883 in fiscal year 1991 to 15,618 in fiscal year 1998.

- The number of racial harassment charges rose from 4,910 to 9,908 charges filed in the same time period.

Workshop Objectives

- Review Company Position
- Review Discrimination Laws
- Define harassment
- Recognizing Harassment
- Determine liabilities & costs associated with harassment
- Understand Anti-Harassment Policy

Discrimination Laws

There are laws that govern behavior in the workplace. Some of these laws are:

1. The Civil Rights Act of 1964 (Title VII) prohibits employment discrimination on the basis of race, color, religion, national origin, and sex. (There is no mention of sexual harassment in this law). Prohibits discrimination in hiring, firing, demotion, promotion, work assignments, pay decisions, etc.

2. In 1980, the Equal Employment Opportunity Commission (EEOC) issued guidelines interpreting the law to forbid sexual harassment as a form of sex discrimination.

3. In 1990, the EEOC issued a policy statement saying that sexual favoritism is a form of sex harassment.

4. The Civil Rights Act of 1991 provides for jury trials and increased damages when intentional discrimination prohibited by Title VII occurs.

5. Age Discrimination in Employment Act of 1987 (ADEA) makes it unlawful to discriminate against employees or applicants age 40 or older.

6. American with Disabilities Act (ADA) prohibits discrimination based on disabilities.

What is Harassment?

Before we can stop harassment from happening, we have to be able to identify what it is.

Title VII defines harassment as:

> "It is unlawful for an employer, employment agency, or labor organization to discriminate against any person because of race, color, sex, religion, national origin with respect to employment practices, terms or conditions of employment, union membership or representation, and/or exclusion, applicant referral, etc.
> It is unlawful to discriminate against a person where the individual has filed a charge, opposed an unlawful employment practice, participated in an investigation or proceeding under the Title."

Basically, harassment is:

> any unwanted, unwelcome or unsolicited conduct imposed on **a person who regards it as offensive or undesirable.** When a person communicates, verbally or though their actions, that the conduct is unwelcome, it becomes illegal. Even if the conduct is implicit in nature (hidden in subtlety or innuendo), as long as it is unwelcome, it is unlawful. Anyone can be the victim or perpetrator of harassment. Harassment can be based on age, race, religion, national origin, sex, veteran status, disability, or sexual orientation.

Types of Harassment

In the past many EEOC documents classified harassment as either:

A. **Quid Pro Quo:** There is a condition implied or explicit with the unwelcome conduct.

B. **Hostile Work Environment:** an environment that causes psychological or emotional harm or otherwise unreasonably interferes with an individual's job performance.

The behavior typically has to happen more than once over a period of time. However, if the event is significant or severe it is possible that only one situation will be viewed as creating a hostile work environment.

Recognizing Harassment

Victims or harassers can be male or female. They do not have to be of the opposite sex, they can be a supervisor, an associate, a vendor, etc. They may not even be the person actually harassed but was affected by the harassment.

Harassment can be verbal, visual, physical, or written.

Verbal Harassment

- Referring to another as sunshine, hunk, doll, babe, honey, etc.
- Whistling, making cat calls, grunting, etc.
- Making comments about a person's body i.e. you have a nice butt, or I bet you get beat up pretty bad when you jog.
- Telling offensive jokes, making fun of someone, referring to someone by derogatory names. i.e. dump Pollock
- Imposing your religious views on others.
- Asking questions about another's social or sexual life, sexual preferences, and history.
- Repeatedly asking someone out even if they have already said no.

Visual

- Looking a person up and down (elevator eyes)
- Blocking a person's path.
- Giving personal gifts
- Displaying pornographic materials, derogatory cartoons, graffiti, or any other offensive material in common areas.
- Making facial expressions such as winking, throwing kisses, licking lips, giving them tongue motions.
- Making inappropriate gestures with hands or body movements.

Physical

- Unwanted touching such as petting, pinching, or hugging.
- Giving a massage.
- Standing too close (invading their personal space: 3 feet) or brushing up against a person.
- Touching or rubbing yourself in a sexual or demeaning way around another person.

Written

- Written hostile, malicious, hateful, or discriminatory remarks. Note: sending suggestive or any e-mail that could be viewed as offensive by another can be extremely dangerous at work. To avoid any questions, do not send these at work.

EQUAL EMPLOYMENT OPPORTUNITY POLICY

strives to promote an equal employment opportunity work environment for all associates that is free of discrimination.

Equal Employment Opportunity Policy prohibits discrimination in any condition of employment at regardless of one's race, color, religion, national origin, veteran status, sex, sexual orientation, age, disability or military status. policy of equal employment opportunity applies to all phases of the employment relationship, including recruitment, advertising, hiring, promotion, demotion, layoff, termination, rates of pay, and other forms of selection, training and compensation.

On-the-job harassment based on one's race, color, religion, national origin, sex, sexual orientation, age, disability or military status is prohibited. Such harassment may take many forms and examples as well as reporting mechanisms are detailed in anti-harassment policy that is attached hereto.

will not tolerate or condone behavior by any associate that is in violation of this Equal Employment Opportunity Policy. Behavior that interferes with the ability to work in a discrimination-free environment will be dealt with promptly and may result in disciplinary action up to and including separation.

also does not tolerate retaliation. Appropriate disciplinary action, up to and including separation, will be taken against any associate who retaliates against another associate because they have reported discrimination, harassment, and/or cooperated in the investigation of such alleged conduct.

Human Resources office is staffed to assist associates who perceive they have been victims of harassing or discriminatory acts.

Any such acts should be reported directly and promptly to:

Corp. HR Mgr.	**Ext. 1604**	**Corp. HRS**	**Ext. 8686**
Distribution HR Mgr.	**Ext. 4005**	**DC HRS**	**Ext. 4070**
Foothills Region HR Mgr.	**Ext. 3046**	**Foothills HRS**	**Ext. 3045**
Eastern Region HR Mgr.	**Ext. 3049**	**Eastern HRS**	**Ext. 5225**
Mountain Region HR Mgr.	**Ext. 3622**	**Mountain HRS**	**Ext. 3629**

At , Equal Employment Opportunity is Everyone's Right, Everyone's Responsibility

QUIZZES AND TESTS

Sexual Harassment Awareness
Pre-Workshop Quiz
(Management)

1. **Only women can be sexually harassed.**

   TRUE FALSE

2. **Sexual harassment only occurs when the harasser is male.**

   TRUE FALSE

3. **Sexual harassment occurs only when a woman is told she must date the boss, in order to keep her job.**

   TRUE FALSE

4. **The sexual harasser must be an employee of your company for the conduct to be harassment.**

   TRUE FALSE

5. **Sexual harassment can only occur in the workplace during working hours.**

   TRUE FALSE

6. **It is okay for non-management employees to tell jokes in the workplace, even if they are off-color, just as long as it is only the guys.**

   TRUE FALSE

7. **It may be sexual harassment to <u>continually</u> ask a co-worker for a date, if that person has already indicated no interest.**

TRUE FALSE

8. **One of the best ways to stop sexual harassment is to ignore the harasser.**

TRUE FALSE

9. **Employees are required to tell the sexual harasser to stop.**

TRUE FALSE

10. **Sexual harassment can be initiated by a customer or vendor.**

TRUE FALSE

11. **It is always sexual harassment if someone compliments your appearance.**

TRUE FALSE

12. **It is acceptable for a manager to date an hourly employee who is not in his/her workgroup but works on the same shift at the same location.**

TRUE FALSE

13. **It is acceptable for a team leader to date an hourly employee in his/her workgroup.**

TRUE FALSE

14. **When someone is making comments you feel are sexually suggestive you can tell him/her to stop.**

TRUE FALSE

15. **You keep sexually explicit pictures in your office at work. Someone complains about them. If you do not remove them, you may be considered guilty of sexual harassment.**

TRUE FALSE

16. **The basic rule of thumb to remember is "If you wouldn't do it or say it in front of your family, don't do or say it."**

TRUE FALSE

17. **You should never touch your co-workers.**

TRUE FALSE

18. **As long as you do not say things that are sexually explicit, or physically touch someone, it is ok to look at them all you want.**

TRUE FALSE

19. **Sexual harassment is against the law.**

TRUE FALSE

20. You (as a manager) are being harassed by a co-manager. You have told the person to stop, but he/she has not. You should ask your sr. manager or HR to help.

TRUE FALSE

21. A female employee tells you (the manager) that a co-worker of hers keeps making unwanted advances toward her. After telling her you need to contact HR about this and that an investigation will occur, she states that she doesn't want to make a big deal about it. She writes and signs a statement that she told you about this, but that "she will handle it and will tell you if it continues." With that statement, you are not obligated to call Human Resources unless the behavior continues.

TRUE FALSE

22. **You are a manager. You are aware that your employees occasionally tell "dirty jokes" and make "off-color" comments but no one is complaining. Since no one has complained, you cannot be sued if someone feels harassed and files a lawsuit.**

TRUE FALSE

23. **You are a manager. You are at a restaurant after hours and see a group of employees. After sitting with them, one of them states in a joking tone of voice that one of the other employees just exposed himself to her. Everyone laughs. Given the fact that it is after hours, not at a work location, and a joke to which no one took offense, you are under no obligation to pursue the comment any further.**

TRUE FALSE

24. An employee complains that a worker at XYZ company (one of our customers) is sexually harassing her at the customer's location during her route. She tells you she plans to report it to the manager of XYZ company. Since the employee will report the issue to XYZ, you do not need to do anything else about this situation.

TRUE FALSE

25. An employee alleges that he is being sexually harassed and the manager feels that the employee is just being hazed since he is new to the workgroup. The manager's first step should be to encourage the employee to try to get along better with his peers.

TRUE FALSE

26. Anti-Harassment (PEOPLE 5-55) is not violated unless conduct is severe and pervasive.

TRUE FALSE

27. The company is directly liable for sexual harassment by a manager if there are tangible effects on an employee's job.

TRUE FALSE

28. Tangible effects may include reassignment to different duties at the same pay and hours.

TRUE FALSE

29. An employee with a pending sexual harassment claim gets into a loud and nasty verbal argument with the alleged harasser. Since the manager witnessed part of the argument, the manager should immediately issue both employees Warning Letters for unacceptable behavior.

TRUE FALSE

30. An employee advises the HR rep of alleged sexual harassment by a co-worker but refuses to put his concerns in writing or complete an employee statement. The HR rep does not need to investigate since the employee won't provide a statement.

TRUE FALSE

Sexual Harassment Awareness
Pre-Workshop Quiz
(NON Management)

1. Only women can be sexually harassed.

TRUE FALSE

2. Sexual harassment only occurs when the harasser is male.

TRUE FALSE

3. Sexual harassment occurs only when a woman is told she must date the boss, in order to keep her job.

TRUE FALSE

4. The sexual harasser must be an employee of your company for the conduct to be harassment.

TRUE FALSE

5. Sexual harassment can only occur in the workplace during working hours.

TRUE FALSE

6. It is okay to tell jokes in the workplace, even if they are off-color, just as long as it is only the guys.

TRUE FALSE

7. It is sexual harassment to tell a co-worker of the opposite sex that he/she looks nice.

TRUE FALSE

8. It may be sexual harassment to <u>continually</u> ask a co-worker for a date, if that person has already indicated no interest.

TRUE FALSE

9. One of the best ways to stop sexual harassment is to ignore the harasser.

TRUE FALSE

10. Employees are required to tell the sexual harasser to stop.

TRUE FALSE

11. Sexual harassment can be initiated by a customer or vendor.

TRUE FALSE

12. It is always sexual harassment if someone compliments your appearance.

TRUE FALSE

13. Asking a co-worker out on a date is sexual harassment.

TRUE FALSE

14. When someone is making comments you feel are sexually suggestive you can tell him/her to stop.

TRUE FALSE

15. You keep sexually explicit pictures in your office at work. Someone complains about them. If you do not remove them, you may be considered guilty of sexual harassment.

TRUE FALSE

16. Only those in management positions can initiate sexual harassment.

TRUE FALSE

17. The basic rule of thumb to remember is "If you wouldn't do it or say it in front of your mother, don't do or say it".

TRUE FALSE

18. You should never touch your co-workers.

TRUE FALSE

19. As long as you do not say things that are sexually explicit, or physically touch someone, it is ok to look at them all you want.

TRUE FALSE

20. Sexual harassment is against the law.

TRUE FALSE

21. Sexual harassment can only occur in the workplace.

TRUE FALSE

22. You are being harassed by a co-worker. You have told them to stop, but they have not. You should ask your manager or HR to help.

TRUE FALSE

Scenario 1

You are a sort operations manager who recently moved from the PM to the AM side. An hourly employee you know in the PM operation tells you that her manager is sexually harassing another hourly employee on her shift. When she tells you the name of the alleged victim (Vicki), you are immediately skeptical. You recall that Vicki, the "victim," is generally known to be a flirt who has engaged in inappropriate conversations with other hourly employees, and once showed a picture of herself in a skimpy swimsuit around the operations. You tell the employee who reports this to you that you will take care of things. You advise the manager who is alleged to have harassed the employee of the complaint, and determine that because anything that may have happened was consensual you do not need to do anything else.

Later that week, you learn that Vicki's manager recalculated her attendance and issued her a performance reminder. Because it was her third letter in twelve months, Vicki's employment was terminated. She filed a GFTP/EEO complaint, and named you as a witness. When contacted by the HR Rep, you relate the story above.

Did you (the manager) handle things properly?

What should you have done differently?

What other issues do you see?

When should you (the manager) have contacted HR?

Scenario 2

Michael reports to manager Louis that Sharon "gave him the finger" and cursed at him while on the sort. Louis requests a statement from Sharon, who accuses Michael of sexual harassment, including leering, blowing kisses, honking the tug horn at her, comments on the physical attributes of one of her friends, and making statements of a sexually suggestive nature. Sharon identified several other women who she believes also were subjected to sexual harassment by Michael. When questioned about her gesture and cursing, Sharon says, "I don't remember. I could have, I was so fed up with his behavior."

Louis notifies his HR Rep, who initiates a sexual harassment investigation, and Louis stops his investigation of Sharon's conduct. During the investigation, Michael denies harassing Sharon. He states he uses the tug horn to warn people walking in the vicinity when he is driving by. He denies making inappropriate statements or looking at her in any particular way. The only witness to the alleged harassment of Sharon is Valerie, who states that Michael did honk the tug horn as he was driving by, and it made Sharon mad. Valerie did not witness the other actions Sharon alleged, but stated that Michael had asked her (Valerie) when she was first hired whether she had any boyfriends who would mind him looking at her. She complained about this to Michael's friend, Edward, and Michael quit talking to her. Edward said he remembered a conversation with Valerie about her being uncomfortable around Michael.

Sharon identified Tamara as someone else to whom she believed Michael also had made sexually suggestive statements. Tamara did not recall a suggestive statement, but said that Michael had blown kisses at her and asked her out on dates. She complained to her manager, Lea, and Michael's behavior stopped. Lea said she didn't recall the specifics, but remembered that Tamara said Michael was bothering her. Lea told Michael to leave Tamara alone, but there was no documentation from Lea about the situation.

Michael denied blowing kisses, but admitted talking to Tamara and saying "you need a man like me." Michael said they were just talking, and it was nothing serious. When Michael was interviewed, he was told not to discuss the investigation, but he approached Tamara and asked if she had talked to the HR Rep. Tamara reported this conversation to her manager and asked to go home because she was so upset after being approached by Michael.

There were no findings of inappropriate behavior directed at the Complainant, Sharon. However, there were findings that Michael engaged in behavior that could be considered harassing toward Valerie and Tamara, and that he retaliated against Tamara for speaking with the HR Rep.

Do you think Michael engaged in sexual harassment? Towards whom?

Did Michael's manager, Louis, act correctly in taking Sharon's statement?

Should Louis discipline Sharon for her conduct?

What disciplinary action do you think is appropriate for Michael's conduct?

Scenario 3

You are an ops manager. John, one of your new male RTDs, comes to you and tells you that he is being "sexually harassed" by his fellow male RTDs. He says that they have called him "shorty boy" since he prefers wearing shorts and occasionally bump into him in the hallway and knock him into the wall. He also says they pick on him and state he "isn't carrying his weight in the workgroup." You know that John, who used to be a handler, is new to this workgroup and all of the other male RTDs are long tenured.

Is this sexual harassment?

What should you (the ops manager) do?

What should John do?

If the evidence doesn't support a sexual harassment claim, would you pursue this further? Why or why not? How?

Quiz: What Constitutes Harassment?

(Please circle "yes" or "no")

1. Janet, a supervisor, and Phillip, an hourly associate that works in her section, are both consenting adults involved in a torrid love affair. Is this harassment?

   Yes No

2. Roth is transferred to another area of the business. When he returns nearly two years later, Harris (an old flame) wishes to resume the affair, but Roth has become engaged to be married and does not want a sexual relationship with Harris. When Harris tells Roth his next promotion may be contingent on resuming their affair, Roth sues. Is this harassment?

   Yes No

3. A supervisor has witnessed repeated incidents in which four male associates tease a female associate about her chest and bottom size. The female laughs and jokes and doesn't seem to mind. Is this harassment?

   Yes No

4. Joe, a supervisor, describes himself as a "friendly" and "huggy" person who is always touching his employees. He touches both male and female associates alike and no one has ever complained, but Joe's supervisor notices that many of the associates take a step back when he approaches them. Is this harassment?

   Yes No

5. Hank, an associate, keeps posters of nude women in his cubicle. His cubicle is in the corner at the back of the hall, so there is not a lot of traffic in the area. Is this harassment?

   Yes No

6. An associate tells a superintendent that he needs to "lighten up, this is not the North, we do things differently down here." Is this harassment?

   Yes No

7. Dan and Joanna are coworkers; Dan continually makes lewd or suggestive comments directed at Joanna. No one else ever hears these comments. Is this harassment?

   Yes No

8. Order point associates, both male and female, routinely give each other neck rubs because they are at the computer all day and their necks get tense. Is this harassment?

   Yes No

9. Roland is a manager who has two female associates that report to him. Eileen is young and attractive and Roland frequently makes passes which she laughs off. Roland believes his behavior is taken just as he intended. Is this harassment?

   Yes No

10. Faye, a Christian, is a supervisor and Tom, a Muslim, reports to her. When Tom approaches Faye about a confrontation with another associate, Faye advises Tom to "put the dispute into the Lord's hands." Is this harassment?

    Yes No

11. B.J., an order selector, is having difficulty maintaining production at 100%. In his first written warning, he tells his supervisor that he has been diagnosed bipolar and is having trouble concentrating while on his prescribed medication. B.J. later overhears his supervisor telling the site manager about B.J.'s condition and that he needs some applications to fill a position that will soon be vacant. Is this harassment?

    Yes No

12. Phillip and Kevin, two decorated Vietnam vets, are discussing plans to ask for Veteran's Day off. Lisa, their supervisor and a self-described "hippie", calls their plans to a halt by refusing to give them the day off, saying "you did enough damage then." Is this harassment?

    Yes No

Case Study #1

You are Joe's supervisor. Joe has a private office and a computer assigned to him. Your IT staff informs you that the office's network management software has detected that Joe's computer has been used to visit explicit sexually oriented web sites. Joe admits that he has visited these sites during his personal time before and after work and at lunch.

Is this harassment?

If so, what type? (TEA or hostile work environment)

What action(s) should be taken in this situation?

Case Study #3

Jack is a sanitation assistant and is a very hard worker who takes his job seriously. He always speaks and is very friendly; Jack also has a mental disability. Jack is not included in staff meetings by his supervisor, Randy, who says that Jack makes funny noises and distracts the group, and besides, the meeting would go over his head anyway. During the meeting some rule changes were communicated. The next week, Jack violated one of the new safety policies and received disciplinary action for the violation which meant he would not receive his safety bonus.

Is this harassment?

If so, what type? (TEA or hostile work environment)

What action(s) should be taken in this situation?

Case Study #4

Kathy is an employee with vision trouble. In fact, the company has purchased a special monitor for her computer to help her work more comfortably. However, when Kathy goes to her weekly staff meetings, she cannot see the overheads. She has repeatedly asked her boss to provide her with print outs so that she may use her magnifying glass to read them and follow the meeting. Kathy's supervisor has yet to provide the documents, and week after week Kathy struggles along in meetings. Kathy was up for a promotion but the person making the decision did not select Kathy because she did not "keep up" or participate in the meetings.

Is this harassment? Yes or No?

If so, what type? (TEA or hostile work environment)

What action(s) should be taken in this situation?

Case Study #5

A young seasonal employee has told you that she hopes to return next summer. She also tells you that her supervisor has shown a special interest in her and has asked her to accompany him on long rides to the park. She feels that he wants to help her career along and has promised to call other hiring official to help her get a permanent job. She enjoys the work and has told him so. She hinted that he is willing to write a glowing appraisal but she'll have to do "special projects" for him after hours and away from the park.

Is this harassment? Yes or No?

If so, what type? (TEA or hostile work environment)

What action(s) should be taken in this situation?

Case Study #6

You are the VP of Human Resources; your company's president is very active in day-to-day activities, notwithstanding the fact that he is 64 years old. He has no retirement plans. Recently the CFO, a 42 year old female, told you that the president has been sexually harassing her. She claims that she has said something to him but he simply does not take her rebuffs seriously. In the CFO's conversation with you, she mentions that he is creating a "hostile work environment" by constantly staring at her chest when in conversation with her. She now wants you to get this stopped—or else.

You find a way to tactfully suggest to the president that the CFO is offended by his conduct and add that possibly he does not recognize what he is saying and doing is being interpreted as sexual harassment. His response is that she is wrong, that everything is innocent, and that she better learn how to accept a compliment if she wants to succeed in the corporate world.

Is this harassment?

If so, what type? (TEA or hostile work environment)

What action(s) should be taken in this situation?

HARASSMENT QUIZ

1. An employer does everything that it should do to try to prevent and correct harassment problems. These measures include having an excellent policy against harassment, communicating the policy, conducting training sessions on the subject and having an effective complaint procedure. A supervisor, Notso Smart, requests that a subordinate employee, Innocent Victim, go with him to a nearby hotel to have sex. When she does not abide by his wishes, he fires her. Innocent Victim does not complain to management. Management only learns of the incident when they receive a copy of the EEOC Charge in the mail. Is the employer liable?

2. Harry Spider sometimes makes comments to his secretary, Miss Muffet, about how attractive she is. She never says anything when he makes these comments. One day, Miss Muffet requests a raise. Mr. Spider says that he will consider her request. He then suggests that the two of them go for drinks and dinner after work. Miss Muffet makes it clear that she wants to keep the relationship purely professional and would, therefore, prefer not to go out with Mr. Spider. Mr. Spider says that he understands. Two weeks later Mr. Spider informs Ms. Muffet that he has denied her request for a raise. Ms. Muffet asks Mr. Spider for an explanation. Mr. Spider responds that if she would just be more "cooperative" with him that her chances for a raise would improve. Ms. Muffet meekly asks if the "cooperativeness" that Mr. Spider desires is sexual in nature. Mr. Spider smiles and says, "You figure it out as you get caught in my web."

3. An employer gives an independent contractor, Sameold Stuff, supervisory authority over some of its employees. The contractor harasses one of the subordinate employees based on her religion. Is the employer liable for the harassment?

4. A supervisor sexually harasses an individual, Daisy Mae Doogood, who is assigned by a temporary employment agency to work in his office for a short period of time. Could the employer be held liable for the harassment?

5. Playalong Sam works as an administrative assistant. Many of his male co-workers and a few of his female co-workers enjoy engaging in sexual banter and horseplay in the office. They often trade stories about their sexual exploits, kid about each other's sexual prowess, and even grab each other's body parts. Playalong is very upset and offended by the conduct. However, he does not communicate the conduct to anyone and at times has joined in the sexual banter himself. Is this sexual harassment?

6. A manager, Buryhis Head, knows of sexual jokes, banter, and graffiti in the workplace. No one has complained. What should the manager do?

7. What should an employer do in a "he said/she said" situation?

8. **Two co-workers, Jack and Jill, are engaged in a sexual relationship with each other until they had a falling out while climbing a hill. Jill breaks off the relationship. Jack continues to bother her at work asking Jill to please resume the relationship. Jack continues and Jill reports Jack's behavior to management. Can the company be held liable for harassment? Would transferring Jill in this situation be a possible solution?**

INTERNAL COMPLAINT PROCESS POLICY

5-5 Guaranteed Fair Treatment Procedure/EEO Complaint Process

(Last Revised 23 Nov 2003)

Policy

The Company provides a procedure for handling employee complaints, problems, concerns, and allegations of employment discrimination. An employee's right to participate within the guidelines of the process is guaranteed, although the outcome is not ensured to be in the employee's favor.

Scope

All permanent employees except employees represented by a collective bargaining agreement

Guidelines

Eligibility

All employees who receive discipline, including termination, or treatment that they believe to be unfair are eligible to participate in the GFTP/EEO process.

Eligible Issues

Issues eligible for consideration in the GFTP/EEO process include the following:

- selections
- application of compensation and benefit policies
- disciplinary actions, including terminations
- performance reviews
- all allegations of discriminatory employment practices based on an employee's race, color, sex, sexual orientation, religion, national origin, age, physical or mental handicap/disability, or veteran status including all allegations of sexual harassment
- Discipline resulting from an EEO investigation may proceed directly to GFT Step 2. Step 2 is the final step for discipline resulting from an EEO investigation.

When an employee adds an allegation of discrimination or sexual harassment after entering the GFTP process, the GFTP is deferred until allegations of employment discrimination are resolved. The steps outlined in **Table 2** should be followed. If an employee receives discipline as a result of the EEO investigation, the employee may proceed to Step 2 of the GFT Procedure as outlined in **Table 1**. Step 2 is the final step for discipline resulting from an EEO investigation.

Employees terminated for drug, alcohol, or falsification of the employment application related to a criminal event (arrest, conviction, etc.) should proceed to Step 2 of the GFTP process.

Ineligible Issues

Issues not eligible for consideration in the GFTP/EEO process are those seeking a change in or review of the following:

- work assignments
- hours of employment
- compensation rates and grade levels
- content of benefit policies
- content of Corporate policies and procedures
- decision to suspend with pay pending further investigation
- denial of a request for case review by the Accident/Occurrence Appeals Board
- discipline initiated by the Appeals Board
- documented counseling
- other issues defined as inappropriate by the Appeals Board
- clearance denial by the United States Postal Service for a position involving handling or access to U.S. mail and subsequent termination of a new hire because clearance was denied.
- clearance denial of an internal applicant by the USPS for a position involving handling or access to U.S. mail.

Employees are permitted to utilize the GFTP process for resolution regarding work assignments that are presumed to be unsafe or where no training has been provided.

Initiating a GFTP (Nondiscrimination) Complaint

Active Employees
Employees who wish to initiate a complaint to resolve a concern unrelated to alleged discrimination must hold an open and frank discussion as soon as possible with their immediate manager before entering the process.
If the complaint is with a member of management in another division, the employee must have an open and frank discussion with a member of management in that division before entering the process.
If the discussion is unsatisfactory, the employee must submit an electronic GFTP request via the GFTPP screen in PRISM within 5 calendar days of the occurrence of the eligible issue. The complaint will be forwarded automatically at each step to the appropriate members of management and matrix human resources. (See **Table 1**.)

EXCEPTION In situations where computer terminals are not available, employees may submit at each step a written complaint to the appropriate members of management, with a copy to the matrix Human Resources representative for entry into the GFTPP monitoring and tracking system.

Terminated Employees.
At each step in the process, the appropriate GFTP bubble form and questionnaire for terminated employees must be completed and forwarded to Memphis, Tennessee 38116.
At each step in the process, all nondiscrimination complaints must be submitted within 5 calendar days of the occurrence of the eligible issues or receipt of GFTP response. (See **Table 1**.)
That division's chain of command should be followed throughout the process.

Benefits Related GFTP/EEO Process

When a GFT is filed that is related to benefits, (e.g., medical leave of absence) is not resolved at Step 2, Step 3 of the GFT process is delayed until resolution of the benefits issue through the benefits appeal process.

Steps in the GFTP/EEO Process

The GFTP/EEO process for nondiscrimination issues is a 3-step process that requires specific individuals to perform specific actions within a designated timeframe (see **Table 1**). The steps in the GFTP process for non-discrimination issues are:

1. Management review
2. Officer review
3. Appeals Board

Appeals Board

Participants
The Appeals Board consists of 5 management members.

The permanent members are:

1. the chief executive officer (CEO)
2. the executive vice president (EVP) and chief operating officer (COO)
3. the chief human resources officer (CHRO)

The rotating members are:

4. one senior vice president
5. one vice president

All permanent members should all be present at all Appeals Board meetings. If this is not possible, a permanent member is required to chair the board. Three members constitute a quorum.
In the absence of the CEO, the executive vice president and chief operating officer serves as chairman.
One senior vice president serves on the board on a 2-month rotation basis. The senior vice president can delegate to a vice president for an absence.
One vice president also serves on a 2-month rotation basis. Vice presidents who are selected to serve must live in Memphis, and have been a vice president for 12 months. The selected vice president must find a replacement when unavailable to attend the Appeals Board meeting. This replacement must be a vice president or a senior vice president.

Final Decisions
Since the Appeals Board is the last step in the GFTP, all of its decisions are final and binding on the Company and the employee.

Administrator.
The Appeals Board administrator is responsible for the administrative function of the Appeals Board. At the board's direction, the administrator has the authority to act on their behalf and to carry out their instructions and decisions. A member of management in the HR Compliance Department signs the letters as administrator of the Appeals Board.
All resolution disputes arising during the GFTP/EEO process are referred to the Appeals Board administrator for evaluation and final resolution by the Appeals Board. The Appeals Board administrator has the authority to remand cases to the lower levels for resolution.

Alternate Resolution Process

At the discretion of the Company, an Alternate Resolution Process may be used as part of the GFTP/EEO process in certain types of cases.
For more information on the Alternate Resolution Process, contact your matrix Human Resources representative or the HR Compliance Department.

Board of Review

The decision to initiate a Board of Review is within the sole discretion of the senior vice president/vice president at step 2 or the Appeals Board at step 3. **This is not a formal step in the appeal process but is an option available to the senior vice president/vice president or the Appeals Board.**

Discrimination and sexual harassment allegations are not eligible for consideration by a Board of Review. If allegations of employment discrimination surface during a Board of Review, notify the Appeals Board administrator. The board can proceed on the fair treatment issues.

Participants.
When initiated, a Board of Review is composed of

- a panel of 5 voting members
- a chairperson (nonvoting)
- an HR Compliance representative (nonvoting)
- a representative of matrix Human Resources (nonvoting)
- the complainant (nonvoting)
- the manager (nonvoting)
- witnesses (nonvoting)
- observers (nonvoting)

Observers must be FedEx Express employees. Their attendance at or removal from a Board of Review is at the chairperson's discretion.
If an employee is granted a Board of Review and is not present for the Board of Review, the case is automatically forfeited unless it is rescheduled by HR Compliance due to extenuating circumstances. Management is also required to be present.

Final Decisions
The decision of a Board of Review initiated at step 2 by a senior vice president may be appealed to the Appeals Board. However, the decision of a Board of Review initiated at step 3 by the Appeals Board may not be appealed. All Board of Review recommendations become final after confirmation by the Appeals Board.
For more information on the Board of Review process, contact the HR Compliance Department or the matrix Human Resources representative.

Initiating an Internal EEO Discrimination or Harassment Complaint

Employees who wish to initiate an employment discrimination or harassment complaint should discuss their concerns with a member of management, Human Resources, or HR Compliance. The employee will then receive an Employee Information Statement form to complete and return. All complaints will be promptly and thoroughly investigated in as confidential a manner as possible. If the complaint is submitted to a member of management, copies should be forwarded to the matrix Human Resources representative/management and HR Compliance within 48 hours.
Employees are protected by the Company and federal statutes from coercion, intimidation, retaliation, interference, or discrimination for filing a complaint or assisting in a complaint. The Company specifically prohibits such action on the part of its management and other employees.
Before the resolution of any discrimination or harassment complaint, an employee may not be involuntarily transferred, reassigned, or subjected to any punitive action without concurrence of the matrix Human Resources management, HR Compliance, and the Legal Department.

Steps in the GFTP/EEO Internal EEO Discrimination or Harassment Procedure

The employment internal EEO discrimination or harassment complaint procedure is a 1-step process that requires specific actions to be performed by specific individuals. See **Table 2**.

Investigation Responsibilities.
An investigation is not initiated or discontinued without approval or concurrence from the Legal Department. An E-mail must be received from Legal before investigating or taking any disciplinary actions on all employment discrimination issues. The managing director may designate specific duties to matrix human resources and/or another member of management. The managing director is responsible for the content of the report and accountable for meeting the timeframes in the process.

Final Decisions
All decisions relating to employment discrimination complaints are final and binding on the Company and the employee.

For more information on the employment discrimination complaint process, contact the HR Compliance Department or the matrix Human Resources representative.

Exclusive Remedy

The GFTP/EEO process is the exclusive remedy for all disputes or work-related complaints arising from an employee's employment or termination from employment. As described in the employment agreement signed upon application for employment, the policies and procedures set forth by the Company provide guidelines for management and other employees during employment, but do not create contractual rights regarding termination or otherwise.

Maintaining Communication

Employees must keep management and HR Compliance advised of any change in their address or telephone number to maintain communication and timeliness throughout the GFTP/EEO process.

Confidential Communications/ Documents

All internal documents, including E-mails, investigative notes and materials generated in the course of the GFTP/EEO process, including without limitation, internal EEO and harassment investigations are confidential and subject to various legal privileges against disclosure. Circulation, distribution, or discussion of this information is strictly limited to those who have a need to know its content. Written or oral release of the contents of this information beyond this limited circulation must be approved by the Legal Department.

Third-party Representation

Attorneys are not permitted to serve as advocates on behalf of the Company or employees, nor to appear on behalf of employees or former employees or submit letters directly to the Company on behalf of employees or former employees in the GFTP/EEO process. Attorneys or other such representatives are directed to contact the Legal Department. No third party is permitted to participate in any manner in the GFTP/EEO procedure.

CONDUCTING AN INVESTIGATION AND WITNESS INTERVIEWS

TIPS FOR CONDUCTING AN INVESTIGATION

What are the goals of an effective investigation? Confidentiality, Promptness, Thoroughness, and Impartiality.

When do you investigate? When any information comes to light in any way regarding unlawful discrimination or possible violations of company policy. Information includes but is not limited to: complaints to management, teammates, HR, loss prevention, external federal and state agencies, the EEOC and the BEAR Line.

INVESTIGATIVE STEPS

1. **INTERVIEW THE COMPLAINANT/CHARGING PARTY/ALLEGED ASSAILANT/WITNESSES.**

   Respond immediately to the Complainant, should be within 24 hours.
   Find a private interview location.
   - Assure and ensure no retaliation.
   - Ask questions that are relevant.
   - Make detailed notes of any information received.
   - Identify any other witnesses that may have relevant knowledge.
   - Identify any physical evidence, e.g., notes, photographs, letters, recordings.
   - Ask the complainant what result is desired.
   - Avoid obtaining medical information.
   - Assure and ensure maximum possible confidentiality.
   - Explain the investigation process to both the complainant and any others accused.
   - Keep detailed notes of facts without conclusions/theories separate from personnel files.
   - Obtain signed statements.

   If a party refuses to provide a statement ask why and note the refusal in the file. If the charging party refuses to provide a statement or participate in the investigation consult with legal and legal will provide a letter to the charging party regarding refusal to participate.

2. **CREATE AN INVESTIGATION PLAN.**
   - Take into consideration the nature of the conduct.
   - Be consistent with prior similar investigations.
   - Consult with legal and HR.
   - Assure confidentiality, *i.e.*, talk to those on a "need to know" basis about the matter.
   - Find a place to conduct the interviews out of public sight.

3. **TAKE APPROPRIATE INTERIM ACTION.**
   - Immediate suspension may be necessary
   - Make schedule changes if necessary.
   - Make transfers to another department/group if feasible.
   - Offer paid leave for the complainant/victim and the accused if necessary.
   - Separate the parties involved in the complaint.

4. **INTERVIEW THE ACCUSED.** Follow the same procedures you use to interview the charging party.

5. **INTERVIEW WITNESSES.** Follow the same procedures you use to interview the charging party, but keep in mind that witnesses may have limited knowledge.

6. **CONDUCT FOLLOW-UP INTERVIEWS.** The interview process frequently brings to light new information and the names of new potential witnesses. Re-interview the witnesses or new witnesses but be sure to maintain confidentiality.

7. **DETERMINE CREDIBILITY.** Consider the following factors:
   - Sensibility
   - Demeanor
   - Motive
   - Evidence
   - Past Behavior

8. **REACH A CONCLUSION**. Your conclusion will typically be one of the following 1) the conduct occurred; 2) the conduct did not occur; and 3) the investigation cannot substantiate whether the conduct occurred. A summary report should be prepared. The final report should be provided to Loss Prevention, HR and Legal. If the situation requires suspension, termination or may result in significant PR or liability, legal should be consulted prior to action being taken.

9. **TAKE APPROPRIATE CORRECTIVE ACTION.** If the investigation found harassment, you should take steps to stop current harassment. Further, you should put the victim in the same position had the harassment not occurred, which may include counseling, deletion of negative evaluations if a result of sexual harassment, compensation for losses, restoration of leave, etc. Finally, follow-up with the harasser to ensure that the corrective program responsibilities are met. Determine based on the allegation if any company policy or practice changes are necessary.

WHY SHOULD WE CONDUCT GOOD QUALITY INVESTIGATIONS?

Good quality investigations are essential to:

1. Maintain positive employee relations environment;

2. Meet legal obligations to investigate and to respond to claims;

3. Determine whether the claim has merit, and may result in liability;

4. Facilitate resolution of meritorious claims;

5. Obtain dismissal of non-meritorious claims;

6. Identify possible discrimination before tangible effects occur.

1. Understanding the Context

A. EEO Laws and Types of Discrimination

1. Federal, state and local EEO and FEP laws protect employees from discrimination on the basis of:

Race	Genetic Condition
National Origin	Reporting Violations of Law
Sex	Military Service
Religion	Sexual Orientation
Pregnancy	Supporting/Providing
Age	Statements for claims of Disability Discrimination

2. Also protects applicants, former employees, vendors' employees and customers.

2. Your Role as Investigator:

Your role in an EEO investigation is to be a credible, neutral fact finder, recorder, evaluator and reporter.

Credibility of the investigative processes is established through:

1. Independence

2. Integrity

3. Investigative Professionalism
   a. Prompt
   b. Open and Thorough
   c. Objective
   d. Protect from Retaliation

AS AN INVESTIGATOR, YOU ARE <u>NOT</u>:

- an advocate for the Company or the employee.
- an advisor to management or the employee.
- a participant in the events or an apologist for short-comings.

3. Reviewing and Determining the Basis of the Complaint.

A. Start with what the employee has written.

1. Employee Information Form:
   a. Starting point for understanding the employee's perception.
   b. Begins (but does not end) your search for the legal basis of the claim of discrimination.

2. Read the Complaint and list the circumstances, participants and outcomes.
   a. Construct a chronology of events.
   b. List the name of each person the employee identifies.
   c. Identify the documents you will need to gather.

B. Don't limit your list to what the employee supplies.

C. Consider the employee's legal theory and any other basis for discrimination the facts support.

1. Don't rule out same sex, race, national origin, etc.

2. "Reverse Discrimination" is still discrimination.

4. Developing an Investigative Plan

A. Need for written plan

1. Improves efficiency
2. Reminder of witnesses and documents to be reviewed
3. Documents thoroughness of investigation
4. Serves as preliminary outline of report
5. Living document

B. Elements of a plan

1. Identify Complainant.
2. Brief summary of factual allegations
3. Short description of legal theories
4. Witness information—names, titles, numbers, contacts
5. List of documents
6. Diagram work location if applicable
7. Leave space to list follow-up inquiries.

C. Review and revise plan during investigation

5. Assembling and reviewing relevant documents

A. Obtain copies of relevant documents.

B. Use the documents to develop and conduct interviews.

C. Use documents to confirm witness statements**.**

6. Witness Interviews

A. Separate contact sheet for each witness

1. List name, job title, employee number, state, manager, contact addresses and numbers, date, time and place.
2. Face-to-face interviews are preferred.

B. Write out your questions.

1. Good reference and check list to be sure all issues are covered
2. Documents thoroughness of investigation
3. Leave space to write in additional questions.
4. Ensure all questions are asked.

C. Before you begin:

1. Explain what is being investigated-names not necessary.
2. State that the witness's information is limited to need-to-know.
3. Describe the difference between first hand knowledge and rumors, gossip and hearsay.
4. Assure the witness that he/she is protected from retaliation.
5. Remind the witness that he/she should not discuss the interview with others.

D. Housekeeping

1. Start a new page for each interview.
2. Take detailed notes – as close to verbatim as possible.
3. At the conclusion, review with the witness your notes to ensure accuracy and to record any additional information.
4. LISTEN!

E. What do you ask?

1. Who, What, When, Where, Why, Who was present, Who else has information, Who said What, What Documents exist, What similar things have happened before or since?
2. Do not ask questions that suggest the answer.
3. Do not ask questions that ask the witness to draw a conclusion.
4. Do not give any indication that you believe or disbelieve the witness.
5. Do not inform the witness of other witness's statements unless it is necessary to phrase the question or confirm other statements.
6. Save embarrassing or unfriendly questions until close to the end.
7. Ask open-ended questions based on the answers to your written questions.
8. Ask follow-up questions based on the answers to your written questions.
9. Ask the witness if he/she has any other information that might be important to the investigation.
10. Ask whether there are any questions not asked that the witness feels should have been asked.
11. Tell the witness to contact you ASAP if he/she recalls anything else.
12. Cover every issue in the Complaint – even if you think the witness may not have information about the issue.

7. Follow-up Inquiries

A. The results of your investigation may suggest additional questions.

B. You should *always* re-contact the complainant.

C. Obtain a commitment.

8. Writing the Report

A. Follow the Format

1. Identify the employee and the nature of the complaint.
2. Summarize the employees' specific allegations.
3. Set forth Managements' Response.
4. Detail your investigative findings.
5. State your factual conclusion(s).
6. List recommendations for corrective action (if any).

B. Review the Checklist

1. Have all allegations been addressed?
2. Is the decision maker identified?
3. Was the decision maker/actor asked what was alleged?
4. Have all documents been attached?
5. Did Complainant respond?
6. Does it pass the smell test?

9. Communicating the Results

A. MD is responsible for communicating to Complainant.

1. Employees often complain of no response.
2. The process has not been followed unless all steps complete.
3. Failure to communicate seen as a cover-up.

B. The HR Rep should follow up with a call to complainant.

10. Ensuring Corrective Action is Carried Out

A. Follow-up with the manager who is responsible for carrying out the corrective action.

B. Check PRISM records to be sure that discipline is properly recorded**.**

11. Protecting the Complainant Against Retaliation

A. Be alert for discipline during or shortly after EEO *investigation is completed*.

B. HR and Legal concurrence required for discipline while EEO is open.

C. Courts consider discipline within 1 year suspect, *unless objectively based.*

CONDUCTING AND MANAGING EFFECTIVE COMPANY INVESTIGATIONS

1. **Keep Your Eye on the Ball – What are you trying to achieve by conducting this investigation?** Sometimes investigations can become tedious and it is easy to get caught up in the many details that surface. Keeping your focus on the purposes of the investigation will help keep you on track. Why do we conduct investigations? There are several reasons:

   A. Because it's the right thing to do. It preserves the integrity of the company's GFTP/EEO process and our PSP philosophy;

   B. Because we may have a legal obligation to investigate the claim;

   C. To determine whether the EEO Complaint has merit;

   D. To determine if corrective action is necessary;

   E. If the claim appears to have merit, to determine if the company should attempt to resolve the EEO Complaint without further ado; and

   F. If the claim does not have merit, to determine the best way to demonstrate to the investigating agency that the claims are weak or invalid.

II. **What's the Process?** Each investigation has its own quirks. Different issues raised by Complainants mean that documents you need to review will be different from case to case. Each incident alleged by the Complainant will likely call for a different set of questions. The questions you ask one witness will be different from the questions you ask another witness. The basics, however, will not vary from case to case. For all EEO Complaints, you must determine what the basis for the EEO Complaint is, who made the decisions at issue, who the witnesses are, what questions to ask each witness, what documents you need and where to get them, etc.

III. **What Is the Legal Theory (or Theories) of the EEO Complaint?** It is important to determine, prior to the investigation, exactly what the Complainant is alleging. Why? Because the facts and documents you will need to gather in order to defend a gender discrimination will be different from those needed to defend a race discrimination case. In a gender discrimination case you will want to find out how the alleged wrongdoer treated persons of one sex vis-à-vis members of the opposite sex. Obviously, in a race discrimination case, the inquiry will involve an analysis of how members of various races were treated. If the Complainant is alleging retaliation, you will need to investigate the way the Complainant was treated after he engaged in the "protected activity." If the basis of the EEO Complaint is harassment, the inquiry must include an analysis of whether the company knew of the alleged harassment and made prompt efforts to eradicate it.

   A. First, look on the face of the Internal EEO Complaint Form to see which boxes the Complainant has checked in the "Basis of Discrimination" section. This will certainly point you in the right direction, but it may not be enough information.
   For example:
   What if the Complainant has checked the "SEX" box? Based on this information alone, you do not know if the Complainant is alleging sex D discrimination, sexual harassment or both.

B. Second, read the Complainant's allegations carefully. Hopefully, this narrative will provide enough additional information to clarify more precisely the basis of the Complainant's claim.

   1. What do you do if the narrative is so vague that you cannot really decipher what the Complainant is alleging?

   For example:
   Suppose a white male has checked both the "SEX" and "RACE" boxes. In the narrative he states that he should not have been terminated for falsifying his time card and that "other employees were treated more favorably." This narrative does not explain who the other employees were, how their situations were similar to his situation, or how they were treated more favorably.
   What should you do?
   Call the Complainant and ask questions: Who are the employees to whom the Complainant is referring? Is he alleging that *all* blacks and *all* females were treated more favorably or that just black females were treated more favorably? Did these employees also falsify their time cards and, if so, how? In what way did they receive better treatment than the Complainant? Be sure to explain to the Complainant that the better you understand the specific allegations, the more quickly you will be able to provide a response and the more precise and thorough the response will be.

   2. What if the narrative includes allegations of race discrimination but the "RACE" box is not checked?
   Do you still need to investigate the race discrimination allegations?
   Absolutely.

IV. **What are the Specific Circumstances Alleged?** Complainants generally offer support for their allegations by describing incidents in which they believe they

were treated unfairly.
For example:
A Complainant who claims to have been discriminated against on the basis of race may describe incidents similar to the following: "My manager promoted Sam O'Neil (white male) to the coordinator
position even though I was more qualified. My co-workers make racial comments to me which my manager overhears and allows to continue. My manager does not offer me any overtime hours; he gives all the overtime to white workers."
Complainant has described three circumstances. Each must be analyzed independently to determine who could be witnesses, what documents are needed, etc.

V. **Identify the Critical Issues and What Facts You Will Need to Support the Company's Position.**

A. Each allegation will present different issues. For each, you need to identify the critical issues. Issues are not limited solely to whether the specific allegations made by the Complainant are true.

B. Carefully review what the Complainant will have to show to prove his case, and look to see which defenses could be worth pursuing.

C. Identify what facts you will need to know in order to address the critical issues and argue the defenses you feel may apply to the situation.

VI. **Who Are the Relevant Witnesses?**

A. Review the EEO Complaint to see whether any witnesses have been identified by the Complainant. All should be interviewed. If a witness is no longer employed by the company, he or she must still be interviewed if you can locate them.

B. Identify those who made, or participated in, the decisions that are at issue in the case.
For example:
If an employee was terminated, find out who participated in making the decision. Interview all who participated in the termination decision, not just the manager who made the ultimate or final decision. Others may have had input into the decision. They can provide you with details about why the decision was made and may have relevant documents, such as notes of discussions or files.

C. Determine whether there are others who may be witnesses. Who might have been in a position to see a particular incident? Who might have relevant or helpful information (including documents) needed to support your defenses.

VII. **What Documents Do I Need?**

A. Documents relating to the Complainant: Review all personnel documents relating to the Complainant, even if they do not seem to be directly related to the specific allegations. Often, these documents can provide information that can be helpful to a complete understanding of the circumstances leading up to the decisions at issue.

B. Documents relating to the decision-maker or alleged bad actor:

Depending upon the circumstances and allegations, you may want to Review the personnel documents of the individual who made the decision at issue or the individual who is accused of wrongdoing. These documents may suggest a pattern of similar behavior.

C. Documents relating to comparable employees: A comprehensive investigation requires a close inspection of personnel records for those to whom the Complainant compares himself. It also includes a similar inspection of the records of those employees the company feels were treated the same way the Complainant was treated.

D. Documents relating to the issues raised: Some allegations, such as those relating to disability discrimination, hiring and promotion decisions, and retaliation claims call for a close inspection of additional documents.
For example:
In a disability case, you will want to review all documents relating to the employee's request for an accommodation and information received from the employee's doctor.
Hiring and promotion allegations will require a review of documents relating to other applicants and the successful candidate.

E. Miscellaneous documents that could be helpful: Do not overlook other documents that could be helpful to a full understanding of the allegations or to the company's defenses. Notes made by managers, e-mail correspondence, cell phone bills, computer records, payroll documents, and daily incident logs are just a few examples of documents that could provide insight into the circumstances.

F. A list of possible documents for each type of claim is provided in the attached Investigation Plan.

VIII. **Witness Interviews**

A. Prepare an outline of questions for each witness. Not only will this help you outline your thoughts, it will serve as a checklist to use during your interview. Before concluding your interview, review the list to be sure all your questions have been answered. As you prepare your list, refer to the critical issues and the list of facts you need to know. Make a list of any documents this witness may have.

B. Ask each witness if he/she has any documents relevant to the investigation.

C. Ask each witness if he/she knows of anyone else who may have information relevant to the investigation.

D. Do not ask questions that suggest a particular answer, such as "You didn't see Sam touch Cindy, did you?"

E. Do not ask questions that require the interviewee to draw a conclusion from the facts.
For example:
Do not ask a witness "Did you ever see Sam sexually harass Cindy?"
This question requires the witness to recall all the times he has seen Sam and Cindy together and determine whether any conduct he observed was or was not "sexual harassment."
Instead ask a series of questions relating to what he may have seen:
Did you ever see Sam touch Cindy?
Did you ever hear Sam ask Cindy out for a date?
Did you ever hear Sam say anything to Cindy about her appearance?

F. Make sure the witness clarifies for you what he knows from personal experience (what he personally saw or heard) and what he heard through someone else. Do not discourage a witness from telling you information he heard from others. It may provide additional information or witnesses. Just be sure you understand what the witness saw and heard with his own eyes and ears.

G. Ask open-ended questions, not "yes" or "no" questions. These will prompt the witness to provide a narrative.

H. Encourage witnesses to be frank and honest and remind them that they will not be penalized in any way for their participation, so long as they tell the truth.

I. Tell witnesses that the investigation is confidential and that they should not discuss the interview with others.

IX. **The Investigative Report.** Whether writing the investigative report or reviewing one written by another, a critical eye is necessary.

A. Have all the allegations been addressed? Refer back to the employee's original statement of events.

B. Is it thorough? Have all the appropriate witnesses been interviewed? Have all relevant documents been reviewed?

C. Does the report pass the "smell test?" Do the facts make sense or do you smell a rat?

D. Does the report include inappropriate legal conclusions? Investigative Reports should never include legal conclusions. The only conclusion an investigative report should include is whether the investigator believes a *company policy* was violated, not whether a law was broken.
For example:
A report should not include a conclusion such as "Sam sexually harassed Cindy."
Instead, the report should state: "Sam's behavior toward Cindy was a violation of company policy."
Ultimately, only a judge or jury can decide when a law is broken.

E. Are the recommendations appropriate, given all the circumstances? Review the report carefully to determine whether the suggested recommendations are in accordance with company policy and practice. Do they seem too harsh or too lenient?

F. Are there any remaining questions?

TIPS FOR CONDUCTING AN INVESTIGATION – SPECIFIC CLAIMS

The investigation will be your employer's initial source of information about the validity of the claim. It will be the basis on which your employer will make important decisions about how to respond to the complaint. Below represents a list of the most common types of employment disputes, and key points/questions that should be made part of your investigation. The recommendations are broken down by types of potential claims.

AGE DISCRIMINATION DISPUTES. Employers are prohibited from discriminating on the basis of age against job applicants and employees 40 years of age and older. Remember that successful ADEA claims involve the other party proving that: 1) (s)he is at least 40 years old; 2) (s)he suffered some adverse employment action; 3) (s)he is qualified for the position (s)he either lost or was not hired for; and 4) a person younger than the other party was selected for the position.

- Recommended Questions
  - Why did the employee bring this complaint?
  - What reasons does the employee have for his or her allegations?
  - Have there been any other age discrimination disputes?
  - What are the employee's perceptions about his age?
  - Have there been any "ageist" comments made to the employee?
  - Has the employee reported age discrimination before?
  - Has retirement been recently discussed?
  - How long has the employee worked for the company?
  - Does the employee have a higher salary or increased benefits?
  - Are there any comparable positions to the one sought or lost?
  - What are the names of any alleged employee's that are treated differently.

DISABILITY DISCRIMINATION DISPUTES. Employers are prohibited from discriminating in employment against qualified individuals with a disability who, with or without reasonable accommodation, can perform the essential functions of a job.

- Recommended Questions
  - What are the essential functions of the employee's job?
  - What are the non-essential functions of the employee's job?
  - What disability does the employee claim to have?
  - What has the employee told you about his abilities?
  - Has the employee ever requested an accommodation?
  - Has anyone talked to the employee about his disability?
  - Has anyone talked to the employee about his work performance?
  - How can the job get done differently?
  - What impact does the disability have on business operations?
  - What impact does the disability have on others?
  - Is the employee limited in any major life activities?
  - Has the employee ever provided medical documentation for an accommodation?
  - If the employee is accommodated can the employee fulfill the essential functions of the job?

SEX AND RACE DISPARATE TREATMENT DISPUTES. An employer is prohibited from treating one person less favorably than another based on a person's race or sex in making adverse employment decision (e.g., in hiring, firing, promotion, and other terms and conditions of employment). To successfully maintain a suit, the charging party must show that: 1) (s)he belongs to a protected group; 2) if an applicant for a job, that (s)he was qualified for the job; if an employee, that (s)he performed the job competently; 3) that despite his or her qualifications or satisfactory job performance, (s)he was subjected to an adverse employment action; and that there is evidence of discrimination after the employee was subject to the adverse employment action (e.g., the position that the applicant applied for, and was refused, remained open, and the employer continued to seek applications from persons with the same qualifications as the applicant).

- Recommended Questions
  - What was the adverse employment action?
  - What are the qualifications for the job?
  - Did the employee meet the qualifications of the job?
  - Who was eventually hired or who replaced the other party?
  - How did the employee perform?
  - What was the reason for the adverse employment action?
  - Is there any evidence supporting the adverse employment action?
  - Have there been any other complaints of preferential treatment?
  - Has the other party been disciplined or terminated when other similarly situation persons who perform the same way have not been?
  - What are the names of the other employees the charging party claims are treated favorably?

SEXUAL HARASSMENT DISPUTES.

1. **"QUID PRO QUO"**

   This dispute is also known as "quid pro quo" (something for something) harassment. Quid pro quo sexual harassment is found when any adverse employment decision results from an employee's refusal to accept a supervisor's demands for sexual favors or to tolerate a sexually charged work environment.

   - Recommended Questions
     - What adverse employment action has the other party faced?
     - Did the supervisor and employee have a personal relationship?
     - What exact conduct did the supervisor display to the employee?
     - What exact words did the supervisor use with the employee?

- Did the employee report the harassment?
- If reported, have any steps been taken to remedy the situation?
- Are there any improper notes, pictures, or objects given to the employee by the supervisor? If so, what are they?

2. HOSTILE WORK ENVIRONMENT

SEX AND RACE HOSTILE WORK ENVIRONMENT DISPUTES. As a form of harassment, a "hostile work environment" is verbal or physical conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment. Anyone in the workplace--not just supervisors--may create a "hostile environment." However, for the hostile environment to be unlawful, it needs to be so severe and/or pervasive that a reasonable person would find the conduct to be hostile or abusive.

- What was said that was offensive to the employee?
- How many times did the employee hear offensive remarks?
- Did the employee report the harassment?
- If reported, what steps were taken to remedy the situation?
- Are there any improper notes, pictures, or objects given to the employee by an employee? If so, what are they?

WORKPLACE VIOLENCE ISSUES. Includes physical violence, threats of violence and verbal assaults.

- Recommended Questions
  - What exact behavior was exhibited?
  - Is there a record or log of the inappropriate behavior?
  - What steps were taken to deal with the situation?
  - Was anyone hurt or property damaged?
  - Were there any witnesses to the violence or threats?
  - Is there any hard evidence? (video, sound, e-mail)
  - Is a temporary restraining order necessary?
  - Were the police contacted?

WORKERS' COMPENSATION RETALIATION. This claim results when an employee alleges that (s)he was discharged or suffered an adverse employment action as a result of his or her filing a claim for workers' compensation benefits. To be successful with this claim, the Complainant must show: 1) an employment relationship; 2) an on-the-job injury; 3) knowledge on the part of the employer of the on-the-job injury, and 4) subsequent adverse employment action (usually termination) based solely upon the employee's on-the-job injury and the filing of a workers' compensation claim..

! Recommended Questions

- Describe the on-the-job injury.
- When did the Complainant file a claim for workers' compensation?
- Did the decision-maker know that the Complainant had an injury or filed a workers' compensation claim?
- What is the reason the decision-maker made the adverse employment action?
- What evidence exists that the employee was terminated for reasons other than retaliation?
- How much time passed in between the filing of a workers' compensation claim and the adverse employment action?
- Were any other employees treated differently than the Complainant based upon his claim?
- What perceptions does the Complainant and decision-maker have about workers' compensation claims?

WITNESS INTERVIEWS

Before You Begin

1. Prepare in advance of the interview.
2. Have a full understanding of the law and/or policies that will be involved in reaching a determination of the facts.
3. Understand what facts or documents are important.
4. Prepare an outline for each witness that contains a list of all incidents or matters about which the witness has knowledge or information.
5. Carefully review the employee statement form or relevant documents. Prepare a Chronology of Events so that you have a full understanding of the dates/times of the incidents being investigated.

Introductory Remarks

1. At the outset, explain to the witness what is being investigated. For example, "an employee at the station has complained that he/she is offended by racial slurs commonly used by employees during the sort." It is not necessary to provide names.
2. Explain that the information provided during the interview will be reported only to those who have a need to know.
3. Explain the importance of accurate information and the witness' obligation to provide truthful information.
4. Explain to the witness the difference between first-hand knowledge and rumors, gossip, or information that came from a third party. Request that the witness state whether what he/she is telling you is based on his/her observations or what someone else reported.
5. Explain that employees who participate in the investigative process are protected from retaliation and that the witness should come forward if he/she believes retaliation is occurring.
6. Explain that the witness should not discuss the interview with others.

Housekeeping

1. Start a new page for each interview.
2. List the names of those present, the date, time and place of the interview. Sign and date your notes.
3. Take detailed notes, as close to verbatim if possible. If quoting the witness, indicate by quotation marks.
4. Record the questions asked as well as the responses.
5. At the conclusion of the interview, review with the witness the points in your notes to confirm their accuracy and to determine if the witness has any other information to add.

The Interview

1. Do not ask questions that suggest a particular answer:
"You didn't see Sam touch Cindy, did you?"

2. Do not ask questions that require the interviewee to draw a conclusion from the facts:
"Did you ever see Sam sexually harass Cindy?"
This question requires the witness to recall all the times he has seen Sam and Cindy together and determine whether what he observed was or was not "sexual harassment." Instead, as a series of questions relating to what the witness may have seen:
Did you ever see Sam touch Cindy?
Did you ever hear Sam ask Cindy out for a date?
Did you ever hear Sam say anything to Cindy about her appearance?

3. Ask open-ended questions, not "yes" or "no" questions. Open ended questions will prompt the witness to provide a narrative.

4. When asking question about a particular event, cover:
   a. Exactly what happened?
   b. When did it happen?
   c. Where did it happen?
   d. Who was involved or present?
   e. Who else may know of relevant information?
   f. How did it happen?
   g. Who did or said what?
   h. In what order?
   i. Was this an isolated incident or did other similar events occur?

5. Try to save unfriendly or embarrassing questions until the end of the interview.

6. Do not give the impression that you disbelieve any witness nor express an opinion as to whether something inappropriate has happened.

7. Ask additional follow-up questions based on answers to pre-planned questions.

8. Ask the witness if he/she has any other information that may be relevant.

9. Ask the witness if there are any questions which were not asked that the witness feels should have been asked.

10. Let the witness know that if he/she has forgotten some information and later recalls any information or documents, the witness should call you immediately.

Handling the witness who says: "Yes, I think there was discrimination."

1. Ask for every detail—the facts and first-hand knowledge that make him/her believe that conclusion.
2. Lead him/her through the facts—do they really support an inference of discrimination?
   For example:
   If the witness states, "I think there is discrimination because Julie told me that her co-workers don't like her." Ask the witness, "What about that makes you think that is discrimination?" If the witness responds, "Because her co-workers are white," follow up with questions to probe into why the witness believes that race discrimination exists. "Why do you believe that Julie's coworkers dislike her because of her race?" "Are there other possible reasons?" "Could there be reasons that you are not aware of?"

Uncooperative Interviewee

- Greet the interviewee with a handshake and a smile.
- Attempt to put interviewee at ease by thanking him/her for being there.
- Ensure environment and body language is not defensive.
- Explain the company's responsibility to investigate the complaint.
- State his/her cooperation is necessary and appreciated.
- Explain the importance of maintaining confidentiality.
- Ask interviewee in advance if he/she has questions to ask you, prior to formally beginning the interview.

If interviewee continues to remain uncooperative:

- Remind interviewee that the Company would conduct the same type investigation on his/her behalf.
- Explain to interviewee how the allegations affect the entire department/company/group.
- If interviewee is also the Complainant, reiterate the company's responsibility to conduct a complete investigation in order to address the allegations.
- If all else fails, remind the witness that being uncooperative is a violation of the Acceptable Conduct policy.

Emotional Interviewee

- Greet interviewee warmly with a handshake.
- Offer interviewee a tissue and give him/her a moment to gain composure.
- Offer interviewee a cup of coffee or water.
- After the interviewee gains composure, inform him/her that you are going to begin the interview process.
- Explain to interviewee the importance of conducting the investigation.
- Show professional empathy, but do not touch the interviewee.
- Thank interviewee for his/her cooperation. Explain that you know this was hard for interviewee, however, you appreciate his/her cooperation.

The Off Track Interviewee

- Ensure environment comfortable; body language is not defensive.
- Explain the company's responsibility to investigate the complaint.
- Explain the company's and the complainant's importance of maintaining confidentiality.
- State his/her cooperation is necessary to stay on track and meet obligation for garnering all facts relevant to the allegations.
- Advise interviewee you will ask a series of questions. Further advise they will be allowed later to add any additionally information needed that pertains to the subject being investigated.
- Explain to witness the importance of responding to the questions being asked. Thank them for their cooperation.
- Ask witness to briefly tell you what they know about the incident being investigated.
- DO NOT ask witness at the beginning of the interview if he/she has any knowledge about the incident or allegations being investigated.
- Ask witness if he/she have questions for you, or if he/she have additional information to share.

- Thank witness for his/her cooperation. Explain that you know this was hard for the witness however, you appreciate his/her cooperation.

OPENING AN INVESTIGATION

INTERNAL EEO

EMPLOYEE PACKET

INTRODUCTION

To the Employee:

As you know, FedEx is an Equal Opportunity employer. As such, it prohibits discrimination within the workplace.

Because you have raised an allegation of discrimination and/or harassment, the attached packet is submitted to you for information.

The material in this packet will provide you with:

- **Roles and responsibilities of available resources**
- Overview of the basis for discrimination and related issues
- An Employee ***Information*** Form which you must complete
- An Employee ***Statement*** Form which you must complete

Please review all of the material in your packet before completing the Employee Statement Form. The information you provide will assist in the investigation of your concerns regarding discrimination.

Once you have completed both forms, forward them to your HR representative or HR Compliance department. Each page should be initialed and written legibly.

ROLES & RESPONSIBILITIES

HR COMPLIANCE

The role of HR Compliance is to enhance the corporate values, which support the PEOPLE philosophy and ensure compliance with all governmental agency requirements.

HR Compliance acts as the liaison between executive management, line management, and the employee dealing with:

- EEO issues
- Employee incidents and letters referred by executive management
- The Open Door Process
- Corporate HR Compliance concerns
- Executive inquiries

In addition, this Department acts as advisor and provides counsel on internal unlawful discrimination issues.

HUMAN RESOURCES

Human Resources (HR) will be represented by the HR representative assigned to the managing director investigating the internal EEO complaint.

The role of HR in the internal EEO complaint process is that of consultant to all levels of management and the Complainant regarding applicable policies/practices relating to the complaint. Further, HR is a source of guidance and counsel throughout the process. HR should also provide related statistical information relative to the complaint.

LEGAL

The Labor and Employment section of the Legal Department directs all investigations in the EEO process and functions as consultant and advisor regarding legal issues in accordance with applicable EEO laws.

In the event there are resolution difficulties, HR Compliance, in conjunction with HR and Legal, will determine the appropriate remedy consistent with company policy and applicable EEO laws and regulations. If resolution difficulties remain, the chief human resources officer and general counsel will make a final decision.

BASIS OF DISCRIMINATION

Discrimination within the workplace is the act of treating employees differently based on one or more of the following basis:

Race
Caucasian/White
Black
Hispanic
Asian/Pacific Islander
American Indian/Alaskan Native

Color
Skin Color

Age
40 years or older (or as identified by state laws)

Handicap Status (Disability)
1.Physical or mental impairment

which substantially limits one or more
of your major life activities; or

discrimination

2. History of such impairment; or

3. Is regarded as having such an impairment, but is capable of performing a particular job with or without a reasonable to accommodation to his/her handicap.

Religion
Jewish
Seventh Day Adventist, etc.

National Origin
Polish
Italian

Vietnam Era Veteran
Served on active duty for more than 180 days any part of which was between 08/05/1964 and 05/07/1975

Sex
Male

Female

A major issue under sex

is sexual harassment which is
"unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

Special Disabled Veteran
A person entitled to disability compensation under laws administered by the Veterans Administration for disability rated at 30 percent or more, or a person whose discharge or release from active duty incurred or aggravated in the line of duty.

EMPLOYEE INFORMATION FORM

Date_____

Name: _____ Employee Number: _____

Job Title: _____ Date of Hire: _____

Department: _____ Comat Address: _____

Home Address: _____ Home Phone: _____

_____ Work Phone: _____

Geographic Location: (Select One)

Mid-Atlantic _____ Southern _____ Eastern _____

Western _____ Central _____ Southwestern _____

Headquarters _____

Division: (Select One)

Ground Ops _____ AGFS _____ Air Ops _____

CSSD _____ HR _____ Legal _____

ITD _____ Finance_____ Corp Comm _____

Customer Svc/Ops Support _____ Latin America _____

Additional Contact Information

Manager: _____ Work Phone: _____

Sr. Mgr: _____Work Phone: _____

Mng Director: _____Work Phone: _____

*HR Rep:_____ Work Phone: _____

❖ **It is very IMPORTANT that your HR representative's name is provided.**

Basis:

Race ☐ Sex ☐ Age ☐

Handicap ☐ Vietnam Era/ ☐ Origin ☐

Disability Status ☐ Special Disabled Veteran Religion ☐

Color ☐

Issue:

Termination ☐ Perf. Review ☐ Sexual Harass ☐

Selection ☐ Terms & Conditions Demotion ☐

Job Assignment ☐ of Employment ☐ Discipl Action ☐

Accommodation ☐ Failure to Promote ☐ Harassment ☐

Retaliation ☐ Pay ☐

Other (Specify)_____

Please return this form along with your Employee Statement Form to your HR representative or HR Compliance.

_____ _____

EMPLOYEE NUMBER EMPLOYEE INITIAL HERE

EMPLOYEE STATEMENT FORM

Instructions: **Please complete the following questions and return this form within 7 calendar days. Your cooperation and assistance in resolving this complaint is appreciated. The contents of these forms are confidential.**

1. Please explain why you feel you have been discriminated against or harassed, and by whom.

_____

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_____ _____
EMPLOYEE NUMBER EMPLOYEE INITIAL HERE

EMPLOYEE STATEMENT FORM

2. Provide examples of how you have been discriminated against (treated differently). For each claim, please give a complete and detailed explanation. Provide examples of how others were treated differently than you. Provide names, dates and locations where possible.

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_____ _____
EMPLOYEE NUMBER EMPLOYEE INITIAL HERE

EMPLOYEE STATEMENT FORM

3. If there were any witnesses, please furnish their names and any details of their involvement.

Details of Involvement:

_____

_____

_____

Witness Name: _____

Details of Involvement:

_____

_____

_____

Witness Name: _____

Details of Involvement:

_____

_____

_____

Witness Name: _____

Details of Involvement:

_____

_____

_____

_____

_____

Employee Statement Form
Page 4

_____ _____
EMPLOYEE NUMBER EMPLOYEE INITIAL HERE

4. Identify an/or attach any documents you feel will support your claim of discrimination or harassment.

Document	Relevancy to your claim
_____	_____
_____	_____
_____	_____
_____	_____

5. Suggest ways or methods to correct your feelings of discrimination or harassment.

_____
_____
_____
_____
_____
_____

This packet of information is my total complaint and inclusive of all the data known to me at this time.

Submitted by:

_____ _____
Signature Date

Date, 2005

Ms. Employee X

Dear Employee X:

Your complaint of discrimination has been received and assigned to me for investigation. I understand you are currently on leave and expected to return on July 5, 2005. Once you return, please contact me to schedule an appointment to discuss your allegations. A thorough investigation will be conducted in as confidential a manner as possible.

Employees are protected by company policy and federal statutes from coercion, intimidation, retaliation, interference or discrimination as a result of filing a complaint of discrimination. The Company specifically prohibits such actions on the part of management or other employees.

You will be notified in writing once the investigation has been completed. If you have any questions, please feel free to contact me.

Sincerely,

Managing Director

REFUSAL TO PARTICIPATE IN INVESTIGATION

Date

Dear Name:

In a letter addressed to Name on Date, you requested a third party conduct an investigation of your allegation description of complaint. Pursuant to procedures, in response to your allegation I contacted you on Date and scheduled a mutually agreeable meeting for Date of meeting so could investigate your allegation.

When I contacted you on Date and attempted to conduct the investigation, you refused to participate in the process. You refused to speak with me about your allegations and you demanded all questions be submitted to you in writing. It is our protocol to conduct an interactive interview.

If you refuse to speak with me and participate in interactive investigative process will not be able to investigate your allegations. Accordingly, please let me know whether you will participate in interactive investigative procedures and permit to conduct an investigation into your allegations.

I am enclosing a form for you to indicate whether you will permit to investigate your allegations. Please return this form to me by Date which is within 5 working days. Your failure to respond will indicate that you are refusing to participate in investigative procedures and do not wish for the investigation process to be pursued.

For your convenience, I am enclosing a stamp self-addressed envelope for you to return the enclosed form to me. For a faster reply you can fax the form to me at Fax Number.

Sincerely,

Name
Title

To: Associate' name

From: Your Name

Date:

On (DATE) , I requested that an investigation be conducted into an internal complaint that I initiated. By choosing one of the following options listed below, I am indicating my decision in proceeding with the next steps:

1. ☐ I wish to proceed with my request for an investigation into my complaint and will speak with investigators and participate in the interactive process.

OR

2. ☐ I withdraw my request for an investigation into my complaint.

This form must be returned to Name by (DATE). I also understand that failure to return this form to Name will indicate that I no longer wish to have an investigation conducted.

_____

Associate's Signature Date

Mail to:

Address
Name

Or Fax to:

Name
Fax No

MEDIATION

TIPS FOR PREPARING FOR MEDIATION

WHAT IS MEDIATION? Mediation is a process for handling conflict in which two or more parties involved in a dispute meet with a neutral, third party mediator to discuss the issues and attempt to reach a voluntary agreement. The mediation process is confidential and is an efficient and often satisfying alternative to litigation in a court of law. Mediation is not binding unless an agreement is signed.

WHO PARTICIPATES IN MEDIATION? A typical mediation includes the mediator, the parties' lawyers, and the parties or their representatives. The mediator is not a judge, and therefore will not decide the issues. (S)he is impartial, although (s)he may seem partial when she plays the devil's advocate during negotiation. The mediator sponsors constructive communication between the two parties, carries offers and counter-offers between the parties, and seeks to identify the strengths and weaknesses in each party's case. The party's lawyer is expected to consult with and guide the party, to listen and re-evaluate the case in light of what is heard, and to be sure the party understands the merits and risks involved in the case. The parties themselves are expected to listen attentively, to re-evaluate the case open-mindedly with the benefit of the lawyer's consultation and advice, and to participate in the negotiation. The parties are also expected to answer questions from the mediator and explain facts, feelings, attitudes, motivations, and goals.

WHAT IS THE MEDIATION FORMAT? The mediation process generally begins with a mediator's opening remarks, which explain the mediator's approach to resolving the dispute. Next, each party and his or her lawyer are given an opportunity to present an opening statement, explaining their initial viewpoint on the merits of the dispute. Thereafter, a series of meetings take place between both the party and his or her lawyer, the lawyers themselves, and the mediator and each party and his or her lawyer. Finally, a mediation should culminate in a joint meeting with all parties, lawyers, and the mediator, which hopefully produces an agreement to settle the case. The majority of our mediations are with the EEOC.

♦♦♦

BEFORE THE MEDIATION, BE PREPARED TO…

Create an Outline for your presentation. Prepare a Case Summary. Have a checklist of points and questions for clarification from the charging party and for negotiating a better settlement.

Identify the Issues. List out all the allegations and charges from the EEOC charge and inquire whether the charging party possesses any additional claims beyond what has already been presented. Make sure you have all information regarding liability and damages. Make sure all pending allegations are addressed prior to reaching settlement and that all claims are accounted for and settled.

Plan the presentation. Before the mediation Consider what information you wish to disclose to the charging party and mediator and what information you want/do not want disclosed to the other party. Consider the value in providing a confidential statement to the mediator, which includes your thoughts and the criteria you will use to determine when a proposed agreement is fair. If you want to share information with the mediator that you don't want shared you must communicate that to the mediator.

Evaluate the strengths and weaknesses of the case. Research what juries have done in other cases where the fact patterns are similar to your case. Your expectations for the outcome should be reasonable and must be supported by evidence. You will need to take a balanced approach even though you have a subjective view of the facts. Determine the other party's motivations and perceptions.

Review any documents or materials that would be helpful in communicating issues and concerns. Obtain written signed statements to support your case.

DURING THE MEDIATION, BE PREPARED TO…

Be organized. Bring with you any documents that may help you or the mediator.

Be patient and persevere. Searching for options for a resolution will take much time and effort. Put in the Time necessary to achieve a resolution (this may take the entire day or more).

Listen carefully. You will have to re-evaluate your position after hearing different opinions and facts.

Display empathy and deference. BE RESPECTFUL. Do not interrupt the charging party, opposing counsel or the mediator. Do not raise your voice and always remain calm. Use no threats or pejorative words. Settlement will not likely be reached if you use words such as "liar," "cheat," "crazy," "hoodlum," etc. or if you show no understanding of the plight the other party perceives him/herself to be in.

Consider the following during your mediation:

- What has the other party said or done?
- How do you feel about this dispute?
- What do you really want in a settlement?
- What are the risks of not settling?
- What are the strengths of your position?
- What are the weaknesses of your position?
- What is your expectation from a trial?
- What do you expect the other party to offer?
- What are your biases in looking at this case?
- What is the importance of a timely resolution?
- What are the limits on your ability to settle?
- What scares you the most about this case?
- How would it feel to be in their shoes?
- What do you think they think of their case?
- What is a realistic settlement range?
- What will you offer as part of a settlement? (dollars, an apology, etc.)
- If the charging party is a current employee do you want them to remain in the work force?

Be Creative. Think of what the charging party may value to reach settlement. Consider what the charging party may value: pain and suffering damages instead of wages, COBRA/healthcare payments, unemployment compensation, job relocation, job re-assignment, assistance with job placement with another employer, payment of a training course or additional education.

TYPES OF EMPLOYMENT DISPUTES AT MEDIATION

The most common types of disputes and workplace issues are listed below. Bear in mind that the complaining party may raise more than one issue, or may raise issues that are highly interrelated. In addition to being prepared to answer the mediator's questions listed on side one, be prepared also to answer questions relating to specific types of disputes.

Age Discrimination Disputes. If the employee was terminated look at the age of his or her replacement. Look at the age of the employee at time of hire.

Disability Discrimination Disputes. Is the individual disabled as defined by the ADA. Can the individual fulfill the essential functions of his or her position with or without accommodations. Does the individual present a safety risk to him or others. Has the individual provided any medical documentation supporting he or she has a disability? Has the individual provided any medical documentation supporting an accommodation is necessary and the should be provided. if an accommodation was requested was it specific, quantifiable, and reasonable or did it create an undue hardship?

Sex and Race Disparate Treatment Disputes. Where there other minorities/women treated the same way? How where white males treated that exhibited the same or similar conduct? Is the allegation an isolated incident or systematic?

Sexual Harassment Disputes.

1) **Quid Pro Quo.** What was allegedly promised or asked of the charging party. does the alleged harrasser have any history of sexual harassment?
2) **Hostile Work Environment Disputes.** Was the alleged conduct severe or pervasive (how often)? does the alleged harrasser have any history of sexual harassment?

Racial Hostile Work Environment. Where there other minorities treated the same way? Is the allegation an isolated incident or systematic?

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Sex and Race Disparate Treatment Disputes. Where there other minorities/women treated the same way? How where white males treated that exhibited the same or similar conduct? Is the allegation an isolated incident or systematic?

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Racial Hostile Work Environment. Where there other minorities treated the same way? Is the allegation an isolated incident or systematic?

CLOSING INVESTIGATION, FOLLOW UP AND DISCIPLINE

CLOSURE E-MAIL—CORRECTIVE ACTION NECESSARY

PRIVILEGED AND CONFIDENTIAL/ATTORNEY WORK PRODUCT

The EEO investigation for (Employee Name) has been completed. For your convenience, I have attached a letter that you should use to notify the employee of this.
The investigation did determine that corrective action is necessary.
The directives, which are listed below, must be completed within 10 days, unless otherwise noted.

Directives:

NOTE: Documented counselings are not eligible issues under the GFTP process.

This email is an official closure document. You must print a copy of it, sign below, and return via overnight letter with the appropriate documentation indicating all action items have been completed. Send to my attention at:

HR Compliance Department
Memphis, TN 38125

Management signature_____Date_____

CLOSURE LETTER—CORRECTIVE ACTION TAKEN

DEAR MR./MS.:

Thank you for using our internal EEO complaint process relating to your claim of discrimination. Your claim has been thoroughly investigated.

Our investigation did identify some practices that may be inconsistent with our policies, culture and philosophy. Appropriate recommendations were made for your management team to implement to address these practices.

Your complaint was treated confidentially to the extent possible while still allowing us to conduct a full investigation. The identity of witnesses and information gathered is confidential to encourage employees to come forward with issues, and at the same time alleviate any concerns they may have of retaliation. Likewise, we discipline employees confidentially. Therefore, no additional information will be provided regarding this investigation.

We appreciate your taking the time to bring these matters to our attention as COMPANY takes all complaints seriously. I want to remind you that it is against Company policy for you to be retaliated against for filing your complaint. Should you believe that you are being retaliated against, or should you have any other concerns, please report them immediately to a member of management, your human resources representative, or the HR Compliance department.

Sincerely,

Managing Director

CLOSURE E-MAIL—NO CORRECTIVE ACTION

PRIVILEGED AND CONFIDENTIAL/ATTORNEY WORK PRODUCT

The EEO investigation for () has been completed. The investigation determined that no corrective action was necessary.

For your convenience, I have attached a letter that you should use to notify the employee that the investigation has been completed.

This email is an official closure document. You must print a copy of it, sign below, and return via overnight letter with the appropriate documentation indicating all action items have been completed. Send to my attention at:

HR Compliance Department
Memphis, TN 38125

Management signature_____Date_____

CLOSURE LETTER—NO CORRECTIVE ACTION

DATE

Dear Mr./Ms. Complainant:

Thank you for using our internal grievance process relating to your claim of _____. Your claim has been investigated.

Although our investigation did not reveal any policy violations, I want to let you know that COMPANY takes all complaints seriously. Additionally, I wanted to remind you that it is against Company policy for you to be retaliated against for filing your complaint. Should you believe that you are being retaliated against, or should you have any other concerns, please report them immediately to your human resources representative, or the HR Compliance department.

Again, we appreciate you using our internal process.

Sincerely,

MD

cc: HR Representative
HR Compliance Advisor

Human Relations address

PRIVILEGED & CONFIDENTIAL
Attorney/Client Communication

TO: Associate name

FROM: Your name
Title

RE: Harassment Letter

DATE: Date

The purpose of this letter is to place you on written notice that on Date of Incident a harassment complaint was filed against you. In response, conducted an investigation where the following statements were obtained about your conduct through first and third party accounts:

(very briefly describe the incident or the actions that ocurred.)

abides and complies with all state and federal laws regulating the work place. possesses a strict Anti-Harassment Policy and does not tolerate conduct violating any state or federal law. does not condone or tolerate harassment.

As set forth above, you have violated the Company's Anti-Harassment Policy. You will be required to re-read the Anti-Harassment Policy, watch the anti-harassment CBT and sign the Acknowledgement form stating you understand and agree to abide by ANTI-HARASSMENT Policy. You must make arrangements with name and date to review the policy and complete the CBT. Any further violation of the Anti-Harassment Policy will result in additional disciplinary action up to and including discharge.

considers the above-described alleged conduct as a serious violation of company policy and an infraction of expected appropriate conduct in the work place.

Received and reviewed on. Date _____ 200_.

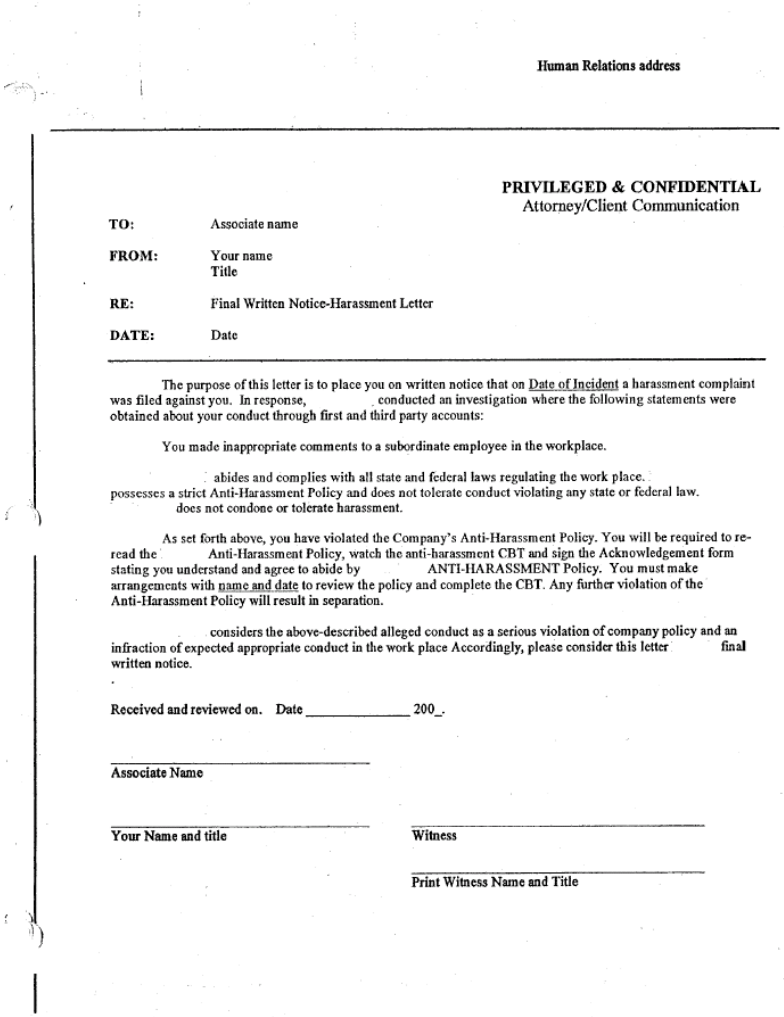
_____
Associate Name

_____
Your Name and title

_____
Witness Signature

_____
Print Witness Name and Title

SAMPLE REPORT AND REPORT CHECKLIST



Human Relations address

PRIVILEGED & CONFIDENTIAL
Attorney/Client Communication

TO: Associate name

FROM: Your name
Title

RE: Final Written Notice-Harassment Letter

DATE: Date

The purpose of this letter is to place you on written notice that on Date of Incident a harassment complaint was filed against you. In response, conducted an investigation where the following statements were obtained about your conduct through first and third party accounts:

You made inappropriate comments to a subordinate employee in the workplace.

abides and complies with all state and federal laws regulating the work place. possesses a strict Anti-Harassment Policy and does not tolerate conduct violating any state or federal law. does not condone or tolerate harassment.

As set forth above, you have violated the Company's Anti-Harassment Policy. You will be required to re-read the Anti-Harassment Policy, watch the anti-harassment CBT and sign the Acknowledgement form stating you understand and agree to abide by ANTI-HARASSMENT Policy. You must make arrangements with name and date to review the policy and complete the CBT. Any further violation of the Anti-Harassment Policy will result in separation.

considers the above-described alleged conduct as a serious violation of company policy and an infraction of expected appropriate conduct in the work place Accordingly, please consider this letter final written notice.

Received and reviewed on. Date _____ 200_.

_____
Associate Name

_____ _____
Your Name and title Witness

_____
Print Witness Name and Title

Checklist for Writing Internal EEO Reports

Are all of the allegations addressed in the report? (Be sure to check the Employee Statement Form and all other documents in which the employee has made complaints, such as letters, etc.)

Have the elements of the claim (i.e., the statutory elements of an age claim) been investigated?

Does the report identify the person(s) who made the decision that is being contested? Has that person(s) been interviewed?

Have all of the witnesses identified by the complainant been interviewed – even those who are no longer with the company?

Have all employees who would be in a position to know details about the allegations been interviewed – even if there were not identified by the complainant?

Have the witnesses been asked the appropriate questions? (e.g., were the questions asked in such as way as to suggest particular answers?)

Have the witnesses been asked necessary follow-up questions?

Have the appropriate documents been reviewed? (e.g, time cards, etc.)

Have all of the relevant documents been provided?

Does the report contain information that is not relevant to the employee's allegations? (e.g., Does it dwell on something that is not an issue in the matter? Does it identify the genders and races of the witnesses when the allegations do not raise gender and race issues?)

Does the report provide information about comparable employees (if applicable)?

Does the report contain conclusory statements without back-up factual support? (e.g., In the Investigation Findings section: "The investigation concluded that Mr. Complainant was treated the same as others who engaged in fighting." If comparable employees aren't provided, they need to be.)

Does the report include inappropriate legal conclusions? (e.g., "Sam sexually harassed Cindy" instead of "Sam's behavior toward Cindy was a violation of company policy.")

Does the conclusion address all of the issues?

Is the recommended action appropriate? Should more or less discipline be issued? Is training needed?

Are there any "red flags" that are raised by the information in the report? (e.g., Do the facts raise FMLA issues, even though the employee didn't complain about FMLA issues?)

Do you have all of the attachments?

Are the attachments relevant to the charge?

Does it pass the smell test? Do you smell a rat?

Is the document labeled "Privileged and Confidential"?

Is the attorney assigned to the matter cc'd on the document?

SAMPLE

Internal EEO Complaint Summary
Privileged & Confidential
Attorney Work Product

INTEROFFICE MEMORANDUM

DATE: September 21, 2004 **TO:** HRC Advisor

FROM: Managing Director **Cc:** Legal Advisor
Sr. HR Rep

SUBJECT: Internal EEO Complaint
Investigative Report, Employee Name #
Department, District/Region, Division

Complainant/Charging Party

Name: **Complainant** **Employee #: 00000**

Management		**Human Resources**	
Vice President	Bob Bob	Human Resources MD	More More
Managing Director	Jim Jim	HR Manager	Sun Sun
Senior Manager	Lin Linn	HR Rep	Up Close

A. Summary of Employee's Complaint:
Complainant states that X used inappropriate behavior towards him in the work place and he feels harassed because of his "sexual orientation". Complainant states that he can deal with the "verbal harassment", but X's behavior is inappropriate in the work place and he asks FedEx to "do something about it."

B. Employees' Specific Allegations:

Allegation (1)

Complainant alleges that X "smacked him on the derriere with a FedEx pack on purpose". The Complainant further alleges that X has teased him about his "sexual preference" and talks to him in what he perceives as a "gay voice."

Allegation (2)

Complainant further states that X's inappropriate behavior was not an isolated occurrence. The Complainant states that X "always talks about different ethnic groups". Complainant also states that the reason he wants the occurrence to be "kept quiet" is that

he knows X will make things more difficult for him now that he has spoken to management about it.

Allegation (3)
The Complainant states that Witness #1 saw X hit him with the FedEx pack because she and X were both laughing when it happened. According to the Complainant, Witness #2 witnessed the verbal harassment. Furthermore, the Complainant alleges that X has been counseled/disciplined before for sexual harassment and he has heard him talk badly and treat others badly as well.

C. X's responses to the allegations:

Response (1)
In response to the Complainant's allegation, X states that he honestly does not remember if he did or did not slap Complainant on his derriere. X states that; "We have poked at each other jokingly in the past". " I didn't think it was big deal to be honest". X also states that he is sorry if his actions were perceived as sexual. He admits to having been counseled in the past regarding the way he communicates with other employees and he is working on "not being so forthright with my opinions." X further states that he hopes what happened on Friday is not "construed as harassment" because that was never his intention.

Response (2) Human Resources
Human Resources advised the Complainant "FedEx condemns any acts in its work environments that create the potential for illegal harassment, both in terms of individual employee morale and in violation of applicable federal, state, and local laws. The Company will not tolerate harassment of any employee because of that employee's sex, gender, race, color, religion, national origin, age or disability." Per policy, the definition of sexual harassment is "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" therefore; it is the Company's obligation to investigate his allegations.
Human Resources also advised that, "There will be no retaliation against any employee who reports a claim or incident of sexual or other harassment against any employee who participates as a witness in a harassment investigation. Complainant understood that if he feels he has been subjected to retaliation he must immediately "make a report to management, Human Resources, or the HR Compliance Department in Memphis, Tennessee."

Response (3)
Witness #1 stated that she did not see X smack the Complainant on the derriere.

Witness #2 stated that her back was turned when the alleged incident took place but witnessed how upset the Complainant was right after the incident occurred. Witness #2 also stated that X often makes inappropriate comments and likes to "annoy people". When asked if she could provide specific examples, witness #2 stated that she recalls a comment made by X to witness #1 when they were discussing dinner plans. Witness #2 stated that Complainant's name came up in their conversation and X said; "Complainant can't go anymore, he's too gay". Witness #2 further stated X is loud and makes off color/racial remarks that she feels are inappropriate.

Another employee was identified as having been near X and the Complainant the day of the incident, Witness #3 was asked if he had witnessed the incident that took place on August 7, 2004 or if he was aware of any inappropriate language in the work place. Witness #3 stated that he had not witnessed the incident himself but was aware of the inappropriate comments X often makes. When asked for specific examples, Witness #3 states he recalled one particular comment in which X told a fellow courier next to him; " that nigger son of a bitch, how could he talk to me that way, how soon do they forget". Witness #3 also states; that X has made inappropriate comments to him as well in a "loud, offensive and inappropriate manner."

The final employee interviewed during this investigation (Witness #4) indicated that he did not witness the incident; however, he knew X was upset following the incident, which affected his ability to perform his job duties. Witness #4 mentioned that he keeps to himself, does his job, and go home. Witness #4 did indicate that X is loud and often teases others.

D. Investigative Findings:

The Complainant raised several concerns in his complaint, all of which have been addressed in this document. X admitted he slapped Complainant on the derriere, which he indicated was not sexual in nature. X also indicated he has been counseled about inappropriate comments made in the workplace. While none of the witnesses saw X hit Complainant on the derriere, several indicated that Complainant was upset after the incident occurred. It was also determined that Complainant has used inappropriate language in the workplace about and/or to co-workers.

The following were interviewed:
Witness #1
Witness #2
Witness #3
Witness #4
Complainant
Alleged Harasser

E. Conclusion of Report
Based on this investigation, it appears that X did hit Complainant on the derriere when he engaged in horseplay. X has also made several inappropriate comments toward his co-workers in the workplace.

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F. Recommendations:

1. Issue X (77777) a warning letter for violation of the Acceptable Conduct Policy.

2. Review Anti-Harassment Policy (P5-55) with all workgroups at XYZ station.

Signed:

_____
Managing Director/VP Signature Block

_____
(signature of any person assisting with the investigation)

EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT

The U.S. Equal Employment Opportunity Commission

[redacted]	***NOTICE***	**Number**
EEOC		**N-915-050**
		Date
[redacted]		**3/19/90**

1. SUBJECT: Policy Guidance on Current Issues of Sexual Harassment.

2. EFFECTIVE DATE: Upon receipt.

3. EXPIRATION DATE: As an exception to EEOC Order 295.001, Appendix B, Attachment 4, § a(5), this notice will remain in effect until rescinded or superseded.

4. SUBJECT MATTER:

This document provides guidance on defining sexual harassment and establishing employer liability in light of recent cases.

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer - -

... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

In 1980 the Commission issued guidelines declaring sexual harassment a violation of Section 703 of Title VII, establishing criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defining the circumstances under which an employer may be held liable, and suggesting affirmative steps an employer should take to prevent sexual harassment. See Section 1604.11 of the Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 ("Guidelines"). The Commission has applied the Guidelines in its enforcement litigation, and many lower courts have relied on the Guidelines.

The issue of whether sexual harassment violates Title VII reached the Supreme Court in 1986 in Meritor Savings Bank v. Vinson, 106 S. Ct. 2399, 40 EPD ¶ 36,159 (1986). The Court affirmed the basic premises of the Guidelines as well as the Commission's definition. The purpose of this document is to provide guidance on the following issues in light of the developing law after Vinson:

- determining whether sexual conduct is "unwelcome";
- evaluating evidence of harassment;
- determining whether a work environment is sexually "hostile";
- holding employers liable for sexual harassment by supervisors; and
- evaluating preventive and remedial action taken in response to claims of sexual harassment.

BACKGROUND

A. Definition

Title VII does not proscribe all conduct of a sexual nature in the workplace. Thus it is crucial to clearly define sexual harassment: only unwelcome sexual conduct that is a term or condition of employment constitutes a violation. 29 C.F.R. § 1604.11(a). The EEOC's Guidelines define two types of sexual harassment: "quid pro quo" and "hostile environment." The Guidelines provide that "unwelcome" sexual conduct constitutes sexual harassment when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment," 29 C.F.R § 1604.11 (a)(1). "Quid pro quo harassment" occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual," 29 C.F.R § 1604.11(a)(2).[1] 29 C.F.R. § 1604.11(a)(3).[2] The Supreme Court's decision in Vinson established that both types of sexual harassment are actionable under section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), as forms of sex discrimination.

Although "quid pro quo" and "hostile environment" harassment are theoretically distinct claims, the line between the two is not always clear and the two forms of harassment often occur together. For example, an employee's tangible job conditions are affected when a sexually hostile work environment results in her constructive discharge.[3] Similarly, a supervisor who makes sexual advances toward a subordinate employee may communicate an implicit threat to adversely affect her job status if she does not comply. "Hostile environment" harassment may acquire characteristics of "quid pro quo" harassment if the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct. Sexual harassment may culminate in a retaliatory discharge if a victim tells the harasser or her employer she will no longer submit to the harassment, and is then fired in retaliation for this protest. Under these circumstances it would be appropriate to conclude that both harassment and retaliation in violation of section 704(a) of Title VII have occurred.

Distinguishing between the two types of harassment is necessary when determining the employer's liability (see infra Section D). But while categorizing sexual harassment as "quid pro quo," "hostile environment," or both is useful analytically these distinctions

should not limit the Commission's investigations,[4] which generally should consider all available evidence and testimony under all possibly applicable theories.[5]

B. Supreme Court's Decision in Vinson

Meritor Savings Bank v. Vinson posed three questions for the Supreme Court:

(1) Does unwelcome sexual behavior that creates a hostile working environment constitute employment discrimination on the basis of sex;

(2) Can a Title VII violation be shown when the district court found that any sexual relationship that existed between the plaintiff and her supervisor was a "voluntary one"; and

(3) Is an employer strictly liable for an offensive working environment created by a supervisor's sexual advances when the employer does not know of, and could not reasonably have known of, the supervisor's misconduct.

1) Facts - The plaintiff had alleged that her supervisor constantly subjected her to sexual harassment both during and after business hours, on and off the employer's premises; she alleged that he forced her to have sexual intercourse with him on numerous occasions, fondled her in front of other employees, followed her into the women's restroom and exposed himself to her, and even raped her on several occasions. She alleged that she submitted for fear of jeopardizing her employment. She testified, however, that this conduct had ceased almost a year before she first complained in any way, by filing a Title VII suit, her EEOC charge was filed later (see infra at n.34). The supervisor and the employer denied all of her allegations and claimed they were fabricated in response to a work dispute.

2) Lower Courts' Decisions - After trial, the district court found the plaintiff was not the victim of sexual harassment and was not required to grant sexual favors as a condition of employment or promotion. Vinson v. Taylor, 22 EPD ¶ 30,708 (D.D.C. 1980). Without resolving the conflicting testimony, the district court found that if a sexual relationship had existed between plaintiff and her supervisor, it was "a voluntary one...having nothing to do with her continued employment." The district court nonetheless went on to hold that the employer was not liable for its supervisor's actions because it had no notice of the alleged sexual harassment; although the employer had a policy against discrimination and an internal grievance procedure, the plaintiff had never lodged a complaint.

The court of appeals reversed and remanded, holding the lower court should have considered whether the evidence established a violation under the "hostile environment" theory. Vinson v. Taylor, 753 F.2d 141, 36 EPD ¶ 34,949, denial of rehearing en banc, 760 F.2d 1330, 37 EPD ¶ 35,232 (D.C. Cir. 1985). The court ruled that a victim's "voluntary" submission to sexual advances has "no materiality whatsover" to the proper inquiry: whether "toleration of sexual harassment [was] a condition of her employment." The court further held that an employer is absolutely liable for sexual harassment committed by a supervisory employee, regardless of whether the employer actually knew or reasonably could have known of the misconduct, or would have disapproved of and stopped the misconduct if aware of it.

3) Supreme Court's Opinion - The Supreme Court agreed that the case should be remanded for consideration under the "hostile environment" theory and held that the proper inquiry focuses on the "unwelcomeness" of the conduct rather than the "voluntariness" of the victim's participation. But the Court held that the court of appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisory employees.

a) "Hostile Environment" Violates Title VII - The Court rejected the employer's contention that Title VII prohibits only discrimination that causes "economic" or "tangible" injury: "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult whether based on sex, race, religion, or national origin. 106 S. Ct. at 2405. Relying on the EEOC's Guidelines definition of harassment, [6] the court held that a plaintiff may establish a violation of Title VII "by proving that discrimination based on sex has created a hostile or abusive work environment." Id. The Court quoted the Eleventh Circuit's decision in Henson v. City of Dundee, 682 F.2d 897, 902, 29 EPD ¶ 32,993 (11th Cir. 1982):

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and made a living can be as demeaning and disconcerting as the harshest of racial epithets.

106 S. Ct. at 2406. The Court further held that for harassment to violates Title VII, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Id. (quoting Henson, 682 F.2d at 904).

b) Conduct Must Be "Unwelcome" - Citing the EEOC's Guidelines, the Court said the gravamen of a sexual harassment claim is that the alleged sexual advances were "unwelcome." 106 S. Ct. at 2406. Therefore, "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. . . . . The correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." Id. Evidence of a complainant's sexually provocative speech or dress may be relevant in determining whether she found particular advances unwelcome, but should be admitted with caution in light of the potential for unfair prejudice, the Court held.

c) Employer Liability Established Under Agency Principles - On the questions of employer liability in "hostile environment" cases, the Court agreed with EEOC's position that agency principles should be used for guidance. While declining to issue a "definitive

rule on employer liability," the Court did reject both the court of appeals' rule of automatic liability for the actions of supervisors and the employer's position that notice is always required. 106 S. Ct. at 2408- 09.

The following sections of this document provide guidance on the issues addressed in Vinson and subsequent cases.

GUIDANCE

A. Determining Whether Sexual Conduct Is Unwelcome

Sexual harassment is "unwelcome . . . verbal or physical conduct of a sexual nature . . . ." 29 C.F.R. § 1604.11(a). Because sexual attraction may often play a role in the day-to-day social exchange between employees, "the distinction between invited, uninvited-but-welcome, offensive- but-tolerated, and flatly rejected" sexual advances may well be difficult to discern. Barnes v. Costle, 561 F.2d 983, 999, 14 EPD ¶ 7755 (D.C. Cir. 1977) (MacKinnon J., concurring). But this distinction is essential because sexual conduct becomes unlawful only when it is unwelcome. The Eleventh Circuit provided a general definition of "unwelcome conduct" in Henson v. City of Dundee, 682 F.2d at 903: the challenged conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."

When confronted with conflicting evidence as to welcomeness, the Commission looks "at the record as a whole and at the totality of circumstances . . . ." 29 C.F.R. § 1604.11(b), evaluating each situation on a case-by-case basis. When there is some indication of welcomeness or when the credibility of the parties is at issue, the charging party's claim will be considerably strengthened if she made a contemporaneous complaint or protest.[7] Particularly when the alleged harasser may have some reason (e.g., prior consensual relationship) to believe that the advances will be welcomed, it is important for the victim to communicate that the conduct is unwelcome. Generally, victims are well-advised to assert their right to a workplace free from sexual harassment. This may stop the harassment before it becomes more serious. A contemporaneous complaint or protest may also provide persuasive evidence that the sexual harassment in fact occurred as alleged (see infra Section B). Thus, in investigating sexual harassment charges, it is important to develop detailed evidence of the circumstances and nature of any such complaints or protests, whether to the alleged harasser, higher management, co-workers or others.[8]

While a complaint or protest is helpful to charging party's case, it is not a necessary element of the claim. Indeed, the Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct. If the victim failed to complain or delayed in complaining, the investigation must ascertain why. The relevance of whether the victim has complained varies depending upon "the nature of the sexual advances and the context in which the alleged incidents occurred." 29 C.F.R. § 1604.11(b).[9]

Example - Charging Party (CP) alleges that her supervisor subjected her to unwelcome sexual advances that created a hostile work environment. The investigation into her charge discloses that her supervisor began making intermittent sexual advances to her in June, 1987, but she did not complain to management about the harassment. After the harassment continued and worsened, she filed a charge with EEOC in June, 1988. There is no evidence CP welcomed the advances. CP states that she feared that complaining about the harassment would cause her to lose her job. She also states that she initially believed she could resolve the situation herself, but as the harassment became more frequent and severe, she said she realized that intervention by EEOC was necessary. The investigator determines CP is credible and concludes that the delay in complaining does not undercut CP's claim.

When welcomeness is at issue, the investigation should determine whether the victim's conduct is consistent, or inconsistent, with her assertion that the sexual conduct is unwelcome.[10]

In Vinson, the Supreme Court made clear that voluntary submission to sexual conduct will not necessarily defeat a claim of sexual harassment. The correct inquiry "is whether [the employee] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." 106 S. Ct. at 2406 (emphasis added). See also Commission Decision No. 84-1 ("acquiescence in sexual conduct at the workplace may not mean that the conduct is welcome to the individual").

In some cases the courts and the Commission have considered whether the complainant welcomed the sexual conduct by acting in a sexually aggressive manner, using sexually-oriented language, or soliciting the sexual conduct. Thus, in Gan v. Kepro Circuit Systems, 27 EPD ¶ 32,379 (E.D. Mo. 1982), the plaintiff regularly used vulgar language, initiated sexually-oriented conversations with her co-workers, asked male employees about their marital sex lives and whether they engaged in extramarital affairs, and discussed her own sexual encounters. In rejecting the plaintiff's claim of "hostile environment" harassment, the court found that any propositions or sexual remarks by co-workers were "prompted by her own sexual aggressiveness and her own sexually-explicit conversations" Id. At 23,648.[11] And in Vinson, the Supreme Court held that testimony about the plaintiff's provocative dress and publicly expressed sexual fantasies is not per se inadmissible but the trial court should carefully weigh its relevance against the potential for unfair prejudice. 106 S. Ct. at 2407.

Conversely, occasional use of sexually explicit language does not necessarily negate a claim that sexual conduct was unwelcome. Although a charging party's use of sexual terms or off-color jokes may suggest that sexual comments by others in that situation were not unwelcome, more extreme and abusive or persistent comments or a physical assault will not be excused, nor would "quid pro quo" harassment be allowed.

Any past conduct of the charging party that is offered to show "welcomeness" must relate to the alleged harasser. In Swentek v. US AIR, Inc., 830 F.2d 552, 557, 44 EPD ¶ 37,457

(4th Cir. 1987), the Fourth Circuit held the district court wrongly concluded that the plaintiff's own past conduct and use of foul language showed that "she was the kind of person who could not be offended by such comments and therefore welcomed them generally, " even though she had told the harasser to leave her alone. Emphasizing that the proper inquiry is "whether plaintiff welcomed the particular conduct in question from the alleged harasser," the court of appeals held that "Plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.'" 830 F.2d at 557 (quoting Katz v. Dole, 709 F.2d 251, 254 n.3, 32 EPD ¶ 33,639 (4th Cir. 1983)). Thus, evidence concerning a charging party's general character and past behavior toward others has limited, if any, probative value and does not substitute for a careful examination of her behavior toward the alleged harasser.

A more difficult situation occurs when an employee first willingly participates in conduct of a sexual nature but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment. Here the employee has the burden of showing that any further sexual conduct is unwelcome, work-related harassment. The employee must clearly notify the alleged harasser that his conduct is no longer welcome.[12] If the conduct still continues, her failure to bring the matter to the attention of higher management or the EEOC is evidence, though not dispositive, that any continued conduct is, in fact, welcome or unrelated to work [13] In any case, however, her refusal to submit to the sexual conduct cannot be the basis for denying her an employment benefit or opportunity; that would constituted a "quid pro quo" violation.

B. Evaluating Evidence of Harassment

The Commission recognizes that sexual conduct may be private and unacknowledged, with no eyewitnesses. Even sexual conduct that occurs openly in the workplace may appear to be consensual. Thus the resolution of a sexual harassment claim often depends on the credibility of the parties. The investigator should question the charging party and the alleged harasser in detail. The Commission's investigation also should search thoroughly for corroborative evidence of any nature.[14] Supervisory and managerial employees, as well as co-workers, should be asked about their knowledge of the alleged harassment.

In appropriate cases, the Commission may make a finding of harassment based solely on the credibility of the victim's allegation. As with any other charge of discrimination, a victim's account must be sufficiently detailed and internally consistent so as to be plausible, and lack of corroborative evidence where such evidence logically should exist would undermine the allegation.[15] By the same token, a general denial by the alleged harasser will carry little weight when it is contradicted by other evidence.[16]

Of course, the Commission recognizes that a charging party may not be able to identify witnesses to the alleged conduct itself. But testimony may be obtained from persons who observed the charging party's demeanor immediately after an alleged incident of harassment. Persons with whom she discussed the incident - - such as co-workers, a doctor or a counselor - - should be interviewed. Other employees should be asked if they noticed changes in charging party's behavior at work or in the alleged harasser's treatment of charging party. As stated earlier, a contemporaneous complaint by the victim would be persuasive evidence both that the conduct occurred and that it was unwelcome (see supra Section A). So too is evidence that other employees were sexually harassed by the same person.

The investigator should determine whether the employer was aware of any other instances of harassment and if so what was the response. Where appropriate the Commission will expand the case to include class claims.[17]

Example - Charging Party (CP) alleges that her supervisor made unwelcome sexual advances toward her on frequent occasions while they were alone in his office. The supervisor denies this allegation. No one witnessed the alleged advances. CP's inability to produce eyewitnesses to the harassment does not defeat her claim. The resolution will depend on the credibility of her allegations versus that of her supervisor's. Corroborating, credible evidence will establish her claim. For example, three co-workers state that CP looked distraught on several occasions after leaving the supervisor's office, and that she informed them on those occasions that he had sexually propositioned and touched her. In addition, the evidence shows that CP had complained to the general manager of the office about the incidents soon after they occurred. The corroborating witness testimony and her complaint to higher management would be sufficient to establish her claim. Her allegations would be further buttressed if other employees testified that the supervisor propositioned them as well.

If the investigation exhausts all possibilities for obtaining corroborative evidence, but finds none, the Commission may make a cause finding based solely on a reasoned decision to credit the charging party's testimony.[18]

In a "quid pro quo" case, a finding that the employer's asserted reasons for its adverse action against the charging party are pretextual will usually establish a violation.[19] The investigation should determine the validity of the employer's reasons for the charging party's termination. If they are pretextual and if the sexual harassment occurred, then it should be inferred that the charging party was terminated for rejecting the employer's sexual advances, as she claims. Moreover, if the termination occurred because the victim complained, it would be appropriate to find, in addition, a violation of section 704(a).

C. Determining Whether a Work Environment Is "Hostile"

The Supreme Court said in Vinson that for sexual harassment to violate Title VII, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" 106 S. Ct. at 2406 (quoting Henson v. City of Dundee, 682 F.2d at 904. Since "hostile environment' harassment takes a variety of forms, many factors may affect this determination, including: (1) whether the conduct was verbal or physical, or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a co-

worker or a supervisor; (5) whether the others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.

In determining whether unwelcome sexual conduct rises to the level of a "hostile environment" in violation of Title VII, the central inquiry is whether the conduct "unreasonably interfer[es] with an individual's work performance" or creates "an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3). Thus, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment.

1) Standard for Evaluating Harassment - In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive." Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784, 35 EPD ¶ 34, 766 (E.D. Wis. 1984). See also Ross v. Comsat, 34 FEP cases 260, 265 (D. Md. 1984), rev'd on other grounds, 759 F.2d 355 (4th Cir. 1985). Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

Example - Charging Party alleges that her coworker made repeated unwelcome sexual advances toward her. An investigation discloses that the alleged "advances" consisted of invitations to join a group of employees who regularly socialized at dinner after work. The coworker's invitations, viewed in that context and from the perspective of a reasonable person, would not have created a hostile environment and therefore did not constitute sexual harassment.

A "reasonable person" standard also should be applied to be more basic determination of whether challenged conduct is of a sexual nature. Thus, in the above example, a reasonable person would not consider the co-worker's invitations sexual in nature, and on that basis as well no violation would be found.

This objective standard should not be applied in a vacuum, however. Consideration should be given to the context in which the alleged harassment took place. As the Sixth Circuit has stated, the trier of fact must "adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances." Highlander v. K.F.C.National Management Co., 805 F.2d 644, 650, 41 EPD ¶ 36,675 (6th Cir. 1986).[20]

The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant. Cf. Rabidue v. Osceola Refining Co., 805 F.2d 611, 626, 41 EPD ¶ 36,643 (6th Cir. 1986) (Keith, C.J., dissenting), cert. denied, 107 S. Ct. 1983, 42 EPD 36,984 (1987). Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 48 EPD ¶ 38,393 (1st Cir. 1988).

2) Isolated Instances of Harassment - Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. As the Court noted in Vinson, "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII." 106 S.Ct. at 2406 (quoting Rogers v. EEOC, 454 F.2d 234, 4 EPD ¶ 7597 (5th Cir. 1971), cert. denied, 406 U.S. 957, 4 EPD ¶ 7838 (1972)). A "hostile environment" claim generally requires a showing of a pattern of offensive conduct.[21] In contrast, in "quid pro quo" cases a single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits.[22]

But a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severed the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical.[23] Thus, in Barrett v. Omaha National Bank, 584 F. Supp, 22, 35 FEP Cases 585 (D. Neb. 1983), aff'd, 726 F.2d 424, 33 EPD ¶ 34,132 (8th Cir. 1984), one incident constituted actionable sexual harassment. The harasser talked to the plaintiff about sexual activities and touched her in an offensive manner while they were inside a vehicle from which she could not escape.[24]

The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment. If an employee's supervisor sexually touches that employee, the Commission normally would find a violation. In such situations, it is the employer's burden to demonstrate that the unwelcome conduct was not sufficiently severe to create a hostile work environment.

When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found. Similarly, incidents of sexual harassment directed at other employees in addition to the charging party are relevant to a showing of hostile work environment. Hall v. Gus Construction Co., 842 F.2d 1010, 46 EPD ¶ 37,905 (8th Cir. 1988); Hicks v. Gates Rubber Co., 833 F.2d 1406, 44 EPD ¶ 37,542 (10th Cir. 1987); Jones v. Flagship International, 793 F.2d 714, 721 n.7, 40 EPD ¶ 36,392 (5th Cir. 1986), cert. denied, 107 S. Ct. 952, 41 EPD ¶ 36,708 (1987).

3) Non-physical Harassment - When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context, and intended target of the remarks. Questions to be explored might include:

- Did the alleged harasser single out the charging party?
- Did the charging party participate?
- What was the relationship between the charging party and the alleged harasser(s)?
- Were the remarks hostile and derogatory?

No one factor alone determines whether particular conduct violates Title VII. As the Guidelines emphasize, the Commission will evaluate the totality of the circumstances. In general, a woman does not forfeit her right to be free from sexual harassment by choosing to work in an atmosphere that has traditionally included vulgar, anti-female language. However, in Rabidue v. Osceola Refining Co., 805 F.2d 611, 41 EPD ¶ 36,643 (6th Cir. 1986), cert. denied, 107 S. Ct. 1983, 42 EPD ¶ 36,984 (1987), the Sixth Circuit rejected the plaintiff's claim of harassment in such a situation.[25]

One of the factors the court found relevant was "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectations of the plaintiff upon voluntarily entering that environment." 805 F.2d at 620. Quoting the district court, the majority noted that in some work environments, "`humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations, and girlie magazines may abound. Title VII was not meant to - - or can - - change this.`" Id. At 620-21. The court also considered the sexual remarks and poster at issue to have a "de minimus effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places." Id. at 622.

The Commission believes these factors rarely will be relevant and agrees with the dissent in Rabidue that a woman does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment. "Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act." 805 F.2d at 626 (Keith, J., dissenting in part and concurring in part). Thus, in a decision disagreeing with Rabidue, a district court found that a hostile environment was established by the presence of pornographic magazines in the workplace and vulgar employee comments concerning them; offensive sexual comments made to and about plaintiff and other female employees by her supervisor; sexually oriented pictures in a company- sponsored movie and slide presentation; sexually oriented pictures and calendars in the workplace; and offensive touching of plaintiff by a co-worker. Barbetta v. Chemlawn Services Corp., 669 F. Supp. 569, 45 EPD ¶ 37,568 (W.D.N.Y. 1987). The court held that the proliferation of pornography and demeaning comments, if sufficiently continuous and pervasive "may be found to create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal coworkers." Barbetta, 669 F. Supp. At 573. The Commission agrees that, depending on the totality of circumstances, such an atmosphere may violate Title VII. See also Waltman v. International Paper Co., 875 F.2d 468, 50 EPD ¶ 39,106 (5th Cir. 1989), in which the 5th Circuit endorsed the Commission's position in its amicus brief that evidence of ongoing sexual graffiti in the workplace, not all of which was directed at the plaintiff, was relevant to her claim of harassment. Bennett v. Coroon & Black Corp., 845 F.2d 104, 46 EPD ¶ 37,955 (5th Cir. 1988) (the posting of obscene cartoons in an office men's room bearing the plaintiff's name and depicting her engaged in crude and deviant sexual activities could create a hostile work environment).

4) Sex-based Harassment - Although the Guidelines specifically address conduct that is sexual in nature, the Commission notes that sex-based harassment - - that is, harassment not involving sexual activity or language - - may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is "sufficiently patterned or pervasive" and directed at employees because of their sex. Hicks v. Gates Rubber Co., 833 F.2d at 1416; McKinney v. Dole, 765 F.2d 1129, 1138, 37 EPD ¶ 35,339 (D.C. Cir. 1985).

Acts of physical aggression, intimidation, hostility or unequal treatment based on sex may be combined with incidents of sexual harassment to establish the existence of discriminatory terms and conditions of employment. Hall v. Gus Construction Co., 842 F.2d 1014; Hicks v. Gates Rubber Co., 833 F. 2d at 1416.

5) Constructive Discharge - Claims of "hostile environment" sexual harassment often are coupled with claims of constructive discharge. If constructive discharge due to a hostile environment is proven, the claim will also become one of "quid pro quo"harassment.[26] It is the position of the Commission and a majority of courts that an employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation. See Derr v. Gulf Oil Corp., 796 F.2d 340, 343-44, 41 EPD ¶ 36,468 (10th Cir. 1986); Goss v. Exxon Office Systems Co., 747 F.2d 885, 888, 35 EPD ¶ 34, 768 (3d Cir. 1984); Nolan v. Cleland, 686 F.2d 806, 812-15, 30 EPD ¶ 33,029 (9th Cir. 1982); Held v. Gulf Oil Co., 684 F.2d 427, 432, 29 EPD ¶ 32,968 (6th Cir. 1982); Clark v. Marsh, 655 F.2d 1168, 1175 n.8, 26 EPD ¶ 32,082 (D.C. Cir. 1981); Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61, 65, 23 EPD ¶ 30,891 (5th cir. 1980); Commission Decision 84-1, CCH EEOC Decision ¶ 6839. However, the Fourth Circuit requires proof that the employer imposed the intolerable conditions with the intent of forcing the victim to leave. See EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672, 30 EPD ¶ 33,269 (4th Cir. 1983). But this case is not a sexual harassment case and the Commission believes it is distinguishable because specific intent is not likely to be present in "hostile environment" cases.

An important factor to consider is whether the employer had an effective internal grievance procedure. (See Section E, Preventive and Remedial Action). The Commission argued in its Vinson brief that if an employee knows that effective avenues of complaint and redress are available, then the availability of such avenues itself becomes a part of the work environment and overcomes, to the degree it is effective, the hostility of the work environment. As Justice Marshall noted in his opinion in Vinson, "Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination ...." 106 S.Ct. at 2411 (Marshall, J., concurring in part and dissenting in part). Similarly, the court of appeals in Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 44 EPD ¶ 37,557 (5TH Cir. 1987), held the plaintiff was not constructively discharged after an incident of harassment by a co-worker because she quit immediately, even though the employer told her she would

not have to work with him again, and she did not give the employer a fair opportunity to demonstrate it could curb the harasser's conduct.

[D. Deleted 6/1999]

E. Preventive and Remedial Action

1) Preventive Action - The EEOC'S Guidelines encourage employers to:

take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f). An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non- supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. See Vinson, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

2) Remedial Action - Since Title VII

"affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" (Vinson), 106 S. Ct. at 2405), an employer is liable for failing to remedy known hostile or offensive work environments. See, e.g., Garziano v. E.I. Dupont de Nemours & Co., 818 F.2d 380, 388, 43 EPD ¶ 37,171 (5th Cir. 1987) (Vinson holds employers have an "affirmative duty to eradicate 'hostile or offensive' work environments"); Bundy v. Jackson, 641 F.2d 934, 947, 24 EPD ¶ 31,439 (D.C. Cir. 1981) (employer violated Title VII by failing to investigate and correct sexual harassment despite notice); Tompkins v. Public Service Electric & Gas Co., 568 F.2d 1044, 1049, 15 EPD 7954 (3d Cir. 1977) (same); Henson v. City of Dundee, 682 F.2d 897, 905, 15 EPD ¶ 32,993 (11th Cir. 1982) (same); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 16 EPD ¶ 8233 (E.D. Mich. 1977) (employer has an affirmative duty to investigate complaints of sexual harassment and to deal appropriately with the offending personnel; "failure to investigate gives tactic support to the discrimination because the absence of sanctions encourages abusive behavior")[27]

When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. See Waltman v. International Paper Co., 875 F.2d at 479 (appropriateness of remedial action will depend on the severity and persistence of the harassment and the effectiveness of any initial remedial steps). Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309-10, 44 EPD ¶ 37,557 (5th Cir. 1987) (the employer's remedy may be "assessed proportionately to the seriousness of the offense"). The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.

Recent Court decisions illustrate appropriate and inappropriate responses by employers. In Barrett v. Omaha National Bank, 726 F.2d 424, 33 EPD ¶ 34,132 (8th Cir. 1984), the victim informed her employer that her co-worker had talked to her about sexual activities and touched her in an offensive manner. Within four days of receiving this information, the employer investigated the charges, reprimanded the guilty employee placed him on probation, and warned him that further misconduct would result in discharge. A second co-worker who had witnessed the harassment was also reprimanded for not intervening on the victim's behalf or reporting the conduct. The court ruled that the employer's response constituted immediate and appropriate corrective action, and on this basis found the employer not liable.

In contrast, in Yates v. Avco Corp., 819 F.2d 630, 43 EPD ¶ 37,086 (6th Cir. 1987), the court found the employer's policy against sexual harassment failed to function effectively. The victim's first-level supervisor had responsibility for reporting and correcting harassment at the company, yet he was the harasser. The employer told the victims not to go to the EEOC. While giving the accused harasser administrative leave pending investigation, the employer made the plaintiffs take sick leave, which was never credited back to them and was recorded in their personnel files as excessive absenteeism without indicating they were absent because of sexual harassment. Similarly, in Zabkowicz v. West Bend Co., 589 F. Supp. 780, 35 EPD ¶ 34,766 (E.D. Wis. 1984), co-workers harassed the plaintiff over a period of nearly four years in a manner the court described as "malevolent" and "outrageous." Despite the plaintiff's numerous complaints, her supervisor took no remedial action other than to hold occasional meetings at which he reminded employees of the company's policy against offensive conduct. The supervisor never conducted an investigation or disciplined any employees until the plaintiff filed an EEOC charge, at which time one of the offending co-workers was discharged and three others were suspended. The court held the employer liable because it failed to take immediate and appropriate corrective action.[28]

When an employer asserts it has taken remedial action, the Commission will investigate to determine whether the action was appropriate and, more important, effective. The EEOC investigator should, of course, conduct an independent investigation of the harassment claim, and the Commission will reach its own conclusion as to whether the law has been violated. If the Commission finds that the harassment has been eliminated, all victims made whole, and preventive measures instituted, the Commission normally

will administratively close the charge because of the employer's prompt remedial action.[29]

_____ Approved: _____
Date R. Gaull Silberman
Vice Chairman

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[1] See, e.g., Miller v. Bank of America, 600 F.2d 211, 20 EPD ¶ 30,086 (9th Cir. 1979) (plaintiff discharged when she refused to cooperate with her supervisor's sexual advances); Barnes v. Costle, 561 F.2d 983, 14 EPD ¶ 7755 (D.C. Cir. 1977) (plaintiff's job abolished after she refused to submit to her supervisor's sexual advances); Williams v. Saxbe, 413 F. Supp. 665, 11EPD 10,840 (D.D.C. 1976), rev'd and remanded on other grounds sub nom. Williams v. Bell, 587 F.2d 1240, 17 EPD ¶ 8605 (D.C. Cir. 1978), on remand sub nom. Williams v. Civiletti, 487 F. Supp. 1387, 23 EPD ¶ 30,916 (D.D.C. 1980) (plaintiff reprimanded and eventually terminated for refusing to submit to her supervisor's sexual demands).

[2] See, e.g., Katz v. Dole, 709 F.2d 251, 32 EPD ¶ 33,639 (4th Cir. 1983) (plaintiff's workplace pervaded with sexual slur, insult, and innuendo and plaintiff subjected to verbal sexual harassment consisting of extremely vulgar and offensive sexually related epithets); Henson v. City of Dundee, 682 F.2d 897, 29 EPD ¶ 32,993 (11th Cir. 1982) (plaintiffs's supervisor subjected her to numerous harangues of demeaning sexual inquiries and vulgarities and repeated requests that she have sexual relations with him); Bundy v. Jackson, 641 F.2d 934, 24 EPD ¶ 31,439 (D.C. Cir. 1981) (plaintiff subjected to sexual propositions by supervisors, and sexual intimidation was "standard operating procedure" in workplace).

[3] To avoid cumbersome use of both masculine and feminine pronouns, this document will refer to harassers as males and victims as females. The Commission recognizes, however, that men may also be victims and women may also be harassers.

[4] For a description of the respective roles of the Commission and other federal agencies in investigating complaints of discrimination in the federal sector, see 29 C.F.R. § 1613.216.

[5] In a subsection entitled "Other related practices," the Guidelines also provide that where an employment opportunity or benefit is granted because of an individual's submission to the employer's sexual advances or requests for sexual favors," the employer may be liable for unlawful sex discrimination against others who were qualified for but were denied the opportunity or benefit. 29 C.F.R. § 1604.11 (g). The law is unsettled as to when a Title VII violation can be established in these circumstances. See DeCintio v. Westchester County Medical Center, 807 F.2d 304, 42 EPD ¶ 36,785 (2d Cir. 1986), cert. Denied, 108 S. Ct. 89, 44 EPD ¶ 37,425 (1987); King v. Palmer, 778 F.2d 878, 39 EPD ¶ 35,808 (D.C. Cir. 1985), decision on remand, 641 F. Supp. 186, 40 EPD ¶ 36,245 (D.D.C. 1986); Broderick v. Ruder, 46 EPD ¶ 37,963 (D.D.C. 1988); Miller v. Aluminum Co. of America, 679 F. Supp. 495, 500-01 (W.D. Pa.), aff'd mem., No. 88-3099 (3d Cir. 1988). However, the Commission recently analyzed the issues in its "Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism" dated January 1990.

[6] The Court stated that the Guidelines, "`while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.`" Vinson, 106 S. Ct. at 2405 (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 141-42, 12 EPD ¶ 11,240 (1976), quoting in turn Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

[7] For a complaint to be "contemporaneous," it should be made while the harassment is ongoing or shortly after it has ceased. For example, a victim of "hostile environment" harassment who resigns her job because working conditions have become intolerable would be considered to have made a contemporaneous complaint if she notified the employer of the harassment at the time of her departure or shortly thereafter. The employer has a duty to investigate and, if it finds the allegations true, to take remedial action including offering reinstatement (see infra Section E).

[8] Even when unwelcomeness is not at issue, the investigation should develop this evidence in order to aid in making credibility determinations (see infra p. 12).

[9] A victim of harassment need not always confront her harasser directly so long as her conduct demonstrates the harasser's behavior is unwelcome. See, e.g., Lipsett v. University of Puerto Rico, 864 F.2d 881, 898, 48 EPD ¶ 38,393 (1st Cir. 1988) ("In some instances a woman may have the responsibility for telling the man directly that his comments or conduct is unwelcome. In other instances, however, a women's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man's conduct is unwelcome"); Commission Decision No. 84-1, CCH EEOC Decisions ¶ 6839 (although charging parties did not confront their supervisor directly about his sexual remarks and gestures for fear of losing their jobs, evidence showing that they demonstrated through comments and actions that his conduct was unwelcome was sufficient to support a finding of harassment).

[10] Investigators and triers of fact rely on objective evidence, rather than subjective, uncommunicated feelings. For example, in Ukarish v. Magnesium Electron, 33 EPD ¶ 34,087 (D.N.J. 1983), the court rejected the plaintiff's claim that she was sexually harassed by her co- worker's language and gestures; although she indicated in her personal diary that she did not welcome the banter, she made no objection and indeed appeared to join in "as one of the boys." Id. At 32,118. In Sardigal v. St. Louis National Stockyards Co.,41 EPD ¶ 36,613 (S.D. Ill. 1986), the plaintiff's allegation was found not credible because she visited her alleged harasser at the hospital and at his brother's home, and allowed him to come into her home alone at night after the alleged harassment occurred. Similarly, in the Vinson case, the district court noted the plaintiff had twice refused transfers to other offices located away from the alleged harasser. (In a particular charge, the significance of a charging party's refusing an offer to transfer will depend upon her reasons for doing so.)

[11] See also Ferguson v. E.I. DuPont deNemours and Co., 560 F. Supp. 1172, 33 EPD ¶ 34,131 (D. Del. 1983) ("sexually aggressive conduct and explicit conversation on the part of the plaintiff may bar a cause of action for [hostile environment] sexual harassment"); Reichman v. Bureau of Affirmative Action, 536 F. Supp. 1149, 1172, 30 FEP Cases 1644 (M.D. Pa. 1982) (where plaintiff behaved "in a very flirtatious and provocative manner" around the alleged harasser, asked him to have dinner at her house on several occasions despite his repeated refusals, and continued to conduct herself in a similar manner after the alleged harassment, she could not claim the alleged harassment was unwelcome).

[12] In Commission Decision No. 84-1, CCH Employment Practices Guide ¶ 6839, the Commission found that active participation in sexual conduct at the workplace, e.g., by "using dirty remarks and telling dirty jokes," may indicate that the sexual advances complained of were not unwelcome. Thus, the Commission found that no harassment occurred with respect to an employee who had joined in the telling of bawdy jokes and the use of vulgar language during her first two months on the job, and failed to provide subsequent notice that the conduct was no longer welcome. By actively participating in the conduct, the charging party had created the impression among her co-workers that she welcomed the sort of sexually oriented banter that she later asserted was objectionable. Simply ceasing to participate was insufficient to show the continuing activity was no longer welcome to her. See also Loftin Boggs v. City of Meridian, 633 F. Supp. 1323, 41 FEP Cases 532 (S.D. Miss. 1986) (plaintiff initially participated in and initiated some of the crude language that was prevalent on the job; if she later found such conduct offensive, she should have conveyed this by her own conduct and her reaction to her co-workers' conduct).

[13] However, if the harassing supervisor engages in conduct that is sufficiently pervasive and work-related, it may place the employer on notice that the conduct constitutes harassment.

[14] As the court said in Henson v. City of Dundee, 682 F.2d at 912 n.25, "In a case of alleged sexual harassment which involves close questions of credibility and subjective interpretation, the existence of corroborative evidence or the lack thereof is likely to be crucial."

[15] In Sardigal v. St. Louis National Stockyards Co., 41 EPD ¶ 36,613 at 44,694 (S.D. Ill. 1986), the plaintiff, a waitress, alleged she was harassed over a period of nine months in a restaurant at noontime, when there was a "constant flow of waitresses or customers" around the area where the offenses allegedly took place. Her allegations were not credited by the district court because no individuals came forward with testimony to support her.

[16] See Commission Decision No. 81-17, CCH EEOC Decisions (1983) ¶ 6757 (violation of Title VII found where charging party alleged that her supervisor made repeated sexual advances toward her; although the supervisor denied the allegations, statements of other employees supported them).

[17] Class complaints in the federal sector are governed by the requirements of 29 C.F.R. § 1613 Subpart F.

[18] In Commission Decision No. 82-13, CCH EEOC Decisions (1983) ¶ 6832, the Commission stated that a "bare assertion" of sexual harassment "cannot stand without some factual support." To the extent this decision suggests a charging party can never prevail based solely on the credibility of her own testimony, that decision is overruled.

[19] See, e.g., Bundy v. Jackson, 641 F.2d 934, 953, 24, EPD ¶ 31,439 (D.C. Cir. 1981).

[20] In Highlander and also in Rabidue v. Osceola Refining Co., 805 F.2d 611, 41 EPD ¶ 36,643 (6th Cir. 1986), cert. denied, 107 S. Ct. 1983, 42 EPD ¶ 36,984 (1987), the Sixth Circuit required an additional showing that the plaintiff suffered some degree of psychological injury. Highlander, 805 F.2d at 650; Rabidue, 805 F.2d at 620. However, it is the Commission's position that it is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the work environment of a reasonable person.

[21] See, e.g., Scott v. Sears, Roebuck and Co., 798 F.2d 210, 214, 41 EPD ¶ 36,439 (7th Cir. 1986) (offensive comments and conduct of co-workers were "too isolated and lacking the repetitive and debilitation effect necessary to maintain a hostile environment claim"); Moylan v. Maries County, 792 F.2d 746, 749 40 EPD ¶ 36,228 (8th Cir. 1986) (single incident or isolated incidents of harassment will not be sufficient to establish a violation; the harassment must be sustained and nontrivial); Downes v. Federal Aviation Administration, 775 F.2d 288, 293, 38 EPD ¶ 35,590 (D.C. Cir. 1985 (Title VII does not create a claim of sexual harassment "for each and every crude joke or sexually explicit remark made on the job...[A] pattern of offensive conduct must be proved..."); Sapp v. City of Warner-Robins, 655 F.Supp. 1043, 43 FEP Cases 486 (M.D. Ga. 1987) (co-worker's single effort to get the plaintiff to go out with him or did not create an abusive working environment); Freedman v. American Standard, 41 FEP Cases 471 (D.N.J. 1986) (plaintiff did not suffer a hostile environment from the receipt of an obscene message from her co-workers and sexual solicitation from one co-worker); Hollis v. Fleetguard, Inc., 44 FEP Cases 1527 (M.D. Tenn. 1987) (plaintiff's co-worker's requests, on four occasions over a four-month period, that she have a sexual affair with him, followed by his coolness toward her and avoidance of her did not constitute a hostile environment; there was not evidence he coerced, pressured, or abused the plaintiff after she rejected his advances).

[22] See Neville v. Taft Broadcasting Co., 42 FEP Cases 1314 (W.D.N.Y. 1987) (one sexual advance, rebuffed by plaintiff, may establish a prima facie case of "quid pro quo" harassment but is not severe enough to create a hostile environment).

[23] The principles for establishing employer liability, set forth in Section D below, are to be applied to cases involving physical contact in the same manner that they are applied in other cases.

[24] See also Gilardi v. Schroeder, 672 F. Supp. 1043, 45 FEP Cases 283 (N.D. Ill. 1986) (plaintiff who was drugged by employer's owner and raped while unconscious, and then was terminated at insistence of owner's wife, was awarded $133,000 in damages for harassment and intentional infliction of emotional distress); Commission Decision No. 83-1, CCH EEOC Decisions (1983) ¶ 6834 (violation found where the harasser forcibly grabbed and kissed charging party while they were alone in a storeroom); Commission Decision No. 84-3, CCH Employment Practices Guide ¶ 6841 (violation found where the harasser slid his hand under the charging party's skirt and squeezed her buttocks).

[25] The alleged harasser, a supervisor of another department who did not supervise plaintiff but worked with her regularly, "was an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff." 805 F.2d at 615. The plaintiff and other female employees were exposed daily to displays of nude or partially clad women in posters in male employees' offices. 805 F.2d at 623- 24 (Keith, J., dissenting in part and concurring in part). Although the employees told management they were disturbed and offended, the employer did not reprimand the supervisor.

[26] However, while an employee's failure to utilize effective grievance procedures will not shield an employer from liability for "quid pro quo" harassment, such failure may defeat a claim of constructive discharge. See discussion of impact of grievance procedures later in this section, and section D(2)(c)(2), below.

[27] The employer's affirmative duty was first enunciated in cases of harassment based on race or national origin. See, e.g., United States v. City of Buffalo, 457 F. Supp. 612, 632-35, 18 EPD ¶ 8899 (W.D.N.Y. 1978), modified in part, 633 F.2d 643, 24 EPD ¶ 31,333 (2d Cir. 1980) (employer violated Title VII by failing to issue strong policy directive against racial slurs and harassment of black police officers, to conduct full investigations, and to take appropriate disciplinary action); EEOC v. Murphy Motor Freight Lines, Inc., 488 Supp. 381, 385-86, 22 EPD ¶ 30,888 (D. Minn. 1980) (defendant violated Title VII because supervisors knew or should have known of co-workers' harassment of black employees, but took inadequate steps to eliminate it).

[28] See also Delgado v. Lehman, 665 F.Supp. 460, 44 EPD ¶ 37,517 (E.D. Va. 1987) (employer failed to conduct follow-up inquiry to determine if hostile environment had dissipated); Salazar v. Church's Fried Chicken, Inc., 44 FEP Cases 472 (S.D. Tex. 1987) (employer's policy inadequate because plaintiff, as a part-time teenage employee, could have concluded a complaint would be futile because the alleged harasser was the roommate of her store manager); Brooms v. Regal Tube Co., 44 FEP Cases 1119 (N.D. Ill. 1987) (employer liable when a verbal reprimand proved ineffective and employer took no further action when informed of the harasser's persistence).

[29] For appropriate procedures, see §§ 4.4(e) and 15 of Volume I of the Compliance Manual.

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[Title 29, Volume 4]
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[Page 186-192]

                              TITLE 29--LABOR

                          CHAPTER XIV--EQUAL
                       EMPLOYMENT OPPORTUNITY
                            COMMISSION

PART 1604--GUIDELINES ON DISCRIMINATION BECAUSE OF SEX--Table of
Contents

Sec. 1604.11  Sexual harassment.

    (a) Harassment on the basis of sex is a violation of section 703 of
title VII.<SUP>1</SUP> Unwelcome sexual advances, requests for sexual
favors, and other verbal or physical conduct of a sexual nature
constitute sexual harassment when (1) submission to such conduct is
made
either explicitly or implicitly a term or condition of an individual's
employment, (2) submission to or rejection of such conduct by an
individual is used as the basis for employment decisions affecting such
individual, or (3) such conduct has the purpose or effect of
unreasonably interfering with an individual's work performance or
creating an intimidating, hostile, or offensive working environment.
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    <SUP>1</SUP>  The principles involved here continue to apply to
race, color, religion or national origin.
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    (b) In determining whether alleged conduct constitutes sexual
harassment, the Commission will look at the record as a whole and at
the
totality of the circumstances, such as the nature of the sexual
advances
and the context in which the alleged incidents occurred. The
determination of the legality of a particular action will be made from
the facts, on a case by case basis.
    (c) [Reserved]
    (d) With respect to conduct between fellow employees, an employer
is
responsible for acts of sexual harassment in the workplace where the
employer (or its agents or supervisory employees) knows or should have
known of the conduct, unless it can show that it took immediate and
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appropriate corrective action.
(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.
(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.
(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors,

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the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

Appendix A to Sec. 1604.**11**--Background Information

The Commission has rescinded Sec. 1604.**11**(c) of the Guidelines on Sexual Harassment, which set forth the standard of employer liability for harassment by supervisors. That section is no longer valid, in light
of the Supreme Court decisions in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998). The Commission has issued a policy document that examines the Faragher and Ellerth decisions and provides detailed guidance on the issue of vicarious liability for harassment by supervisors. EEOC Enforcement Guidance: Vicarious Employer Liability for
Unlawful Harassment by Supervisors (6/18/99), EEOC Compliance Manual (BNA), N:4075 [Binder 3]; also available through EEOC's web site, at www.eeoc.gov., or by calling the EEOC Publications Distribution Center, at 1-800-669-3362 (voice), 1-800-800-3302 (TTY).

(Title VII, Pub. L. 88-352, 78 Stat. 253 (42 U.S.C. 2000e et seq.))

[45 FR 74677, Nov. 10, 1980, as amended at 64 FR 58334, Oct. 29, 1999]

Appendix to Part 1604--Questions and Answers on the Pregnancy Discrimination Act, Public Law 95-555, 92 Stat. 2076 (1978)

Introduction

On October 31, 1978, President Carter signed into law the Pregnancy Discrimination Act (Pub. L. 95-955). The Act is an amendment to title VII of the Civil Rights Act of 1964 which prohibits, among other things,
discrimination in employment on the basis of sex. The Pregnancy Discrimination Act makes it clear that ``because of sex'' or ``on the basis of sex'', as used in title VII, includes ``because of or on the basis of pregnancy, childbirth or related medical conditions.'' Therefore, title VII prohibits discrimination in employment against women affected by pregnancy or related conditions.
The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is
therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion.
She usually cannot be forced to go on leave as long as she can still work. If other employees who take disability leave are entitled to get their jobs back when they are able to work again, so are women who have been unable to work because of pregnancy.
In the area of fringe benefits, such as disability benefits, sick leave and health insurance, the same principle applies. A woman unable to work for pregnancy-related reasons is entitled to disability benefits
or sick leave on the same basis as employees unable to work for other medical reasons. Also, any health insurance provided must cover expenses
for pregnancy-related conditions on the same basis as expenses for other
medical conditions. However, health insurance for expenses arising from abortion is not required except where the life of the mother would be endangered if the fetus were carried to term, or where medical complications have arisen from an abortion.
Some questions and answers about the Pregnancy Discrimination Act follow. Although the questions and answers often use only the term ``employer,'' the Act--and these questions and answers--apply also to unions and other entities covered by title VII.
1. Q. What is the effective date of the Pregnancy Discrimination Act?
A. The Act became effective on October 31, 1978, except that with respect to fringe benefit programs in effect on that date, the Act will take effect 180 days thereafter, that is, April 29, 1979.
To the extent that title VII already required employers to treat persons affected by pregnancy-related conditions the same as persons affected by other medical conditions, the Act does not change employee rights arising prior to October 31, 1978, or April 29, 1979. Most employment practices relating to pregnancy, childbirth and related conditions--whether concerning fringe benefits or other practices--were already controlled by title VII prior to this Act. For example, title VII has always prohibited an employer from firing, or refusing to hire or promote, a woman because of pregnancy or related conditions, and from
failing to accord a woman on pregnancy-related leave the same seniority retention and accrual accorded those on other disability leaves.
2. Q. If an employer had a sick leave policy in effect on October 31, 1978, by what date must the employer bring its policy into compliance with the Act?
A. With respect to payment of benefits, an employer has until April 29, 1979, to bring into compliance any fringe benefit or insurance program, including a sick leave policy, which was in effect on October

31, 1978. However, any such policy or program created after October 31, 1978, must be in compliance when created.

With respect to all aspects of sick leave policy other than payment of benefits, such

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as the terms governing retention and accrual of seniority, credit for vacation, and resumption of former job on return from sick leave, equality of treatment was required by title VII without the Amendment.

3. Q. Must an employer provide benefits for pregnancy-related conditions to an employee whose pregnancy begins prior to April 29, 1979, and continues beyond that date?

A. As of April 29, 1979, the effective date of the Act's requirements, an employer must provide the same benefits for pregnancy-related conditions as it provides for other conditions, regardless of when the pregnancy began. Thus, disability benefits must be paid for all absences on or after April 29, 1979, resulting from pregnancy-related temporary disabilities to the same extent as they are paid for absences resulting from other temporary disabilities. For example, if an employee gives birth before April 29, 1979, but is still unable to work on or after that date, she is entitled to the same disability benefits available to other employees. Similarily, medical insurance benefits must be paid for pregnancy-related expenses incurred on or after April 29, 1979.

If an employer requires an employee to be employed for a predetermined period prior to being eligible for insurance coverage, the period prior to April 29, 1979, during which a pregnant employee has been employed must be credited toward the eligibility waiting period on the same basis as for any other employee.

As to any programs instituted for the first time after October 31, 1978, coverage for pregnancy-related conditions must be provided in the same manner as for other medical conditions.

4. Q. Would the answer to the preceding question be the same if the employee became pregnant prior to October 31, 1978?

A. Yes.

5. Q. If, for pregnancy-related reasons, an employee is unable to perform the functions of her job, does the employer have to provide her an alternative job?

A. An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc. For example, a woman's primary job function may be the operation of a machine, and, incidental to that function, she may carry materials to and from the machine. If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.

6. Q. What procedures may an employer use to determine whether to place on leave as unable to work a pregnant employee who claims she is able to work or deny leave to a pregnant employee who claims that she is disabled from work?

A. An employer may not single out pregnancy-related conditions for special procedures for determining an employee's ability to work. However, an employer may use any procedure used to determine the ability of all employees to work. For example, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statement. Similarly, if an employer allows its employees to obtain doctor's statements from their personal physicians for absences due to other disabilities or return dates from other disabilities, it must accept doctor's statements from personal physicians for absences and return dates connected with pregnancy-related disabilities.

7. Q. Can an employer have a rule which prohibits an employee from returning to work for a predetermined length of time after childbirth?

A. No.

8. Q. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, may her employer require her to remain on leave until after her baby is born?

A. No. An employee must be permitted to work at all times during pregnancy when she is able to perform her job.

9. Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?

A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons.

10. Q. May an employer's policy concerning the accrual and crediting of seniority during absences for medical conditions be different for employees affected by pregnancy-related conditions than for other employees?

A. No. An employer's seniority policy must be the same for employees absent for pregnancy-related reasons as for those absent for other medical reasons.

11. Q. For purposes of calculating such matters as vacations and pay increases, may an employer credit time spent on leave for pregnancy-related reasons differently than time spent on leave for other reasons?

A. No. An employer's policy with respect to crediting time for the purpose of calculating such matters as vacations and pay increases cannot treat employees on leave for pregnancy-related reasons less favorably than employees on leave for other reasons.

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For example, if employees on leave for medical reasons are credited with the time spent on leave when computing entitlement to vacation or pay raises, an employee on leave for pregnancy-related disability is entitled to the same kind of time credit.

12. Q. Must an employer hire a woman who is medically unable,

because of a pregnancy-related condition, to perform a necessary function of a job?

A. An employer cannot refuse to hire a women because of her pregnancy-related condition so long as she is able to perform the major functions necessary to the job. Nor can an employer refuse to hire her because of its preferences against pregnant workers or the preferences of co-workers, clients, or customers.

13. Q. May an employer limit disability benefits for pregnancy-related conditions to married employees?

A. No.

14. Q. If an employer has an all female workforce or job classification, must benefits be provided for pregnancy-related conditions?

A. Yes. If benefits are provided for other conditions, they must also be provided for pregnancy-related conditions.

15. Q. For what length of time must an employer who provides income maintenance benefits for temporary disabilities provide such benefits for pregnancy-related disabilities?

A. Benefits should be provided for as long as the employee is unable to work for medical reasons unless some other limitation is set for all other temporary disabilities, in which case pregnancy-related disabilities should be treated the same as other temporary disabilities.

16. Q. Must an employer who provides benefits for long-term or permanent disabilities provide such benefits for pregnancy-related conditions?

A. Yes. Benefits for long-term or permanent disabilities resulting from pregnancy-related conditions must be provided to the same extent that such benefits are provided for other conditions which result in long-term or permanent disability.

17. Q. If an employer provides benefits to employees on leave, such as installment purchase disability insurance, payment of premiums for health, life or other insurance, continued payments into pension, saving or profit sharing plans, must the same benefits be provided for those on leave for pregnancy-related conditions?

A. Yes, the employer must provide the same benefits for those on leave for pregnancy-related conditions as for those on leave for other reasons.

18. Q. Can an employee who is absent due to a pregnancy-related disability be required to exhaust vacation benefits before receiving sick leave pay or disability benefits?

A. No. If employees who are absent because of other disabling causes receive sick leave pay or disability benefits without any requirement that they first exhaust vacation benefits, the employer cannot impose this requirement on an employee absent for a pregnancy-related cause.

18 (A). Q. Must an employer grant leave to a female employee for chidcare purposes after she is medically able to return to work following leave necessitated by pregnancy, childbirth or related medical conditions?

A. While leave for childcare purposes is not covered by the Pregnancy Discrimination Act, ordinary title VII principles would require that leave for childcare purposes be granted on the same basis as leave which is granted to employees for other non-medical reasons. For example, if an employer allows its employees to take leave without pay or accrued annual leave for travel or education which is not job related, the same type of leave must be granted to those who wish to remain on leave for infant care, even though they are medically able to return to work.

19. Q. If State law requires an employer to provide disability insurance for a specified period before and after childbirth, does compliance with the State law fulfill the employer's obligation under the Pregnancy Discrimination Act?

A. Not necessarily. It is an employer's obligation to treat employees temporarily disabled by pregnancy in the same manner as employees affected by other temporary disabilities. Therefore, any restrictions imposed by State law on benefits for pregnancy-related disabilities, but not for other disabilities, do not excuse the employer from treating the individuals in both groups of employees the same. If, for example, a State law requires an employer to pay a maximum of 26 weeks benefits for disabilities other than pregnancy-related ones but only six weeks for pregnancy-related disabilities, the employer must provide benefits for the additional weeks to an employee disabled by pregnancy-related conditions, up to the maximum provided other disabled employees.

20. Q. If a State or local government provides its own employees income maintenance benefits for disabilities, may it provide different benefits for disabilities arising from pregnancy-related conditions than for disabilities arising from other conditions?

A. No. State and local governments, as employers, are subject to the Pregnancy Discrimination Act in the same way as private employers and must bring their employment practices and programs into compliance with the Act, including disability and health insurance programs.

21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

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A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of other dependents as long as it excludes the pregnancy-related conditions of the dependents of male and female employees equally.

22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for

the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male
employee's spouse must be covered at the 50 percent level.

23. Q. May an employer offer optional dependent coverage which excludes pregnancy-related medical conditions or offers less coverage for pregnancy-related medical conditions where the total premium for the
optional coverage is paid by the employee?

A. No. Pregnancy-related medical conditions must be treated the same
as other medical conditions under any health or disability insurance or sick leave plan available in connection with employment, regardless of who pays the premiums.

24. Q. Where an employer provides its employees a choice among several health insurance plans, must coverage for pregnancy-related conditions be offered in all of the plans?

A. Yes. Each of the plans must cover pregnancy-related conditions. For example, an employee with a single coverage policy cannot be forced to purchase a more expensive family coverage policy in order to receive coverage for her own pregnancy-related condition.

25. Q. On what basis should an employee be reimbursed for medical expenses arising from pregnancy, childbirth or related conditions?

A. Pregnancy-related expenses should be reimbursed in the same manner as are expenses incurred for other medical conditions. Therefore,
whether a plan reimburses the employees on a fixed basis, or a percentage of reasonable and customary charge basis, the same basis should be used for reimbursement of expenses incurred for pregnancy-related conditions. Furthermore, if medical costs for pregnancy-related conditions increase, reevaluation of the reimbursement level should be conducted in the same manner as are cost reevaluations of increases for other medical conditions.

Coverage provided by a health insurance program for other conditions
must be provided for pregnancy-related conditions. For example, if a plan provides major medical coverage, pregnancy-related conditions must be so covered. Similarily, if a plan covers the cost of a private room for other conditions, the plan must cover the cost of a private room for
pregnancy-related conditions. Finally, where a health insurance plan covers office visits to physicians, pre-natal and post-natal visits must
be included in such coverage.

26. Q. May an employer limit payment of costs for pregnancy-related medical conditions to a specified dollar amount set forth in an insurance policy, collective bargaining agreement or other statement of benefits to which an employee is entitled?

A. The amounts payable for the costs incurred for pregnancy-related conditions can be limited only to the same extent as are costs for other
conditions. Maximum recoverable dollar amounts may be specified for pregnancy-related conditions if such amounts are similarly specified for
other conditions, and so long as the specified amounts in all instances cover the same proportion of actual costs. If, in addition to the scheduled amount for other procedures, additional costs are paid for, either directly or indirectly, by the employer, such additional payments
must also be paid for pregnancy-related procedures.

27. Q. May an employer impose a different deductible for payment of costs for pregnancy-related medical conditions than for costs of other medical conditions?

A. No. Neither an additional deductible, an increase in the usual deductible, nor a larger deductible can be imposed for coverage for pregnancy-related medical costs, whether as a condition for inclusion of
pregnancy-related costs in the policy or for payment of the costs when incurred. Thus, if pregnancy-related costs are the first incurred under the policy, the employee is required to pay only the same deductible as would otherwise be required had other medical costs been the first incurred. Once this deductible has been paid, no additional deductible can be required for other medical procedures. If the usual deductible has already been paid for

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other medical procedures, no additional deductible can be required when pregnancy-related costs are later incurred.

28. Q. If a health insurance plan excludes the payment of benefits for any conditions existing at the time the insured's coverage becomes effective (pre-existing condition clause), can benefits be denied for medical costs arising from a pregnancy existing at the time the coverage
became effective?

A. Yes. However, such benefits cannot be denied unless the pre-existing condition clause also excludes benefits for other pre-existing conditions in the same way.

29. Q. If an employer's insurance plan provides benefits after the insured's employment has ended (i.e. extended benefits) for costs connected with pregnancy and delivery where conception occurred while the insured was working for the employer, but not for the costs of any other medical condition which began prior to termination of employment, may an employer (a) continue to pay these extended benefits for pregnancy-related medical conditions but not for other medical conditions, or (b) terminate these benefits for pregnancy-related conditions?

A. Where a health insurance plan currently provides extended benefits for other medical conditions on a less favorable basis than for
pregnancy-related medical conditions, extended benefits must be provided
for other medical conditions on the same basis as for pregnancy-related medical conditions. Therefore, an employer can neither continue to provide less benefits for other medical conditions nor reduce benefits currently paid for pregnancy-related medical conditions.

30. Q. Where an employer's health insurance plan currently requires total disability as a prerequisite for payment of extended benefits for

other medical conditions but not for pregnancy-related costs, may the employer now require total disability for payment of benefits for pregnancy-related medical conditions as well?

A. Since extended benefits cannot be reduced in order to come into compliance with the Act, a more stringent prerequisite for payment of extended benefits for pregnancy-related medical conditions, such as a requirement for total disability, cannot be imposed. Thus, in this instance, in order to comply with the Act, the employer must treat other medical conditions as pregnancy-related conditions are treated.

31. Q. Can the added cost of bringing benefit plans into compliance with the Act be apportioned between the employer and employee?

A. The added cost, if any, can be apportioned between the employer and employee in the same proportion that the cost of the fringe benefit plan was apportioned on October 31, 1978, if that apportionment was nondiscriminatory. If the costs were not apportioned on October 31, 1978, they may not be apportioned in order to come into compliance with the Act. However, in no circumstance may male or female employees be required to pay unequal apportionments on the basis of sex or pregnancy.

32. Q. In order to come into compliance with the Act, may an employer reduce benefits or compensation?

A. In order to come into compliance with the Act, benefits or compensation which an employer was paying on October 31, 1978 cannot be reduced before October 31, 1979 or before the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

Where an employer has not been in compliance with the Act by the times specified in the Act, and attempts to reduce benefits, or compensation, the employer may be required to remedy its practices in accord with ordinary title VII remedial principles.

33. Q. Can an employer self-insure benefits for pregnancy-related conditions if it does not self-insure benefits for other medical conditions?

A. Yes, so long as the benefits are the same. In measuring whether benefits are the same, factors other than the dollar coverage paid should be considered. Such factors include the range of choice of physicians and hospitals, and the processing and promptness of payment of claims.

34. Q. Can an employer discharge, refuse to hire or otherwise discriminate against a woman because she has had an abortion?

A. No. An employer cannot discriminate in its employment practices against a woman who has had an abortion.

35. Q. Is an employer required to provide fringe benefits for abortions if fringe benefits are provided for other medical conditions?

A. All fringe benefits other than health insurance, such as sick leave, which are provided for other medical conditions, must be provided for abortions. Health insurance, however, need be provided for abortions only where the life of the woman would be endangered if the fetus were carried to term or where medical complications arise from an abortion.

36. Q. If complications arise during the course of an abortion, as for instance excessive hemorrhaging, must an employer's health insurance plan cover the additional cost due to the complications of the abortion?

A. Yes. The plan is required to pay those additional costs attributable to the complications of the abortion. However, the employer is not required to pay for the abortion itself, except where the life of the mother would be endangered if the fetus were carried to term.

37. Q. May an employer elect to provide insurance coverage for abortions?

A. Yes. The Act specifically provides that an employer is not precluded from providing

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benefits for abortions whether directly or through a collective bargaining agreement, but if an employer decides to cover the costs of abortion, the employer must do so in the same manner and to the same degree as it covers other medical conditions.

[44 FR 23805, Apr. 20, 1979]

Sexual Harassment

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and must stop. The victim should use any employer complaint mechanism or grievance system available.

When investigating allegations of sexual harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

Statistics

In Fiscal Year 2004, EEOC received 13,136 charges of sexual harassment. 15.1% of those charges were filed by males. EEOC resolved 13,786 sexual harassment charges in FY 2003 and recovered $37.1 million in monetary benefits for charging parties and other aggrieved individuals (not including monetary benefits obtained through litigation).

Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992 - FY 2004

The following chart represents the total number of charge receipts filed and resolved under Title VII alleging sexual harassment discrimination as an issue.

The data in the sexual harassment table reflect charges filed with EEOC and the state and local Fair Employment Practices agencies around the country that have a work sharing agreement with the Commission.

The data are compiled by the Office of Research, Information, and Planning from EEOC's Charge Data System - national data base.

	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	2
Receipts	10,532	11,908	14,420	15,549	15,342	15,889	15,618	15,222	15,836	15,475	14,396	13,566	13,
% of Charges Filed by Males	9.1%	9.1%	9.9%	9.9%	10.0%	11.6%	12.9%	12.1%	13.6%	13.7%	14.9%	14.7%	15
Resolutions	7,484	9,971	11,478	13,802	15,861	17,333	17,115	16,524	16,726	16,383	15,792	14,534	13,
Resolutions By Type													
Settlements	1,029	1,132	1,075	978	1,082	1,178	1,218	1,361	1,676	1,568	1,692	1,783	1,
	13.7%	11.4%	9.4%	7.1%	6.8%	6.8%	7.1%	8.2%	10.0%	9.6%	10.7%	12.3%	11
Withdrawals w/Benefits	705	1,026	1,118	1,280	1,223	1,267	1,311	1,299	1,389	1,454	1,235	1,300	1,
	9.4%	10.3%	9.7%	9.3%	7.7%	7.3%	7.7%	7.9%	8.3%	8.9%	7.8%	8.9%	8
Administrative Closures	3,007	4,121	5,240	6,898	6,826	6,908	6,296	5,412	4,632	4,306	3,957	3,600	3,
	40.2%	41.3%	45.7%	50.0%	43.0%	39.9%	36.8%	32.8%	27.7%	26.3%	25.1%	24.8%	23
No Reasonable Cause	2,458	3,326	3,525	4,195	6,153	7,172	7,243	7,272	7,370	7,309	7,445	6,703	6,
	32.8%	33.4%	30.7%	30.4%	38.8%	41.4%	42.3%	44.0%	44.1%	44.6%	47.1%	46.1%	48
Reasonable Cause	285	366	520	451	577	808	1,047	1,180	1,659	1,746	1,463	1,148	1,
	3.8%	3.7%	4.5%	3.3%	3.6%	4.7%	6.1%	7.1%	9.9%	10.7%	9.3%	7.9%	7
Successful Conciliations	152	180	220	174	232	298	357	383	524	551	455	350	
	2.0%	1.8%	1.9%	1.3%	1.5%	1.7%	2.1%	2.3%	3.1%	3.4%	2.9%	2.4%	2
Unsuccessful Conciliations	133	186	300	277	345	510	690	797	1,135	1,195	1,008	798	
	1.8%	1.9%	2.6%	2.0%	2.2%	2.9%	4.0%	4.8%	6.8%	7.3%	6.4%	5.5%	5
Merit Resolutions	2,019	2,524	2,713	2,709	2,882	3,253	3,576	3,840	4,724	4,768	4,390	4,231	3,
	27.0%	25.3%	23.6%	19.6%	18.2%	18.8%	20.9%	23.2%	28.2%	29.1%	27.8%	29.1%	27
Monetary Benefits (Millions)*	$12.7	$25.1	$22.5	$24.3	$27.8	$49.5	$34.3	$50.3	$54.6	$53.0	$50.3	$50.0	$37

** Does not include monetary benefits obtained through litigation.*

The total of individual percentages may not always sum to 100% due to rounding.

EEOC total workload includes charges carried over from previous fiscal years, new charge receipts and charges transferred to EEOC from Fair Employment Practice Agencies (FEPAs). Resolution of charges each year may therefore exceed receipts for that year because workload being resolved is drawn from a combination of pending, new receipts and FEPA transfer charges rather than from new charges only.

Definitions of Terms

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