

The Federal Employee Advocate

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EEOC GUIDANCE TO SMALL EMPLOYERS ON SEXUAL HARASSMENT

The Federal Employee Advocate is publishing here the EEOC's Guidance to Small Employers on Sexual Harassment, modified by the EEOC April 1, 2010. The law firm of Josh F. Bowers, P.C. has extensive experience representing Federal employees who suffered sexual harassment in the workplace.

Disclaimer

The legal information in this article is intended as a general overview of this issue and is subject to change; it is not meant to serve as legal advice in any particular situation. The law is in a constant state of change as Congress amends statutes; Federal Agencies issue and amend regulations, and the courts issue decisions interpreting the laws and regulations. We recommend you consult a licensed lawyer who is knowledgeable about the area of law in question before you take action to address a legal matter.

The U.S. Equal Employment Opportunity Commission

Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors

Title VII of the Civil Rights Act (Title VII) prohibits harassment of an employee based on race, color, sex, religion, or national origin. The Age Discrimination in Employment Act (ADEA) prohibits harassment of employees who are 40 or older on the basis of age, the Americans with Disabilities Act (ADA) prohibits harassment based on disability, and the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits harassment of an employee based on genetic information. All of the anti-discrimination statutes enforced by the EEOC prohibit retaliation for complaining of discrimination or participating in complaint proceedings.

The Supreme Court issued two major decisions in June of 1998 that explained when employers will be held legally responsible for unlawful harassment by supervisors. The EEOC's Guidance on Employer Liability for Harassment by Supervisors examines those decisions and provides practical guidance regarding the duty of employers to prevent and correct harassment and the duty of employees to avoid harassment by using their employers' complaint procedures.

1. When does harassment violate federal law?

- Harassment violates federal law if it involves discriminatory treatment based on race, color, sex (with or without sexual conduct), religion, national origin, age, disability, genetic information, or because the employee opposed job discrimination or participated in an investigation or complaint proceeding under the EEO statutes. Federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not extremely serious. The conduct must be sufficiently frequent or severe to create a hostile work environment or result in a "tangible employment action," such as hiring, firing, promotion, or demotion.

2. Does the guidance apply only to sexual harassment?

- No, it applies to *all* types of unlawful harassment.

3. When is an employer legally responsible for harassment by a supervisor?

- An employer is always responsible for harassment by a supervisor that culminated in a tangible employment action. If the harassment did not lead to a tangible employment action, the employer is liable unless it proves that: 1) it exercised reasonable care to prevent and promptly correct any harassment; *and* 2) the employee unreasonably failed to complain to management or to avoid harm otherwise

4. Who qualifies as a "supervisor" for purposes of employer liability?

- An individual qualifies as an employee's "supervisor" if the individual has the authority to recommend tangible employment decisions affecting the employee.

5. What is a "tangible employment action"?

- A "tangible employment action" means a significant change in employment status. Examples include hiring, firing, promotion,

demotion, undesirable reassignment, a decision causing a significant change in benefits, compensation decisions, and work assignment.

6. How might harassment culminate in a tangible employment action?

- This might occur if a supervisor fires or demotes a subordinate because she rejects his sexual demands, or promotes her because she submits to his sexual demands.

7. What should employers do to prevent and correct harassment?

- Employers should establish, distribute to all employees, and enforce a policy prohibiting harassment and setting out a procedure for making complaints. In most cases, the policy and procedure should be in writing.
- Small businesses may be able to discharge their responsibility to prevent and correct harassment through less formal means. For example, if a business is sufficiently small that the owner maintains regular contact with all employees, the owner can tell the employees at staff meetings that harassment is prohibited, that employees should report such conduct promptly, and that a complaint can be brought "straight to the top." If the business conducts a prompt, thorough, and impartial investigation of any complaint that arises and undertakes swift and appropriate corrective action, it will have fulfilled its responsibility to "effectively prevent and correct harassment."

8. What should an anti-harassment policy say?

- An employer's anti-harassment policy should make clear that the employer will not tolerate harassment based on race, sex, religion, national origin, age, disability, or genetic information, or harassment based on opposition to discrimination or participation in complaint proceedings. The policy should also state that the employer will not tolerate retaliation against anyone who complains of harassment or who participates in an investigation.

9. What are important elements of a complaint procedure

- The employer should encourage employees to report harassment to management before it becomes severe or pervasive.
- The employer should designate more than one individual to take complaints, and should ensure that these individuals are in

accessible locations. The employer also should instruct all of its supervisors to report complaints of harassment to appropriate officials.

- The employer should assure employees that it will protect the confidentiality of harassment complaints to the extent possible.

10. Is a complaint procedure adequate if employees are instructed to report harassment to their immediate supervisors?

- No, because the supervisor may be the one committing harassment or may not be impartial. It is advisable for an employer to designate at least one official outside an employee's chain of command to take complaints, to assure that the complaint will be handled impartially.

11. How should an employer investigate a harassment complaint?

- An employer should conduct a prompt, thorough, and impartial investigation. The alleged harasser should not have any direct or indirect control over the investigation.
- The investigator should interview the employee who complained of harassment, the alleged harasser, and others who could reasonably be expected to have relevant information. The Guidance provides examples of specific questions that may be appropriate to ask.
- Before completing the investigation, the employer should take steps to make sure that harassment does not continue. If the parties have to be separated, then the separation should not burden the employee who has complained of harassment. An involuntary transfer of the complainant could constitute unlawful retaliation. Other examples of interim measures are making scheduling changes to avoid contact between the parties or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.

12. How should an employer correct harassment?

- If an employer determines that harassment occurred, it should take immediate measures to stop the harassment and ensure that it does not recur. Disciplinary measures should be proportional to the seriousness of the offense. The employer also should correct the effects of the harassment by, for example, restoring leave taken because of the harassment and expunging negative evaluations in the employee's personnel file that arose from the harassment.

13. Are there other measures that employers should take to prevent and correct harassment?

- An employer should correct harassment that is clearly unwelcome regardless of whether a complaint is filed. For example, if there is graffiti in the workplace containing racial or sexual epithets, management should not wait for a complaint before erasing it.
- An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedures.
- An employer should screen applicants for supervisory jobs to see if they have a history of engaging in harassment. If so, and the employer hires such a candidate, it must take steps to monitor actions taken by that individual in order to prevent harassment.
- An employer should keep records of harassment complaints and check those records when a complaint of harassment is made to reveal any patterns of harassment by the same individuals.

14. Does an employee who is harassed by his or her supervisor have any responsibilities?

- Yes. The employee must take reasonable steps to avoid harm from the harassment. Usually, the employee will exercise this responsibility by using the employer's complaint procedure.

15. Is an employer legally responsible for its supervisor's harassment if the employee failed to use the employer's complaint procedure?

- No, unless the harassment resulted in a tangible employment action or unless it was reasonable for the employee not to complain to management. An employee's failure to complain would be reasonable, for example, if he or she had a legitimate fear of retaliation. The employer must prove that the employee acted unreasonably.

16. If an employee complains to management about harassment, should he or she wait for management to complete the investigation before filing a charge with EEOC?

- It may make sense to wait to see if management corrects the harassment before filing a charge. However, if management does not act promptly to investigate the complaint and undertake corrective action, then it may be appropriate to file a charge. The deadline for filing an EEOC charge is either 180 or 300 days after

the last date of alleged harassment, depending on the state in which the allegation arises. **This deadline is *not* extended because of an employer's internal investigation of the complaint.**