

Administrative Resource

Sample Questions for Conducting the Internal Sexual Harassment in the Workplace Investigation

Introduction

The person charged with conducting the internal sexual harassment investigation for a School District must ascertain whether the sexual conduct is unwelcome and whether it affects a term or condition of employment. 29 C.F.R. ¶ 1604.11(a). The questions that follow are designed to help the investigator uncover the evidence relevant to these inquiries. They are not all-inclusive and the exact questions must be designed for the specific allegations in each case.

I. Is The Conduct Complained Of Unwelcome Sexual Conduct?

"Unwelcome sexual conduct" is that verbal or physical sexual conduct which the employee did not solicit or incite and that which the employee regarded as undesirable or offensive. Hensen v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). It is difficult to discern because the line between welcome and unwelcome sexual conduct is often quite fuzzy. The EEOC evaluates the issue of welcomeness in sexual harassment cases on a case-by-case basis. It looks at the record as a whole, considering the totality of the circumstances. The wise investigator will do the same.

Below are sample questions that can be used to formulate actual questions for this part of the investigation.

1. Who is the alleged sexual harasser? What is his/her name? Is he/she a co-worker or a supervisor?
2. Is the sexual conduct complained of verbal or physical?
3. If physical, describe with specificity the nature of the physical conduct, including where the complainant was touched, when, how often, how he/she was approached, who witnessed the physical conduct, and where was the complainant when the conduct took place?
4. Was medical treatment required? If so, when was he/she treated, how often, by whom, where was he/she treated, and what was the diagnosis?
5. If medical treatment was not required, was a contemporaneous complaint or protest made to anyone employed by the District or to anyone else? If so, to whom did he/she complain, when was the complaint made, what was stated therein and were there any witnesses to this or these complaints?

6. If the unwelcome conduct was verbal, what was stated, when, how often, where were the parties when the statements were made, and who witnessed the statements being made?
7. Was medical treatment required to address the impact of the verbal conduct? If so, when was he/she treated, how often, by whom, where was he/she treated, and what was the diagnosis?
8. If medical treatment was not required to address the impact of the verbal conduct, was a contemporaneous complaint or protest made to anyone employed by the employer or to anyone else? If so, to whom did he/she complain, when was the complaint made, what was stated therein and were there any witnesses to this or these complaints?
9. What was the complainant's response to the physical or verbal conduct? Did he/she tell him/her to stop? Did he/she complain to others about his/her behavior? Did he/she ask co-workers, supervisors or managers to make the harassment stop? If so, obtain all relevant details.
10. Did the complainant engage in any conduct with the alleged harasser that could have encouraged his/her behavior? If so, what was the conduct, when and where did it occur, how often and who witnessed it?
11. Did the complainant and the alleged harasser have a prior consensual relationship? If so, how long did it last and when did that relationship end?
12. Did the complainant make the alleged harasser aware at the point when the sexual advances became unwelcome? If so, when, how was this done, what was communicated to the alleged harasser, and were there any witnesses?
13. Did the complainant complain about the harassment to the alleged harasser, his/her supervisors, other managers or others? If so, when were the complaints made, what was said, who was present, and what was the response to each complaint?
14. If no complaints about the alleged harassment were made, why not?
15. What other actions, if any, did the complainant take to indicate to the alleged harasser that his/her conduct was unwelcome?
16. Did the complainant engage in any conduct which elicited the unwelcome conduct of the alleged harasser? For example, how did he/she demean him or herself in the workplace, how did he/she dress, did he/she use sexual and provocative language, did he/she engage in sexually provocative conduct, and was this conduct directed towards the alleged harasser?

17. If they lack knowledge about the harassment, did co-workers, supervisors or managers notice any changes in charging party's behavior at work or in the alleged harasser's treatment of the charging party?
18. Has the alleged harasser been accused of sexual harassment by other employees? If so, when, and were the allegations investigated? If so, what was the result of the investigation, and what was management's response, i.e., what remedy was imposed?

II. Did the Work Environment Become Hostile?

To ascertain whether unwelcome sexual conduct rises to the level of a "hostile environment" in violation of Title VII, the major inquiry is whether the conduct "unreasonably interferes with an individual's performance" or creates "an intimidating, hostile, or offensive working environment." 29 C.F.R. ¶ 1601.11(a)3. Thus, trivial or annoying conduct such as sexual flirtation or innuendo or vulgar language would probably not establish a hostile environment. The challenged conduct must substantially effect the work environment of a reasonable person for a violation to be found. [Harris v. Forklift Systems, 114 S.Ct. 367 (1993).] Zabkowicz v. West Bend Co., 589 F.Supp. 780, 784 (E.D. Wisc. 1984).

Consider the following additional questions for this part of the inquiry:

1. What effect, if any, did the alleged harassment have upon the complainant's ability to perform his/her job?
2. What effect, if any, did the alleged harassment have upon the complainant's mental or physical health or well-being?
3. What was the sexual character of the work environment before the complainant entered the environment? Were sexual comments and actions common? If so, what types, when did they occur? Who was involved? Were supervisors involved or just co-workers?
4. Did the character of the workplace change after complainant joined the workplace? If so, how? What was complainant's behavior? How did the accused and other co-workers or supervisors respond to complainant's behavior?
5. Was the complaint of verbal or physical behavior directed at persons other than complainant? If so, who were they? What conduct was directed towards them, when, how frequently, who was present, where did it occur and who witnessed it? How did these persons react to the physical or verbal conduct?
6. Did the alleged harasser single out the charging party? If so, how, when, where, and why?
7. Did others join in perpetrating the harassment? If so, who? What was done; when,

where, who witnessed the conduct, and were others harassed too?

8. If the complaint of conduct was verbal, what were the remarks? Were they hostile and derogatory? What was the frequency and context of the comments? Were the parties in or out of the workplace when the comments were made?
9. Was the alleged harassment observed by supervisors, managers, or other co-workers? If so, by whom, when, where, and what was observed?
10. Was the alleged harassment observed by former employees or others outside the workplace? If so, by whom, when, where, and what was seen?

III. Was The Harassment *Quid Pro Quo*?

In order to properly ascertain the employer's liability for sexual harassment, it is important to distinguish between hostile environment cases and those involving *quid pro quo* harassment. An employer will always be held responsible for acts of *quid pro quo* harassment since this conduct occurs in situations in which a supervisor is exercising authority over terms and conditions of employment granted to him/her by his/her employer. Liability will be assessed for *quid pro quo* sexual harassment unless the employer took definite and prompt action to stop the harassment.

In hostile environment cases, on the other hand, employers are liable where they knew or should have known of the alleged misconduct.

To further ferret out any *quid pro quo* harassment and the employer's response to it, include questions such as the following:

1. What sexual conduct is the supervisor accused of? When, where, how often did it occur, and who observed?
2. Was the supervisor asked by the complainant to stop? If so, when, where, how often, and who observed?
3. If a complaint of the alleged harassment by the supervisor was made to another supervisor or managerial employee, what acts, if any, did he or she take to stop the on-going harassment?
4. If no complaint was made, did the complainant's behavior change in any way that would have put management on notice that he/she was being sexually harassed?
5. If no complaint was made, did the complainant's co-workers engage in any conduct that would have put management on notice that he/she was being sexually harassed?
6. How was the complainant's employment affected by the alleged supervisor's harassment? Was he/she denied a salary increase, a promotion, a job transfer, etc.? If so, when?

7. Was the complainant treated differently from similarly situated employees in regard to the denied salary increase, promotion, job transfer, etc.? If so, who was treated differently by this same supervisor?
8. Were the supervisor's sexual attentions to other employees different from those directed to the complainant? If so, how? Who witnessed these differences?
9. Was anything done by management to stop the supervisor's misconduct? If so, what, when, and was this communicated to the victim?
10. Did the alleged misconduct occur on or off the employee's premises? Were there any witnesses? If so, who and what was observed?

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