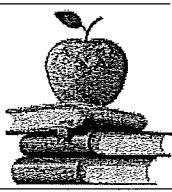


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Harassment Investigations: Do You Know?
Best practices for investigating employee misconduct

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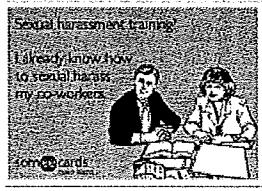
In Sum

1. The definition: *Is it harassment, or is my colleague just a jerk?*
2. Identifying the investigator
3. Preparing to investigate
4. Witness interviews
5. Pause before concluding
6. The written report
7. Consequences
 1. For the alleged harasser
 2. For the alleged victim
 3. For the school district

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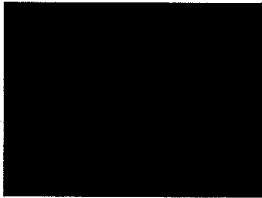
Harassment: What *Not* to Do at Work!



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An Example

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It's Really No Laughing Matter

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- Poll conducted by the Workplace Bullying Institute: 37% of U.S. workers - 54 million people - believe they have been subjected to a workplace "hostility."
 - EEOC finds cause in roughly 6% of sexual harassment cases.
 - Where's the disconnect?
- While "hostile workplace" and "hostile work environment" are common phrases, few circumstances meet the legal definition.
- There is no federal or state law that *explicitly and generally* outlaws "bullying" at work or "hostile" work environments.
- To meet the legal definition, the harassment generally must be related to a protected characteristic(s).





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It's Really No Laughing Matter



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- No harassment based on
 - Age (The Age Discrimination in Employment Act)
 - Race (Title VII of the Civil Rights Act of 1964)
 - Color (Title VII of the Civil Rights Act of 1964)
 - National origin (Title VII of the Civil Rights Act of 1964)
 - Sex (Title VII of the Civil Rights Act of 1964)
 - Disability and Genetic Information (Americans With Disabilities Act, Rehabilitation Act of 1973, The Genetic Information Nondiscrimination Act)
 - Veteran status (Uniformed Services Employment and Reemployment Rights Act (USERRA))
 - Religion (Title VII of the Civil Rights Act of 1964)

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 EEOC	Focus on Gender Identity and Transgender Discrimination
 DOJ	<p>“ I have determined that the best reading of Title VII's prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status. ”</p>
 OSHA	<p>Previous U.S. Attorney General Eric Holder in December 2014 Memorandum</p>
Pursuit of Discrimination Cases	

Protected Class Harassment, Generally	
<ul style="list-style-type: none"> Prohibited harassment occurs when unwelcome physical, verbal, or nonverbal conduct is <i>based upon an individual's protected class</i> and when the conduct has the purpose or effect of: <ul style="list-style-type: none"> interfering with the individual's work; of creating an intimidating, hostile, or offensive working, and/or learning environment; or of interfering with one's ability to participate in or benefit from an educational program or activity. For example, harassment may occur where conduct is directed at the characteristics of a person's race or color, such as racial slurs, nicknames implying stereotypes, epithets, and/or negative references relative to racial customs. 	
<small>squirepattonboggs.com</small>	<small>8</small>

What Is Sexual Harassment?	
<ul style="list-style-type: none"> When you think of the term "sexual harassment," what comes to mind? Definition <ul style="list-style-type: none"> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . 	
	
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What Is Sexual Harassment? **SQUIRE**
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- Submission is made a term or condition of employment
or
- Submission is used as a basis for employment decisions
or
- It 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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Forms of Sexual Harassment **SQUIRE**
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- Two Forms of Sexual Harassment
 1. Quid Pro Quo (This for that)
 2. Hostile Environment

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Quid Pro Quo **SQUIRE**
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- "You scratch my back and I'll promote you." (or "I won't fire you.")
- Unwelcome words or conduct, submission to which is a condition of employment or rejection of which may result in adverse employment action.

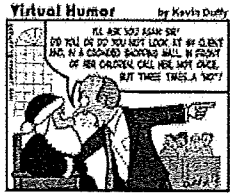
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Hostile Environment

• Unwelcome words or conduct having the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

• Examples:

- Unwanted Advances
- Sexual Innuendo
- Dirty Jokes
- Pin-ups
- Calendars
- Leering
- Staring
- Unwanted Propositions



Santa's sexual harassment trial takes a dramatic change for the worse

The Stats, a 2015 Poll

HOW COMMON IS SEXUAL HARASSMENT OVERALL?



The Stats, a 2015 Poll


81% OF WOMEN EXPERIENCE HARASSMENT IN VERBAL FORM

44% SAY THEY'VE ENCOUNTERED UNWANTED TOUCHING AND SEXUAL ADVANCES


25% SAY THEY'VE RECEIVED LEWD TEXTS OR EMAILS

The Stats, a 2015 Poll SQUIRE PATTON BOGGGS

THE FIELDS WITH THE LOWEST LEVELS OF REPORTED SEXUAL HARASSMENT:



23%
EDUCATION




21%
MEDICAL/
HEALTH CARE


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The Stats, a 2015 Poll SQUIRE PATTON BOGGGS

ARE WOMEN REPORTING SEXUAL HARASSMENT?



29%
DID REPORT IT



71%
DID NOT REPORT IT

ONLY 15% FELT THE REPORT WAS HANDLED FAIRLY

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Myths to Debunk SQUIRE PATTON BOGGGS

- Remember:
 - Women can harass men.
 - Men can harass men.
 - Women can harass women.
 - Supervisors can be harassed by those they supervise.
 - Employees can be harassed by non-employees.

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Preparing to Investigate

Has a Report Been Received?

- By a building-level administrator?
- Central office?
- Compliance officer?
- Teacher or colleague?
- KEY: Are employees aware of their obligation to report, and how does your District inform employees of where to report (i.e., compliance officer contact information)?
- KEY: Prompt reporting is a must.

The District Receives a Report, Now What?

- "Who You Gonna Call?" THE LAWYERS!
 - Well, maybe.
- Most common "investigator" options:
 - Compliance officer or other designated District-wide representative;
 - Board counsel (either in a supportive role or conducting the investigation); or
 - Outside support company, such as HR On Call
- Who should *not* be conducting these investigations?



Review Board Policy for Procedures SQUIRE
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- This is complicated stuff. Make an outline of procedure and people.
- NEOLA District?
 - Informal complaint procedure
 - Formal complaint procedure
 - Specific and strict timelines
 - Required forms
 - Check policy and administrative guideline

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Review Board Policy for Procedures SQUIRE
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- OSBA District?
 - More generalized complaint procedure (with formal and informal component)
 - Specific forms
 - Check policy and corresponding regulation
 - Timelines are likely more flexible but require "prompt" action

STATE OF OHIO
 DEPARTMENT OF REVENUE
 DIVISION OF TAX SERVICES
 TAXPAYER SERVICES SECTION
 100 EAST WASHINGTON AVENUE
 COLUMBUS, OHIO 43260-1199
 TEL: 614-467-3300
 FAX: 614-467-3301
 WWW: OHIO.TAXES.OHIO.GOV

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Review Collective Bargaining Agreements SQUIRE
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- Some may have a nondiscrimination Article.
- Check for procedural requirements:
 - E.g., Remember employees are entitled to representation in meetings that may result in disciplinary action.

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Temporary and Immediate Action **SQUIRE PATTON BOGGGS**

- It may be necessary to undertake intermediate measures before conducting/completing the investigation to ensure that further harassment does not occur.
- Examples:
 - Making work scheduling changes so as to avoid contact between the parties;
 - Temporarily transferring the alleged harasser; or
 - Placing the alleged harasser on paid administrative leave pending the conclusion of the investigation.
- Is it a criminal matter?

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Documentation and Witness Interviews

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Get a Written Compliant Form **SQUIRE PATTON BOGGGS**

- Have the alleged victim complete the required report form.
- If he or she refuses, the person receiving the report or the compliance officer should reduce the complaint to writing (check policy).
- Include:
 - What occurred, when, and where;
 - The alleged harasser;
 - Any relevant documents the alleged victim thinks are important; and
 - Any individuals with whom the District should speak, including witnesses.
- Have the alleged victim sign the form.
- Give copy of the relevant policy and administrative guidelines or regulation.
- Tell him/her to keep the matter confidential.

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Notify the Alleged Harasser **SQUIRE**
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- After speaking to the alleged victim, notify the harasser of the nature of the allegations against him/her.
- Give the alleged harasser an opportunity to respond in writing and in person.
- Give him/her a copy of the relevant policy board and/or administrative guideline/regulation.
- Tell him/her to keep the matter confidential.

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What to Ask the Alleged Victim **SQUIRE**
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- Who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How often* did it occur?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any people who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after the episodes of alleged harassment?

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What to Ask the Alleged Victim **SQUIRE**
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- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

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What to Ask the Alleged Harasser



- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any people who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

What to Ask Witnesses



- What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did he/she tell you this?
- Do you know of any other relevant information?
- Are there other people who have relevant information?
- Tell him/her to keep the matter confidential.

Making Judgment Calls



- **Weighing Credibility**
- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

Investigate the Investigation SQUIRE PATTON BOGGS

- Before reaching any conclusions, *review the investigation*. This is critical to avoid mistakes.
- Has the District spoken with all necessary people?
- And reviewed all relevant documents, including any information the District may have on file (for example, video footage, absence records, etc.)?

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The Written Report and Consequences

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The Written Report and Recommendation SQUIRE PATTON BOGGS

- Make the report chronological.
- Describe when first learned of the complaint.
- Provide exact details of the complaint.
- Note the documents reviewed.
- Describe the interviews.
 - For all witnesses, distinguish between firsthand knowledge and rumor.
- State conclusions as to whether harassment occurred and provide specific justification. (*More likely than not that it occurred?*)
- Recommend corrective action if harassment occurred.
- The corrective action should:
 - be reasonably calculated to prevent further harassment;
 - not punish the victim; and
 - be consistent with the discipline imposed in the past in similar situations.

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Submit the Report for Review



- Most policies have the Compliance Officer submit a report to the Superintendent for review.
- The Superintendent issues a final determination letter.
 - Should not be a rubber stamp.
 - Point out any deficiencies in the report.
 - Superintendent may ask follow-up questions if necessary, and can conduct interviews if needed.

Submit the Report for Review



- Corrective action could include:
 - Discipline up to and including termination
 - Involuntary transfer
 - Mandatory training
 - Counseling services for victim
- Even if unsubstantiated report, consider:
 - Discipline based on grounds other than unlawful harassment
 - Policy review
 - Global training

Follow Up With the Alleged Victim and Harasser



- Follow up with the victim and perpetrator after the decision has been made.
- Provide them with the Superintendent's final determination letter.
- But remember, the investigation records are likely public records subject to a records request.

Appeal Process **SQUIRE PATTON BOGGGS**

- Check your policy.
- Some have the Superintendent's decision as final.
- Others might have an appeal to the board of education, with the board's decision as final.

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Consequences for the Victim **SQUIRE PATTON BOGGGS**

- No retaliation based reports or complaints of discrimination or harassment
 - Age
 - Race
 - Color
 - National origin
 - Sex
 - Disability/Genetic information
 - Veteran status
 - Religion

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Consequences for the District **SQUIRE PATTON BOGGGS**

- The District must be able to show it took reasonable care to prevent and promptly correct harassment.
- Reasonable care generally requires a District to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment.

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Questions?

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