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Questions & Answers from US EEOC 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, and the Americans with Disabilities Act (ADA) prohibits harassment based on disability. 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, 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 *or* if the individual has the authority to direct the employee's daily work activities.
- 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, or disability, or harassment based on opposition to discrimination on 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.

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.