

SEXUAL HARASSMENT ON CAMPUS

Addressing Claims of Faculty, Students and Staff

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INTRODUCTION

Understanding the Legal Issues

- Title VII – Employment
- Title IX – Students
- Retaliation – both Title VII and Title IX



MANAGING THE ISSUES

- How to investigate and who should do it?
- How to maintain confidentiality while protecting the rights of the accused and the college or university community?
- How to balance sexually harassing language and free speech?



LEGAL FRAMEWORK – TITLE VII

- *Faragher* and *Ellerth* – U.S. Supreme Court decisions
- Employer vicarious liability established
- Creation of affirmative defense



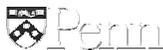
AFFIRMATIVE DEFENSE – TITLE VII

- Employer exercised reasonable care to prevent sexual harassment
- Employer acted promptly to investigate and correct any sexually harassing behavior
- Employee unreasonably failed to take advantage of any preventative or corrective opportunities



SEXUAL HARASSMENT POLICY UNDER TITLE VII

- Separate policy
- Widely disseminated
- Reporting procedure
- Process for investigation and resolution
- Provide for confidentiality



LEGAL FRAMEWORK – TITLE IX

- Private right of action
- Money damages for intentional violations
- Ignoring sexual harassment of a student by a teacher is actionable
- Ignoring student – student harassment is also actionable



SEXUAL HARASSMENT POLICY UNDER TITLE IX

Same kinds of provisions as under Title VII



RETALIATION

- Always clear under Title VII – in the statute
- Now clear under Title IX – *Jackson v. Birmingham Board of Education*
- Claims often accompany a sexual harassment claim – and they can be even more challenging



**RESPONDING TO CLAIMS OF
SEXUAL HARASSMENT**

- Conduct a prompt investigation
- Determine who is best to conduct it
- Interview the complainant and any witnesses
- Interview the accused harasser
- Review written records – ESPECIALLY EMAIL
- Document the investigation



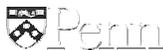
**RESPONDING TO CLAIMS OF
SEXUAL HARASSMENT**

- Determine whether improper behavior occurred
 - Violate the law?
 - Violate your policy?
- Take corrective action



**CONFIDENTIALITY – THE
INSTITUTIONAL DILEMMA**

- Policy must provide for confidentiality – question is, what does that mean?
- What if complainant does not want an investigation?
- What if complainant wants an anonymous investigation?
- How can an institution establish a pattern of behavior without a single repository of all complaints – even confidential complaints?



THE CASE LAW –
IMPORTANCE OF CONFIDENTIALITY

- “Maintaining confidentiality will encourage victims to come forward and report prohibited conduct.” *Payton v. New Jersey Turnpike Authority*



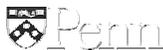
THE CASE LAW –
IMPORTANCE OF CONFIDENTIALITY

- “If an alleged victim of sexual harassment asks a person or authority to whom she has reported the harassment to keep it confidential, and the employer attempts to reduce the emotional trauma on the victim by honoring her request, it risks liability for not quickly and effectively remedying the situation.” *Gallagher v. Delaney*



THE CASE LAW –
IMPORTANCE OF CONFIDENTIALITY

- Did the conduct inflict serious physical or psychological harm?
- Is there a pattern of sexually harassing behavior
Torres v. Pisano
Wixted v. DHL Airways
Hardage v. CBS Broadcasting



POSSIBLE SOLUTIONS

- Clarify the difference between confidential counseling and reporting of sexual harassment
- Identify separate offices (May depend on who complainant is and who is the accused)
- Counselors: Women's Center; Counseling Center; Chaplain; Special Victims
- University authority: Affirmative Action; Academic Dean; Dean of Students; Human Resources; Office of Student Conduct



POSSIBLE SOLUTIONS

- Clearly identify the roles of various office in your policies and guidelines
- Explain what counselors do – provide support; explain options
- Educate the counselors, the administrators, and the community



POSSIBLE SOLUTIONS

- Always make sure that the complainant understands what the process is
- Always make sure the extent to which confidentiality will be honored – and the extent to which it cannot be honored
- Help your faculty, administrators and staff understand their roles and their responsibility



SEXUAL HARASSMENT AND SPEECH

- Sexual harassment must be "so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." *Faragher*
- In order to determine if there is severe and pervasive conduct, a court will review all the circumstances – was it frequent, was it humiliating, was it physically threatening – or merely offensive?
- Off-hand comments are generally not enough



TENSION BETWEEN SEXUAL HARASSMENT AND FREE SPEECH

- What is speech and what is conduct?
- What is offensive and what is humiliating?
- What is appropriate on our campuses?
- How do we draw the lines?