

Investigating Sexual Harassment Complaints: Guidelines and Instructions

Civil Rights Center (CRC) U.S. Department of Labor

CRC enforces Section 188 of the Workforce Innovation and Opportunity Act (WIOA), which prohibits discrimination because of sex, among other bases, in the administration of or in connection with any programs and activities financially assisted under Title I of WIOA. Sexual harassment is a violation of WIOA's nondiscrimination provisions. As a reminder, unlawful sexual harassment is defined in the WIOA regulations as unwelcome sexual advances, requests for sexual favors, offensive remarks about a person's sex, and other unwelcome verbal or physical conduct based on sex when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of accessing the aid, benefit, service, or training of, or employment in the administration of or in connection with, any WIOA Title I-financially assisted program or activity;
- Submission to or rejection of such conduct by an individual is used as the basis for limiting that individual's access to any aid, benefit, service, training, or employment from, or employment in the administration of or in connection with, the program or activity; or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's participation in the program or activity by creating an intimidating, hostile or offensive program environment.¹

Importantly, this includes harassment based on gender identity; failure to conform to sex-based stereotypes; and pregnancy, childbirth, and related medical conditions. The definition also encompasses harassment that is not sexual in nature but that is because of sex/gender or where one sex/gender is targeted for the harassment. Investigators must keep these legal standards in mind as they request and evaluate information from the complainant, respondent,² and witnesses.

Furthermore, CRC investigators must also determine whether the recipient organization violated its obligation to design and observe fair and transparent complaint processing procedures. More specifically, investigators will evaluate whether recipients have met the following requirements laid out in 29 CFR § 38.72:

- Designating an Equal Opportunity (EO) officer who will, among other things, develop and publish the recipient's procedures for processing discrimination complaints. This includes tracking the discrimination complaints filed against the recipient; developing procedures for investigating and resolving discrimination complaints filed against the recipient; making sure that those procedures are followed; and making available to the public, in appropriate languages and formats, the procedures for filing a complaint.³ 29 CFR §§ 38.28-.32.

¹ 29 CFR § 38.10. Sexual harassment encompasses a range of behaviors, generally organized into two forms: quid pro quo and hostile environment (bullets two and three in the definition above, respectively). Quid pro quo harassment generally results in a tangible employment decision based upon the victim's acceptance or rejection of unwelcome sexual advances or requests for sexual favors. Hostile environment harassment can result from the unwelcome conduct of supervisors, coworkers, program providers or those administering programs, participants, or anyone else with whom the victim interacts as a part of the program or activity, where the unwelcome conduct renders the atmosphere intimidating, hostile, or offensive. In terms of recipients' liability for such harassment, CRC recognizes and follows the principles established by the Department of Education's Title IX guidance, linked at the end of this document, and by Title VII and Title IX case law.

² "Respondent" refers to a grant applicant or recipient against which a discrimination complaint has been filed. 29 CFR § 38.4(bbb).

³ Service providers are not required to designate an EO officer. 29 CFR § 38.4(ggg), .33.

- Developing, adopting, and publishing complaint processing procedures that include at least the following elements:
 - A statement confirming that the recipient will issue a written Notice of Final Action on complaints within 90 days of the date on which the complaint is filed.
 - Written notice to the complainant that acknowledges receipt of the complaint and also provides notice of the complainant’s right to be represented in the complaint process; rights laid out in the recipient’s equal opportunity notice; and rights to request and receive auxiliary aids and services, language assistance services, and translation of this notice into certain non-English languages as required in §§ 38.4(h) and (i), .34, and .36. 29 CFR § 38.35.
 - A written statement of the issue(s), provided to the complainant, that includes the following information:
 - A list of the issues raised in the complaint; and
 - A statement as to whether each issue is accepted or rejected for investigation, along with the reasons for each rejection.
 - A period for fact-finding or investigation of the circumstances underlying the complaint. **** Note:** The following section describes the sorts of questions investigators should ask and techniques they should observe as a part of a robust investigation.
 - A period during which the recipient attempts to resolve the complaint. The methods available for such resolution must include alternative dispute resolution (ADR), as described in 29 CFR § 38.72(c).
 - Written Notice of Final Action to the complainant within 90 days of filing the complaint, containing the following information:
 - A statement of the recipient’s decision on each issue raised in the complaint and an explanation of the underlying reasons, or a description of how the parties resolved the issue; and
 - Notice that the complainant has a right to file a complaint with CRC within 30 days of receiving the Notice of Final Action if they are dissatisfied with the recipient's final action on the complaint.

Structuring the Investigation

A sexual harassment investigation requires multiple components, as listed below, and will vary depending on a number of factors, including the availability of witnesses or lack thereof; the type and volume of documentary evidence; the respondent’s past history of allegations; whether the complainant first filed a complaint with the recipient organization and how it was resolved (if at all); and the complainant’s emotional or physical wellbeing. The following steps are not exhaustive, but reflect best practices for CRC investigators as well as recipients’ EO officers and other staff:

- **Review the complaint, as well as any documentation submitted with it, and identify main parties relevant to the case.**
 - If any critical information is missing – for instance, sufficient detail to judge the timeliness and apparent merit of the complaint – reach out to the complainant as soon as possible to “perfect” the complaint. *See* 29 CFR § 38.70.
 - Be sure to have as detailed an understanding of the claim as possible. Begin to establish a written timeline of the claim(s) as you understand them, to be expanded as the investigation progresses.
 - Develop a list of relevant parties to interview, beginning with the complainant, the alleged harasser, the recipient’s EO officer, and anyone specifically named in the complaint.

- **** Note on confidentiality:** While interview subjects should be assured that confidentiality will be maintained to the greatest extent practicable, it is not always possible. Accordingly, CRC investigators should not promise absolute confidentiality to the complainant, alleged harasser, or witnesses, or assert that their statements will be off the record. However, they should remind interview subjects that any individual whose identity is disclosed will be protected from retaliation for their participation in the investigation. 29 CFR §§ 38.19, .45.
- **Identify a preliminary list of documents that will be needed in the investigation. These could include:**
 - Relevant rules, policies, procedures, and instructions, including any applicable handbooks or manuals, anti-harassment and workplace violence policies, and grievance procedures or progressive discipline policies.
 - Recipients are required to publish the equal opportunity notice prescribed in 29 CFR § 38.35 in their employee and participant handbooks or manuals. 29 CFR § 38.36. Crucially, this notice outlines the complaint process available to applicants and employees if they believe they have experienced discrimination.
 - Memoranda or notes about the incident(s).
 - Files/statements from prior investigations, if any.
- **Interview the complainant and/or submit requests for information.**
 - If conducting an interview in person or over the phone, schedule it at a time that works best for the complainant and make it clear that you are available for questions both before and after the interview.
 - Prepare questions in advance. The following questions, excerpted from EEOC enforcement guidance with a few changes, provide a helpful starting point:
 - Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? What was the context in which it occurred? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?
 - How did you react? What was your response when the incident(s) occurred or afterwards?
 - How did the harassment affect you? Has your participation in or capacity to benefit from the program or activity in question been affected in any way?
 - Are there any persons who may have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? If so, when and in what context? Did anyone see you immediately after the alleged harassment?
 - Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
 - Are there others with similar characteristics to you who may also have been harassed on these same bases?
 - Are there others with similar characteristics to you who you do not believe have been harassed on these same bases?
 - Are there any notes, physical evidence, or other documentation regarding the incident(s)? This can include not only evidence of the harassment, such as texts, emails, etc., but also contemporaneous documentation of the incident(s) in journals, diaries, etc.
 - How would you like to see the situation resolved?

- Do you know of any other relevant information?⁴
 - Obtain background information regarding the context in which the alleged harassment occurred. Did the complainant and alleged harasser have any interactions prior to the harassment? What were they? What was their context? If the complainant and alleged harasser had a defined professional relationship, did the alleged harasser act in a position of responsibility or authority while committing the harassment? Did the harassment occur for the entirety of that relationship? If not, how/when did it start? Did the complainant do anything to indicate that actions by the alleged harasser were unwelcome? If so, what? How did they respond? Has the harassment caused any change in the complainant's routine, and if so, what?
 - Request evidence to support any assertion made. This can include texts, emails, or other electronic correspondence between the complainant and the alleged harasser, or between the complainant and a third party (i.e., a witness or others involved in the underlying action(s) at issue), or the alleged harasser and a third party, as well as any voicemails, phone records, etc. This could also include time sheets, calendars, photographs, logs, or travel or meeting agendas/reports.
 - In the absence of witnesses or clear evidence of the harassment itself, contemporaneous accounts of the events in question will be extremely important. Ask the complainant for any relevant communications to friends, family or coworkers, any notes they might have taken about the events after they occurred, etc.
 - Maintain a trauma-informed approach. It is important to keep in mind that the complainant may have experienced significant trauma due to the alleged harassment and recounting these details may be difficult and emotional. For a successful interview, in which the complainant is addressed with all due care and respect, keep these tips in mind:
 - Give the complainant the time and space to share their story without interruption, even if you think that much of the relevant ground was already covered in the complaint.
 - Ask open-ended follow-up questions and encourage the complainant to provide as much detail as they can. When seeking to clarify something the complainant has said, be thoughtful about your words and tone and provide reasons for the questions. You don't want the complainant to think you're interrogating them.
 - Be flexible, allowing time and latitude for the complainant's emotional processing or later recollection of details.
 - Consider asking questions about sensory details. Survivors of trauma often remember these vividly, and questions like, "What did you hear?" may prompt a complainant's recall of particular events.
 - As the facts take shape, submit additional questions or schedule follow-up interviews.
- **Interview the alleged harasser and/or submit requests for information.**
 - ****Note:** The WIOA regulations include several important provisions governing the conduct of complaint investigations, which are referenced throughout these guidelines. Keep the following in mind while interacting with representatives of the recipient, which may include the alleged harasser.
 - The recipient's EO Officer is the CRC's liaison.
 - Under 29 CFR § 38.44, recipients must permit CRC access during its hours of operation to its premises and to its employees and participants, to the extent that

⁴ U.S. Equal Employment Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), *available at* <http://www.eeoc.gov/policy/docs/harassment.html>.

- such individuals are on the premises during the course of the investigation, for the purpose of conducting complaint investigations. While there, CRC investigators may inspect and copy any books, records, accounts and other materials that may be pertinent to ascertain compliance with and ensure enforcement of the WIOA's nondiscrimination and equal opportunity provisions.
- Recipients must preserve any hard-copy or electronic records it has kept related to the complaint – including records that have any relevance to the underlying allegations in the complaint, as well as records regarding actions taken on the complaint – for at least three years from the date of final action related to resolution of the complaint. 29 CFR § 38.43(b).
 - CRC may require recipients to provide, in a timely manner, any information or data it deems necessary to investigate the complaint. 29 CFR § 38.44(c).
- If conducting an interview in person or over the phone, schedule the interview at a time that works for the subject and make it clear you are available for questions both before and after the interview.
 - Maintain a neutral and objective tone throughout the interview.
 - Prepare questions in advance. The following questions, excerpted from EEOC enforcement guidance with a few changes, provide a helpful starting point:
 - What is your response to the allegations?
 - If the alleged harasser claims that the allegations are false, ask why the complainant might have a different perception of events.
 - Are there any persons who may have relevant information about the incident(s) and/or your version of events?
 - Are there any notes, physical evidence, or other documentation regarding the incident(s) and/or your version of events?
 - Do you know of any other relevant information?
 - Did the complainant ever indicate that anything that you did/said was unwelcome? What did they say? How did you respond?
 - Have you had any interactions with the complainant prior to the events mentioned in their allegations? What were those interactions? What was their context? Do you have a defined relationship (i.e., supervisor/subordinate or program provider/participant)? If so, how would you characterize that relationship prior to these allegations of harassment? Was there an event that may have precipitated these allegations of harassment? If so, what? And why do you believe it precipitated the allegations?
 - Have similar allegations been made against you in the past? How were they handled? What was the outcome?⁵
 - Request evidence to support any assertion made. This can include texts, emails, or other electronic correspondence between the complainant and the alleged harasser, or between the complainant and a third party, or the alleged harasser and a third party, as well as any voicemails, phone records, etc. This could also include time sheets, calendars, photographs, logs, or travel or meeting agendas/reports.
 - If the complainant filed a complaint with the recipient prior to filing with CRC, you should request a description of the investigation, as designed and executed, including the specific allegations management officials reviewed and the individuals to whom they spoke. You should also request all of the material the recipient reviewed in addressing the complaint.
 - As the facts take shape, submit additional questions or schedule follow-up interviews.

⁵ *Id.*

- **Interview third parties and/or submit requests for information.**
 - Third parties include individuals within the workplace with whom the complainant or alleged harasser interacts or who may work with or in close proximity to the complainant and/or alleged harasser. This includes people who can comment on the general tenor of the location, the observed dynamic between the complainant and the alleged harasser, any related incidents of harassment by the alleged harasser that did not involve the complainant, any behavior by the complainant or the alleged harasser that they considered unusual or otherwise made them uncomfortable, or any sudden unexplained changes in the complainant's routine habits that may be attributable to the harassment. They can also include people with similar characteristics (members of the same protected groups) who may or may not have experienced similar treatment.
 - If conducting an interview in person or over the phone, schedule the interview at a time that works for the interview subject and make it clear you are available for questions both before and after the interview.
 - Prepare questions in advance. The following questions, excerpted from EEOC enforcement guidance with a few changes, provide a helpful starting point:
 - Regarding the general environment as well as the specific allegations, what did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in this location.
 - What did the complainant or the alleged harasser tell you? When did they tell you this?
 - Do you know of any other relevant information?
 - Are there other persons who may have relevant information?
 - Did you ever report/document your observations, if so, how?⁶
 - Request evidence to support any assertion made. This can include texts, emails, or other electronic correspondence between the third party and the complainant or the alleged harasser, or between various third parties, as well as any voicemails, phone records, etc.
 - As the facts take shape, submit additional questions or schedule follow-up interviews.
- **Check for history of past allegations, complaints, or reviews.**
 - Look at any past complaints against the alleged harasser. Recipients are required to maintain – and provide upon request – a log of previous discrimination complaints. 29 CFR § 38.41(c).
 - Look for any patterns or repetitions of behavior that relate to the current allegations. For instance, a history of engaging in sexual favoritism with others can convey the expectation that fair treatment and benefits will be conditioned on the acceptance of sexual advances, thus supporting a harassment claim.
- **Conclude the investigation.**
 - The investigator should prepare a report composed of the following elements:
 - Summary of the initial complaint and a discussion on the background of the complaint.
 - Findings from the investigation.
 - Proposed recommendations.
 - CRC's investigation must conclude with one of the following two determinations:
 - The Director's Initial Determination that reasonable cause exists to believe that a violation has taken place, including the following elements:
 - The specific findings of the investigation;

⁶ *Id.*

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- The corrective or remedial action that the Department proposes to the respondent, under 29 CFR § 38.90;
 - The time by which the respondent must complete the corrective or remedial action;
 - Whether it will be necessary for the respondent to enter into a written agreement under 29 CFR §§ 38.91-.93; and
 - The opportunity to engage in voluntary compliance negotiations. 29 CFR §§ 38.86, .87.
- The Director's Final Determination that no reasonable cause exists to believe that a violation has taken place, which constitutes CRC's final agency action regarding the complaint. 29 CFR § 38.88; *see* 29 CFR § 38.96.
- CRC must provide notice to the complainant, respondent, and grantmaking agency, in writing, of its determination – Initial or Final. 29 CFR § 38.86.

For more information, consult the following sources:

- U.S. Dep't of Labor, Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act, 81 Fed. Reg. 87,130 (Dec. 2, 2016) (codified at 29 C.F.R. pt. 38).
- Office for Civil Rights, U.S. Dep't of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (Jan. 19, 2001), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.
- U.S. Equal Employment Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), *available at* <http://www.eeoc.gov/policy/docs/harassment.html>.