

2020 Annual Title IX Training Series Sexual Harassment October 14, 2020

Systemwide Title IX Compliance
Office of the Chancellor
The California State University

Sexual Harassment

1096/1097

- Quid pro quo sexual harassment
- Hostile environment sexual harassment

Addendum B

- Quid pro quo sexual harassment
- Hostile environment sexual harassment

Quid Pro Quo - Definitions

Addendum B

- An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in **unwelcome sexual conduct**

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- **Unwelcome verbal, nonverbal or physical conduct of a sexual nature** where:
 - Submission to, or rejection of, the conduct is explicitly or implicitly used as the basis for:
 - (Students) for any decision affecting a CP's academic status or progress, or access to benefits and services etc...
or
 - (Employees) any decision affecting a term or condition of the CPs employment, or an employment decision

Quid Pro Quo - Addendum B

- Should be interpreted broadly (FR 30147, fn. 644)
- Applies whether the “bargain” proposed is communicated “expressly or impliedly” and does not require that harassment be severe and pervasive (FR 30147)
- “Consent” to conduct does not necessarily mean that the conduct is not “unwelcome,” especially where the conduct is “consented to” for purposes of avoiding negative consequences (FR 30148)
- Where the speech is, by definition, designed to compel sexual conduct it generally does not violate the 1st Amendment (FR 30142, fn. 625)

Affecting Terms and Conditions of Employment – EO

- The test is not whether work has been impaired, but whether working **conditions** have been discriminatorily altered.
- [T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with ... work performance. To show such interference, “[one] need not prove that his or her tangible productivity has declined as a result of the harassment.” ...[i]t suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to “ma[k]e it more difficult to do the job.”

“Hostile Environment” - Definition

Addendum B

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- Unwelcome conduct “on the basis of sex” determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to an education program or activity
- Unwelcome verbal, nonverbal or physical conduct of a sexual nature where:
 - Sufficiently severe, persistent or pervasive that its effect could be considered by a Reas. P, and is, considered by the CP, to:
 - (students only) limit their ability to participate...
 - create an intimidating, hostile, or offensive environment

Elements of Hostile Environment

Addendum B

- Was there **conduct on the basis of sex**?
- Was the alleged conduct **unwelcome**?

Then, evaluating from the perspective of

- Reasonable person
- Was the conduct so **severe, and pervasive, and objectively offensive** as to **effectively deny** Complainant equal access to an Education Program or Activity?

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- Was there conduct of a **sexual nature**?
- Was the alleged conduct **unwelcome**?

Then, evaluating from the perspective of

- Reasonable person in the Complainant's shoes, and
- Complainant themselves
- Was the conduct:
 - Students - sufficiently severe, **or** persistent **or** pervasive to **limit their ability to participate** in or benefit from... or creates an **intimidating, hostile, or offensive environment**?
 - Employees – Creates an **intimidating, hostile, or offensive environment**?

On the Basis of Sex vs. Of a Sexual Nature

Addendum B - Conduct

- For QPQ:
 - Sexual Conduct may be verbal, visual, or physical
- For Hostile Environment:
 - The phrase “unwelcome conduct on the basis of sex,” is broader than “unwelcome conduct of a sexual nature” phrase used in Department guidance. (FR 30152)
 - Ex: direct comparative evidence that only men, and not women, are groped and hazed
 - Ex: rumor was that a female employee had sex with her male superior to obtain promotion

EO 1096/1097 - Conduct

- For QPQ and Hostile Environment:
 - **Visual conduct:** leering, making sexual gestures, displaying of sexually suggestive objects or pictures, cartoons or posters.
 - **Verbal conduct:** making or using derogatory comments, epithets, slurs and jokes. Verbal abuse of a sexual nature, graphic verbal commentaries about an individual’s body, sexually degrading words used to describe an individual.
 - **Physical conduct:** touching, assault, impeding or blocking movements.

What about conduct that is not sexual in nature but is based on sex or gender?

As noted by some commenters, sex-based harassment includes unwelcome conduct of a sexual nature but also includes unwelcome conduct devoid of sexual content that targets a particular sex. The final regulations use the phrase “sexual harassment” to encompass both unwelcome conduct of a sexual nature, and other forms of unwelcome conduct “on the basis of sex.” § 106.30 (defining “sexual harassment”).

(Preamble fn 670)

“Unwelcome” – Add. B and EO

- EEOC - When welcome-ness is at issue, the investigation should determine whether the CP's conduct is consistent, or inconsistent, with the assertion that the sexual conduct is unwelcome. Acquiescence in sexual conduct at the workplace may not mean that the conduct is welcome to the individual.
- OCR – The Department interprets “unwelcome” as a “subjective element”. Therefore even if a CP “pretended to welcome the conduct,” the complainant’s subjective statement that they found the conduct to be unwelcome suffices to meet the “unwelcome” element.
- 2001 OCR Guidance (Rescinded) - Conduct is unwelcome if the student did not request or invite it and “regarded the conduct as undesirable or offensive.”

Who is the Reasonable Person?

- The severe, pervasive, and objective elements “must be evaluated in light of the known circumstances and depend on the facts of each situation but must be determined from the perspective of a reasonable person **standing in the shoes of the complainant.**” (FR 30156)
- The burden is on the educational institution to evaluate complaints by considering the totality of the circumstances, which “includes taking into account the complainant’s age, disability status, and other factors that may affect how an individual complainant describes or communicates about a situation involving unwelcome sex-based conduct.” (FR 30156)

What is Severe **and** Pervasive under Addendum B?

- Disseminating “revenge porn,” or conspiring to sexually harass people (such as fraternity members telling new pledges to “score”), ...particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement. (FR 30166)
- A single instance of unwelcome physical conduct may meet definitions of assault or battery prohibited by other laws, even if the incident does not meet one of the three prongs of the § 106.30 definition of sexual harassment. (FR 30166)

Evaluating Effective Denial – Addendum B

- This element:
 - does *not* require that a complainant has already suffered loss of education (FR 30169)
 - Does require that a person’s “equal” access to education has been denied, not that a person’s total or entire educational access has been denied (FR 30169)
- Signs of enduring *unequal* educational access may include:
 - skipping class to avoid a harasser,
 - a decline in a student’s grade point average,
 - having difficulty concentrating in class
- No concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant’s position of the ability to access their education on an equal basis with persons who are not suffering such harassment. (FR 30170)

“Effectively denied Complainant equal access to an Education Program or Activity” – Addendum B

- The definition “has the advantage of being adopted from the Supreme Court’s interpretation of Title IX, yet does not act as a more stringent element than the “interferes with or limits a student’s ability to participate in or benefit from the school’s programs” language found in Department guidance.” (FR 30152)

What is Objectively Offensive under Addendum B?

- EEOC - Unwelcome, intentional touching of a party's intimate body areas is sufficiently offensive to alter the condition of their working environment and constitute a violation

Evaluating Severe Or Pervasive – EO 2001 OCR Guidance (Rescinded)

- Factors to Consider:
 - The degree to which the conduct affected one or more students' education.
 - The type, frequency, and duration of the conduct.
 - The number of individuals involved.
 - The age and sex of the alleged harasser and the subject or subjects of the harassment.
 - The size of the school, location of the incidents, and context in which they occurred.

Additional Guidance on Severe **Or** Pervasive In Employment Context

- Cal. Prac. Guide – Can look to whether it is physically threatening or humiliating or a mere offensive utterance;
- Cal. Prac. Guide - Whether it unreasonably interferes with an employee's work performance.
- EEOC - A single, unusually severe incident of harassment may be sufficient to constitute a violation
- CA SB 1300 - **A single incident** of harassing conduct is sufficient regarding the existence of a hostile work environment if the harassing conduct has **unreasonably** interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. (January, 2019)

Limited the Complainant's ability to participate in or benefit from the services, activities or opportunities offered by the University – EO – 2001 OCR Guidance (Rescinded)

- A student's grades going down or the student being forced to withdraw from school
- A student may also suffer physical injuries or mental or emotional distress.
- However, a student may have been able to keep up their grades and continue to attend school even though it was very difficult for them.
 - Are they avoiding the library, not attending sports events or somehow restricting their movement and participation in order to avoid the respondent?

Intimidating, Hostile, or Offensive Environment

- “Does not need to be a descent into the Inferno”
- SB 1300 - It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, [one] should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties.
- Look at totality of circumstances, including:
 - Power differential between complainant and respondent
 - Frequency of conduct
 - Severity of conduct
 - Whether it is physically threatening or humiliating and
 - It alters the conditions of the work or educational environment¹⁹

Questions

Scenarios

Scenario #1

- Employee (Tracy) says they have been harassed for several months by a donor to the university who is also an alumni. Tracy says that the donor comes by at least once a week. Tracy says that the donor has attempted to solicit biographical information (address and telephone number) from the employee, complimented their appearance (in ways that made the complainant uncomfortable), and requested dates. Tracy also says there was some physical touching (e.g. touches on the wrist and cheek and attempted hugs).
- This is not the first time that you have spoken with Tracy. They came to you several months ago and asked for a “no-contact” order against the donor for similar behavior because Tracy did not want an investigation at the time as it could have upset the donor’s relationship with university. The donor agreed to the no-contact order. The talking and touching took place in violation of the “no contact” order that you had put in place at the time.

Scenario #2

- According to Devan, shortly after starting at CSU West, Devan noticed the environment in the residence hall was at times sexually charged. Male students were often referred to by offensive nicknames such as “Bitchy Ritchie” and “Nips.” Students also openly discussed the sexual activities of the Fed Ex delivery person and disparaged the female women that the Fed Ex delivery person associated with. The RA was present for many of the incidents and attempted to pretend these conversations were not happening, putting fingers in their ears to demonstrate blocking it out. Devan overheard students talk about how one female student dressed inappropriately.
- The RA stated that they were aware of the offensive nicknames and may have used them on occasion. Devan did not tell anyone that they were offended, nor did they make any formal or informal complaints for six months. Devan did tell the RA that the environment was not overly sexualized, but it was aggressive, disrespectful, and rude, and that they were surprised at the disrespect the students directed at the RA.

Scenario #3

- Drew wants to file a complaint claiming that Jordan made three crude sexual references. Drew is a resident advisor and tells you that on Drew's first day, Jordan, also a resident advisor, told Drew that they were "really attractive." Drew said that they were not offended by this comment.
- One time, as they were meeting to discuss issues that occurred in the residence hall. Jordan told Drew that they had a body like their ex, but better. The first or second time Drew and Jordan worked together, a song came on the radio containing the lyrics "eating booty like groceries." Jordan asked Drew, "[D]oes your boyfriend eat that thang?" Drew replied that their boyfriend did not and did not know how to do so. Jordan answered, "I could teach him." Another time, while taking a walk around the campus, Drew recommended chocolate milk to help Jordan with muscle soreness. A few hours later, Jordan texted Drew that he loved chocolate milk, along with images of "tongue" emojis. This happened the same day as the comment Jordan made about his ex-girlfriend.
- When working out together at the gym on another occasion, Jordan pointed out Drew's groin area, which was wet with sweat, and commented, "Damn, that thing get wet like that."

Scenario #4

- About two weeks after Parker assumed a position as a supervisor, they learned that “certain employees were circulating within the division...an unfounded, sexually-explicit rumor about them.” The rumor was that Parker “[had] a sexual relationship” with a higher-ranking manager, in order to obtain the management position. The rumor originated with another employee (Smith), who began working at the university at the same time as Parker and in the same position. Because of Parker’s promotions, however, Parker soon became Smith’s superior.
- According to Parker, the AVP over the department, Moppins, participated in spreading the rumor. In a conversation with another employee Parker heard that Moppins speculated that Parker’s recent divorce may have been due to the alleged affair. As the rumor spread, Parker says that they “were treated with open resentment and disrespect” from many coworkers, including employees that Parker was responsible for supervising.
- As evidence of the hostility being directed against them, Parker tells you that Smith recently told Parker that they had a sexually explicit photograph of Parker and planned to send it to everyone in the department. Parker tells you that there no way that Smith could have an image like that because it simply does not exist. Parker is concerned that their image has been superimposed on a pornographic image.

Scenario #5

- Farley has filed a complaint because he believes he is being harassed by his supervisor (Alex). Farley identifies as a straight male and claims that he has been placed on a performance improvement plan and is being given different assignments than his colleagues. Farley's colleagues are predominantly female. Farley tells you that Alex never invites him to staff lunches, does not talk to him about his weekend, and teases him about his manner of dress. He admits that he wears shorts on zoom meetings but says that others are not keeping up with dress codes requirements either.
- Farley says that the other employees are being hostile to him and he is convinced that all of this stems from how Alex is treating him. Farley explains that Alex has never been friendly towards him and believes that it is because Alex is a gay male who prefers female employees based on rumors that have been swirling around for years. Farley adds that he also has excellent "gaydar."

Questions



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