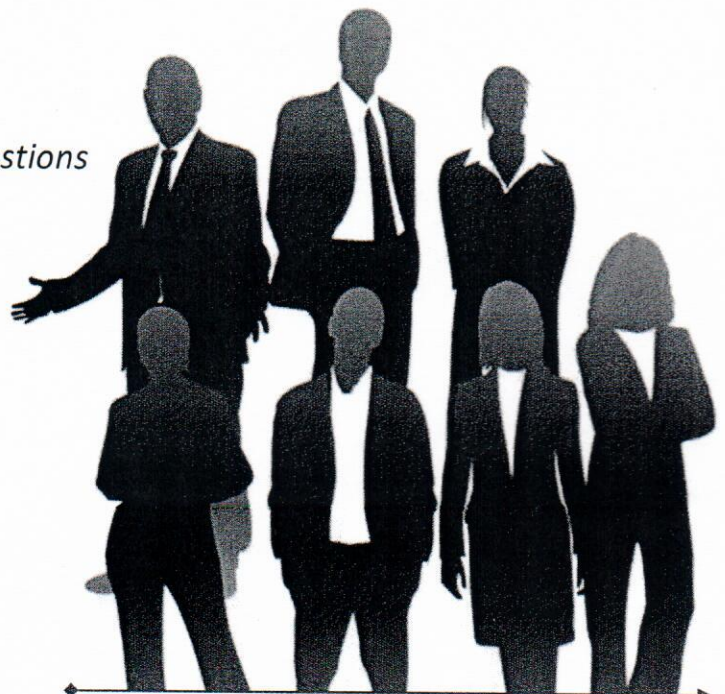


Zero Tolerance

Workplace Harassment

UNDERSTAND-PREVENT-RESPOND

- *Know Your Responsibilities as a Leader*
- *Understand Employer Liability*
- *Investigate Promptly - Ask the Right Questions*
- *Model & Promote Respectful Behavior*
- *Review Policy Often*



Friday, December 9, 2016
Ohio CASA/GAL Association
2016 Directors' Technical Assistance Meeting

Presented by
Elizabeth Manns, Training Officer
Franklin County Board of Commissioners'
Learning & Staff Development Department
Robert J. Young, Director

Sexual Harassment Defined

The EEOC Guidelines on Discrimination Because of Sex defines actionable sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.	Quid Pro Quo
2) Submission to or rejection of such conduct is used as the basis for employment decisions affecting such individual, or	
3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.	Hostile Environment

Three categories of sexual harassment

Category	Defined	Examples
	Uninvited behaviors that explicitly communicate sexual desires or intentions toward another individual.	Overt behaviors and comments, such as staring at a woman's breasts or making verbal statements that explicitly or implicitly propose or insinuate sexual activities.
	Putting physical or psychological pressure on a person to elicit sexual cooperation.	Actual, undesired physical touching, offers of a bribe for sexual favors, or making threats to receive sexual cooperation.
	Unwelcome verbal and visual actions, comments and remarks that insult individuals because of their gender or that use stimuli known or intended to provoke negative emotions.	Posting pornographic pictures in public or in places where they deliberately insult, telling chauvinistic jokes, and making gender related degrading remarks.

HARASSMENT PREVENTION

Employees' Responsibilities:

- Employees are expected to maintain a productive environment that is free from harassing or disruptive activity.
- No form of harassment will be tolerated included harassment for the following reasons: race, color, national origin, religion, sex, sexual orientation, disability or age.
- Any employee who believes that he/she is victim of unwelcome harassment has the responsibility to report or file a complaint about the situation as soon as possible.
- The report or complaint should be made to the employee's supervisor; or Senior Management if the complaint involves the supervisor or manager.

Employee Expectations:

- Avoid behavior that may be misconstrued as possible sexual harassment.
 - Avoid sexual jokes, comments, and e-mails.
 - Respect a person's indication that your conduct or attention is not welcome.
 - Not invade another individual's personal space.
 - Not touch anyone without their permission.
 - Clearly inform those engaging inappropriate sexually oriented behavior that you find it objectionable.
 - Seek assistance promptly if you are the target of or observe severe or repeated instances of behavior that you believe qualify as sexual harassment.
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WHAT SHOULD A VICTIM OF HARASSMENT DO?

- A victim of harassment should clearly communicate to the harasser - verbally, in writing, through a third party, or in some other way - that the conduct is unwelcome.
- Evidence that the victim participated in the conduct that she or he later challenged, would generally defeat a harassment claim, since participation communicates welcomeness.
 - ✓ However, participation does not necessarily mean the conduct is welcome.
 - ✓ In particular acquiescence or submission to sexual demands does not necessarily mean that the conduct was welcome.
- The victim or person affected by the conduct should promptly report it or file a complaint - if the conduct continues after the perpetrator becomes aware it is unwelcome.

HARASSMENT PREVENTION: Supervisors' Responsibilities

- Monitor workplace behavior, enforce respect.
 - Treat all complaints seriously and confidentially. Do not ignore any allegation.
 - Post/disseminate Anti-Harassment Policy.
 - Respond to allegations immediately; investigate, as appropriate.
 - Be sensitive but impartial.
 - Interview parties and relevant witnesses.
 - Ask open-ended questions.
 - Collect relevant documentation/evidence.
 - Take appropriate corrective action, follow-up
 - Ensure no retaliation.
 - Document your actions.
-
-
-

REASONS EMPLOYEES DO NOT REPORT SEXUAL HARASSMENT

FEAR

- loss of job opportunities
- rejection by coworkers
- not being accepted
- being labeled...
- _____
- _____
- the "rumor mill"
- not being _____
- embarrassment
- Fear of _____
- not being considered a "team player"

Empower all employees to feel comfortable enough to tell you whenever they feel threatened, offended, or violated in any way at work.

"I" Statement
Example

When you...

I feel...

I need...

WHAT TO DO ONCE AN EMPLOYEE REPORTS HARASSMENT

We suggest that you _____

Vs

What not to do:



“THE OSTRICH” - The ostrich myth says that when faced with a dangerous situation this large bird buries its head so as not to see what is coming.

Q: What is the implication for an organization when a manager takes this ostrich approach to sexual harassment?



“THE CHAMELEON” - A chameleon changes its appearance to “fit in” with its environment.

Q: What happens when a manager sets a standard for workplace behavior and then does not live up to that standard?



“THE MOTHER HEN” - The analogy of a “mother hen” suggests over-protectiveness.

Q: How can a manager protect his or her employees without becoming over-protective? What should the standard be?



“THE WOUNDED TIGER” – Would the real victim, please stand up?

Q: What ramifications could the wounded tiger have on the immediate work unit and overall organization?

Liability For Harassment By Managers

Employers are strictly liable for economic harassment and environmental harassment committed by managers, regardless of whether the employer actually knew of the harassment in advance. Strict liability means that once an employee proves that unlawful harassment occurred, there is generally no defense available to the employer.

- *Exception for Environmental Harassment*

However, for environmental harassment, the law does provide one defense to employers who have actively attempted to prevent harassment in their workplaces. Under this affirmative defense, an employer is not liable for environmental harassment committed by managers if it can meet the two pronged test:

1. Did the employer take reasonable steps to prevent harassment?
2. Did the employee unreasonably fail to complain?

Manager's Checklist: The Affirmative Defense

- Read and learn your employer's harassment policy and complaint procedures – every policy is unique.
- Comply with and consistently apply your employer's harassment policy.
- Use the policy actively during meetings, training sessions, complaints and disciplinary actions.
- Distribute the policy to all employees at the beginning of and throughout their employment.
- Ensure your employees receive anti-harassment training.
- Respond promptly to any complaint and take appropriate remedial and disciplinary action.

Employer Liability For Co-Worker And Non-Employee Harassment

Employers are liable for harassment by co-workers and non-employees only if the employer (e.g., a manager) knew or should have known about the harassing conduct. Thus, an employer would be liable for co-worker or non-employee harassment if the victim complained to management, or if a manager witnessed the harassment and nothing was done to remedy the situation. An employer may avoid or limit its liability by demonstrating that it took immediate and appropriate corrective action after learning of the harassment.

An employee complaining of harassment may show that the employer *"should have known"* about the situation by showing:

- The employer did not provide and appropriate avenues for the victim to complain to the management;
- The employer did not take the victim's complaint seriously;
- The employer failed to adequately investigate the situation; or
- The employer failed to continue monitoring the alleged harasser's conduct.

The best way to avoid claims that the employer *"should have known"* is to encourage all employees to bring their issues to management's attention.

- Ensure that there are no barriers to reporting harassment;
- Be an open and responsive manager;
- Address the behavior of co-workers and employees that may discourage reporting;
- Recognize that out-of-channel reporting triggers a responsibility on your part to act;
- Respond promptly to a complaint of harassment from anyone who seeks your help – not just employees that you immediately supervise;
- Simply referring an employee back to their immediate supervisor is not enough. His or her manager may be the underlying cause of the harassment complaint.
- Your job is not to override the decision of another manager, but to contact Human Resources or senior management to inform them of the situation.

Individual Liability For Harassment

Supervisors should be careful of their behavior, not only in preventing harassment, but also in addressing harassment complaints. A supervisor can be held individually liable for:

- Defamation, if he or she falsely publicizes information about employees involved in a harassment claim
- Inflicting emotional distress
- Negligent supervision and retention
- Falsely imprisoning an employee, alleged harasser or witness during an investigation
- Committing assault/battery against a complainant or alleged harasser
- Engaging in harassment

To avoid individual liability and create a more productive workforce, practice the steps in the checklist on page 13.

INTERVIEWING THE COMPLAINING EMPLOYEE

1. Start Immediately -
2. Choose Your Investigator -
3. Private Setting -
4. No Distractions -
5. Preliminary Remarks -
6. Thorough Questioning - It is critical to get the whole story. At a minimum, be sure to ask:
 - ✓ What happened?
 - ✓ Who was involved, and what are their positions relative to the employee (supervisor? subordinate? executive? co-worker? contractor?)
 - ✓ When did the incident take place?
 - ✓ Where did it take place?
 - ✓ Were there any observers? Who?
 - ✓ How many incidents were there?
 - ✓ Has the employee talked to anyone else at the company about this issue? Who?
 - ✓ Are there any written documents, emails, voicemails, or text messages relevant to the complaint? Ask for copies.
 - ✓ Has the employee kept any written records or diaries that are relevant to the complaint? Any personnel file memos or other notes?
 - ✓ Have other employees had similar concerns?
 - ✓ Has the employee had other interactions (positive or negative) with the offending employee? What did those involve?
 - ✓ What does the employee think is motivating the objectionable conduct?
 - ✓ How has the conduct affected the employee and his/her work?
 - ✓ Does the employee have any additional facts or information that would be helpful to your investigation?

Note* – It is helpful to ask “**wrap up**” questions that commit the employee to closure of an issue. Examples: “Have you now told me all of the improper remarks he said to you?” “Is this the complete list of witnesses?” “If I could recap, the basis for your complaint is these two emails she sent to you in February?”

7. Get a Written Statement -

8. Closing Comments -

9. Allow the Employee to Take the Day Off -

10. Take Precautions to Prevent Interactions Between the Employee and the Accused -

WHAT IF...

Here are answers to some common tough questions about interviewing the complaining employee:

What if the employee mentions going to the EEOC?

What if a co-worker, and not the alleged target of harassment, makes the complaint?

What if the employee tells you to "do nothing"?

What if the employee asks if you think the conduct is offensive or if it constitutes "harassment"?

INTERVIEWING THE ACSUSED

Your goals in this interview: to conduct a fair but firm questioning, nail down their story with as many specific details as possible, and judge their credibility.

Preliminary Remarks -

Example: A sample preliminary statement follows.

We are conducting an investigation into a complaint we received about your conduct toward a female employee. We need to ask you some questions and want to give you a chance to respond to the claims. Our goal is to gather all of the relevant facts.

Harassment is strictly prohibited by CASA policy and CASA takes this matter very seriously. We ask that you do the same.

I need to go over some ground rules:

We request that you be truthful in all of your answers and give complete information. Providing misleading or untrue information in this investigation will subject you to discipline, including termination, regardless of the ultimate findings. You must not contact the complaining employee in any way while this investigation is pending. This means no face-to-face contact, no emailing, no calling, and no texting. You also must not attempt to influence any employee's testimony in this investigation, encourage anyone to change his/her testimony, or encourage anyone to give untruthful testimony. Making any employee feel uncomfortable or coerced in this investigation is strictly prohibited. Retaliating against the complaining employee or any witness is also strictly prohibited.

Is this clear? Do we have your complete agreement on these points? Do you have any questions?

Start Out General, Then Focus In -

It is usually logical to start out with general questions about the alleged incident or conduct, and then focus in on specifics. Let's face it—this is awkward and uncomfortable for everyone in the room, and this tactic will help the person get comfortable talking to you. It also shows that you are there to hear this person's side of the issue, not to blindside, bully, or trick them.

Example: If the allegation is that John made an offensive sexual remark to Ashley after her presentation in last week's staff meeting, you could start with:

- ✓ *"Do you recall last week's staff meeting?"*
- ✓ *"Who was there?"*
- ✓ *"What did you think of Ashley's presentation?"*
- ✓ *"Did you talk to Ashley during or after the meeting?"*
- ✓ *Who else was standing there?*
- ✓ *"What did you say to her?"*
- ✓ *"Is there anything else that you said?"*

If the employee does not volunteer making the remark in question, you can then focus in and nail down the answer:

- ✓ *"Did you say anything to Ashley that could have been offensive?"*
- ✓ *"I need you to think really hard and be sure. It was reported to us that you said 'give the quote.' Did you say that?"*
- ✓ *"Did you say anything similar to that?"*
- ✓ *"How sure are you?"*
- ✓ *"Are you 100% sure you did not say that or anything similar?"* (Requiring the person to place a "percentage of certainty" on their answers is a good way to test credibility).

If the conduct is denied, ask the accused if there is any reason the complaining employee would have to lie. If they provide a reason, ask for supporting evidence such as text messages, e-mails, or other documents, and also for other witnesses who may have information on this point.

For example: if John tells you he broke up with Ashley last week and she texted him that she would *"get revenge at work,"* get a copy of the text (and then you will need to re-interview Ashley).

Get the Full Story in Chronological Order -

Example: Assume the complaint is that during a work conference at a hotel, John propositioned Ashley during dinner and a few hours later barged into her hotel room. Ask John to take you through his evening hour by hour. Ask him to detail his whereabouts and activities in chronological order, asking for approximate times and amount of time spent. If John tells you he ate dinner at a separate restaurant at 6:00, watched TV in his room from 7:00-9:00, and was asleep by 9:30, you can then compare that to other witness accounts, hotel access card data, and other evidence to test its credibility.

Final Remarks -

Administrative Leave –

After interviewing the accused, you need to consider placing the employee on some form of administrative leave or suspension pending the conclusion of your inquiry. If the employee admitted engaging in conduct that violates your anti-harassment policy, administrative leave/suspension is certainly appropriate. It also may be appropriate even when the conduct is denied if the employee's continued presence at work could:

1. intimidate the complaining employee;
2. intimidate other employees/potential witnesses;
3. result in contact with the complaining employee; or
4. distract or interfere with your ability to do a thorough and prompt investigation. This is particularly likely if the accused employee is a manager or supervisor.

WHAT IF...

Here are answers to some common tough questions about interviewing the complaining employee:

Should I keep the complaining employee's identity a secret?

What if the accused employee refuses to cooperate?

What if the accused becomes belligerent or threatening?

What if the accused asks for a lawyer to sit in the interview?

EXAMPLES OF PROHIBITED RETALIATION

Poor performance reviews	"Cold Shoulder" treatment or social isolation from the team	Transfer to a less desirable work location or shift
Longer work hours	Threats from the accused harasser	Assignment of excessive work

Manager's Checklist: Avoiding High-Risk Behavior

- ☐ Recognize the devastating impact a claim of personal liability would have on your career, professional reputation, family and health.
- ☐ Avoid any kind of harassing behavior, whether physical, verbal or nonverbal.
- ☐ Monitor your workplace for potential harassment.
- ☐ Make time to address harassment claims, no matter how busy you are, and take all complaints of potential workplace harassment seriously.
- ☐ Respond promptly to all complaints, and cooperate fully with your employer's investigative and remedial procedures.
- ☐ Maximize training opportunities by using some simple learned rules – this can be one of the best investments for you and your employer's protection.
- ☐ Apply workplace rules consistently.
- ☐ Use respectful language and terminology at work and work-related functions.
- ☐ Avoid negative jokes or comments about protected categories.
- ☐ Never threaten an employee based on a protected category.
- ☐ Do not engage in any kind of physical conduct that could lead to a harassment claim – inappropriate touching, physical intimidation, assault, or destruction of property.
- ☐ Be aware of how physical touching could be misinterpreted or later misrepresented.
- ☐ Remember that nonverbal conduct could also lead to a harassment claim – offensive graffiti, the circulation or posting of offensive materials such as magazine, posters and Internet sites inappropriately related to protected categories.
- ☐ Do not endorse stereotypes.
- ☐ Scrutinize your own actions. Ask yourself if you would feel comfortable with your behavior knowing that it was being observed by an immediate supervisor.
- ☐ Address the inappropriate behavior of co-workers and non-employees. You and your employer's obligation to ensure a harassment-free workplace extends to all those who interact with employees in the workplace.
- ☐ Do not excuse workplace harassment, even if it comes from a volunteer. Your obligations and liabilities are the same and will require appropriate solutions.
- ☐ Watch your use of alcohol at meetings and off-site. Remember that just because your inhibitions may be lower, your liability is not.

MANAGER'S INITIAL RESPONSE TO HARASSMENT (FIRST STEPS)

- ☐ Contact HR to conduct investigation
- ☐ Act immediately – do not procrastinate or avoid the matter.
- ☐ Meet with the employee privately to get initial information.
- ☐ Give the employee a chance to explain the situation.
- ☐ Review the organization's harassment policy with the employee.
- ☐ Discuss confidentiality (but do not promise it.)
- ☐ Ensure no retaliation.
- ☐ Tell the employee he or she will be kept informed.



"Situation Room" – training activity

Thank you for participating today's session.

Training Resources:

Video: Sexual Harassment in the Workplace, Fred Pryor Seminars, www.pryor.com

Equal Employment Opportunity Commission (EEOC), www.eeoc.gov

Franklin County Department of Human Resources/Training, <http://commissioners.franklincountyohio.gov/hr/>

To avoid Vicarious Liability it is your duty to prove - Affirmative Defense requirement (two pronged test)

1. *Employer must take reasonable care to prevent and promptly correct harassment*
2. *Employee unreasonably failed to take advantage of any preventative or corrective opportunities offered by the agency or to avoid harm otherwise*

Note: If "tangible" — hiring, firing, failing to promote, reassigning with significantly different responsibilities, making a decision causing a significant change in an employee's benefits — *then the employer will be held vicariously liable and an affirmative defense will not be available.*

On the other hand, if the conduct involved "intangible" employment action — such as the creation of a hostile work environment — *then protection from liability can be afforded to an employer if it can establish the two-pronged affirmative defense outlined above.*

Examples of questions to ask during the interviewing process and the **purpose** for asking these questions:

QUESTIONS FOR THE COMPLAINANT

1. Identify specific events and dates which compromise the harassment/hostile environment. For each event, identify who, what, when, where, and how:

Who committed the alleged harassment?

What exactly occurred or what was said?

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 response did you make when the incident(s) occurred or afterwards?

{Purpose: to elicit complainant's facts}

2. How did the harassment affect you? Has your job been affected in any way?

{Purpose: to examine whether there was tangible employment action; to examine the impact}

3. Did others witness these events? Who, how, what events were witnessed and on what dates were these events witnessed?

4. Did you tell anyone about the harassment?

5. Who did you tell, when, and what did you tell the person?

{Purpose: to elicit complainant's facts}

6. Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?

{Purpose: Affirmative Defense: 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test quality of evidence}

7. Are there any notes, physical evidence, or other documentation regarding the incident(s)?
{Purpose: to test if the event occurred}
8. Did you complain or make known your rejection of the alleged discriminatory conduct?
Who did you tell, when, what did you tell the person?
{Purpose: goes to issue of unwelcomeness}
9. Are you aware of the agency's anti-harassment policy? How are you aware? Did you complain pursuant to that policy?
{Purpose: Affirmative Defense, 2nd Prong: Employee's duty to exercise reasonable care to minimize the damages that result from violations of the statute}
10. Did you complain about the harassment/hostile work environment? Who did you tell, when, and what did you tell the person?
{Purpose: Affirmative Defense, 2nd Prong: Employee's duty to exercise reasonable care to minimize the damages that result from violations of the statute; to test whether agency knew or should have known of the harassment and failed to take immediate and appropriate corrective action}
11. What happened as a result of your complaint? Did the harassment/hostile work environment stop? When did it stop? Promptly?
{Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test agency's burden to take immediate and appropriate corrective action}
12. Did you take any action to avoid further harm by the perpetrator?
{Purpose: Affirmative Defense, 2nd Prong: Employee's duty to exercise reasonable care}
13. How would you like to see the situation resolved?
{Purpose: Remedy or ADR - Alternative dispute resolution (ADR) refers to a variety of processes that help parties resolve disputes without a trial. Typical ADR processes include mediation, arbitration, and neutral evaluation}
14. Do you have any other relevant information?

QUESTIONS FOR ALLEGED HARASSER

1. What is your title/role in the organization? What is your work relationship with the complainant?
2. Recite events and dates claimed by complainant as harassment/hostile work environment. Ask perpetrator for his/her response: record details of events and dates as recited by alleged Harasser.
3. Did the complainant notify you that the conduct was unwelcome? What form did this notification take? What did the complainant say or write to you?
{Purpose: to ascertain/clarify complainant's facts re: unwelcomeness}

4. What was your reaction? What did you do?
{Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test complainant's facts}
 5. If alleged harasser asserts that the complainant's claims are false, ask why complainant might lie. Ask alleged harasser for his/her explanation of events.
{Purpose: Employer must take reasonable care to prevent and promptly correct harassment; to test complainant's facts}
 6. Are there any persons who have relevant information?
{Purpose: to ascertain/clarify complainant's/alleged harasser's facts}
 7. Do you know of any other relevant information?
{Purpose: to ascertain/clarify complainant's/alleged harasser's facts}
 8. Are there any notes, physical evidence or other documentation regarding the incidents?
{Purpose: to ascertain/clarify complainant's/alleged harasser's facts}
-

QUESTIONS FOR WITNESSES

1. Recite events and dates claimed by the complainant as harassment/hostile work environment. Ask witnesses to recite details of events and dates.

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.
{Purpose: to ascertain/clarify complainant's/alleged harasser's facts}
2. Does witness know if complainant told alleged harasser that conduct was unwelcome? How does witness know? Recite dates, details of observable events, conversations
{Purpose: to ascertain/clarify complainant's/alleged harasser's facts; goes to issue of unwelcomeness}
3. Did witness and complainant discuss the harassment/hostile work environment? When/what was substance of conversation? Did you observe any actions by the complainant regarding harassment? If so, what, where, when did you observe?
{Purpose: to ascertain/clarify complainant's facts}
4. Do you know of any other relevant information?
5. Are there other persons who have relevant information?

QUESTIONS FOR RESPONSIBLE OFFICIAL IN COMPLAINANT'S CHAIN OF COMMAND/IN AGENCY'S ANTI-HARASSMENT CHAIN

1. How/when did you become aware that complainant complained of harassment/hostile work environment?
{Purpose: Note and Affirmative Defense, 2nd Prong: Employee's duty to exercise reasonable care}
2. What actions did you take once you became aware of the harassment/hostile work environment complaint? Provide events and dates.
{Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test agency's burden to take immediate and appropriate corrective action}
3. Did you offer any preventive or corrective action?
{Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test agency's burden to take immediate and appropriate corrective action}
4. Do you know if complainant took advantage of this offer?
{Purpose: Affirmative Defense, 2nd Prong: Employee's duty to exercise reasonable care}
5. Are you aware of any previous complaints against this alleged harasser? If so, what actions did the agency take in response to the complaint(s)?
{Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test agency's burden to take immediate and appropriate corrective action}
6. Where is the agency's anti-harassment policy posted? How/when is it disseminated to staff?
{Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment}

