

JOINT STATE GOVERNMENT COMMISSION

General Assembly of the Commonwealth of Pennsylvania

SEXUAL HARASSMENT AND MISCONDUCT IN THE WORKPLACE: SURVEY OF CLAIMS AND POLICIES IN PENNSYLVANIA GOVERNMENTAL AGENCIES:

STAFF STUDY

JUNE 2019



*Serving the General Assembly of the
Commonwealth of Pennsylvania Since 1937*

REPORT

*Sexual Harassment and Misconduct in the Workplace:
Survey of Claims and Policies in Pennsylvania Governmental Agencies*

Staff Study

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The Joint State Government Commission was created in 1937 as the primary and central non-partisan, bicameral research and policy development agency for the General Assembly of Pennsylvania.¹

A fourteen-member Executive Committee comprised of the leadership of both the House of Representatives and the Senate oversees the Commission. The seven Executive Committee members from the House of Representatives are the Speaker, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. The seven Executive Committee members from the Senate are the President Pro Tempore, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. By statute, the Executive Committee selects a chairman of the Commission from among the members of the General Assembly. Historically, the Executive Committee has also selected a Vice-Chair or Treasurer, or both, for the Commission.

The studies conducted by the Commission are authorized by statute or by a simple or joint resolution. In general, the Commission has the power to conduct investigations, study issues, and gather information as directed by the General Assembly. The Commission provides in-depth research on a variety of topics, crafts recommendations to improve public policy and statutory law, and works closely with legislators and their staff.

A Commission study may involve the appointment of a legislative task force, composed of a specified number of legislators from the House of Representatives or the Senate, or both, as set forth in the enabling statute or resolution. In addition to following the progress of a particular study, the principal role of a task force is to determine whether to authorize the publication of any report resulting from the study and the introduction of any proposed legislation contained in the report. However, task force authorization does not necessarily reflect endorsement of all the findings and recommendations contained in a report.

Some studies involve an appointed advisory committee of professionals or interested parties from across the Commonwealth with expertise in a particular topic; others are managed exclusively by Commission staff with the informal involvement of representatives of those entities that can provide insight and information regarding the particular topic. When a study involves an advisory committee, the Commission seeks consensus among the members.² Although an advisory committee member may represent a particular department, agency, association, or group, such representation does not necessarily reflect the endorsement of the department, agency, association, or group of all the findings and recommendations contained in a study report.

¹ Act of July 1, 1937 (P.L.2460, No.459); 46 P.S. §§ 65 – 69.

² Consensus does not necessarily reflect unanimity among the advisory committee members on each individual policy or legislative recommendation. At a minimum, it reflects the views of a substantial majority of the advisory committee, gained after lengthy review and discussion.

Over the years, nearly one thousand individuals from across the Commonwealth have served as members of the Commission's numerous advisory committees or have assisted the Commission with its studies. Members of advisory committees bring a wide range of knowledge and experience to deliberations involving a particular study. Individuals from countless backgrounds have contributed to the work of the Commission, such as attorneys, judges, professors and other educators, state and local officials, physicians and other health care professionals, business and community leaders, service providers, administrators and other professionals, law enforcement personnel, and concerned citizens. In addition, members of advisory committees donate their time to serve the public good; they are not compensated for their service as members. Consequently, the Commonwealth of Pennsylvania receives the financial benefit of such volunteerism, along with their shared expertise in developing statutory language and public policy recommendations to improve the law in Pennsylvania.

The Commission periodically reports its findings and recommendations, along with any proposed legislation, to the General Assembly. Certain studies have specific timelines for the publication of a report, as in the case of a discrete or timely topic; other studies, given their complex or considerable nature, are ongoing and involve the publication of periodic reports. Completion of a study, or a particular aspect of an ongoing study, generally results in the publication of a report setting forth background material, policy recommendations, and proposed legislation. However, the release of a report by the Commission does not necessarily reflect the endorsement by the members of the Executive Committee, or the Chair or Vice-Chair of the Commission, of all the findings, recommendations, or conclusions contained in the report. A report containing proposed legislation may also contain official comments, which may be used in determining the intent of the General Assembly.³

Since its inception, the Commission has published more than 350 reports on a sweeping range of topics, including administrative law and procedure; agriculture; athletics and sports; banks and banking; commerce and trade; the commercial code; crimes and offenses; decedents, estates, and fiduciaries; detectives and private police; domestic relations; education; elections; eminent domain; environmental resources; escheats; fish; forests, waters, and state parks; game; health and safety; historical sites and museums; insolvency and assignments; insurance; the judiciary and judicial procedure; labor; law and justice; the legislature; liquor; mechanics' liens; mental health; military affairs; mines and mining; municipalities; prisons and parole; procurement; state-licensed professions and occupations; public utilities; public welfare; real and personal property; state government; taxation and fiscal affairs; transportation; vehicles; and workers' compensation.

Following the completion of a report, subsequent action on the part of the Commission may be required, and, as necessary, the Commission will draft legislation and statutory amendments, update research, track legislation through the legislative process, attend hearings, and answer questions from legislators, legislative staff, interest groups, and constituents.

³ 1 Pa.C.S. § 1939 (“The comments or report of the commission . . . which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly”).



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To the Members of the General Assembly of Pennsylvania:

We are pleased to release *Sexual Harassment and Misconduct in the Workplace: Survey of Claims and Policies in Pennsylvania Governmental Agencies*, a staff study directed by HR829 of 2018. The report is a review and analysis of the sexual harassment policies in the agencies established under the Commonwealth's legislative, executive, and judicial branches of government. The report also profiles the number, type, and disposition of sexual harassment claims filed with the agencies between 2013 and 2018. The report concludes with recommendations based on Commission staff's review of Commonwealth agency policies.

Respectfully submitted,

Glenn J. Pasewicz

Executive Director

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INTRODUCTION

#MeToo

House Resolution 829 (Printer's No. 3365) of 2018, adopted June 18, 2018, directed the Joint State Government Commission to "conduct a study and publish a report on the prevalence and outcomes of workplace harassment and sexual misconduct complaints within State government entities, including the Governor and the departments, boards and commissions, authorities and other officers or agencies of the Commonwealth, the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies and any independent agencies . . .". Specifically, the resolution requested data on:

- The number of workplace harassment and sexual misconduct complaints over the past five years for each State government agency or entity, categorized by the type of complaint.
- The number of workplace harassment and sexual misconduct complaints which resulted in disciplinary action for each State government agency or entity, categorized by type of complaint and the type of disciplinary action taken.
- The number of workplace harassment and sexual misconduct complaints which resulted in referral to law enforcement authorities, categorized by type of complaint.
- The number of workplace harassment and sexual misconduct complaints which resulted in monetary settlements or awards for each State government agency or entity, including the amounts of the settlements or awards.
- The number of inquiries received by the agency or entity about its complaint process or policies related to harassment or sexual misconduct in the workplace which did not result in a complaint, if available.

Additionally, the resolution directed the JSGC to prepare a comparison of the human resources policies related to workplace harassment and sexual misconduct in place for each State government agency or entity.

The context and legislative history of this resolution indicated that this study was focused on sexual harassment and misconduct, and thus, JSGC did not specifically collect information on harassment claims that might otherwise be determined to be discrimination of a non-sexual nature under the purview of the federal Equal Employment Opportunity

Commission (EEOC) and Pennsylvania Human Relations Commission.⁴ Discrimination, which include offenses based on race, color, religion, age, sex, pregnancy, gender identity or expression, sexual orientation, national or ethnic origin, disability or genetic information, is proscribed under the federal Civil Rights Act of 1964,⁵ and related federal anti-discrimination laws enforced by the Equal Employment Opportunity Commission. Additionally, the Pennsylvania Human Relations Commission enforces Pennsylvania's anti-discrimination laws, including the Pennsylvania Human Relations Act,⁶ and the Pennsylvania Fair Educational Opportunities Act,⁷ and investigates employment discrimination complaints on behalf of the EEOC, and housing discrimination complaints on behalf of the U.S. Department of Housing and Urban Development (HUD).⁸ While discrimination and harassment can entail the same activities, gathering data on all workplace harassment claims that involve discrimination would serve to mask the actual occurrence of sexual harassment and misconduct, and thus agencies were requested to limit their responses to sexual harassment and misconduct only. Further, while only the first resolved clause refers to the previous five years, JSGC staff applied that same review limit to all of the data requests in the HR829.

Defining Sexual Harassment

Review of the agencies' policies revealed that most common definition of "sexual harassment" used by Commonwealth is the one found in EEOC regulations:

Sexual harassment includes unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:

- (1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.
- (2) Submission to or rejection of such conduct by and individual is used as the basis for employment decisions affecting such individual.
- (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.⁹

The United Nations uses the same definition of sexual harassment, as well as provides a lengthy list of examples of specific conduct that is considered sexual

⁴ Commonwealth of Pennsylvania, Legislative Journal, Session of 2018, No. 28, June 18, 2018, pp. 843-847.

⁵ Pub. L. 88-352, (Title VII), as amended, 42 U.S.C. § 2000e et seq.

⁶ Act of October 27, 1955 (P.L. 744, No. 222), as amended.

⁷ Act of July 17, 1961 (P.L. 776, No. 341), as amended. 24 P.S. §§5001-5010.

⁸ Pennsylvania Human Relations Commission, "About Us." <https://www.phrc.pa.gov/About-Us/Pages/About-PHRC.aspx>

⁹ 29 C.F.R. § 1604.11(a).

harassment.¹⁰ Several Pennsylvania agencies also provide specific examples of prohibited conduct in their definition, including:

- Repeated flirtations
- Sexual advances or propositions
- Requests or pressure for sexual favors
- Jokes, stories, comments or verbal abuse of a sexual nature
- Leering, whistling or other sexually suggestive conduct
- The display of sexually explicit or suggestive objects, whether in the workplace or while on agency business
- Inquiries into or descriptions of one's sexual experiences or activities
- Unnecessary or inappropriate physical contact
- Requests for sexual activity
- Unwelcome physical touching of another
- Sexual jokes or innuendoes
- Overly personal comments or questions
- Posting of material of a sexual nature, including cartoons, written jokes, posters, notices, memos, letters, e-mails, etc.
- Any harassing conduct to which an individual would not be subjected but for such individual's sex
- Inappropriate question of a worker's private life
- Explicit propositions
- Discriminatory ridicule or insults
- Undesired, unaccidental touching (embracing, patting, pinching, etc.)
- Threat of rape, sexual assault, or actual sexual assault
- Offensive motions or gestures suggesting sexual acts
- Repeated sexually explicit comments or obscene and suggestive remarks that are objectionable or discomfiting to the recipient
- Off-color jokes, particularly if an employee(s) considers them offensive
- Offensive or sexually explicit posters or calendars

¹⁰ Womenwatch is the central gateway to information and resources on the promotion of gender equality and the empowerment of women throughout the United Nations system. The internet resources is managed by a task force of the Inter-Agency Network on Women and Gender Equality, led by UN Women. UN Women is the United Nations entity dedicated to gender equality and the empowerment of women. <https://www.un.org/womenwatch/osagi/pdf/whatish.pdf>

- Behavior at off-site social events involving supervisor and worker that fits the definition of sexual harassment
- Conduct that occurs outside of the work setting when such conduct alters the conditions of employment by creating an abusive, hostile, intimidating, or offensive work environment, including conduct that occurs via electronic means such as text messages, email, and other social media

A few agencies note that sexual harassment may occur between members of the same sex, sexual orientation or gender identity, which is consistent with EEOC Guidance.¹¹

EEOC regulations also add that:

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.¹²

While federal law does not distinguish between types of sexual harassment, they can be divided into two broad categories: *quid pro quo* and *hostile work environment*. Not all Commonwealth agencies make the distinction between these two types of harassment in either their policies or data collecting. Pennsylvania Unified Judicial System defines the two terms in its policy. Within the General Assembly, only the Local Government Commission provides both definitions.

Quid pro quo claims almost always involve a person in a superior position and a person in a subordinate position, as evidenced by paragraphs (1) and (2) of the EEOC's definition of sexual harassment.

The third paragraph of the EEOC definition describes the hostile work environment category, which has been subject to numerous court interpretations in legal actions claiming a violation of an individual's rights under Title VII of the Civil Rights Act of 1964.

Hostile work environment, a recognizable claim that has spread across the landscape during the past thirty years, has been litigated in Pennsylvania and a number of other jurisdictions. American courts have spent these past thirty years defining what a hostile work environment is and when an employer is ultimately liable for one. The result to date has been a thicket of court holdings that have steadily formed the threshold necessary for a litigant to successfully demonstrate a hostile work environment existed.

¹¹ U.S. Equal Employment Opportunity Commission, Laws, Regulations & Guidance, Types of Discrimination. https://www.eeoc.gov/laws/types/sexual_harassment.cfm

¹² 29 C.F.R. § 1604.11(b).

One of the first major attempts of the federal courts to define hostile work environment came in the 1986 United States Supreme Court case of *Meritor Savings Bank, FSB v. Vinson*. In this case, a former bank employee brought an action against the Meritor Savings Bank specifically alleging that she had been subjected to a hostile work environment by way of sexual harassment from her supervisor. The employee alleged that although she had been promoted several times throughout her employment on merit alone, she had “constantly been subjected to sexual harassment” by her supervisor through repeated demands for sexual favors, physical fondling in front of other employees, and even forcible rape in a bank bathroom.¹³ While the bank did not challenge the proposition that the unwelcome sexual advances created an offensive or hostile work environment, it did argue that a claim for such under Title VII is limited to economic or tangible discrimination.¹⁴

The United States Supreme Court rejected this notion and held that a hostile work environment claim does not have to lead to an economic injury. In fact, the court drew attention to the Equal Employment Opportunity Commission’s (EEOC) own guidelines which made it clear that by

concluding that so-called “hostile environment” (i.e., non-*quid pro quo*) harassment violated Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.¹⁵

The Court also held that in order for sexual harassment to be actionable under a hostile work environment, the conduct “must be sufficiently severe or pervasive to alter the conditions of the [the victim’s] employment...”¹⁶ The court noted that the mere utterance of epithets that engender offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII.¹⁷ Instead, the workplace must be permeated with “discriminatory intimidation, ridicule, and insult” and the resulting environment would be reasonably perceived, and is perceived, as hostile or abusive.¹⁸ Determining whether conduct was severe and pervasive enough so as to create a hostile work environment has proven to be especially difficult in these cases however, since individuals tend to have different perceptions of what defines severe behavior.

Another seminal United States Supreme Court case instrumental in further defining hostile work environment is the 1993 decision in *Harris v. Forklift Systems, Inc.* The Court in *Harris* reaffirmed the standard set forth above in *Meritor Savings Bank, FSB* and added that a hostile work environment can be shown without the victim having to experience psychological injuries. The court noted that even a hostile work environment “that does not seriously affect an employee’s psychological well-being, can and often will detract

¹³ *Meritor Savings Bank, FSB v. Vinson et al.*, 477 U.S. 57 (1986).

¹⁴ *Id.* at p. 64.

¹⁵ *Id.* at p. 65.

¹⁶ *Id.* at p. 67.

¹⁷ *Id.* at p. 65.

¹⁸ *Id.* at pp. 65, 67.

from an employee's job performance..." As such, the court opined that Title VII comes into play before the harassing conduct leads to psychological damage. The court also acknowledged that there cannot be "a mathematically precise test" in determining the existence of a hostile work environment.¹⁹ To the contrary, the existence of a hostile work environment can only be determined by looking at all the circumstances which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The court also determined that "while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."²⁰

In the 1998 court case of *Faragher v. City of Boca Raton*, the U.S. Supreme Court acknowledged that while it established the substantive contours of the hostile work environments forbidden under Title VII, its "cases have established few definite rules for determining when an employer will be liable for a discriminatory environment that is otherwise actionably abusive."²¹ Despite the absence of significant court precedence on employer liability, the court determined that an employer is not always liable for a hostile work environment and could avoid liability if it can show it exercised reasonable care to prevent and correct promptly any sexual harassing behavior, and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.²² Here, the court ultimately determined that the employer was liable for failure to monitor supervisors' behavior and for failure to circulate a policy against sexual harassment to employees.²³

The U.S. Supreme Court also addressed the application of hostile work environment to same-sex sexual harassment in the 1998 case of *Oncale v. Sundowner Offshore Services, Incorporated, et al.* In this case, the court held that there is no categorical rule excluding same-sex sexual harassment claims from being actionable under a hostile work environment theory under Title VII.²⁴

In the 1999 United States Court of Appeals for the Third Circuit (Third Circuit)²⁵ case of *Hurley v. Atlantic City Police Department*, the court attempted to provide greater clarity to what constitutes severe and pervasive conduct by applying the New Jersey Supreme Court's reasonable woman standard. In applying this standard, the court held that the conduct's severity and pervasiveness must be viewed from a woman's perspective when the victim is female because a gender-specific standard provides flexibility and recognizes and respects the differences between both male and female perspectives on

¹⁹ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

²⁰ *Id.* at p. 23.

²¹ *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

²² *Id.* at p. 806.

²³ *Id.* at p. 809.

²⁴ *Oncale v. Sundowner Offshore Services, Incorporated, et al.*, 523 U.S. 75 79 (1998).

²⁵ The Third Circuit maintains appellate jurisdiction over the Eastern, Middle, and Western Districts of Pennsylvania, as well as the District of Delaware and New Jersey.

sexual harassment.²⁶ Some have interpreted this holding to be the understanding that the *Oncala* court's focus on "all the circumstances" and "the plaintiff's position" was to encourage the use of a reasonable woman standard for females.²⁷

In 2013, the Third Circuit presided over the case of *Mandel v. M & Q Packaging Corp.* In this case, the court reaffirmed the Supreme Court's test to determine the existence of a hostile work environment and emphasized an additional element requiring the existence of respondeat superior to establish employer liability.²⁸ The court also concluded that a hostile work environment claim is composed of a series of separate acts that collectively constitute one unlawful employment practice. Accordingly, the court held that a plaintiff must show that all acts which constitute the claim are part of the same unlawful employment practice.²⁹

In the fairly recent 2017 Third Circuit case of *Castleberry v. STI Group*, the court clarified that the correct standard for conduct actionable under a hostile work environment claim is "severe and pervasive" noting that isolated incidents, unless extremely serious, will not amount to a hostile work environment. However, the court explained that severity and pervasiveness are "alternative possibilities: some harassment may be severe enough to contaminate an environment even if not pervasive; other less objectionable, conduct will contaminate the workplace only if it is pervasive." As such, an extreme isolated act of discrimination, can in fact, create a hostile work environment.³⁰

In summation, courts have held that in order for a hostile work environment sexual harassment case to be actionable under Title VII, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile, and one that the victim did perceive to be so. Courts must determine whether an environment is sufficiently hostile by looking at all the circumstances, including the plaintiff's position, the frequency or pervasiveness of discriminatory conduct, its severity, whether its physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Furthermore, proving hostile work environment does not require a showing of economic or psychological injuries. In addition, same-sex sexual harassment is actionable under a hostile work environment claim, and some harassment can be severe enough to create a hostile work environment without being pervasive.

²⁶ *Hurely v. Atlantic City Police Department*, 174 F.3d 95, 115 (3rd Cir. 1999) – an abrogation of this case was recognized by *Nance v. City of Newark*, 501 Fed. Appx. 123 (3rd Cir. 2012) in that the court clarified an unrelated issue regarding prejudice interest which the court found to be available against governmental entities under the NJLAD.

²⁷ V. Blair Druhan, "Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment," *Vanderbilt Law Review*, 355, 364 (2013).

²⁸ *Respondeat Superior* – establishes that the basis of an employer's liability for a hostile work environment depends on whether the harasser is the victim's supervisor or coworker – *Huston v. Proctor & Gamble Paper Products Corp.*, 568 F.3d 100 (3rd Cir. 2009).

²⁹ *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3rd Cir. 2013).

³⁰ *Castleberry v. STI Group*, 863 F.3d 259, 264 (3rd Cir. 2017).

When reviewing these decisions, it is important to note that not all offensive conduct generates a hostile work environment. In fact, the U.S. Supreme Court intended that, when properly applied, its standards should filter out complaints attacking “the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.”³¹

Acknowledgements

Staff contacted and received data from various sources. Within the General Assembly, each caucus and individual legislative service agency was contacted. Information from the Unified Judicial System was provided by the Administrative Offices of Pennsylvania Courts, which regularly collects data about harassment claims under the Pennsylvania Supreme Court’s governing policy. The Governor’s Office of Administration (OA) gathered data and policies from the executive departments and offices, and those independent agencies which use OA’s policies and report data to OA. Independent agencies were contacted individually and asked to provide responses and policies. We deeply appreciate the level of cooperation received from all of the Commonwealth agencies.

³¹ *Supra* n. 9 at p. 788.

SURVEY OF COMPLAINTS

Information contained in this report is categorized by branch of government – legislative, judicial, executive, or independent. Within each category some agencies are aggregated into subcategories. This was done with smaller agencies in particular that may have had only one or two claims during the period in question, in order to help shield the identity of the victims. A total of 597 claims were reported by all agencies, with a variety of disciplinary actions taken, few referrals to law enforcement, and a total in monetary settlements and awards of over \$1.9 million.

With respect to inquiries under Resolved Clause 6, most agencies do not keep records of questions regarding their policies that do not result in a complaint. To the extent any do, the answer is usually “none.” Only two agencies reported receiving specific inquiries that did not result in complaints, and they are the Office of the Auditor General (two inquiries) and the Pennsylvania Turnpike Commission (three inquiries).

The General Assembly

The employees of the General Assembly include:

- House and Senate staff from three groups – the majority caucus, the minority caucus and the core staff in each chamber,
- staff members in the individual member’s district offices, and
- the employees of ten legislative service agencies.

Legislative Service Agencies include:

- Capitol Preservation Committee
- Center for Rural Pennsylvania
- Commission on Sentencing
- Independent Fiscal Office
- Joint Legislative Conservation Committee
- Joint State Government Commission
- Legislative Budget and Finance Committee
- Legislative Data Processing Center
- Legislative Reference Bureau
- Local Government Commission

Tables 1, 2 and 3 contain the data responses from the General Assembly for the years 2013-2018. Because terminology varies from agency to agency with regard to disciplinary responses within the General Assembly, only the total number of sexual harassment claims and monetary settlements have been aggregated. Seven specific claims of sexual harassment and misconduct were identified over the period, resulting in one referral to law enforcement and one settlement of \$250,000. Thirteen additional hostile work environment claims were made, resulting in six offenders receiving counseling, two receiving counseling and suspension, and one termination. Additionally, 9 unspecific violations of an agency’s policy were noted, 4 of which were found to not be violations, one was unsubstantiated, and 4 were found to be policy violations. Those 4 violations resulted in 1 reprimand and 3 other undisclosed disciplinary responses.

Table 1						
House of Representatives Workplace Harassment and Sexual Misconduct Claims 2013-2018						
Agency/Group	Number of Complaints, By Type		Disciplinary Action		Referrals to Law Enforcement	Monetary Settlements or Awards
House of Representatives	Hostile Work Environment	13	No discipline ³²	4		
			Counseling	6		
			Counseling with unpaid suspension	2		
			Termination	1		
	General Harassment	5	No discipline	3		
			Termination	1		
			Decision pending	1		
	Sexual Harassment	6	No discipline	2	1	1 totaling \$250,000
			Removal from committee assignments	1		
			Disciplinary action (unspecified)	2		
	Total:	24				1 totaling \$250,000

Source: Compiled by Joint State Government Commission staff via email and telephone conversations with the listed agencies from August 2018 to May 2019.

³² “No discipline” responses may include cases where the allegations were unfounded.

Table 2					
Senate Workplace Harassment and Sexual Misconduct Claims 2013-2018					
Agency/Group	Number of Complaints	Number of Complaints by Disposition		Number of Disciplinary Actions Taken for Policy Violations	
Senate of Pennsylvania	9	Policy Violated	4	Reprimand	1
		Policy Not Violated	4	Other	3
		Unsubstantiated	1		
	Total:	9			

Source: Compiled by Joint State Government Commission staff via email and telephone conversations with the listed agencies from August 2018 to May 2019.

*Note that there were no referrals to law enforcement or monetary settlements

Table 3			
Legislative Service Agencies Workplace Harassment and Sexual Misconduct Claims 2013-2018			
Agency/Group	Number of Complaints, By Type		Disciplinary Action
Legislative Service Agencies	General Harassment	2	Informal counseling by agency directors
	Sexual Harassment ³³	1	Claim made against independent contractor - relationship terminated
	Total:	3	

Source: Compiled by Joint State Government Commission staff via email and telephone conversations with the listed agencies from August 2018 to May 2019.

*Note that there were no referrals to law enforcement or monetary settlements

³³ Refers to non-sexual harassment – bullying; personality conflicts

The Governor and the Executive Departments

Human relations policies and procedures for Pennsylvania's executive branch of government are implemented under the Office of Administration (OA), which oversees employees of the Governor's Executive Staff and Cabinet Officials. These include 18 administrative departments and 11 other agencies. These 29 agencies report workplace harassment claims to the OA:

Executive Departments

- Aging
- Agriculture
- Banking and Securities
- Community and Economic Development
- Conservation and Natural Resources
- Corrections
- Drug and Alcohol Programs
- Education
- Environmental Protection
- General Services
- Health
- Human Services
- Insurance
- Labor and Industry
- Military and Veterans' Affairs
- Revenue
- State
- Transportation

Executive Offices

- Governor's Office
- Office of Administration
- Office of the Budget
- Office of Inspector General
- Office of General Counsel
- Commission on Crime and Delinquency
- Juvenile Court Judges' Commission
- Council on the Arts
- Pennsylvania State Police
- State Fire Commissioner
- Pa. Emergency Management Agency

Additionally, there are nine independent agencies that use the Office of Administration for their human relations/resources (HR) matters, follow OA harassment policies, and report claims to OA. These include:

- Board of Probation and Parole
- State Civil Service Commission
- Human Relations Commission
- Fish and Boat Commission
- Game Commission
- Liquor Control Board
- Public Utility Commission
- Public School Employees Retirement System
- State Employees Retirement System

Table 4 contains data for the executive agencies for the fiscal years 2013-2018. Claims for the forgoing 29 departments, offices and agencies totaled 316. They resulted in 31 reprimands, 39 suspensions, 23 terminations, two demotions and two undefined dispositions. No reports to law enforcement were noted; monetary settlements and awards totaling \$1,413,900.80 were paid on 10 claims.

Table 4			
Executive Branch Agencies Governor's Cabinet Departments FY 2013-2018			
Agency	Number of Complaints	Number of complaints resulting in disciplinary action by type of complaint and type of action	Number of complaints resulting in monetary settlements or awards
Aging	2	No discipline	
Agriculture	6	4 - Reprimand 1 - Suspension 1 - No discipline	
Banking	0		
Community and Economic Development	4	No discipline	
Conservation and Natural Resources	5	3 - Reprimand 1 - Termination 1 - No discipline	
Corrections	130	13 - Reprimand 20 - Suspension 8 - Termination 2 - Demotion 2 - Undefined 85 - No discipline	3 totaling \$76,245.33
Education	0		
Environmental Protection	2	2 - Reprimand	
Executive Offices	4	1 - Suspension 3 - No discipline	
General Services	3	2 - Reprimand 1 - Termination	
Health	2	No discipline	
Human Services	58	3 - Reprimand 2 - Suspension 3 - Termination 50 - No discipline	2 totaling \$10,093.61

Military and Veterans' Affairs	10	No discipline	
Insurance	1	No discipline	
Labor and Industry	17	No discipline	
PEMA	0		
Revenue	6	1 - Termination 5 - No discipline	1 totaling \$902,572.10
State	4	No discipline	
State Police	31	1 - Reprimand 5 - Suspension 1 - Termination 24 - No discipline	3 totaling \$384,989.76
Transportation	32	3 - Reprimand 10 - Suspension 8 - Termination 11 - No discipline	1 totaling \$40,000
TOTALS	316		10 totaling \$1,413,900.80

Source: Compiled by Joint State Government Commission staff via email and telephone conversations with the listed agencies from August 2018 to May 2019.

Table 5 contains the data for the independent agencies that use the Office of Administration for HR and report claims to OA. These 9 agencies had 86 claims resulting in 7 reprimands, 9 suspensions, and 7 terminations. No law enforcement referrals and monetary settlements or awards were reported.

Table 5**Independent Agencies Reporting to OA
2013-2018 FY**

Agency	Number of Complaints	Number of complaints resulting in disciplinary action by type of complaint and type of action
Fish and Boat Commission	6	6 – Reprimands
Game Commission	0	
Liquor Control Board	64	1 - Reprimand 5 - Suspension 6 – Termination
Board of Probation and Parole	12	1 - Suspension 2- Termination 9 - No discipline
Public Utility Commission	3	3 – Suspension
State Civil Service Commission	0	
Public School Employees Retirement System	1	No discipline
State Employees Retirement System	0	
TOTALS:	86	

Source: Compiled by Joint State Government Commission staff via email and telephone conversations with the listed agencies from August 2018 to May 2019.

The Unified Judicial System

Pennsylvania's Unified Judicial System (UJS) consists of approximately 1,000 judicial officers (justices and judges), and the employees of:

- Supreme Court (including all boards and committees)
- Superior Court
- Commonwealth Court
- Courts of Common Pleas in 60 Judicial Districts
- Minor Courts (which include Philadelphia and Pittsburgh Municipal Court judges and magisterial district judges)
- Administrative Office of Pennsylvania Courts

The court system includes approximately 1,000 state-level court employees and more than 15,000 county-level court employees. AOPC administers the UJS' discrimination and harassment policy for judicial employees and the Judicial Conduct Board administers it for judicial officers.

During the five year time period spanning October 1, 2013 to September 30, 2018, the AOPC and Judicial Conduct Board combined received 90 complaints of sexual harassment. Table 6 contains the data relating to these claims. The 64 claims reviewed by AOPC resulted in 5 counseling/training assignments, 5 reprimands, 2 suspensions, 6 terminations, 1 demotion, 18 other/unknown dispositions, and 6 referrals to the Judicial Conduct Board. Of the 26 claims received by the Judicial Conduct Board, 18 were dismissed, 6 are still under investigation, one was referred to law enforcement, and one resulted in a monetary fine for the offender.

Table 6			
Unified Judicial System			
October 1, 2013 – September 30, 2018			
Number of Complaints	Number of complaints resulting in disciplinary action by type of complaint and type of action	Number of referrals to law enforcement, by complaint type	Number of complaints resulting in monetary settlements
<i>Administrative Offices of the Pennsylvania Courts</i>			
	1 - Investigation ongoing		
	9 - No discrimination found		
	9 - Complaint unsubstantiated		
	2 - Policy not applicable		
	1 - Judicial process ³⁴		
	Disciplinary actions taken: 5 - Counseling/training 5 - Reprimand 2 - Suspension 6 - Termination 1 - Demotion 9 - Other 8 - Unknown 6 - Referred to Judicial Conduct Board		
TOTAL	64		
<i>Judicial Conduct Board</i>			
	6 - Investigation ongoing		
	18 - Dismissed		
	2 - Action Taken	1	1 - Monetary Fine
TOTAL	26		

Source: Compiled by Joint State Government Commission staff via email and telephone conversations with the listed agencies from August 2018 to May 2019.

³⁴ Judicial process involves a claim against a judge based on discrimination alleged during a judicial proceeding or decision making process. These type of claims are specifically excluded from the UJS policy.

Independent Agencies

Twelve independent agencies individually provided data on workplace harassment and sexual misconduct claims over the past five years. These offices include:

- Office of the Attorney General
- Office of the Auditor General
- Treasury
- Turnpike Commission
- Board of Claims
- Independent Regulatory Review Commission
- Gaming Control Board
- Pa. Higher Education Assistance Agency (PHEAA)
- State Public School Building Authority
- Pa. Higher Educational Facilities Authority
- Health Care Cost Containment Council
- Philadelphia Regional Port Authority (PhilaPort)

Table 7 represents the data received from the foregoing independent agencies. Of the 69 claims presented, 6 reprimands were issued, 12 employees were suspended, and 16 employees had their employment terminated. One person was referred to anger management, one was sent home for the day, and one received a warning and chose to retire. Three received unspecified discipline, and one employee had retired by the time the claim was discovered during another proceeding. In one instance a police report was filed based on misconduct occurring away from the workplace but involving a superior and a subordinate. One claim filed on behalf of 18 individuals in one unit of an agency resulted in monetary settlements to each party of \$12,500, totally \$225,000 and a complaint in a different agency resulted in a monetary settlement of \$25,000.

Table 6					
Independent Agencies 2013-2018					
Agency	Number of Complaints By Type		Number of complaints resulting in disciplinary action by type of complaint and type of action	Number of referrals to law enforcement, by complaint type	Number of complaints resulting in monetary settlements
Office of Attorney General ³⁵	Harassment	8	1		1 complaint filed by 18 employees in the same unit - \$12,500 settlement per person totaling \$225,000
	Sexual misconduct	4	2		1 - \$25,000
Office of Auditor General		0			
Treasury		0			
Turnpike Commission		4	3		1
Board of Claims		0			
Independent Regulatory Review Commission		0	0		
Pa. Gaming Control Board		1	Offender had retired by the time claim came to light		
Pa. Higher Education Assistance Agency (PHEAA) ³⁶	Harassment	33	5 - Reprimand 10 - Suspension 8 - Terminated		
	Sexual misconduct	16	1 - Reprimand 2 - Suspension 8 - Terminated		

³⁵ Data from 2014-2018. Total complaints is 11 – one complaint involved both harassment and sexual misconduct. Total disciplinary action was 2, for the same reason.

³⁶ Data from April 1, 2014 – March 31, 2019

Agency	Number of Complaints By Type		Number of complaints resulting in disciplinary action by type of complaint and type of action	Number of referrals to law enforcement, by complaint type	Number of complaints resulting in monetary settlements
State Public School Building Authority		0			
Pa. Higher Educational Facilities Authority		0			
Health Care Cost Containment Council		0			
Philadelphia Regional Port Authority (PhilaPort)	Harassment	2	1 - Anger management referral 1 - Offender sent home for the day 1 - Provided warnings; employee chose to retire	1 - superior and subordinate encounter outside workplace - police report filed	
	Sexual harassment	1			
TOTALS		69			2 complaints, 19 complainants totally \$250,000; 1 complaint amount not disclosed

Source: Compiled by Joint State Government Commission staff via email and telephone conversations with the listed agencies from August 2018 to May 2019.

Sexual harassment policies vary from agency to agency both between and within Pennsylvania's governmental branches. Some policies include sexual harassment within the category of workplace harassment in general, but many agencies address sexual harassment separately in their workplace policies and/or employee handbooks

The General Assembly

Definition of Sexual Harassment

The EEOC definition of sexual harassment is used in the policies of the following legislative entities:

- House of Representatives Democratic Caucus
- House of Representatives Republican Caucus
- Senate of Pennsylvania
- Capitol Preservation Committee
- Independent Fiscal Office
- Joint Legislative Conservation Committee
- Joint State Government Commission
- Legislative Budget and Finance Committee
- Legislative Data Processing Center
- Legislative Reference Bureau
- Local Government Commission

Several of these agencies also list specific examples of prohibited conduct.

The House Republican Caucus General and Sexual Harassment Policy adds that harassing conduct is prohibited even if it is not sufficiently severe or pervasive to meet the legal definition of creating a hostile environment.

Persons Covered

Most policies protect employees and employment applicants for conduct by or toward the employee or applicant, although who is protected is not always explicitly declared, but rather inferred from the overall content of the policy (e.g., disciplinary actions are limited to those applicable to an employee). A few include vendors, independent contractors, visitors, trade persons and any other non-employee who is on the premises of

the entity or conducts business with the entity. Members of the General Assembly are also covered under the House and Senate policies.

Reports

Most policies of the legislative agencies require an immediate verbal or written report by a complainant to a designated person in a supervisory or leadership position. The designated recipient could be the director, an assistant director, personnel supervisor, comptroller, or legal counsel. Generally, if the complainant is uncomfortable with reporting to the first named title holder, the report can be made to an alternative supervisory person. Most legislative service agencies will also provide for a report to the committee or commission's chairperson, who is always a member of the General Assembly. The Local Government Commission also provides for a report to the Chief Clerk of the Senate. A few of the larger entities have a Human Resources office, in which case reports of sexual harassment are to be made to the HR director. Within the Senate, in addition to the supervisor, reports can be made to the Secretary of the Senate or the Chief Clerk of the Senate.

Most policies request a detailed description of the incident, including date, time and place, and names of witnesses. Additionally, some may require the report to include the circumstances giving rise to the issue or problem.

Investigations

Most policies call for a prompt and thorough investigation that is conducted in as confidential a manner as is reasonably possible. Accuser and accused are notified of investigation results and any disciplinary action taken. Investigations are usually conducted by the person to whom the report was made. The House Republican Caucus uses its Human Resources Department to conduct investigations involving most employees; in matters of complaints against a legislator or staff of the Human Resources Department, the Republican Leader determines the applicable investigative procedure. Complaints against Senate employees are reviewed by the President Pro Tempore, the Majority Leader and the Minority Leader, who may, upon reasonable belief, direct that a formal investigation be conducted by the Secretary and Chief Clerk.

Complaints against Representatives and Senators are investigated by their respective internal ethics body. The House of Representatives' general operating rules charge the Committee on Ethics with investigation of allegations against legislators,³⁷ while the Senate's policy directs that investigations of Senators be conducted by the Committee on Ethics and Official Conduct consistent with the Rule 34 of the Rules of the Senate.³⁸

³⁷ General Operating Rules of the House of Representatives (2019-2020). Rules 2.1E and 3E. <https://www.house.state.pa.us/rules.cfm>

³⁸ Rules of the Senate of Pennsylvania (2019-2020), Rule 34. <https://www.pasen.gov/rules.cfm>

Retaliation

Retaliation is forbidden, and is frequently grounds for further disciplinary action, including termination of employment (some policies do not discuss the consequences).

Discipline

Discipline is to be applied in a timely, consistent, and uniform manner. Generally, discipline is progressive, based on the frequency of occurrences or repeat occurrences. Actions can include:

- Counseling by the agency head
- Oral reprimand/warning
- Written memorandum to employee by supervisor
- Discussion between employee, supervisor and agency head; formal memorandum generated to employee with a copy to the official personnel file
- Placing conditions on the employee, including curtailing the employee's access or responsibilities
- Suspension without pay, with explanatory memo to employee and personnel file
- Termination
- Particularly egregious violations can be met with immediate termination of employment

A few of the policies provide for an expungement of the record if no further incidents occur over a period of time (one to two years).

Training

Most policies require that new employees receive and sign a copy of the entity's workplace conduct policy. Training, usually in the form of reviewing a PowerPoint presentation or video, is also frequently required. Many of the legislative service agencies require that new employees view a workplace harassment video that has been made available by the Pennsylvania Senate. The House Republican Caucus also requires new employees (both in Harrisburg and in the Members' district offices) to watch a general and sexual harassment training video. The House of Representatives' general operating rules mandate that each House member complete one hour of sexual harassment and discrimination in the workplace education and training each legislative term.³⁹ The Senate's Prevention of Workplace Harassment COMO Policy requires that a copy of the

³⁹ General Operating Rules of the House of Representatives (2019-2020). Rules 2.1E and 3E. <https://www.house.state.pa.us/rules.cfm>

policy be included in every employee's first paycheck of each year. New employees are to acknowledge receipt of a copy of the policy prior to beginning employment.

Agencies

The harassment policies of the following entities were reviewed for this portion of the report. Except where noted, each body maintains its own independent personnel policy:

- House of Representatives Democratic Caucus
- House of Representatives Republican Caucus (two handbooks – one for Harrisburg employees, one for district office employees)
- House of Representatives CORE (employees under the Chief Clerk's Office)
- Senate of Pennsylvania
- Capitol Preservation Committee
- Center for Rural Pennsylvania (follows the Senate's Prevention of Workplace Harassment Policy)
- Commission on Sentencing (affiliated with the Pennsylvania State University, follows PSU personnel policies and reports any complaints to PSU Human Resources)⁴⁰
- Independent Fiscal Office (follows EEOC policy)
- Joint Legislative Conservation Committee (follows the House of Representatives CORE policy)
- Joint State Government Commission
- Legislative Budget and Finance Committee
- Legislative Data Processing Center
- Legislative Reference Bureau

⁴⁰ AD85 Sexual And/or Gender-Based Harassment and Misconduct (Including Sexual Harassment, Sexual Assault, Dating Violence, Domestic Violence, Stalking, and Related Inappropriate Conduct (Formerly Discrimination, Harassment, ...)) <https://policies.psu.edu/policies/ad85> and AD91 Discrimination and Harassment and Related Inappropriate Conduct <https://policies.psu.edu/policies/ad91>, both accessed June 3, 2019.

The Governor's Office and Executive Agencies

The executive branch of government in Pennsylvania includes the Governor, his cabinet and executive officers, the executive departments, and some quasi-independent agencies. The Office of Administration coordinates workplace harassment and sexual misconduct in those Commonwealth agencies under the broader EEOC term of “sexual harassment.”

Executive Order 2002-4 “Prohibition of Sexual Harassment in the Commonwealth⁴¹ and Management Directive 505.30 “Prohibition of Sexual Harassment in Commonwealth Work Settings,”⁴² dated June 19, 2002 constitutes the sexual harassment policy for the agencies under the Governor’s jurisdiction. Executive Order 2016-4, issued by Governor Tom Wolf on April 2, 2016, extended “sexual orientation” and “gender identity or expression” to prohibit against discrimination. “Sexual orientation” is defined as: heterosexuality, homosexuality, or bisexuality. “Gender identity or expression” is defined as the gender-related identity, appearance, mannerisms, expression or other gender-related characteristics of an individual regardless of the individual’s designated sex at birth.

Additionally, the Governor’s Office policy provides examples of acts of sexual harassment:

- Written: Unwelcome suggestive, sexually explicit, or obscene letters, poems, notes or invitations.
- Verbal: Derogatory, sexually explicit, or offensive comments, epithets, slurs or jokes; inappropriate comments about an individual’s body or sexual activities; repeated unwelcome propositions or repeated sexual flirtations; direct or subtle pressures or repeated unwelcome requests for dates or sexual activities
- Physical: Impeding or blocking movements, touching, patting, pinching, or any other unnecessary or unwanted physical contact
- Visual: Sexually oriented gestures, display of sexually suggestive or derogatory objects, pictures, cartoons, posters, or drawings⁴³

⁴¹ Executive Order 2002-4, dated May 3, 2002, 32 Pa. Bulletin 2988, found at 4 Pa. Code §§ 7.591 – 7.601.

⁴² Commonwealth of Pennsylvania, Office of Administration, issued June 19, 2002, https://www.oa.pa.gov/Policies/md/Documents/505_30.pdf

⁴³ *Id.*

Executive Departments

Every executive department references Executive Order 2002-4 and Management Directive 505.30 as the guiding documents for its sexual harassment policies. All employees under the Governor's jurisdiction are given copies of both documents and are signed acknowledgement of receipts are maintained in their personal files. Additionally, both documents are to be posted in conspicuous places throughout the workplace, placed in all employee handbooks and/or policy manuals, distributed during new employee orientation programs and redistributed each year.

Additionally, each individual agency produces a policy statement that incorporates those documents by reference, and provides varying degrees of detail relating to specific topics involving sexual harassment claims. All of the policy variations in the individual departmental statements can be found in either the Executive Order or Management Directive.

Definition of Sexual Harassment

Almost every executive department uses the EEOC definition of sexual harassment and some add the list of examples of written, verbal, physical and visual harassment found in Executive Order 2002-4.⁴⁴

Some policies specify that harassment can occur between members of the same sex and several agencies include this in their policy statements.⁴⁵ Prohibited sexual harassment in some policies may include actions which may be overtly sexual or facially neutral if such conduct constitutes gender based discrimination.⁴⁶

Persons Covered

Sexual harassment by any employee against another employee, applicant for employment, customer, contractor or person conducting business with or receiving service from the agency is prohibited.⁴⁷ In some policies, the prohibition also extends harassment committed by persons not employed by the Commonwealth within Commonwealth offices or upon employees of the Commonwealth in the performance of their duties.⁴⁸

⁴⁴ Agriculture, Community and Economic Development, Conservation and Natural Resources, Environmental Protection, General Services, Military and Veterans Affairs, and Transportation. Labor and Industry does not provide the EEOC standard definition, but include the list of examples.

⁴⁵ Community and Economic Development, Corrections, General Services, Insurance, Labor and Industry, State, and Transportation

⁴⁶ Community and Economic Development, Corrections, General Services, Insurance, State, and Transportation

⁴⁷ Aging, Agriculture, Banking and Securities, Community and Economic Development, Corrections, Drug and Alcohol Programs, Education, General Services, Health, Human Services, Insurance, Labor and Industry, Military and Veterans Affairs (includes National Guard workplaces), Revenue, State, and Transportation

⁴⁸ Aging, Community and Economic Development, Corrections, Drug and Alcohol Programs, Education, General Services, Health, Human Services, Insurance, Revenue, State, and Transportation

A few policies require supervisors and managers to inspect their work areas for materials that may be offensive and certify that they have been removed.⁴⁹

Reports

Oral or written reports may be made to an employee's supervisor or others in the direct line of supervision. If this is not comfortable for the employee for any reason, reports can be made to the Human Resources Director⁵⁰ and/or EEO Officer.⁵¹ The Department of Human Services specifically notes that there is no "chain of command" for reporting complaints and that employees may contact the department's EEOC office, the State Civil Service Commission, the Office of Administration, the Human Relations Commission, or the EEOC. The Departments of Education, General Services, Health, Insurance, Military and Veterans Affairs, State, and Transportation have similar statements and list of other avenues of recourse.

An employee who witnesses sexual harassment is required to immediately contact his or her supervisor, someone in the employee's direct line of supervision, the Human Resources Director or the EEO officer.⁵²

Investigations

Investigations are to be conducted as confidentially as possible.⁵³ If the complainant is unhappy with the result, a request for reconsideration can be made.⁵⁴ Further appeals can be made to the Office of Administration.⁵⁵

Retaliation

Retaliation is strictly prohibited and can be independent cause for disciplinary action.⁵⁶

⁴⁹ Agriculture, Community and Economic Development, Conservation and Natural Resources, Corrections, Environmental Protection, General Services, and Transportation

⁵⁰ Agriculture, Banking and Securities, Conservation and Natural Resources, and Environmental Protection

⁵¹ Aging, Community and Economic Development, Corrections, Drug and Alcohol Programs, Education, General Services, Health, Insurance, Labor and Industry, Military and Veterans Affairs, Revenue, State, and Transportation

⁵² Aging, Drug and Alcohol Programs, Education, Health, Military and Veterans Affairs, and State

⁵³ Aging, Agriculture, Conservation and Natural Resources, Corrections, Drug and Alcohol Programs, Education, Environmental Protection, General Services, Health, Insurance, Military and Veterans Affairs, State, and Transportation

⁵⁴ Aging, Drug and Alcohol Programs, General Services, Health, Insurance, State, and Transportation

⁵⁵ Aging, Drug and Alcohol Programs, General Services, Health, Insurance, and State

⁵⁶ Aging, Agriculture, Community and Economic Development, Conservation and Natural Resources, Corrections, Drug and Alcohol Programs, Education, Environmental Protection, General Services, Health, Insurance, Labor and Industry, Military and Veterans Affairs, Revenue, State, and Transportation

Discipline

In general, discipline can include dismissal.⁵⁷ Failure of a manager or supervisor to take corrective action when it is known, or should have reasonably been known, that an employee in the line of supervision of that manager or supervisor is or was being sexually harassed will result in appropriate disciplinary action, up to and including dismissal.⁵⁸

Training

Some agencies specifically require training, although the frequency varies.⁵⁹ The Department of Corrections requires sexual harassment training during mandatory basic training at or near the beginning of employment. Additional sexual harassment training occurs no less than once every three years. Many agencies provide a copy of their policies to new employees and require them to acknowledge receipt and review of them.⁶⁰ Agencies also may provide a copy of their policy statements annually.⁶¹ Some policies specify that a copy of the Policy Statement be posted either on office bulletin boards⁶² or on the department's website.⁶³

⁵⁷ Aging, Agriculture, Community and Economic Development, Conservation and Natural Resources, Corrections, Drug and Alcohol Programs, Education, Environmental Protection, General Services, Health, Insurance, Revenue, State, and Transportation

⁵⁸ Aging, Agriculture, Community and Economic Development, Conservation and Natural Resources, Corrections, Drug and Alcohol Programs, Education, Environmental Protection, General Services, Health, Insurance, State, and Transportation

⁵⁹ Community and Economic Development, Labor and Industry, and Transportation (no timing provided)

⁶⁰ Corrections, Labor and Industry and Military and Veterans Affairs

⁶¹ Corrections

⁶² Education and Insurance

⁶³ Revenue

Executive Offices

Seven of the nine executive office agencies have an identical policy, incorporating by reference the Executive Order and Management Directive. These agencies include:

- Office of the Budget
- Office of Inspector General
- Office of General Counsel
- Pennsylvania Commission on Crime and Delinquency
- Juvenile Court Judges Commission
- Pennsylvania Council on the Arts
- Pennsylvania Emergency Management Agency

This policy applies to sexual harassment by any employee against another employee, applicant for employment, customer, contractor or person conducting business with or receiving service from the agency, as well as persons not employed by the Commonwealth within Commonwealth offices or upon employees of the Commonwealth in the performance of their duties. It uses the standard EEOC definition of sexual harassment. Oral or written reports may be made to an employee's supervisor or others in the direct line of supervision. If the employee not comfortable for any reason, reports can be made to EEO officer of the General Government Human Resources Delivery Center.

An employee who witnesses sexual harassment is required to immediately contact his or her supervisor, someone in the employee's direct line of supervision, the Human Resources Director, or the EEO officer. Retaliation is strictly prohibited and constitute an independent cause for disciplinary action. Investigations are to be conducted as confidentially as possible.

The policy states that employees may pursue other avenues of recourse, including the Office of Administration, Human Relations Commission, State Civil Service Commission, and the EEOC.

The Office of Administration also uses the same policy, but adds provisions about annual training for all OA employees.

The Pennsylvania State Police policy incorporates sexual harassment into its overall policy on Discrimination, Discriminatory Harassment, Sexual Impropriety, and Retaliation. For purposes of this report, the most significant difference between the PSP policy and other executive office agencies is the use of the term "sexual impropriety" by PSP, which encompasses sexual harassment (based on the standard EEOC definition) and sexual misconduct. Sexual misconduct is defined as any form of uninvited or unwelcome sexual touching, sexual contact, or conduct of a sexual nature which victimizes another. It is further broken down two subcategories. The first, "sexual touching or sexual contact,"

is defined as “intentional touching or other physical contact, whether applied directly to the skin or to clothing covering the skin of one’s self or another individual, which is meant to, is reasonably likely to, or is reasonably perceived to abuse, degrade, harass, humiliate, or sexually arouse any person.” The second is a list of criminal offenses, including rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, institutional sexual assault, aggravated indecent assault, indecent exposure, sexual intercourse with an animal, unlawful dissemination of intimate image, open lewdness, corruption of minors (as it relates to acts of a sexual nature) and equivalent offenses in other jurisdictions.

Independent Agencies Using the Office of Administration for Human Relations Matters

The following nine agencies fall into this category:

- Fish and Boat Commission (FBC)
- Game Commission (Game)
- Pennsylvania Human Relations Commission (PHRC)
- Pennsylvania Liquor Control Board (PLCB)
- Pennsylvania Board of Probation and Parole (PBPP)
- Public Utility Commission (PUC)
- State Civil Service Commission (SCSC)
- Public School Employees Retirement System (PSERS)
- State Employees Retirement System (SERS)

These agency policies essentially mirror the policies of the executive departments. Every agency references Executive Order 2002-4 and Management Directive 505.30 as the guiding documents for their sexual harassment policies. All employees under the Governor's jurisdiction are given copies of both documents and signed acknowledgements of receipt are maintained in their personnel files. Additionally, each individual agency produces a policy statement that incorporates those documents by reference, and provides varying degrees of detail relating to specific topics involving sexual harassment claims.

Definition of Sexual Harassment

Every agency uses the EEOC definition of sexual harassment and two, the Game Commission and PSERS add the list of examples of written, verbal, physical, and visual harassment found in Executive Order 2002-4.

Some policies specify that harassment can occur between members of the same sex and several agencies include this in their policy statements.⁶⁴ Prohibited sexual harassment in some policies may include actions which may be overtly sexual or facially neutral if such conduct constitutes gender based discrimination.⁶⁵

Persons Covered

Sexual harassment by any employee against another employee, applicant for employment, customer, contractor or person conducting business with or receiving service

⁶⁴ PBPP and PUC

⁶⁵ PBPP and PUC

from the agency is prohibited.⁶⁶ In some policies, the prohibition also prohibits harassment by persons not employed by the Commonwealth within Commonwealth offices or upon employees of the Commonwealth in the performance of their duties.⁶⁷

A few policies require supervisors and managers to inspect their work areas for materials that may be offensive and certify that they have been removed.⁶⁸

Reports

Oral or written reports may be made to an employee's supervisor or others in the direct line of supervision. If this is not comfortable for the employee for any reason, reports can be made to the Human Resources Director and/or EEO Officer.⁶⁹ The PUC directs all complaints to the Commission's EEO officer.

An employee who witnesses sexual harassment is required to immediately contact his or her supervisor, someone in the employee's direct line of supervision, the Human Resources Director or the EEO officer.⁷⁰

Employees also have the ability at any time to file a complaint with the Pennsylvania Human Relations Commission, the State Civil Service Commission, or the EEOC.⁷¹

Investigations

Investigations are to be conducted as confidentially as possible.⁷² If the complainant is unhappy with the result, a request for reconsideration can be made.⁷³ Further appeals can be made to the Office of Administration.⁷⁴

Retaliation

Retaliation is strictly prohibited and can be independent cause for disciplinary action.⁷⁵

Discipline

In general, discipline can include dismissal.⁷⁶ Failure of a manager or supervisor to take corrective action when it is known, or should have reasonably been known, that an

⁶⁶ FBC, Game, PBPP, PHRC, PLCB, PSERS, PUC, SCSC, and SERS

⁶⁷ FBC, PBPP, PHRC, PLCB, SCSC, and SERS

⁶⁸ Game and PBPP

⁶⁹ FBC, Game, PBPP, PHRC, PLCB, PSERS, SCSC, and SERS

⁷⁰ FBC, PBPP, PHRC, PLCB, SCSC, and SERS

⁷¹ FBC, PBPP, PHRC, PLCB, PSERS, and SERS

⁷² FBC, Game, PBPP, PHRC, PLCB, PUC, SCSC, and SERS

⁷³ FBC, Game, PLCB, PSERS, and SERS

⁷⁴ FBC, Game, PLCB, PSERS, and SERS

⁷⁵ FBC, Game, PBPP, PHRC, PLCB, PSERS, PUC, SCSC, and SERS

⁷⁶ FBC, Game, PBPP, PHRC, PLCB, PSERS, PUC, SCSC, and SERS

employee in the line of supervision of that manager or supervisor is or was being sexually harassed will result in appropriate disciplinary action, up to and including dismissal.⁷⁷

Training

Some agencies specifically require training, although the frequency varies.⁷⁸ Many agencies provide a copy of their policies to new employees and require them to acknowledge receipt and review of them.⁷⁹ Agencies also may provide a copy of their policy statements annually.⁸⁰ Some policies specify that a copy of the Policy Statement be posted on office bulletin boards.⁸¹

⁷⁷ Game, PBPP, PHRC, PLCB, SCSC, and SERS

⁷⁸ Game (managers and supervisors attend in-class training); PBPP (prevention training periodically, but no less than once every three years)

⁷⁹ Game, PBPP

⁸⁰ PBPP

⁸¹ FBC, PHRC

The Unified Judicial System

Definition of Sexual Harassment

The Unified Judicial System uses the EEOC definition of sexual harassment, adds specific definitions of *quid pro quo* harassment and “hostile work environment,” and provides examples of types of sexual harassment:

- Verbal: Sexually explicit language, sexual innuendoes, suggestive comments, jokes of a sexual nature, sexual propositions or threats
- Non-Verbal: Display of sexually suggestive objects or pictures, commentaries, suggestive or insulting sounds, leering, whistling, or obscene gestures.
- Physical: Unwanted physical contact or the threat of unwanted physical contact, including offensive touching, un-welcomed sexual intercourse, sexual assault and other forms of physical contact of a sexual nature.

Persons Covered

The judges, employees, and related staff of the Unified Judicial System (UJS) are governed by the Supreme Court of Pennsylvania’s “Policy on Non-Discrimination and Equal Employment Opportunity,” which prohibits all forms of discrimination and harassment in a court facility. A court facility is defined as “any building or office serving as the workplace for Personnel of the System, Supreme Court Boards and Committees, and/or Related Staff; and any UJS-related building or office in which Court Users conduct business with the UJS.”

Reports

Any personnel of the system, Supreme Court Boards and Committees, Related Staff and Court Users who have been subjected to, or have observed discrimination or harassment are urged to report the activities.⁸²

Judicial officers, managerial and supervisory personnel of the system, and Supreme Court Boards and Committees that observe or have reason to believe that discrimination or harassment has occurred are required to take immediate action to terminate any ongoing activities if they are reasonably able to do so or immediately report the discrimination or harassment. Court users, defined as attorneys, applicants for employment, litigants, witnesses, jurors, and court volunteers may report complaints as well.

⁸² Defined as attorneys, applicants for employment, litigants, witnesses, jurors, and court volunteers.

Investigations

All complaints are investigated promptly; interviews are conducted and retaliation prohibited. Confidentiality is protected to the extent possible. The UJS website provides links for filing harassment claims against each type of entity in the system.⁸³ Complaints are handled by different offices based on the victim's role in the judicial system.

In general, complaints regarding employees of the system are investigated by the Human Resources office of the Administrative Office of Pennsylvania Courts. Final determinations are made by the Court Administrator. While most of the complaint procedures and policies are the same, the investigating authority varies based upon the judicial entity against which the complaint has been filed. Complaints against the following entities are investigated as follows:

- Justices, Personnel of the Supreme Court, Supreme Court Boards and Committees: Investigated by the executive administrator of the court or an alternate authority appointed by the Chief Justice. Final determinations are made by the Chief Justice.
- Justices and Personnel of Superior Court: Investigated by the executive administrator of the court or an alternate authority appointed by the President Judge. Final determinations are made by the President Judge.
- Justices and Personnel of Commonwealth Court: Investigated by the executive administrator of the court or an alternate authority appointed by the President Judge. Final determinations are made by the President Judge.
- Executive administrators of the courts and district court administrators in the judicial districts: Investigated by the Chief Justice or President Judges of their appropriate courts.
- Chief Justice of the Supreme Court, President Judge of Superior Court, President Judge of Commonwealth Court, Common Pleas Judge, and Magisterial District Judge: Investigated by an authority appointed by AOPC; final determination by the Court Administrator of Pennsylvania.
- Common Pleas Court Judge, Magisterial District Judge, or Personnel of the System in a court facility in a Judicial District. Investigated by the district court administrator or an alternate authority appointed by the President Judge. Final determinations are made by the President Judge of the Court of Common Pleas.
- Attorneys and Judicial Officers: Complaints may be referred to the Disciplinary Board of the Supreme Court or the Judicial Conduct Board.

Complaints against related staff, defined as district attorneys, public defenders, sheriffs or other officers serving process or enforcing orders, registers of wills, prothonotaries, clerks of courts, clerks of the orphan's court division, coroners, jury

⁸³ The Unified Judicial System of Pennsylvania, Judicial Administration, Complaint Procedures.
<http://www.pacourts.us/judicial-administration/human-resources/complaint-procedures>

commissioners, probation officials, and personnel of any of the foregoing, are reported to the chief official in their Related Staff offices for appropriate review and action.

The timeframe for completing the investigation and final adjudication will vary based on the circumstances and complexity of the case. Every effort will be made to resolve the matter as expeditiously as possible.

Discipline

Appropriate remedial actions will be taken to remedy the immediate situation, and prevent future violations. Appropriate remedial or disciplinary action may be taken up to and including discharge.

Training

AOPC is charged overseeing the development of education and training opportunities and materials.

Data Collection

AOPC is also charged with collecting and maintaining data/statistics relating to the number, nature and disposition of complaints under the UJS Policy on Non-Discrimination and Equal Employment Opportunity.

Independent Agencies

Several independent agencies that are not under the Governor's jurisdiction follow the directives of the Governor's office nonetheless. The Independent Regulatory Review Commission, the Pennsylvania Gaming Control Board, the State Public School Building Authority, the Pennsylvania Higher Educational Facilities Authority, the Health Care Cost Containment Council, the Port of Pittsburgh Commission, and PhilaPort (the Port of Philadelphia) all use the Governor's executive orders and management directives as their sexual harassment policies.

Staff identified six statewide independent agencies that maintain their own sexual harassment policies. These include the Office of the Attorney General, Office of the Auditor General, the Treasury Department, the Turnpike Commission, and PHEAA. Within these six agencies, all but one sexual harassment policy is included in the agency's broader anti-discrimination policies (the Office of the Auditor General the exception).

Definition of Sexual Harassment

The Offices of Attorney General, Auditor General, the Treasury Department, the Turnpike Commission, and PHEAA use definitions of sexual harassment that are consistent with the EEOC definitions and examples of written, verbal, physical, and visual forms, although they do not mirror the definitions as closely as executive agency policies do.

Additionally, discrimination on the basis of sexual orientation and gender identity (including transgender status) is prohibited in the Attorney General's policy. The policies of the Auditor General and State Treasurer specify that harassment can occur between members of the same sex.

Persons Covered

Most policies cover sexual harassment by any employee against another employee, applicant for employment, customer, contractor or person conducting business with or receiving service from the agency is prohibited, as is harassment of employees by persons not employed by the Commonwealth within Commonwealth offices or upon employees of the Commonwealth in the performance of their duties. The Turnpike Commission's policy is applicable to employees and applicants for employment.

Reports

The policies of the Office of the Auditor General and PHEAA recommend that the offended person communicate directly with the alleged harasser to inform him or her, if possible, that the conduct is unwelcome to give the offender the opportunity to realize the offensive behavior and correct it. PHEAA requires immediate notification of an incident in any event. Under the Auditor General's policy, if such a conversation is not feasible or

if the conduct continues, then a report may be made to an employee's supervisor or others in the direct line of supervision. If, for any reason, the employee is not comfortable making the report to a supervisor, reports can be made to the Human Resources Director and/or EEO Officer. The director of the bureau or division in which the harassment occurs and the Chief Counsel also receive notice of the complaint. Reports filed with the Turnpike Commission may be filed with the individual's immediate supervisor, the next higher-level supervisor, the Office of Diversity and Inclusion, the Director of Human Resources, the Chief Compliance Officer or the Chief Counsel.

The Auditor General's policy also states that anyone who observes or otherwise knows of harassment or retaliation should report in the same manner as a harassed employee. PHEAA employees are required to report harassment they have encountered or witnessed to Human Resources, and all PHEAA reports must be in writing. This requirement differs from the other agencies in that almost all agencies allow initial verbal complaints. An employee of the Attorney General's office who witnesses sexual harassment is encouraged to report the conduct to the Director of Human Resources.

Investigations

Investigations are to be conducted as confidentially as possible. The Treasury Department has an informal and formal procedure. In all cases, a report may be made to an employee's supervisor, the next person in the chain of command, the EEO officer or Human Resources. If, for any reason, the employee is not comfortable making the report to a supervisor, reports can be made to the Human Resources Director and/or EEO Officer. The bureau manager and EEO officer will attempt to resolve the matter informally. If the matter is not resolved informally or the employee prefers to pursue the formal process, a formal written complaint may be filed with the EEO officer or Human Resources. The office of Chief Counsel will be notified and the Chief Counsel and Director of Human Resources will jointly appoint an investigator. The investigator's report will be the basis for any corrective and/or disciplinary actions.

The Turnpike Commission also provides for informal and formal resolution of complaints. The Fair Employment Practices Committee (FEPC) is the central contact point for evaluating and addressing complaints and is charged with conducting, coordinating and handling internal investigations. Once a complaint is received, the FEPC appoints an investigator. Complaints can be resolved on an informal basis at any time. If the complaint cannot be resolved informally, a formal investigation under FEPC protocols is conducted. The investigator's report can be approved by the FEPC as resolution of the matter. If the complainant is unhappy with the result, a request for reconsideration by the FEPC can be made.

Retaliation

Retaliation is strictly prohibited and can be independent cause for disciplinary action in all independent agencies.

Discipline

In general, discipline can include dismissal. This applies in all independent agency policies reviewed. Other forms of discipline include counseling, reprimands, transfer, suspension or submission to certain conditions.

Training

Some agencies specifically require training, although the frequency varies.

False Claims

The Office of the Auditor General and PHEAA include a provision that complaints made in bad faith without a substantial factual basis are subject to disciplinary action, including termination of employment.

RECOMMENDATIONS

There are a number of provisions in the various Commonwealth agencies that are unique or uncommon. The Commission staff recommends that each agency consider these provisions and determine if they can be incorporated into its individual policy in an effort to have all policies recognize relevant issues.

Determination of Sexual Harassment

EEOC regulations provide that

In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

This or similar language can help an agency investigate allegations of sexual harassment in their proper context.

Social Media

Greater protection for employees in general could also occur with the inclusion of specific language addressing harassment via social media. Most hostile work environment definitions and examples refer to notes, invitations, photos, cartoons, drawings and the like. While social media communications can fall under these categories, the ability to repeatedly make contact with a person via electronic communication can increase the level of harassment exponentially.

Gender Identity

While a number of policies specify that harassment can occur in same-sex situations, specifically including gender identity, and including protections for persons undergoing gender reassignment would be consistent with the Governor's Executive Order 2016-4.

Scope of Employment

All policies state that sexual harassment by employees is not tolerated against other employees, applicants for employment, customers, contractors, vendors, persons conducting business with the agency or receiving services from the agency. Essentially, employees may not commit harassment against anyone encountered by the employee in

the agency's business. Conversely, some, but not all agencies provide protection for their employees from harassment by non-employees in their workplace and scope of work, by providing that sexual harassment by persons not employed by the Commonwealth but visiting Commonwealth offices or by persons not employed by the Commonwealth who encounter employees of the Commonwealth while in the employee's performance of his or her duties is prohibited.

Witnesses

Some policies place an affirmative duty on anyone who witnesses an act of sexual harassment to report it to the appropriate designated person. Other policies encourage but do not mandate witness reporting. Agencies may want to consider if employees should be mandated reporters of sexual harassment in the workplace.

Inspection of Workplaces

Some policies specifically require managers and supervisors to police their workplaces to identify and remove offensive materials. Some agencies may find this a useful practice to include in their policies.

Fraternization

The Pennsylvania House Democratic Caucus Employee Handbook prohibits fraternization between an employee and a supervisor to whom the employee reports or over whom the supervisor has authority. This is unique to the policies review by Commission staff, but may be helpful to other agencies that may wish to provide clearer delineation of relationships among supervisors and employees.

Victims

The Office of the Auditor General's policy specifies that a victim need not be the person harassed but could be anyone materially affected by the offensive conduct. This is unique in the policies reviewed.

Data Collection

The Unified Judicial System requires data collection and evaluation of harassment complaints twice yearly. While the time frame covered should be left to the discretion of the agency (especially smaller agencies), collecting data to monitor and address harassment concerns could be helpful.

Training

While many agencies provide training or information to new employees, few have "refresher" courses. Updated training could be appropriate for all agencies, with a

minimum of once every three years, as is required by the Department of Corrections and the Board of Probation and Parole.

Expungement

A couple of agencies provide that if single incidence of sexual harassment has been satisfactorily resolved, and the person who committed the harassment is not involved in any further incidents, the record of the harassment complaint may be removed from their personnel record after a set period of time. The agencies providing for this record-clearing used 18 months and 2 years as the time frame. Some agencies may wish to consider a similar provision.

False Claims

If false claims are a concern, adoption of a provision that complaints made in bad faith without a substantial factual basis are subject to disciplinary action, including termination of employment, may be appropriate.

APPENDIX A: RESOLUTION

PRINTER'S NO. 3365

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE RESOLUTION

No. 829 Session of
2018

INTRODUCED BY DELOZIER, OBERLANDER, TOEPEL, TOOHIL, STEPHENS,
CHARLTON, RYAN, O'NEILL, GREINER, MILLARD, ENGLISH, MURT,
ORTITAY, SAYLOR, KLUNK, WATSON, JOZWIAK, CAUSER, REED,
MARSICO, MENTZER AND B. MILLER, APRIL 18, 2018

REFERRED TO COMMITTEE ON LABOR AND INDUSTRY, APRIL 18, 2018

A RESOLUTION

Directing the Joint State Government Commission to study the frequency of harassment and sexual misconduct in the workplace in State government, to conduct a thorough and comprehensive analysis of the prevalence and results of harassment and sexual misconduct complaints, to compare the workplace policies on harassment and sexual misconduct throughout State government and to report to the General Assembly with its findings and recommendations.

WHEREAS, The government of this Commonwealth is orchestrated largely by the tens of thousands of employees under the jurisdiction of the Governor, the General Assembly and the Supreme Court; and

WHEREAS, State government entities have human resource policies in place for the reporting and handling of harassment and sexual misconduct complaints to protect their employees; and

WHEREAS, Recent events require a study of the human resources policies currently in place in relation to harassment and sexual misconduct in state government; and

WHEREAS, The House of Representatives recognizes the seriousness of the issues of harassment and sexual misconduct

among state government entities in all three branches of government; therefore be it

RESOLVED, That the House of Representatives direct the Joint State Government Commission to conduct a study and publish a public report on the prevalence and outcomes of workplace harassment and sexual misconduct complaints within State government entities, including the Governor and the departments, boards, commissions, authorities and other officers and agencies of the Commonwealth, the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies and any independent agencies; and be it further

RESOLVED, That the Joint State Government Commission examine the following for its study:

(1) The number of workplace harassment and sexual misconduct complaints over the past five years for each State government agency or entity, categorized by the type of complaint.

(2) The number of workplace harassment and sexual misconduct complaints which resulted in disciplinary action for each State government agency or entity, categorized by the type of complaint and the type of disciplinary action taken.

(3) The number of workplace harassment and sexual misconduct complaints which resulted in referral to law enforcement authorities, categorized by the type of complaint.

(4) The number of workplace harassment and sexual misconduct complaints which resulted in monetary settlements

or awards for each State government agency or entity,
including the amounts of the settlements or awards.

(5) A comparison of the human resources practices and policies related to workplace harassment and sexual misconduct in place for each State government agency or entity.

(6) The number of inquiries received by the agency or entity about its complaint process or policies related to harassment or sexual misconduct in the workplace which did not result in a complaint, if available;

and be it further

RESOLVED, That the Joint State Government Commission include in its report findings from the study and any recommendations;
and be it further

RESOLVED, That the report shall be a public record under the act of February 14, 2008 (P.L.6, No.3), known as the Right-to-Know Law; and be it further

RESOLVED, That the Joint State Government Commission issue its report to the General Assembly within 12 months of the adoption of this resolution.