

**PROHIBITED WORKPLACE HARASSMENT**

NOTE: This Interpretive Bulletin replaces DOP-P6 (Sexual Harassment Prohibited).

I. PURPOSE: It is the intent of the State of West Virginia to provide a work environment where illegal harassment based on sex (with or without sexual conduct), race, color, religion, national origin, ancestry, age, disability, and protected activity (i.e., opposition to prohibited discrimination or participation in the complaint process) or status explicitly defined as protected under applicable State and federal law as well as non-discriminatory hostile workplace harassment is prohibited.

II. STANDARDS:

- A. Employees have the right to be free from illegal and non-discriminatory hostile workplace harassment on the job, and the State has the moral and legal obligation to ensure that such harassment does not occur and that effective means of redress are available to employees.
- B. Illegal harassment is prohibited by State and federal anti-discrimination laws where such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Though non-discriminatory hostile workplace harassment may not violate existing discrimination laws, such behavior can result in a tort claim of intentional infliction of emotional distress. As such, illegal and non-discriminatory hostile workplace harassment are prohibited in the workplace. This prohibition applies to employees while engaged in any work-/service-related activity which includes performance of agency business. Further, the prohibition applies to independent contractors and volunteers while engaged in any work-/service-related activity in a workplace owned, leased, or operated by a public agency or entity.
- C. Illegal and non-discriminatory hostile workplace harassment will not be tolerated within the workplace and will result in appropriate disciplinary action, up to and including dismissal.

III. DEFINITIONS

- A. **Appointing Authority:** The executive or administrative head of a unit of State government who is authorized by statute to appoint employees in the classified or classified-exempt service.
- B. **Complainant:** Person alleging discriminatory conduct or an administrator who becomes aware of alleged discriminatory conduct within the workplace.
- C. **Employee:** Any person who lawfully occupies a permanent or temporary position with the State, or any affiliated political subdivision, and who is paid a wage or salary including, but not limited to, executive, administrative, classified, non-classified, exempt, seasonal and temporary employees, and employees of county health departments affiliated with the West Virginia Division of Personnel. For the purpose of this document, "employee" shall also include authorized students and interns performing services for an employer under direct supervision irrespective of receipt of wages.



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- D. **Employer:** The State or any affiliated political subdivision including, but not limited to, executive, administrative, classified, non-classified, exempt, and county health departments affiliated with the West Virginia Division of Personnel.
- E. **Equal Employment Opportunity (EEO) Coordinator/Counselor:** The agency employee selected by an appointing authority to be trained to advise employees and management concerning proper EEO procedures.
- F. **Hostile Environment:** Harassment in which a work environment is created where an employee is subject to unwelcome verbal or physical sexual behavior and/or illegal mistreatment that is either severe or pervasive and unreasonably interferes with an individual's work performance.
- G. **Illegal Harassment:** Harassment based on sex (with or without sexual conduct), race, color, religion, national origin, ancestry, age, disability, and protected activity (i.e., opposition to prohibited discrimination or participation in the complaint process), or status explicitly defined as protected under applicable State and federal law.
- H. **Independent Contractor:** Any entity or person responsible for the performance of work under a contract.
- I. **Nondiscriminatory Hostile Workplace Harassment:** Verbal, non-verbal or physical conduct not discriminatory in nature that is so atrocious, intolerable, and so extreme and outrageous as to exceed bounds of decency and which creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee(s) from reasonably performing her or his work.
- J. **Quid Pro Quo (this for that; something for something):** Sexual harassment in which the satisfaction of a sexual demand is used as the basis of an employment decision.
- K. **Respondent:** Person accused of discriminatory conduct.
- L. **Sexual Harassment:** A type of illegal harassment which involves any unsolicited and unwelcome sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature when:
 - 1. Submission to such conduct is made either explicitly or implicitly as a term or condition of an individual's employment.
 - 2. Submission to or rejection of such conduct is used as the basis for personnel actions affecting an employee.
 - 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.
- M. **State EEO Director:** The individual appointed by the Governor and authorized by Executive Order to direct all aspects of the statewide EEO Program.
- N. **Volunteer:** Any authorized individual directly engaged in the performance of services for a State employer without promise, expectation, or receipt of compensation.



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- O. Workplace: A work site where service or work is performed in connection with an independent contractor's, volunteer's, or employee's public employment or service including sites of social functions and conferences. The workplace includes, but is not limited to, facilities, property, buildings, offices, structures, automobiles, trucks, trailers, other vehicles, and parking areas provided by the State, even if not owned, leased, or operated by the State.
- P. Work-/service-related Activity: Includes, but is not limited to, conducting work/service, representing the State or the agency, receiving awards, speaking as a State or agency representative, and participating in receptions when invited as a result of State employment/service.

IV. INTERPRETIVE MATERIAL

- A. Management is potentially liable for acts of illegal harassment in the workplace. Liability for such acts lies with the employer, unless it can be demonstrated that the employer took immediate and appropriate corrective action. Employees may also be held personally liable for illegal harassment.
- B. Illegal harassment includes words, conduct, or action, usually repeated or persistent, directed at a specific person which annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose and is prohibited by State and federal anti-discrimination laws.
- C. There are two legally recognized types of sexual harassment: Quid Pro Quo Sexual Harassment, and Hostile Work Environment Sexual Harassment. Such harassment involves verbal and/or physical conduct which includes, but is not limited to:
 - 1. Sexually-explicit or implicit propositions;
 - 2. Improper questions about an employee's private life;
 - 3. Sexually discriminatory ridicule, insults, jokes, or drawings;
 - 4. Undesired, intentional touching such as embracing, patting, or pinching;
 - 5. Remarks directed against one's sex as a class or group;
 - 6. Threat of rape, or attempted or actual sexual assault;
 - 7. Repeated sexually-explicit or implicit comments or obscene and suggestive remarks that are objectionable or discomfiting to the employee;
 - 8. Offers of employment benefits in exchange for sexual favors, or threats or reprisals for negative responses to sexual advances; and/or
 - 9. Sexual harassment by a supervisor of an employee of the same sex.
- D. While a hostile work environment, which is based on an individual's protected class status under the Civil Rights Act of 1964 (e.g., sex, race, national origin, religion) is illegal, a hostile work environment that lacks a discriminatory intent can also subject an employer to liability for the infliction of emotional distress. This is true when a supervisor, within the scope of employment, caused, contributed to, or acquiesced in the intentional or reckless infliction of emotional distress



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upon an employee, as such conduct is attributed to the employer, and the employer is liable for the damages that result.

- E. Non-discriminatory hostile workplace harassment consists of unreasonable or outrageous behavior that deliberately causes extreme physical and/or emotional distress. Such conduct involves the repeated unwelcome mistreatment of one or more employees often involving a combination of intimidation, humiliation, and sabotage of performance which may include, but is not limited to:
 - 1. Unwarranted constant and destructive criticism;
 - 2. Singling out and isolating, ignoring, ostracizing, etc.;
 - 3. Persistently demeaning, patronizing, belittling, and ridiculing;
 - 4. Threatening, shouting at, and humiliating particularly in front of others; and/or
 - 5. Bullying.

V. COMPLAINT AND INVESTIGATION

- A. It is important to note that nondiscriminatory hostile work environment claims are not within the jurisdiction of the EEO office. Employees must address such complaints through their manager/supervisor, the West Virginia Education and State Employees Grievance Procedure, or litigation. Complaints regarding illegal harassment shall be handled in accordance with the following procedures. All information shall be held in strictest confidence and shall be disclosed only to appropriate individuals on a need-to-know basis to investigate and resolve the matter.
- B. While an individual alleging illegal harassment has a duty to promptly report the incident or complaint to the agency's EEO Coordinator/Counselor or his or her immediate supervisor, the individual also has the right to file such complaints with the West Virginia Human Rights Commission and/or the United States Equal Employment Opportunity Commission (EEOC).
 - 1. The complaint must be received by the Human Rights Commission within 365 days from the date of the cause of harm.
 - 2. A charge must be filed with EEOC within 180 days from the date of the alleged violation, in order to protect the charging party's rights.
 - a. This 180-day filing deadline is extended to 300 days if the charge also is covered by a State or local anti-discrimination law.
 - b. For ADEA charges, only State laws extend the filing limit to 300 days.
 - c. These time limits do not apply to claims under the Equal Pay Act, because under that Act persons do not have to first file a charge with EEOC in order to have the right to go to court.
 - 3. The EEO Coordinator/Counselor or the immediate supervisor shall immediately notify the State EEO Office and the appointing authority of the complaint or charge.



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- C. The appointing authority shall acknowledge in writing to the Complainant, the receipt of his or her complaint of alleged illegal harassment within five working days of such receipt.
- D. The appointing authority or designee shall thoroughly investigate valid claims of illegal harassment. The State EEO Office may be consulted when an agency needs direction on proper investigative procedures. It is recommended that an investigative team of two, one female and one male, be chosen to ensure valid results as well as to establish a comfort level for all involved parties. The appointing authority shall notify the Complainant, Respondent, and State EEO Director, in writing, of the appointment of the investigators should a formal investigation become necessary.
- E. To obtain all relevant information, the appointing authority or designee shall promptly interview the Complainant, witnesses, and the Respondent. An investigation shall be conducted and a confidential written report made to the appointing authority with a copy to the State EEO Director within 45 calendar days of the date of the investigator appointment letter(s).
- F. Should the investigators determine that they are unable to complete the investigation within 45 calendar days, they must promptly request an extension in writing from the State EEO Director. The request must state the reason(s) for the requested extension. The investigators shall immediately notify the Complainant and Respondent of the extension if granted.
- G. The investigator or the investigative team shall prepare the report of the investigation after considering:
 - 1. The validity of the complaint.
 - 2. An assessment of the credibility of the individuals involved.
 - 3. Any previous complaints resulting in an adverse action against the Respondent.
 - 4. Statements of all individuals with information relevant to the alleged incident and complaint.
 - 5. Any other relevant information which may prove or disprove the allegations contained in the complaint.
- H. The appointing authority shall review the written report of the findings and render a decision within 15 calendar days of receipt of investigative results. While the Complainant must be informed that appropriate action was taken, the employer may not disclose the specific details of any disciplinary action taken against the Respondent. The severity of any disciplinary action will be determined by the seriousness of the offense and may include, but is not limited to, the following:
 - 1. A verbal warning documented in writing and placed in an administrative file.
 - 2. A written reprimand that is placed in the employee's agency personnel file.
 - 3. An employee transfer.
 - 4. Suspension, demotion, and/or dismissal.
- I. Should the appointing authority determine that he or she is unable to render a decision within 15 calendar days, he or she must promptly request an extension in writing from the State EEO Director.



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The request must state the reason(s) for the requested extension. The appointing authority shall immediately notify the Complainant and Respondent of the extension if granted.

- J. In the case of a complaint validated by an appropriate investigation, the appointing authority shall periodically check with the Complainant to ensure that the illegal harassment has stopped and that no retaliation has occurred.
- K. Complainants determined to have intentionally filed a false report may be subject to disciplinary action up to and including dismissal.

VI. RESPONSIBILITIES

- A. Employees have a responsibility to refrain from all forms of harassment, to promptly report allegations of illegal harassment, and to fully cooperate in any authorized investigation.
- B. Appointing authorities have the responsibility for:
 - 1. Monitoring the work environment to ensure that it is free of illegal harassment.
 - 2. Investigating complaints of illegal harassment in accordance with this policy.
 - 3. Ensuring that complainants, falsely accused individuals and/or persons interviewed regarding complaints suffer no adverse impact or reprisals.
 - 4. Ensuring that confidentiality is maintained by keeping all information regarding a complaint of illegal harassment in a separate, confidential file with access restricted to appropriate individuals on a need-to-know basis. The investigative report is maintained by the EEO Coordinator.
 - 5. Ensuring that all supervisory personnel attend scheduled training on the Prohibited Workplace Harassment Interpretive Bulletin.
 - 6. Ensuring that all required reports are provided to the State Equal Employment Opportunity Office.
 - 7. Posting the Prohibited Workplace Harassment Interpretive Bulletin at conspicuous locations throughout the agency.
 - 8. Communicating this bulletin to all employees through inclusion in the orientation process of all new employees, and by making it readily available at all work locations.

VII. REFERENCES

- A. FEDERAL
 - 1. U.S. Const., amend. XIV.
 - 2. Executive Order 11246 of 1965, As Amended.
 - 3. 8 U.S.C. 1324 et seq. (Immigration Reform and Control Act of 1986).
 - 4. 29 U.S.C. 206(d) et seq. (Equal Pay Act of 1963).
 - 5. 29 U.S.C. § 621, et seq. (Age Discrimination in Employment Act of 1967, as amended).



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6. 29 U.S.C. 701 et seq. (Rehabilitation Act of 1973).
7. 29 U.S.C. 791 et seq. (Rehabilitation Act of 1992).
8. 29 U.S.C. § 2601 et seq. (Family and Medical Leave Act of 1993).
9. 38 U.S.C. §§ 4301 et seq. (Uniform Services Employment and Re-employment Rights Act).
10. 42 U.S.C. 1981 et seq. (Civil Rights Act of 1991).
11. 42 U.S.C. 12101 et seq. (Americans with Disabilities Act of 1990).
12. 42 U.S.C. 2000 et seq. (Pregnancy Discrimination Act of 1978).
13. 42 U.S.C. 2000d-2000d-7. (Civil Rights Remedies Equalization Act of 1986).
14. 42 U.S.C. 2000e et seq. (Title VII of the U.S. Civil Rights Act of 1964, as amended).
15. 29 C. F. R. 1600-1699 (EEOC Uniform Guidelines).

B. STATE

1. West Virginia Code, 5-11-9, Unlawful Discriminatory Practices (West Virginia Human Rights Act).
2. West Virginia Code, 5-15-7 (White Cane Law)
3. West Virginia Code, 21-3-19 (Discrimination for use of tobacco products prohibited)
4. West Virginia Code, 21-5-17 (Employers prohibited from discharging employees for time lost as volunteer firemen or emergency medical service attendant.
5. West Virginia Code, 21-5-18 (Employers prohibited from discharging employees for time lost as emergency medical service personnel)
6. West Virginia Code, 21-5E-1 (Equal Pay for Equal Work for State Employees)
7. West Virginia Code, 23-5A-3 (Termination of Injured Employee Prohibited; re-employment of injured employees)
8. West Virginia Code, 52-3-1 (Discrimination for Jury Service)
9. West Virginia Equal Employment Opportunity Office Procedure for Handling EEO Complaints - Revised - September 16, 2005.
10. West Virginia Equal Employment Opportunity Office Guidelines for Conducting EEO Complaint Investigations - Revised September 19, 2005.

C. CASE LAW

1. Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S. Ct. 2399 (1986)
2. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998)
3. Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998)
4. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S. Ct. 998 (1998)
5. National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002)
6. Ross v. Douglas County, Nebraska, 234 F.3d 391 (8th Cir. 2000)
7. Travis v. ALCON Laboratories, Inc., 202 W. Va. 369, 5045.E.2d 419 (1998)
8. Price Waterhouse v. Hopkins, 490 US 228 (1989)
9. Harris v. Forklift Systems, Inc., 510 US 17 (1993)
10. Rogers v. City of Chicago, 320 F.3d 748 (7th Cir, 2003)
11. Mattson v. Caterpillar, Inc., 359 F.3d 885, 888 (7th Cir, 2004)
12. Pennsylvania State Police v. Suders, 542 US 129 (2004)
13. Harvill v. Westward Communications, L.L.C., ET AL, 433 F.3d 428 (5th Cir, 2005)
14. Burlington Northern & Santa Fe Railway v. White, 364 F. 3d 789 (6th Cir, 2006)

VIII. EFFECTIVE DATE: May 1, 1993 (this effective date pertains to the original DOP-P6 Policy, Sexual Harassment Prohibited).

IX. REVISIONS:

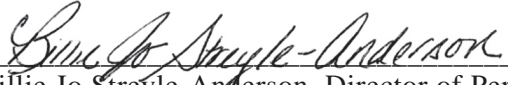
A. Previous Revisions

1. Pertaining to the original DOP-P6 Policy, *Sexual Harassment Prohibited*: July 15, 1994; October 20, 1994; and January 1, 2004.
2. Pertaining to this Interpretive Bulletin: January 1, 2005.

B. Latest Revision: December 1, 2006.

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Approved and Issued By:



Billie Jo Streyle-Anderson, Director of Personnel

Date Signed: December 1, 2006.