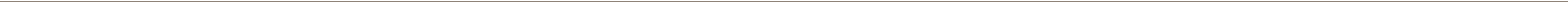


2020 Annual Title IX
Training Series
Sexual Harassment
October 14, 2020

Sexual Harassment





Quid Pro Quo - Addendum B

Should be interpreted broadly (FR 30147, fn. 644)

Applies whether the “bargain” proposed is communicated “expressly or impliedly” and does not require that harassment be severe and pervasive (FR 30147)

“Consent” to conduct does not necessarily mean that the conduct is not “unwelcome,” especially where the conduct is “consented to” for purposes of avoiding negative consequences (FR 30148)

Where the speech is, by definition, designed to compel sexual conduct it generally does not violate the 1st Amendment (FR 30142, fn. 625)

Affecting Terms and Conditions of Employment – EO

The test is not whether work has been impaired, but whether working conditions have been discriminatorily altered.

[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatorily altered working conditions have been discriminatorily altered.

“Hostile Environment” Addendum B

Unwelcome conduct “on the basis of sex” determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to an education program or activity

- Definition EO 1096/1097

Unwelcome verbal, nonverbal or physical conduct of a sexual nature where:

- Sufficiently severe, persistent or pervasive that its effect could be considered by a Reas. P, and is, considered by the CP, to:
 - (students only) limit their ability to participate...
 - create an intimidating, hostile, or offensive environment

On the Basis of Sex vs. Of a Sexual Nature

Addendum B - Conduct

For QPQ:

- Sexual Conduct may be verbal, visual, or physical

For Hostile Environment:

- The phrase “unwelcome conduct on the basis of sex,” is broader than “unwelcome conduct of a sexual nature” phrase used in Department guidance. (FR 30152)

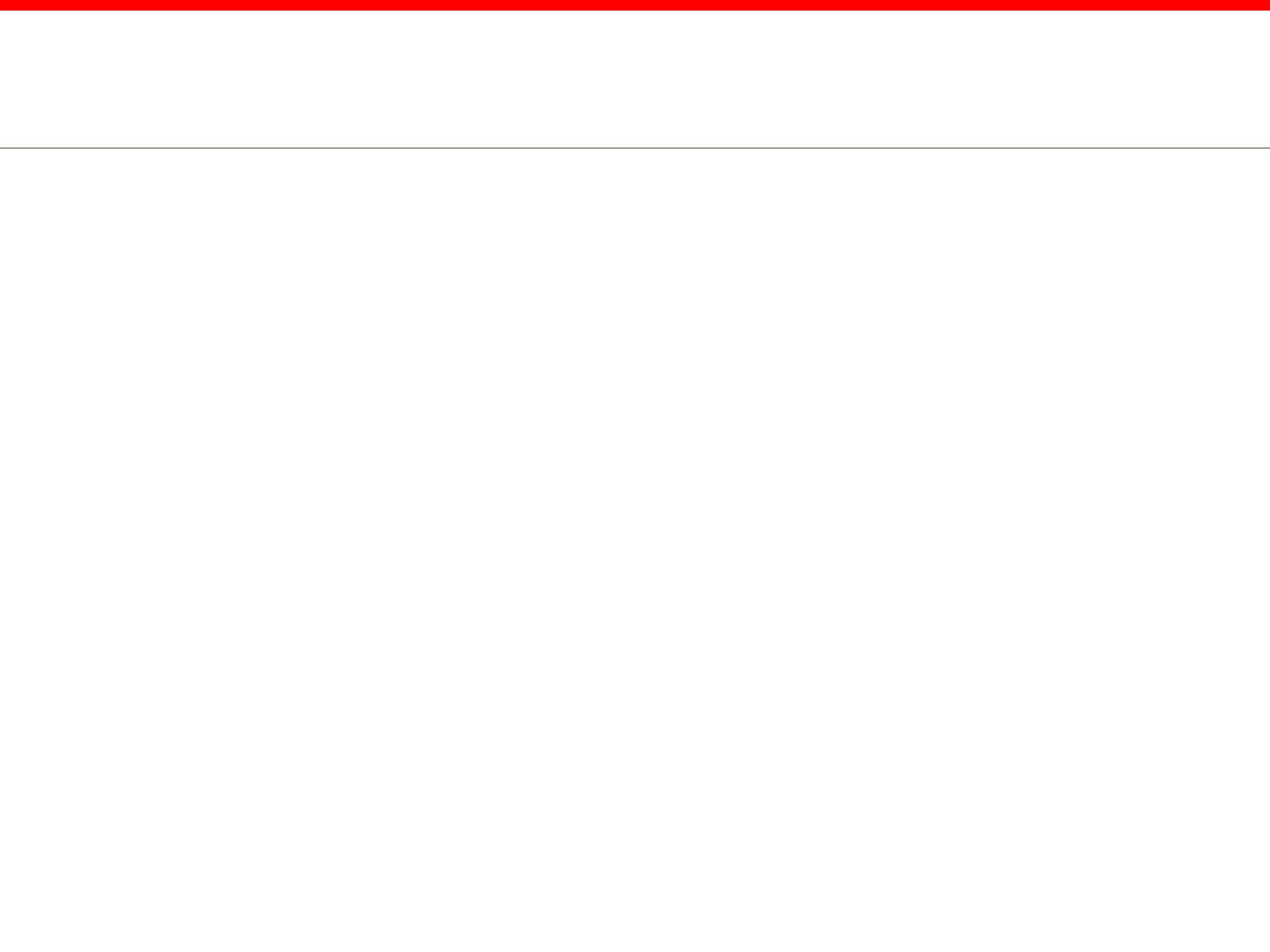
Ex: direct comparative evidence that only men, and not women, are groped and hazed

Ex: rumor was that a female employee had sex with her male superior to obtain promotion

EO 1096/1097 - Conduct

For QPQ and Hostile Environment:

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



“Unwelcome” – Add. B and EO

EEOC - When welcome-ness is at issue, the investigation should determine whether the CP's conduct is consistent, or inconsistent, with the assertion that the sexual conduct is unwelcome. Acquiescence in sexual conduct at the workplace may not mean that the conduct is welcome to the individual.

OCR – The Department interprets “unwelcome” as a “subjective element”. Therefore even if a CP “pretended to welcome the conduct,” the complainant’s subjective statement that they found the conduct to be unwelcome suffices to meet the “unwelcome” element.

2001 OCR Guidance (Rescinded) - Conduct is unwelcome if the student did not request or invite it and “regarded the conduct as undesirable or offensive.”

Who is the Reasonable Person?

The severe, pervasive, and objective elements “must be evaluated in light of the known circumstances and depend on the facts of each situation but must be determined from the perspective of a reasonable person standing in the shoes of the complainant.” (FR 30156)

The burden is on the educational institution to evaluate complaints by considering the totality of the circumstances, which “includes taking into account the complainant’s age, disability status, and other factors that may affect how an individual complainant describes or communicates about a situation involving unwelcome sex-based conduct.” (FR 30156)

What is Severe and Pervasive under Addendum B?

Disseminating “revenge porn,” or conspiring to sexually harass people (such as fraternity members telling new pledges to “score”), ...particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement. (FR 30166)

A single instance of unwelcome physical conduct may meet definitions of assault or battery prohibited by other laws, even if the incident does not meet one of the three prongs of the § 106.30 definition of sexual harassment. (FR 30166)

Evaluating Effective Denial – Addendum B

This element:

- does require that a complainant has already suffered loss of education (FR 30169)
- Does require that a person’s “equal” access to education has been denied, not that a person’s total or entire educational access has been denied (FR 30169)

Signs of enduring educational access may include:

- skipping class to avoid a harasser,
- a decline in a student’s grade point average,
- having difficulty concentrating in class

No concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant’s position of the ability to access their education on an equal basis with persons who are not suffering such harassment. (FR 30170)

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

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

What is Objectively Offensive under Addendum B?

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

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

Factors to Consider:

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

Additional Guidance on Severe Or Pervasive In Employment Context

Cal. Prac. Guide – Can look to whether it is physically threatening or humiliating or a mere offensive utterance;

Cal. Prac. Guide - Whether it unreasonably interferes with an employee's work performance.

EEOC - A single, unusually severe incident of harassment may be sufficient to constitute a violation

CA SB 1300 - A single incident of harassing conduct is sufficient regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. (January, 2019)

Limited the Complainant's ability to participate in or benefit

Intimidating, Hostile, or Offensive Environment

“Does not need to be a descent into the Inferno”

SB 1300 - It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, [one] should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties.

Look at totality of circumstances, including:

- Power differential between complainant and respondent
- Frequency of conduct
- Severity of conduct
- Whether it is physically threatening or humiliating and
- It alters the conditions of the work or educational environment¹⁹

Questions

Scenarios

Scenario #1

Employee (Tracy) says they have been harassed for seTd ()Tp090.9132452 c .3 (a

Scenario #2

According to Devan, shortly after starting at (ng)7.U West Devan nothe environmentn the residence hall was (n6.7 (at)3.3 (t)3.h8pi2.1mh8pm)2 (es)7.3 (sex)7 (were often referred tby offensi2.1mh8pve ni2.1mh8pcknames “Bitchy Ri2.1mh8ptand

Scenario #3

Drew wants to file a complaint claiming that Jordan made three crude sexual references. Drew is a resident advisor and tells you that on Drew's first day, Jordan, also a resident advisor, told Drew that they were "really attractive." Drew said that they were not offended by this comment.

One time, as they were meeting to discuss issues that occurred in the residence hall. Jordan told Drew that they had a body like their ex, but better. The first or second time Drew and Jordan worked together, a song came on the radio containing the lyrics "eating booty like groceries." Jordan asked Drew, "[D]oes your boyfriend eat that thang?" Drew replied that their boyfriend did not and did not know how to do so. Jordan answered, "I could teach him." Another time, while taking a walk around the campus, Drew recommended chocolate milk to help Jordan with muscle soreness. A few hours later, Jordan texted Drew that he loved chocolate milk, along with images of "tongue" emojis. This happened the same day as the comment Jordan made about his ex-girlfriend.

When working out together at the gym on another occasion, Jordan pointed out Drew's groin area, which was wet with sweat, and commented, "Damn, that thing get wet like that."

Scenario #4

About two weeks after Parker assumed a position as a supervisor, they learned that “certain employees were circulating within the division...an unfounded, sexually-explicit rumor about them.” The rumor was that Parker “[had] a sexual relationship” with a higher-ranking manager, in order to obtain the management position. The rumor originated with another employee (Smith), who began working at the university at the same time as Parker and in the same position. Because of Parker’s promotions, however, Parker soon became Smith’s superior.

According to Parker, the AVP over the department, Moppins, participated in spreading the rumor. In a conversation with another employee Parker heard that Moppins speculated that Parker’s recent divorce may have been due to the alleged affair. As the rumor spread, Parker says that they “were treated with open resentment and disrespect” from many coworkers, including employees that Parker was responsible for supervising.

As evidence of the hostility being directed against them, Parker tells you that Smith recently told Parker that they had a sexually explicit photograph of Parker and planned to send it to everyone in the department. Parker tells you that there no way that Smith

Scenario #5

Farley has filed a complaint because he believes he is being harassed by his supervisor (Alex). Farley identifies as a straight male and claims that he has been placed on a performance improvement plan and is being given different assignments than his colleagues. Farley's colleagues are predominantly female. Farley tells you that Alex never invites him to staff lunches, does not talk to him about his weekend, and teases him about his manner of dress. He admits that he wears shorts on zoom meetings but says that others are not keeping up with dress codes requirements either.

Farley says that the other employees are being hostile to him and he is convinced that all of this stems from how Alex is treating him. Farley explains that Alex has never been friendly towards him and believes that it is because Alex is a gay male who prefers female employees based on rumors that have been swirling around for years. Farley adds that he also has excellent "gaydar."

Questions

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