

Instructions for the County Attorney Following a Harassment Complaint

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Sexual Harassment

Quid Pro Quo (this for that)

Where a manager promises an employee something in exchange for a sexual favor.

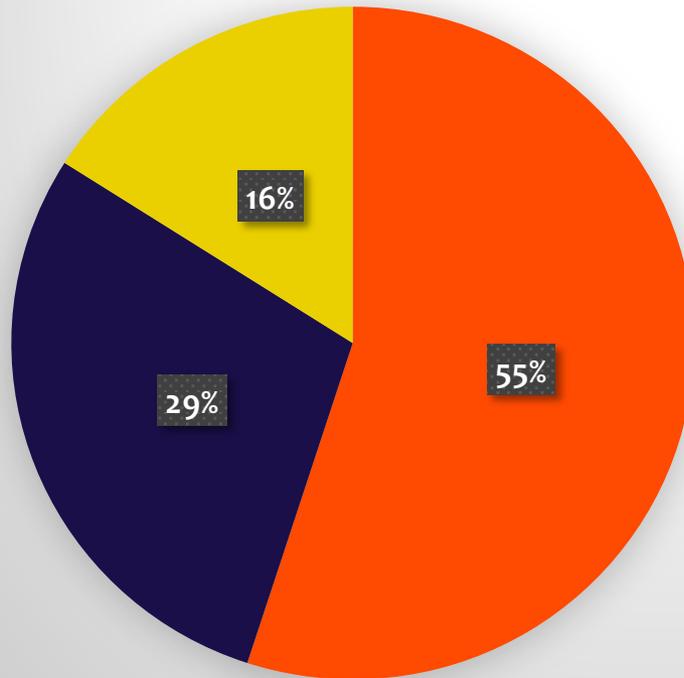
- Favorable performance reviews or recommendations
- Promotions
- Raises
- Sought after assignments, work shifts, vacation days, other benefits

Hostile Work Environment

Frequent or pervasive unwanted sexual comments, advances, requests, or other similar conduct.

- Display of offensive materials
- Sexual jokes
- Persistent, unwanted interactions or comments

Most Common Forms of Sexual Harassment



- Sexually Suggestive Comment or Jokes
- Intrusive Questions/Inappropriate Staring or Leering
- Unwelcome Physical Contact

Issues With Handling Harassment

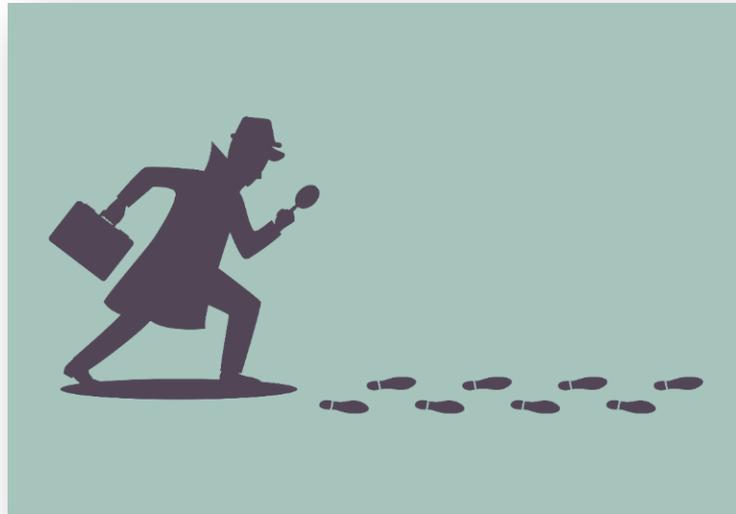
- Poorly written policies.
- Failing to follow anti-discrimination policies.
- Supervisors not escalating complaints of harassment.
- Workplace romances.
- Failure to investigate.
- Blaming the victim.
- Retaliation.



Once a Harassment Complaint is Made

Take it seriously and...

- Investigate!
 - Investigate!
 - Investigate!



Why Investigate?

- Stop problems before they escalate (e.g., minimize risk of litigation).
- Meet the employer's duty to take appropriate measures to prevent inappropriate conduct in the workplace (such as harassment and discrimination).
- Create perception of fairness (i.e., good employee relations).



What About “Off the Record” Complaints

- There is no such thing as an “off the record complaint.”
- All possibly inappropriate conduct should be thoroughly investigated.



What If?

What if the conduct stops before the investigation begins or the complainant does not want to proceed?

Thank goodness!

- No need to investigate?
- Investigate only if the employee agrees?
- Employer must go forward with the investigation?



The Duty to Conduct an Investigation

Once an employer is on notice of a potential problem or violation, it has an obligation to investigate promptly and as thoroughly as is necessary.

- Standard: Did the employer conduct a reasonable, good faith investigation?
 - **Document all findings!**



12 Steps to Conducting the Investigation

1. Prepare an investigative work plan
2. Review any applicable document(s)
3. Interview the complainant(s)
4. Interview the accused
5. Interview the witnesses
6. Re-interview the parties and witness (if necessary)
7. Conclude the investigation
8. Prepare the investigative report
9. Close the investigation
10. Submit the investigative report to the appropriate individual(s)
11. Prepare the investigative file
12. Follow-up

Before Initiating the Investigation

- Secure all electronic and hard copy information and communication that could be relevant.
- Determine the goals of the investigation.
- Assess possible concerns regarding the investigation.
- Prepare a strategy for the investigation.
- Consider separation of the complainant and the accused (but be careful not to penalize the complainant!).

Determine Who Will be Involved in the Investigation

- Choose an appropriate investigator, keeping in mind the parties and potential witnesses.
- Uninterested third party.
- Consider potential conflicts of interest.
- Notify managers and supervisors on a “need-to-know” basis.

Role of the Investigator

- To determine in good faith whether the alleged conduct actually occurred.
- To work with internal and external resources as needed:
 - ✓ HR department
 - ✓ In-house attorneys
 - ✓ Outside attorneys



Purpose of Investigation is Key

Should the County Attorney be the Investigator?

- Is the County Attorney's privileged investigation in compliance with the County's anti-harassment policy?
- Attorney-client privilege applies to communications between lawyers for an employer and its employees.
- But, privilege only attaches where communications are primarily for, or motivated by, legal purposes.
- Therefore, conversations with the County Attorney would be privileged only if the County Attorney was acting in the role of legal advisor when the communication was made.

Case Scenario

- A County employee complains to HR that a Department Head asked if she is single, said he is having marital problems, sat very close to her, then later tried to convince her to have him to her hotel room for a drink.
- Employee also informs HR that she is not the first female to receive this type of behavior from the Department Head.
- HR consults with the County Attorney for advice.
- The County Attorney decides to conduct a privileged investigation.



*Is the lawyer's information
privileged and/or confidential?*



Is the Investigation Predominately for Legal Matters?

- Mixed communications of both legal and other matters may defeat privileged status if Court determines non-legal purpose was predominant purpose or motivation.
- In other words, the purpose of the investigation must be predominantly, but not solely, related to legal matters for the privilege to attach and the investigation to maintain privileged status.



- Consider who is being copied on communications, as privilege may be destroyed via communications to persons not covered by the privilege.

Can a privileged investigation be used as the basis for affirmative defense to sexual harassment claims?

Investigation as a Defense

- The “at issue” waiver finds waiver of privilege if the party relies on a privileged communication to support a claim or defense. This doctrine is followed in NC, although its law on the topic is not particularly well-developed.
- Thus, employer can waive privilege by putting its internal investigation at issue in litigation, e.g., by basing a claim or defense on the attorney’s advice or disclosing findings of the investigation to a person or entity that does not hold privileged status as to the information disclosed. See, e.g., *Metric Constructors, Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, No. 5:97-CV-369BR1, 1998 WL 1742589, at *4 (E.D.N.C. Sept. 28, 1998).
- Accordingly, the privilege is waived if the County relies on the investigation as part of its affirmative defense.
- Rationale: privilege may not be used as both a sword and a shield. See *Technetics Group Daytona, Inc. v. N2 Biomedical, LLC*, N.C. Bus. Ct. 115 (2018).
- Hence, outside counsel or other investigators are often used, sometimes in unison with internal investigation.

How to Maintain the Privilege

Who Should Conduct the Investigation?

- Determine importance to County of maintaining a confidential investigation that cannot be compelled.
- Consider competence and who is best positioned to conduct a thorough investigation.
- Evaluate likelihood of litigation and whether County will want a report and/or witness who can attest to the investigation.
- Consider potential and/or perceived bias of the person conducting the investigation.
- Decide if retention of outside counsel to conduct non-privileged investigation is prudent.
- Key point = reasonably segregate attorney advice and other privileged communications.

Case Scenario

- County Attorney calls employee and tells her she has to participate in the investigation or she may be terminated for failing to cooperate.
- Employee asks if she needs a lawyer and County Attorney advises against it as it is an internal investigation into the Dept. Head's conduct.
- County Attorney meets with employee for purposes of internal investigation and immediately begins questioning her about the alleged harassment by Dept. Head.
- Following interview, County Attorney instructs employee not to discuss interview due to ongoing investigation.



Confidentiality

- County Attorney serves at the “pleasure” of the Board of Commissioners.
N.C.G.S. § 153A-114.
- “Secrets” – County Attorney can’t keep things from the Board.
e.g., County Manager tells County Attorney “don’t tell the Commissioner the subject
of the business meeting I’m having with the Public Works Director.”
- County Attorney must disclose to any inquiring member of the Board the subject of meetings involving County officials and other interested persons despite contrary instructions from the County Manager. See CPR 154.

CONFIDENTIAL

Upjohn Warnings

- Also known as Corporate Miranda Warnings. Purpose is to ensure that privilege is protected despite communicating with employee.
- County Attorney must advise before any employee interview that he/she represents the County and not the employee and that the interview is protected by the attorney-client privilege. See *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981); See also, *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333 (4th Cir. 2013).
- Must explain the purpose is to learn facts so attorney can provide legal advice to the County, and that County holds the privilege.
- Failure to provide *Upjohn* warning, preferably in writing, may result in the court finding that the privilege is held jointly by the County and the employee and thus the employee may block its waiver, i.e., both parties must agree to the waiver for the privilege to be waived.
- Employers may want to waive privilege to demonstrate their affirmative defense, but employees have less incentive or reason to waive.
- Always document the exact language of *Upjohn* warning given; may even print out and have employee sign. See *U.S. v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

Personnel Act

What is a Public Record?

- Name
- Age
- Date of employment
- Terms of employment contract
- Current position
- Office assigned to
- Salary
- Dates and amounts of increase in salary
- Date and type of job change (promotion, demotion, transfer, etc.)
- Date and reason for each job change
- If there was a dismissal, a copy of the written notice of the final decision of the County setting forth the specific acts or omissions that are the basis of the dismissal.

Personnel Act

Who Can Access Confidential Records?

Everything else is confidential and subject to inspection only in the following situations:

1. The employee or his duly authorized agent may examine all portions of his personnel file except:
 - a. Letters of reference solicited prior to employment, and
 - b. Information concerning a medical disability, mental or physical, that a prudent physician would not divulge to his patient.
2. A licensed physician designated in writing by the employee may examine the employee's medical record.
3. A county employee having supervisory authority over the employee may examine all material in the employee's personnel file.
4. By order of a court of competent jurisdiction, any person may examine such portion of an employee's personnel file as may be ordered by the court.

Personnel Act

What is Confidential?

Even if considered part of an employee's personnel file, the following information need not be disclosed to an employee nor to any other person:

1. Testing or examination material used solely to determine individual qualifications for appointment, employment or promotion within the County's service, when disclosure would compromise the objectivity or the fairness of the testing or examination process.
2. Investigative reports or memoranda and other information concerning the investigation of possible criminal actions of an employee, until the investigation is completed and no criminal action is taken, or until the criminal action is concluded.
3. Information that might identify an undercover law enforcement office or a law enforcement informer.
4. Notes, preliminary drafts and internal communications concerning an employee. In the event such materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials.

Beware of...

Wind v. City of Gastonia, 226 N.C. App. 180 (2013)

City Police officer was entitled to unredacted investigative report including the identity of complaining co-workers even when he was not disciplined following an allegation of his harassment.

Case Scenario



- Employee sues both the County and the Dept. Head.
- County Attorney reconsiders decision to be the sole investigator because County cannot use privileged investigation as an affirmative defense.
- County Attorney retains outside counsel to conduct non-privileged investigation that complies with County's HR policies.
- County Attorney continues with own investigation that will be privileged to advise County on risks.
- County Attorney shares investigation work product with outside counsel performing non-privileged investigation.

Sharing Information

Be sure to maintain the privilege, as discussed earlier:

- ✓ Establish in advance and in writing that interview is being conducted to render legal advice to the County.
- ✓ Establish that, as the County Attorney, you represent the County and not the employee. (*Upjohn Warning*)
- ✓ Maintain and segregate privileged documents in secure files, and keep a privilege log if documents are produced to opposing side in litigation.
- ✓ Prepare report again noting the investigation was to render legal advice and that any employees were advised that the County Attorney represents the County and not the employee.

Sharing Information – Other Tips

- Share information only to those ultimately responsible for decisions on which advice was requested.
- Careless sharing by accident generally results in loss of the privilege.
- Privilege is at risk if information from privileged investigation forms basis of the non-privileged investigations.





Issues with Investigation Methodology

Case Scenario

- County Attorney proceeds with privileged internal investigation.
- During investigation County Attorney reviews Dept. Head's emails and finds reference to Facebook posts.
- County Attorney "friends" Dept. Head on Facebook for purposes of further investigation.
- County Attorney also asks employee for her Facebook password.
- County Attorney interviews Dept. Head and records the interview.

“Pretexting” on Social Media

- “Pretexting” = obtaining information or evidence for attorneys in litigation or internal investigations through false pretenses or deception.
- All public social media posts are fair game for viewing by attorneys.
- But, attorneys can never send friend requests to represented persons, conceal their identities when using social media for investigation purposes, or use other peoples’ accounts to access information on social media for investigation purposes.
- Also, never ask employees to provide their social media account login information or otherwise access social media accounts for purposes of investigation.



Access to Employee's E-mail or Phone

- Many states now protect employees from having to provide access to personal emails, phones, or social media accounts or otherwise provide employers with access to these accounts.
- North Carolina does not have any such law. However, as to attorneys' ethical obligations, this type of conduct seems to be at odds with the overall spirit of the ethical obligations.
- Even if potentially permissible, best practice would be to avoid as it could be viewed as coercion.

Recording Witness Interviews

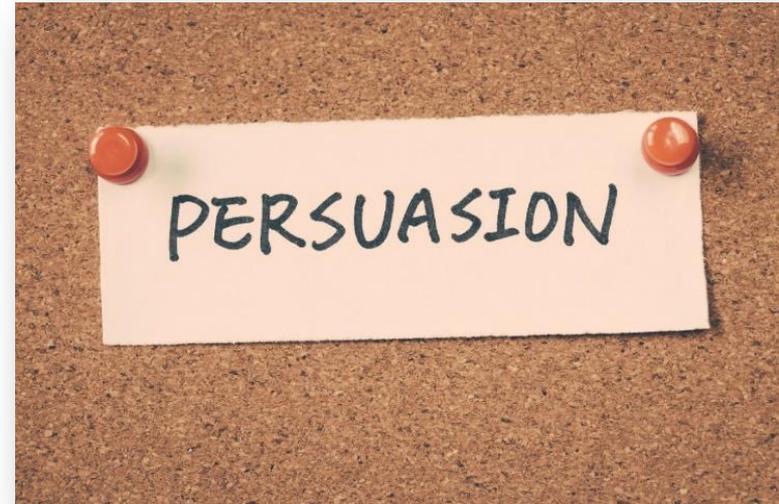
- North Carolina is a “one-party consent” state with respect to recording conversations. N.C.G.S. § 15A-287.
- However, just because it may be technically legal does not necessarily make it a good idea. The broad purpose of the ethical rules seem to be at odds with this type of conduct.
- Additionally, there could be evidentiary issues should the matter go to trial.



Write a Persuasive Report

The reader should believe that:

1. You did a thorough investigation and,
2. You reached the correct conclusion.



The Report Should Support the Discipline Imposed

- If the report reflects intentional and egregious harassment, how do you justify your action plan?
 - Termination?
 - Demotion?
- If the report indicates a misunderstanding, how do you justify termination?
- The report is evidence that will either hurt or help your case.

When You Cannot Determine Who is Telling the Truth

Explain the policy to the accused:

- ✓ Explain that next time termination will happen.
- ✓ Document the conversation (two representatives from the employer).
- ✓ Pay close attention to all parties involved moving forward.
- ✓ Check in with the complainant after a few weeks (document and continue to check in periodically, which creates a record that you care about your employees).

Making Tough Decisions

- Some of the determinations will come down to credibility.
 - You have to be able to explain the decision.
- Consider all factors that might impact the allegations.
- What are the underlying motives?



Disciplining the Harasser



What Happens if “it” Happens Again?

If the complainant complains of harassment following the conclusion of the investigation, the handling of the first complaint will be highly scrutinized.

- Were reasonable steps taken to prevent recurrence?
- The law requires that harassment be stopped.



Liability for Termination

- Inconsistency is a problem.
- Have others engaged in similar conduct without termination?
- Proper documentation was not maintained.



Best Practices

- The best defense is a good offense. Top management must commit.
- Establish strong anti-discrimination policies.
- Clear channels for reporting/complaining. Consider a hotline.
- No retaliation and let employees know of this practice.
- Provide yearly HR 101 training to supervisors and managers, which includes anti-discrimination.
- Investigate everything:
 - ✓ Don't wait.
 - ✓ Select investigator carefully.
 - ✓ Ensure no retaliation.
 - ✓ Be thorough.

Best Practices (cont.)

- Document everything.
- Gather evidence.
- Interview all possible witnesses.
- Determine whether conduct was inappropriate or policies were violated.
- Present and explain report to decision maker.
- Meet separately with complainant and accused.
- Follow-up regularly with complainant to ensure no additional misconduct or retaliation.



Questions?



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Thank you!

