

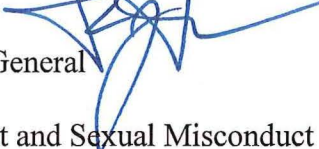


U.S. Department of Justice

Washington, D.C. 20530

April 30, 2018

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS

FROM: Rod J. Rosenstein 
Deputy Attorney General

SUBJECT: Sexual Harassment and Sexual Misconduct

The Office of Inspector General (OIG) issued a memorandum last year concerning how the Department of Justice handles sexual misconduct and harassment claims. After reviewing the memorandum, we established a Department working group to consider additional steps to eliminate harassment and respond effectively to alleged misconduct.

That effort resulted in the attached memorandum from the Assistant Attorney General for Administration. The memorandum sets forth important directives for the Department's components to follow in an effort to enforce the Department's zero-tolerance policy for sexual harassment. Please follow the directives in the memorandum and be vigilant in efforts to ensure a work environment free of discrimination and harassment.

The Department of Justice should be a leader in maintaining a model workplace. I appreciate your support in fulfilling this important responsibility.


Attachment



Washington, D.C. 20530

April 30, 2018

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS

FROM: Lee J. Lofthus
Assistant Attorney General
for Administration 

SUBJECT: Sexual Harassment and Sexual Misconduct

I. Introduction

The Department of Justice, through this memorandum and the directives contained herein, seeks to communicate to its employees in the strongest terms its goal for a workplace free from sexual harassment and sexual misconduct.¹ Toward that end, this memorandum sets forth policies and procedures to ensure that: (1) substantiated allegations of sexual harassment or misconduct result in serious and consistent disciplinary action, (2) components report allegations of sexual harassment or misconduct to the Office of Inspector General and the components' security divisions when appropriate, (3) components appropriately consider allegations of or disciplinary actions for sexual harassment or misconduct in making decisions about awards, public recognition, or favorable personnel actions, and (4) components can be held accountable for their handling of allegations of sexual harassment and misconduct.

The Department has several policies and directives in effect relating to on- and off-duty conduct, including sexual misconduct.²

1. January 29, 2016, Memorandum from the Assistant Attorney General for Administration and Designated Agency Ethics Official: "Off-Duty Conduct"
2. October 9, 2015 Memorandum from the Attorney General: "Prevention of Harassment in the Workplace"

¹ The policy and directives set forth in this memorandum address concerns raised in a Management Advisory Memorandum issued by the Office of the Inspector General on May 31, 2017, concerning the handling of allegations of sexual harassment and misconduct within the Department of Justice. This policy will be implemented consistent with merit system principles and in accordance with labor-management responsibilities as outlined in Title V, Chapter 71 of the United States Code, and any applicable collective bargaining agreements. As a general matter, references to "misconduct" in this memorandum refer to sexual misconduct.

² The listed policies and directives along with this memorandum are collected and available at <https://justice.gov/policies-and-directives-effect-relating-and-duty-conduct-including-sexual-misconduct>, and many pertinent portions are referenced herein.

3. April 10, 2015 Memorandum from the Attorney General: "Prohibition on the Solicitation of Prostitution"
4. November 19, 2013 Policy Statement 1200.2: "Federal Workplace Responses To Domestic Violence, Sexual Assault, and Stalking"

"Sexual harassment" refers to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment, whether such activity is carried out by a supervisor or by a co-worker.³ This could include such workplace conduct as displaying "pinup" calendars or sexually demeaning pictures, telling sexually oriented jokes, making sexually offensive remarks, engaging in unwanted sexual teasing, subjecting another employee to pressure for dates, sexual advances, or unwelcome touching.⁴ Sexual harassment occurs when employment decisions affecting an employee, such as hiring, firing, promotions, awards, transfers or disciplinary actions, result from submission to or rejection of unwelcome sexual conduct.⁵ Title VII of the Civil Rights Act of 1964 generally prohibits sexual harassment.⁶

It is the Department's policy to treat harassing conduct as misconduct, even if it does not rise to the level of harassment actionable under Title VII.⁷ The Department will not wait for a pattern of offensive conduct to emerge before addressing claims of harassment.⁸ Rather, the Department will act before the harassing conduct is so pervasive and offensive as to constitute a hostile environment.⁹ Even where a single utterance of an ethnic, sexual, racial, or other offensive epithet may not be severe enough to constitute unlawful harassment in violation of Title VII, it is the Department's view that such conduct must be prevented whenever possible through awareness, robust policies and effective and appropriate follow-up, investigation, and enforcement of the zero-tolerance policy.¹⁰

"Sexual misconduct" is a broader term. Sexual misconduct can include actions that occur either in the workplace or outside the workplace when there is a nexus between the conduct and the employee's duties and responsibilities or the agency's mission. The Department expects employees will comport themselves appropriately on and off the job.¹¹ The Department may show a nexus between off-duty misconduct and the efficiency of the service by three means: (1)

³ See DOJ Order 1200.2 and <https://www.justice.gov/jmd/eeos/sexual-harassment>.

⁴ <https://www.justice.gov/jmd/eeos/sexual-harassment>.

⁵ *Id.*

⁶ DOJ Order 1200.2.

⁷ October 9, 2015 Memorandum from the Attorney General: "Prevention of Harassment in the Workplace"

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ January 29, 2016, Memorandum from the Assistant Attorney General for Administration and Designated Agency Ethics Official: "Off-Duty Conduct"

a rebuttable presumption in certain egregious circumstances, e.g., commission of a violent crime or sexual misconduct with minors; (2) preponderant evidence that the misconduct adversely affects the employee's or co-workers' job performance or the Department's trust and confidence in the employee's job performance; or (3) preponderant evidence that the misconduct interfered with or adversely affected the Department's mission. This most often applies where the employee engages in the very type of behavior that the Department is charged with preventing or addressing.¹² Off-duty misconduct that has resulted in discipline of federal employees, and in some cases removal from federal service, has included sexist remarks and threats to coworkers or supervisors.¹³ Also, all Department personnel are prohibited from soliciting, procuring, or accepting commercial sex at all times during their employment, including while off duty or on personal leave regardless of whether the activity is legal or tolerated in a particular jurisdiction, foreign or domestic.¹⁴

II. Discipline

The Department seeks to ensure that penalties for sexual harassment or misconduct are sufficiently reviewed and consistently applied across all components. Substantiated allegations of sexual harassment or misconduct must be treated seriously and, absent extraordinary circumstances, should consistently result in formal discipline up to dismissal.

With a view toward achieving more consistency, I am directing each component to implement a system that provides for uniformity in the administration of disciplinary action for sexual harassment or misconduct within the component to the maximum extent feasible.

A. Guiding Principles

To facilitate more consistent discipline across the Department, there are some general guiding principles regarding discipline for sexual harassment or misconduct that should apply throughout all the Department's components.

First, substantiated incidents of sexual harassment or misconduct are of serious gravity and have a significant negative impact on the Department's ability to execute its mission.

Second, in assessing the nature and seriousness of an incident, the presence of certain aggravating factors in a substantiated incident of sexual misconduct should result in a proposal of disciplinary action with a penalty ranging from a 15-day suspension to removal.¹⁵ Those factors

¹² *Id.*

¹³ *Id.*

¹⁴ April 10, 2015 Memorandum from the Attorney General: "Prohibition on the Solicitation of Prostitution"

¹⁵ In addition to a significant suspension, discipline for sexual harassment or misconduct may include a demotion.

include sexual assault,¹⁶ stalking,¹⁷ the subject's supervisory role vis-à-vis the victim, repetition, situations involving *quid pro quo* for official actions, any form of voyeurism (such as peeping), retaliation for reporting prior misconduct, and prior discipline for sexual harassment or misconduct. The Department considers the presence of any of these factors (hereinafter "the aggravating factors") in a substantiated incident of sexual harassment or misconduct to be especially serious. The absence of an aggravating factor does *not* mean that the discipline must be less than a 15-day suspension. Even in the absence of an aggravating factor, a single instance of sexual harassment or misconduct may warrant a suspension of 15 days or more or removal. Disciplinary officials should evaluate the appropriate discipline for a substantiated allegation of sexual harassment or misconduct keeping in mind that any substantiated allegation of sexual harassment or misconduct is serious.

Third, when proposing or deciding discipline for employee misconduct, officials should consider the totality of the circumstances presented. The *Douglas* factors¹⁸ must be considered when determining an appropriate penalty. *Douglas* requires that disciplinary officials consider, among other things, the clarity with which the employee was on notice of any rules that were violated in committing the offense or had been warned about the conduct in question. The Department has communicated to its employees in the strongest terms its goal for a harassment-free workplace. Components must make this memorandum, the cited directives, and any future memoranda on the subject of sexual harassment and misconduct readily available to their employees, including new hires, to ensure that they have clear notice of the Department's policies.

B. Application of Guiding Principles

Department components are directed to apply the above principles in assessing the appropriate penalty for any substantiated incident of sexual harassment or misconduct. Penalties for sexual misconduct and harassment will necessarily vary due to the specific facts at issue, the individualized assessment required under the procedures for disciplinary actions in 5 U.S.C. Chapter 75 and 5 C.F.R. Part 752, and the *Douglas* factors. Nevertheless, application of the

¹⁶ Sexual assault refers to a range of behaviors, including but not limited to, a completed nonconsensual sex act (e.g., rape), an attempted nonconsensual sex act, and/or abusive sexual contact (i.e., unwanted touching). Sexual assault includes any sexual act or behavior that is perpetrated when someone does not or cannot consent. Lack of consent may be inferred when a perpetrator uses force, harassment, threat of force, threat of adverse personnel or disciplinary action, or other coercion, or when the victim is asleep, incapacitated, unconscious, or physically or legally incapable of consent. DOJ Order 1200.2.

¹⁷ Stalking refers to harassing, unwanted or threatening conduct that causes a victim to reasonably fear for his or her safety or the safety of a family member. Stalking conduct can include, but is not limited to: following or spying on a person; appearing uninvited and unwanted at a person's home or work; waiting at places in order to make unwanted contact with a person or to monitor a person; leaving undesired items (e.g., presents or flowers) for a person; and posting information or spreading rumors about a person on the Internet, in a public place, or by word of mouth. It also includes "cyberstalking": following a person's Internet activity with malicious intent, hacking into someone's email, making anonymous contact with someone over the Internet or by email, or otherwise using technology to make unwanted contact. Stalking may occur through use of technology including, but not limited to, e-mail, voice-mail, text messaging, and use of GPS and social networking sites. DOJ Order 1200.2.

¹⁸ See *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

principles articulated above and close monitoring of the imposition of discipline for substantiated incidents of sexual harassment or misconduct will better ensure that the Department lives up to its goal of achieving a harassment-free workplace.

Toward that end, first, I direct all Department components to have procedures and policies that ensure consistency in the administration of discipline for substantiated allegations of sexual harassment or misconduct within the component.¹⁹ Components should review any existing policies and procedures to ensure that they are consistent with the principles articulated herein. Individual components may want to consider adopting a table of penalties, if they have not already done so, consistent with applicable labor-management relations requirements. If a component chooses not to adopt a table of penalties, the disciplinary process should nonetheless be structured and documented.

Second, I direct all components to ensure that supervisors and others involved in the disciplinary process are aware of the requirements of this memorandum and review it each time they propose or impose a disciplinary action for sexual harassment or misconduct.

III. Management of Sexual Harassment Allegations

The Department encourages any employee who believes that he or she has been subjected to harassment to report such behavior immediately to a supervisor or higher-level manager, their Human Resources or personnel officer, or the individuals identified by their office to manage harassment allegations.²⁰ Components shall ensure that employees are informed of all avenues available to them for reporting harassment allegations and are kept reasonably informed of the progress of the components' reviews of their allegations. In addition, the Justice Management Division (JMD) will send a quarterly reminder to all employees advising them of avenues for reporting sexual harassment or misconduct. Those components that have identified individuals to manage harassment allegations must ensure that the names and contact information of those individuals are widely publicized to their employees.

Further, within 90 days from the date of this memorandum, each component must develop a process to track the handling of sexual misconduct and harassment allegations, compatible with its existing systems and resources and applicable law. The tracking process should be sufficient to enhance the component's ability to ensure consistency in the handling of these allegations. The system should record a brief description of the allegation, including the presence or absence of aggravating factors, whether and when the allegation was reported to OIG, whether and when the allegation was reported to the security division, and the disciplinary

¹⁹ The Office of Attorney Recruitment and Management will develop a similar process for disciplinary actions taken against those Department attorneys for whom it has disciplinary authority.

²⁰ The October 9, 2015 memorandum also provides guidance with respect to employees seeking assistance from their component's Equal Employment Opportunity Office, the Office of Professional Responsibility, or the Office of the Inspector General, and in the case of employees in a collective bargaining unit, in accordance with the appropriate provisions of their collective bargaining agreement. This guidance also applies to an employee who believes that he or she has been subjected to sexual misconduct.

action taken. Disciplinary officials must review the information maintained by their component whenever called upon to propose or impose discipline for sexual harassment or misconduct.

The Department's policy is to offer appropriate and timely support to victims of sexual misconduct and harassment.²¹ The Department is committed to making supportive resources available to victims of sexual harassment or misconduct through supervisors, designated persons in human resources divisions, or other persons designated by the agency, and the Department's Employee Assistance Program (EAP).²²

IV. Reporting Sexual Misconduct and Sexual Harassment Allegations to Management Officials, to the Office of Inspector General, and to Security Divisions

Department regulations require that "[e]vidence and nonfrivolous allegations of criminal wrongdoing or serious administrative misconduct by Department employees shall be reported to the OIG, or to a supervisor or a Department component's internal affairs office for referral to the OIG." 28 C.F.R. § 0.29c. Managers or other component-identified points of contact who receive an allegation of sexual harassment or misconduct must report the allegation to a designated management official. The designated management official should then ensure the report of any non-frivolous allegation to the OIG through established channels. *Any doubt should be resolved in favor of reporting the allegation to the OIG.* The component should then consult with the OIG about the investigative steps to follow and whether the component can or should impose discipline prior to the completion of an OIG investigation.

The component should take immediate preventive measures as may be necessary while an investigation into the incident or a disciplinary decision relating to the allegation is pending. Preventive measures may include physical separation of the workspaces of employees at issue, permanent or temporary change in supervision, or assignment of alternative work duties. Such preventive measures are never a substitute for appropriate disciplinary action and should have no impact on the discipline imposed.

As noted previously, the component's process for the handling of allegations of sexual harassment and misconduct, should also track whether and when the component reported the allegation to the OIG and the reasons why any allegation was not reported.

Any substantiated allegation of sexual harassment or misconduct must be reported to the component's security division for appropriate action. With respect to a non-frivolous allegation of sexual harassment or misconduct that includes one or more aggravating factor, a component should report the allegation itself to its security division upon learning of it. The component's process for the handling of allegations of sexual harassment and misconduct should also track referrals to component security divisions.

²¹ See DOJ Order 1200.2.

²² *Id.*

V. Awards, Public Recognition, and Favorable Personnel Actions

The Department confers awards, public recognition and other favorable personnel actions on employees. In order to ensure that such awards are made appropriately, each component must develop and implement a policy addressing the provision of awards and public recognition to employees who are the subject of an ongoing sexual harassment or misconduct investigation or employees who have been recently disciplined for this type of misconduct. Furthermore, there is no logical basis for limiting these policies to employees who are the subjects of investigations or disciplinary action stemming only from allegations of sexual harassment or misconduct. Attached to this memorandum is direction from the Department's Chief Human Capital Officer (CHCO) and Deputy Assistant Attorney General, Justice Management Division (JMD), which establishes the minimum requirements for components to follow when considering performance awards, public recognition, and other favorable personnel actions for employees subject to misconduct investigations or disciplinary actions.²³

VI. Component Reporting Requirements

To monitor components' compliance with the principles and directives set out in this memorandum, components must submit an initial report on their implementation of the directives above to the CHCO through the Director, Human Resources in JMD by August 31, 2018. This report must include, at a minimum:

1. A description of the component's processes for tracking allegations of sexual harassment and misconduct, including the determination of whether or not to report an allegation to the OIG and the component's security division.
2. The outcome of the component's review of its policies and procedures for ensuring consistency in the administration of discipline for substantiated allegations of sexual misconduct and harassment, including any steps the component took to revise its existing policies and procedures as a result of this review.
3. The date(s) and manner in which the component informed its employees regarding how to report sexual harassment and misconduct allegations, including providing the names and contact information for those the component has designated to manage harassment allegations.
4. The date(s) and manner in which the component made its supervisors and others involved in the disciplinary process aware of the aggravating factors identified in this memorandum.
5. The component's policy and procedures for addressing performance awards, public recognition, and other favorable personnel actions for employees subject to misconduct investigations or disciplinary actions.

²³ A component's implementation of such policy is subject to their bargaining unit considerations and obligations, as appropriate.

6. The date(s) and manner in which the component communicated to its employees the Department policies and memoranda referenced in Section I of this memorandum.

JMD will send a data request specifying the format for this information.

Upon receiving the components' submissions and no later than October 31, 2018, the CHCO will review the components' submissions and prepare a summary report for the Office of the Deputy Attorney General. This report will summarize the components' submissions and demonstrated progress toward implementing the guiding principles in this report.

Beginning on January 31, 2019, each Department component must provide an annual summary report for the prior calendar year to the CHCO through the Director, Human Resources in JMD. This summary report must describe the component's ongoing implementation of these directives, including brief summaries of reported allegations and how the component addressed them. The Department will send a data request specifying the format for this information.

Upon receiving the components' submissions and no later than March 30 of each year, the CHCO will prepare a summary report for the Office of the Deputy Attorney General. This report will summarize the components' submissions, and identify any instances in which a component may not have complied with the directives in this memorandum or may have failed to take appropriate disciplinary action regarding a substantiated allegation of sexual harassment or misconduct. The Deputy Attorney General will determine any appropriate steps to take with respect to non-compliance with this memorandum.

If you have any questions about this memorandum or the memorandum regarding awards, public recognition and other favorable personnel actions, please contact Mary Lamary, Deputy CHCO and Director, JMD Human Resources, at (202) 514-4350.

Attachment



U.S. Department of Justice

Washington, D.C. 20530

April 30, 2018

MEMORANDUM FOR COMPONENT EXECUTIVE OFFICERS AND
HUMAN RESOURCES OFFICERS

FROM:

Mari Barr Santangelo
Deputy Assistant Attorney General for
Human Resources and Administration, and
Chief Human Capital Officer

SUBJECT:

Consideration of Misconduct in Making Decisions Regarding
Awards, Public Recognition, and Favorable Personnel Actions

The purpose of this memorandum is to inform components of the requirement to consider misconduct in making decisions regarding awards, public recognition, and other favorable personnel actions for employees. In order to continue to foster a culture in which misconduct is taken seriously, I am directing components¹ to develop guidelines for consideration of misconduct as discussed below.

Misconduct is an employee's failure to adhere to a workplace rule, code, or standard of behavior, whether written or unwritten. When employees engage in misconduct, it can lower employee productivity and morale, as well as disrupt their co-workers' performance and agency operations. Components must take into account any alleged misconduct that is the subject of a pending investigation by the Office of Inspector General (OIG), Office of Professional Responsibility (OPR), or a component's internal investigative authority or any misconduct that has resulted in disciplinary action when making decisions about awards and other favorable personnel actions, including promotions.

It is understood that each component has diverse missions, operational needs, and varying size and structure, and therefore, each component is in the best position to determine how to implement this directive. Guidance must be issued in writing and communicated to the component's workforce, and be consistent with labor-management responsibilities as outlined in Title V, Chapter 71 of the United States Code, and any applicable collective bargaining agreements. Components may establish new guidelines or revise existing policy and procedures to ensure compliance with this memorandum. Components must submit their guidance to the Director, Human Resources no later than August 31, 2018. Component guidance must address, at a minimum, the following elements:

¹ The term "Component" as used herein refers to an office, board, division or bureau.

Memorandum for Component Executive Officers and
Human Resources Officers

1. The parameters for cash awards, quality step increases, time-off awards, honorary awards, promotions, and other forms of public recognition.
2. Procedures for considering allegations of misconduct for employees under investigation or who have been recently disciplined for misconduct in making these personnel decisions.
3. The period of time for which past misconduct will be considered.
4. Training for supervisors and managers on performance management and addressing misconduct.
5. A point of contact with whom supervisors and managers can consult when considering misconduct in making award nominations and decisions.
6. The component's method of tracking the number of employees who are subjects of pending investigations, or who have been disciplined for misconduct, and received an award, form of public recognition, or other favorable personnel action.

Components are to conduct annual reviews of guidelines, procedures, and practices to monitor and evaluate their consideration of misconduct when granting awards and taking favorable personnel actions.

1. The review period will encompass the calendar year (January 1 to December 31).
2. Components must certify their compliance with this memorandum to the Director JMD/HR by March 31 of the year following the previous calendar year.
3. Certifications are to be submitted under the signature of the component head of administration.

If you have any questions, please contact Mary Lamary, Director, JMD Human Resources, at (202) 514-4350.