



U.S. Department of Justice

Office of the Inspector General

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MANAGEMENT ADVISORY MEMORANDUM FOR:

THE DEPUTY ATTORNEY GENERAL

FROM:


MICHAEL E. HOROWITZ
INSPECTOR GENERAL

SUBJECT:

The Handling of Sexual Misconduct and Harassment
Allegations by Department of Justice Components

The purpose of this memorandum is to advise you of potential systemic issues that the Office of the Inspector General (OIG) identified during recent reviews of Department of Justice (Department, DOJ) components' handling of sexual harassment and misconduct allegations, most recently in our review of the Civil Division's handling of such matters.¹ We believe that the systemic issues we describe below necessitate the Department's attention to assess the handling of sexual harassment and misconduct allegations across all components, in accordance with DOJ policy.

¹ DOJ OIG, *Review of the Handling of Sexual Harassment and Misconduct Allegations by the Department's Civil Division*, Evaluation and Inspections (E&I) Report 17-03 (May 2017).

For the purposes of this memorandum, we discuss our concerns related to our recent reviews that focus specifically on the components' handling of sexual harassment and misconduct allegations, or follow up on issues identified in these reviews. For more information related to the OIG's past reporting on the components' disciplinary processes in general, see DOJ OIG, *Review of the United States Marshals Service Discipline Process*, E&I Report I-2001-11 (September 2001); *Review of the Drug Enforcement Administration's Disciplinary System*, E&I Report I-2004-002 (January 2004); *Review of the Federal Bureau of Prisons' Disciplinary System*, E&I Report I-2004-008 (September 2004); *Review of the Bureau of Alcohol, Tobacco, Firearms and Explosives' Disciplinary System*, E&I Report I-2005-009 (September 2005); *Review of the Federal Bureau of Investigation's Disciplinary System*, E&I Report I-2009-002 (May 2009); *Review of the USAOs' and EOUSA's Disciplinary Process*, E&I Report I-2014-001 (February 2014); *The Handling of Sexual Harassment and Misconduct Allegations by the Department's Law Enforcement Components*, E&I Report 15-04 (March 2015); and *Bonuses and Other Favorable Personnel Actions for Drug Enforcement Administration Employees Involved in Alleged Sexual Misconduct Incidents Referenced in the OIG's March 2015 Report*, E&I Report 16-01 (October 2015).

The Department's policy memorandum on Prevention of Harassment in the Workplace requires the Department to maintain a "zero tolerance" work environment that is free from harassment (including sexual harassment).² Harassing conduct does not need to be repetitive or severe enough to be legally actionable before the Department will address it; rather, the conduct should be addressed before it becomes so pervasive and offensive as to constitute a hostile work environment. According to the policy, such conduct must be prevented whenever possible through awareness, robust policies, investigation, and enforcement.

In spite of the strong position that the Department has taken against harassment in the workplace, the OIG has consistently identified potentially significant and recurring issues concerning the components' handling of sexual harassment and misconduct allegations and their enforcement of the Department's zero tolerance policy. For example, from fiscal year (FY) 2012 through FY 2016, the OIG's Investigations Division published summaries of 19 substantiated allegations that included elements of sexual harassment and misconduct made against DOJ employees.³ In total, these substantiated allegations represented 21 percent of the OIG's published summaries of investigative findings of high level or significant public interest employee misconduct over that time. When employees engage in such misconduct, it profoundly affects the victim and affects the agency's reputation, undermines the agency's credibility, and lowers employee productivity and morale. Without strong action from the Department to ensure that DOJ employees meet the highest standards of conduct and accountability, the systemic issues we identified in our work may continue.

Additionally, our program reviews have revealed several concerns regarding the Department's handling of these types of matters, including inconsistent reporting of allegations. In March 2015, we issued a report on the law enforcement components' handling of sexual harassment and misconduct allegations and found that the law enforcement components had failed to follow existing guidance requiring them to report misconduct allegations to headquarters.⁴ In response to our recommendations, each component took

² DOJ Policy Memorandum 2015-04, Prevention of Harassment in the Workplace, October 9, 2015, <https://www.justice.gov/jmd/file/786691/download> (accessed April 11, 2017).

³ The OIG publishes summaries of investigative findings for certain misconduct cases involving subjects who are members of the Senior Executive Service, employees GS-15 and above, Assistant U.S. Attorneys, or cases for which there may otherwise be significant public interest. The totals reported here do not include all sexual harassment or misconduct allegations that the OIG investigated between FY 2012 and FY 2016.

⁴ DOJ OIG, *Handling of Sexual Harassment and Misconduct Allegations by the Department's Law Enforcement Components*.

steps to ensure that supervisors and managers report all allegations to headquarters instead of handling such allegations as a management issue.

While not involving as many underlying cases, our findings with respect to the Civil Division are perhaps even more troubling.⁵ Specifically, we found that the Civil Division lacked any meaningful guidance, policy, or practice as to when a sexual harassment or misconduct allegation should be reported to its front office. Inconsistent reporting to a component's headquarters or front office impedes the component's ability to identify patterns of misconduct and effectively address any underlying systemic problems.

Furthermore, both our 2015 review of the law enforcement components and our 2017 review of the Civil Division found that treating allegations as local management issues was not effective in stopping the harassment or misconduct in some instances, as the following examples show:

- Our 2015 review found that two Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) training instructors continued to engage in consensual sex with their students for over 3 years after being counseled locally for substantially the same activities.
- In another case from the same review, the subordinates of a Federal Bureau of Investigation Supervisory Management and Program Analyst (SMAPA) were subjected to approximately 3 years of sexual harassment, during which the SMAPA was counseled locally four times and even signed a pledge to refrain from such conduct — all to no effect.
- Our 2017 review found that even after a male Civil Division attorney was counseled locally after inappropriate behavior directed toward female coworkers and interns, the attorney allegedly peeped at a woman nursing in a closed office, which resulted only in additional counseling.

The repeated nature of the alleged misconduct in these examples demonstrates that local handling of such issues is not ensuring that harassment is “eliminated in a manner that is prompt and effective,” as the zero tolerance policy requires.

We also continue to be concerned that the components report substantiated misconduct to their security divisions inconsistently. Our 2015 review identified a lack of coordination between internal affairs and security personnel at ATF, the Drug Enforcement Administration (DEA), and the U.S. Marshals Service (USMS), each of which have since taken steps to help ensure

⁵ DOJ OIG, *Handling of Sexual Harassment and Misconduct Allegations by the Department's Civil Division*.

more consistent reporting.⁶ Our 2017 review found that the Civil Division relies on the individuals disciplined for misconduct to self-report to security personnel. Many Department employees hold security clearances, and sexual misconduct allegations clearly are relevant under the factors for adjudicating a security clearance.⁷ If the Department does not ensure that relevant substantiated information is provided to security officials, the Department risks renewing or granting security clearances to ineligible individuals.

We are also concerned that the OIG, which is supposed to receive “any allegation of criminal or serious administrative misconduct” to ensure it is investigated and addressed appropriately, may not be made aware of the allegations when they first occur.⁸ For example, we found that the Civil Division does not have a formal standard to determine whether to report allegations to OIG and that Civil Division personnel varied in their understanding of the OIG reporting requirement. As a result, prior to an OIG preliminary investigation in 2015, out of seven case files addressing allegations of sexual harassment or misconduct, Civil Division management had not referred a single case to the OIG despite the indisputably serious nature of at least some of them.⁹ Because these reporting issues appear to be recurring, the Department should ensure that consistent procedures for reporting to the OIG are created and implemented across all components in compliance with the regulatory requirement.

With regard to substantiated allegations of misconduct, Department policy provides components with considerable discretion in the development and use of penalty tables, which we found can result in inconsistent discipline both within and among Department components.¹⁰ Our 2015 review found that the law enforcement components’ penalty tables often lacked specific language

⁶ The OIG recommended that ATF, the DEA, and the USMS ensure that all non-frivolous sexual harassment and misconduct allegations are referred to their respective security personnel. All three components issued policies establishing new reporting procedures. In addition, ATF provided training on the reporting of allegations. The OIG’s recommendations to ATF, the DEA, and the USMS are closed.

⁷ 32 C.F.R. 147.

⁸ 28 C.F.R. § 45.11 (2006).

⁹ For example, in August 2014 the OIG first became aware of a disturbing sexual misconduct allegation against a manager in the Civil Division’s Office of Immigration Litigation when the OIG received a complaint from DOJ staff alleging that the Civil Division had failed to properly discipline the manager. Subsequently, the OIG’s preliminary investigation found that the Civil Division had in fact imposed discipline on the attorney pursuant to its processes; however, the OIG’s preliminary review revealed broader concerns regarding the adequacy of the discipline imposed by the Civil Division, specifically in light of the employee’s disciplinary history of related sexual misconduct, as well as the Civil Division’s failure to report alleged misconduct to the OIG.

¹⁰ Human Resources Order DOJ 1200.1, August 25, 1998, Chapter 3-1, Discipline and Adverse Actions.

regarding prohibited behaviors, increasing the risk of inconsistent penalties due to open-ended interpretation of the offense classifications. In response to the OIG's recommendation, the Office of the Deputy Attorney General, in conjunction with the Justice Management Division, has and continues to work with the law enforcement components to ensure that component tables of offenses and penalties are complementary and consistent with respect to sexual harassment.

While we have been told by the Department that mechanical application of penalty tables can result in adverse decisions in challenges to administrative actions, components that choose not to use penalty tables at all can risk inconsistent adjudication of similar offenses, which can undermine confidence in the fairness of the Department's disciplinary system. For example, we found that the Civil Division does not use penalty tables, opting instead to apply the Douglas Factors for each case without the benefit of a table of penalties.¹¹ However, none of the case files that we reviewed during our review included a complete Douglas Factor analysis, which the Civil Division could have used for precedent or comparison. We believe that applying the Douglas Factors in such an unstructured and undocumented way could result in preferential treatment for higher level or high performing personnel who engage in such serious misconduct. Accordingly, the Department should continue to work to ensure that penalties for sexual harassment and misconduct are sufficiently reviewed and consistently applied across all components to ensure such substantiated allegations are treated seriously and, absent extraordinary circumstances, consistently result in formal discipline up to dismissal.

Our 2017 Civil Division review identified two particularly serious, substantiated allegations in which the subjects received written reprimands, were demoted, and were transferred to other sections within the Civil Division. Civil Division officials cited the difficulty of removing an employee, even in cases of serious sexual harassment and misconduct, as contributing to this practice. We note that transfers can be used to separate an assailant from a victim or to allow an employee with substantiated misconduct a chance to reform their conduct in a new environment. However, transfers could also be used to avoid imposing more severe disciplinary action and may create a risk that the same type of misconduct will occur in the new environment, placing other Department employees at risk unnecessarily. Moreover, transferring an employee who has committed such misconduct appears to conflict with the Department's zero tolerance policy that requires management to take all necessary steps to prevent harassment.

Finally, there is no Department policy addressing the granting of awards, bonuses, or other favorable personnel actions to an employee who is the subject of a pending misconduct investigation or disciplinary action. We were troubled to learn that subjects of pending sexual misconduct investigations or individuals

¹¹ See *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981).

who had been recently disciplined for sexual misconduct still received performance awards. Most recently, we found three instances in which a Civil Division employee received a performance award while a sexual harassment or misconduct investigation was ongoing or while disciplinary actions for such misconduct were in effect. Further, the Civil Division publishes the names of award recipients, which we believe sends a message to employees victimized by such conduct that reporting sexual harassment and misconduct allegations will not result in any meaningful consequences and, in fact, that the Department honors individuals who engage in such misbehavior. In our October 2015 review of bonuses and other favorable personnel actions for DEA employees involved in specific sexual misconduct incidents, we noted that even though DEA policy requires favorable personnel actions to be held in abeyance during an ongoing investigation, as well as a 3-year waiting period for favorable personnel actions following discipline for significant misconduct, 8 of the 14 individuals involved in such misconduct received bonuses, contrary to DEA policy.¹²

Our most recent review shows that this problem persists. In order to foster a culture in which sexual harassment and misconduct allegations are taken seriously across all components, the Department should consider enforcing a Department-wide policy that requires holding in abeyance any performance awards and public recognition of the subject of an ongoing sexual harassment or misconduct investigation. The Department should also consider establishing a minimum waiting period for bonuses and other favorable personnel actions following discipline for such misconduct.

We believe that a culture of zero tolerance for sexual harassment and misconduct requires the enforcement of Department policy equally across all components. This requires coordinated, high level action within the Department, rather than reliance on component-specific discretion to address misconduct reporting requirements, penalty guidelines, and other policy enforcement issues. We are providing this information so the Department can consider corrective action. Please advise us within 60 days of the date of this memorandum of any actions the Department has taken or intends to take with regard to these issues. If you have any questions or would like to discuss this information and our concerns, please contact me at (202) 514-3435.

¹² DOJ OIG, *Bonuses and Other Favorable Personnel Actions for Drug Enforcement Administration Employees Involved in Alleged Sexual Misconduct Incidents*. The recommendations the OIG made to the DEA were closed as of June 30, 2016.

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