SMITH ANDERSON

WORKPLACE HARASSMENT

(includes policy checklist, complaint handling checklist, sample questions for complainant interview)

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SMITH ANDERSON

WORKPLACE HARASSMENT
A MANAGER'S AND SUPERVISOR'S OVERVIEW

WHAT CONDUCT CAN CONSTITUTE SEXUAL HARASSMENT?

Most broadly stated, sexual harassment can be any unwanted conduct of a requisite severity that is imposed on a person in his or her employment because of his or her sex. Generally, sexual harassment falls into one or more of three categories:

-unwelcome sexual advances;

-a sexually-charged workplace; or

-gender-based animosity.

It can include, but is not limited to, the following:

Verbal: propositions or innuendo; flirtation; suggestive or offensive comments; sexist comments; humor, jokes, and teasing about sex or gender-specific traits; rumors about other employees; verbal abuse, insults, threats;

Non-Verbal: sexually-oriented gestures, signs, cartoons, pictures, graffiti or paraphernalia; whistling; vandalism;

Physical: touching, patting, pinching, brushing the body, sexual assault, rape.

Demands for Sexual Favors and the Hostile Environment

Although sexual harassment encompasses the wide range of above-described conduct, it historically has been recognized to fall within

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two general categories – quid pro quo harassment and hostile environment harassment.

> **Quid pro quo** harassment involves the employer's or its supervisor's request for sexual favors in exchange for job benefits.
>
> **Hostile environment** harassment involves a working environment that is polluted with sex-based offensive conduct.

These types of harassment frequently are intertwined.

For example, failure to submit to demands for sexual favors (quid pro quo) may also lead to a hostile or offensive working environment (hostile environment). By the same token, an employee who is terminated for complaining about a hostile environment or who quits because the hostile environment is intolerable also may assert a quid pro quo claim.

Demands for Sexual Favors (Quid Pro Quo Harassment)

Quid pro quo harassment typically involves supervisors' demands for sexual favors in exchange for job benefits. Rejection of these demands frequently leads to losses such as termination, transfer, delay or denial of job benefits, or adverse performance appraisals.

The loss may occur in several ways:

> benefits may be withheld until the employee submits to the sexual demands;
>
> a supervisor may retaliate against an employee who has refused sexual advances by firing him or her or altering or withholding tangible job benefits; or
>
> an employee may submit to the advance and still not receive the job benefit.

Consensual romance relationships can also lead to quid pro quo claims when the supervisor retaliates against the employee for terminating the relationship.

Hostile Environment Harassment

Hostile environment harassment involves verbal, non-verbal or physical conduct in the workplace by managers, supervisors, coworkers, vendors, clients or other third parties that unreasonably interferes with one's work or creates a hostile or offensive work environment.

To establish a hostile environment claim, the conduct of which the plaintiff complains must have been:

-unwelcome;

-based on sex; and

-sufficiently pervasive or severe to create an abusive working environment.

Additionally, some basis must exist for imputing liability to the employer.

Same-Sex Harassment

In Oncale v. Sundowner Offshore Services, Inc., 118 S.Ct. 998 (1997), the Supreme Court recognized that same-sex sexual harassment is actionable under Title VII. The Court found that nothing in Title VII bars a claim of sex discrimination merely because the plaintiff and defendant are of the same sex. The Court reiterated that only discrimination "because of sex" is actionable. While evidence that the alleged harasser is homosexual could support such a claim, such evidence is not essential. For example, a plaintiff could establish a claim by showing that the harasser, while not homosexual, was motivated by general hostility toward women in the workplace.

In Oncale, the plaintiff was employed on an oil platform as part of an eight-man crew. He alleged that he quit after being subjected to "sex-related, humiliating actions" by supervisors, including a sexual assault and

threatened rape. His complaints fell on deaf ears. Plaintiff testified that he quit for fear of being raped or forced to have sex. The Court held that the plaintiff was entitled to proceed with his case.

WHAT CONDUCT IS SUFFICIENTLY PERVASIVE OR SEVERE TO CREATE A HOSTILE ENVIRONMENT?: MERITOR SAVINGS BANK AND HARRIS

In Meritor Savings Bank, the Supreme Court recognized a Title VII hostile environment claim for sexual harassment observing that requiring employees to run a gauntlet of sexual abuse in the workplace is inconsistent with Title VII's goal of promoting sexual equality. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). In doing so, it reasoned that Title VII affords employees protection from working environments heavily charged with discriminatory intimidation, ridicule and insult.

> One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Meritor Savings Bank, 447 U.S. at 66 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)).

The Court held, however, that not all sexual harassment affects a "term, condition or privilege" of employment within the meaning of Title VII. Id. At 67. To be actionable, it must be sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment. Id.

In Meritor Savings Bank, a hostile environment claim existed where the plaintiff alleged that her supervisor made repeated demands upon her for sexual favors during and after working hours; she had intercourse with him 40-50 times; he fondled her in front of other employees; he followed her into the women's room, exposed himself and forcibly raped her on several occasions; and also fondled other employees.

Meritor Savings Bank led some courts to hold that the conduct must seriously affect the employee's psychological well-being or lead him or her to

suffer injury. The Supreme Court subsequently addressed this issue in Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993).

In Harris, the Supreme Court held that the harassment need not seriously affect the plaintiff's psychological well-being or lead her to suffer injury. Id. In so holding, the Supreme Court reaffirmed the standards set forth in Meritor Savings Bank. This standard, the Court explained, does not require the plaintiff to suffer tangible psychological injury. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, Meritor, supra, at 67, there is no need for it also to be psychologically injurious." Id.

The Court further explained that this standard was comprised of both objective and subjective prongs:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

The Court expressly declined to formulate a "mathematically precise standard. Instead, it set vague outward boundaries noting that while conduct which is merely offensive does not sufficiently affect the conditions of employment to violate Title VII, the conduct does not have to result in a "nervous breakdown" to be actionable.

In determining whether conduct falling between these extremes created an abusive or hostile work environment, the Court held that "all the circumstances" must be considered including:

> -the conduct's frequency and severity;
>
> -whether it is physically threatening or humiliating or a mere offensive utterance;

> -whether it unreasonably interferes with the plaintiff's work performance; and,
>
> -its affect on the plaintiff's psychological well-being.

In particular, the conduct's affect on the plaintiff's psychological well-being is relevant to the subjective prong (i.e., whether she actually perceived the environment to be abusive).

In Harris, the employer, Forklift Systems, Inc. ("Forklift"), employed Teresa Harris ("Harris") as a manager from April 1985 until her resignation in October 1987. Throughout her employment, the company president subjected her to gender-related insults and unwanted sexual innuendos. He made statements such as "you're a woman, what do you know" and "We need a man as a rental manager." He suggested that they "go to the Holiday Inn to negotiate [her] raise." He asked her and another woman to retrieve coins from his front pants pockets and threw objects on the floor and asked them to pick them up. He made sexual innuendos about her and other women's attire.

When Harris complained, the company president stated that he was unaware that the conduct offended her, apologized and promised to stop. Shortly thereafter, however, his conduct continued. Harris resigned and sued Forklift alleging that the conduct created an abusive work environment in violation of Title VII.

Although the United States District Court for the Middle District of Tennessee found that the conduct (i) offended Harris and (ii) would have offended a reasonable woman, it entered judgment in Forklift's favor because the conduct did not seriously affect Harris' psychological well-being. The Sixth Circuit affirmed. As described above, the Supreme Court reversed and remanded noting that the district court's use of an incorrect standard may have influenced its ultimate outcome.

Recently, the Court reiterated the standard set forth in Meritor Savings Bank stating:

> Most recently, we explained that Title VII does not prohibit 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.' A recurring point in these opinions is that 'simple teasing,' offhand

> comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'. . . These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' . . . Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing. . . . We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment.

Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998).

OTHER TYPES OF UNLAWFUL HARASSMENT

Other conduct which can be unlawful harassment includes verbal, nonverbal, or physical conduct that shows aversion, denigration, or hostility because of race, color, religion, national origin, gender, age, or disability and that either:

- creates an intimidating, hostile, or offensive working environment,
- unreasonably interferes with an individual's work, or
- adversely affects and individual's employment opportunities.

WHEN IS AN EMPLOYER LIABLE FOR SEXUAL HARASSMENT BY A SUPERVISOR?

Two recent decisions by the United States Supreme Court have changed the rules applicable to employers' liability for sexual harassment by a supervisor. As a result of Faragher v. Boca Raton, 118 S.Ct. 2275, (1998), and Burlington Industries v. Ellerth, 118 S.Ct. 2257 (1998), employers are liable for all sexual harassment involving a supervisor, regardless of whether it was quid pro quo or hostile work environment harassment.

When the employee actually suffers a "tangible employment action" (e.g., hiring, firing, failing to promote, reassignment with significantly different

responsibilities, or a decision causing a change in benefits), the employer cannot avoid liability under any circumstances.

In cases where the employee did not suffer a "tangible employment action," an employer may avoid liability if it can prove two things:

> (i) the employer acted reasonably to prevent and correct sexual harassment; and
>
> (ii) the employee unreasonably failed to take advantage of any corrective or preventive opportunities or to otherwise actually avoid the conduct.

In Faragher, the plaintiff was a female lifeguard who alleged that her supervisors created a hostile environment by engaging in repeated unwelcome touching, making crude comments about and reference to women's bodies, and requesting sexual favors. Plaintiff never complained to anyone in authority but did discuss it informally with another supervisor who took no action. The city had a sexual harassment policy but failed to distribute it to the lifeguards, including the alleged harassers. The plaintiff did not suffer a tangible employment action. The Supreme Court affirmed the trial court's judgment finding the city liable for the harassment. Because the city had failed to distribute its policy and failed to oversee the alleged harasser's conduct, it did not matter that the plaintiff had failed to report the conduct.

In Ellerth, the plaintiff resigned from her marketing position after allegedly being harassed by the Vice President of Sales and Marketing. Plaintiff alleged three key events that involved crude remarks, rude behavior, and what plaintiff perceived to be threats against her job. Plaintiff suffered no tangible job action and, in fact, received a promotion after at least two of the incidents she complained about. Plaintiff was familiar with the employer's sexual harassment policy, but failed to report any of the alleged conduct. The Court ruled the plaintiff could proceed with her case, but that the employer must have an opportunity to establish its defense to liability.

These cases do not affect the general rule applicable to claims of hostile work environment created by non-supervisory personnel. In these cases, an employer is liable only if it knew or should have known of the harassment and failed to take prompt, effective remedial action.

UNDERSTANDING YOUR COMPANY'S HARASSMENT POLICY

Well-designed harassment policies do more than prevent harassment and protect employees – they minimize potential employer liability and protect corporate and individual assets. Not all policies, however, are equally effective or beneficial, especially in defending harassment claims. And, not all policies reduce your exposure to stale false claims. Worse still, poorly drafted policies can make defending claims more difficult. The following questions and answers outline essential elements of a well-drafted policy.

- **Is your policy written and distributed to all employees?**

  It should be. Harassment claims frequently are accompanied by accusations that you ignore, tolerate or even condone harassment. An explicit policy prohibiting harassment that is clearly and regularly communicated to employees discourages such accusations and helps you minimize liability for harassment – especially in cases where your first notice of the alleged harassment is the EEOC charge or lawsuit.

  Moreover, a written and distributed policy is the simplest and most effective means to place yourself in a position to assert the affirmative defense against liability for a hostile environment created by supervisory personnel.[1] Failure to take these steps may result in loss of this important defense.

- **Do you require all employees to sign a written acknowledgment form that they have read and understand the policy?**

  You should. Again, this step is an effective means to place yourself in a position to assert the affirmative defense against

[1] This defense requires you to show two important things: (i) you exercised reasonable care to prevent and correct promptly any harassment; and (ii) the complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by you or to otherwise avoid harm.

liability for a hostile environment created by supervisory personnel. A written acknowledgement can help establish both required affirmative defense elements.

- **Does your policy unequivocally state that unlawful harassment will not be tolerated, that <u>all</u> harassment reports will be investigated and that, if harassment is found to have occurred, remedial action, including appropriate disciplinary action, will be taken?**

These principles are the essence of what it takes to minimize liability for unlawful harassment – make them the essence of your written policy. Putting them in your policy reminds you how to minimize liability, discourages accusations that you tolerate harassment and, in cases where your first notice of the alleged harassment is the EEOC charge or lawsuit, discourages the frequent accusations that the claimant did not promptly report the alleged harassment because you would not have done anything about it. These features also aid in establishing the affirmative defense for a hostile environment created by supervisory personnel.

- **Does your policy unequivocally state that retaliation against any employee who reports perceived harassment or who participates in an investigation as a witness or in any other capacity is prohibited and will not be tolerated?**

  For the reasons stated above, it should.

- **Does your policy expressly require that all employees <u>immediately</u> report perceived unlawful harassment by following your reporting procedures?**

Again, it should. Stale claims are difficult to investigate and often impossible to corroborate or disprove. Omitting this requirement breeds stale false claims. Including it not only discourages them but also helps you defend them.

- **Does your policy define sexual and other types of unlawful harassment? Does your definition include examples?**

Defining unlawful harassment lets employees know exactly what kind of conduct may get them in trouble. Employees often do not understand that what is welcome workplace banter to one is harassment to another. Defining harassment using examples helps them avoid conduct that might be perceived as unlawful harassment. It also minimizes the chance that employees who are disciplined for harassing conduct will contend that they had no idea their conduct was improper. Defining harassment using examples also enhances the value of your policy in defending harassment claims and establishing the affirmative defense for supervisory hostile environment claims.

The recent attention on sexual harassment has caused some employers to overlook the other types of unlawful harassment when developing or revising harassment policies. Your policy should define not only sexual harassment but also other unlawful harassment, specifically harassment based on race, color, religion, gender, national origin, age and disability.

Your policy also should expressly state that the prohibition against unlawful harassment applies to all management (including the CEO, President and other high ranking officials), and other supervisory personnel, coworkers and non-employees -- no member of the organization is immune.

Finally, use definitions of harassment which are adapted from the definitions set forth in the EEOC Guidelines on Discrimination Because of Sex and proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability. Using these definitions discourages accusations from claimants that your definitions are inadequate or otherwise improper.

- **Does your policy expressly identify the <u>individuals</u> to whom harassment reports should be made? Does it advise how or where these individuals may be reached?**

Doing so may help you avoid liability even if the harassment occurred. Many times employers can avoid liability for harassment simply by taking certain actions once they receive a harassment report. An important key to minimizing employer liability in these cases is to increase the likelihood that harassment reports will be made to individuals who are trained to handle them and whom you can trust to carry out their duties appropriately. You should select these individuals carefully and require all employees to report harassment to them.

Your policy should identify more than one person to whom reports can be made and encourage employees to pick the one with whom they would be most comfortable speaking. These features will preclude the possibility that your policy requires or encourages employees to report the harassment to the individual who happens to be the harasser. This is especially important for establishing the affirmative defense for supervisory hostile environment claims. Finally, identifying at least one woman to whom the report can be made enhances the value of your policy in defending harassment claims.

- **Does your policy say too much? Harassment policies which are distributed to employees should be limited to:**

  - a statement that unlawful harassment is prohibited;

  - a definition and examples of conduct that may be considered unlawful harassment;

  - requirement that employees immediately report all perceived unlawful harassment to one of the expressly designated individuals;

  - a statement that all reports of unlawful harassment will be investigated and, if unlawful harassment is found, appropriate remedial action including discipline will be taken; and

  - a statement that retaliation for reporting unlawful harassment or participating in an investigation is prohibited.

Harassment policies which are distributed to employees are not the place to set forth statements about how supervisors and managers should respond to harassment reports; describe the investigative procedure; or outline appropriate remedial action. While these things will increase the likelihood of successfully defending harassment claims, they should not be set forth in the harassment policy. Instead, they should be set forth in documents which are distributed only to supervisors or managers.

WHAT TO DO WHEN A COMPLAINT IS MADE

A well-drafted policy alone will not minimize liability. Many times, liability will turn on whether the company took appropriate action once it became aware of a harassment allegation. The following points outline actions that can minimize liability.

- **Review and follow the company policy.**

- **An important key to minimizing liability is to get the matter in the hands of someone who is trained to handle harassment matters and whom you trust to carry out these duties appropriately.**

Ideally, this individual will be identified in the policy as the one to whom harassment reports should be made -- and, thus, will receive the report directly. Nonetheless, supervisors and managers may receive the report first or otherwise become aware of the alleged harassment. When this happens, they immediately should report the matter to the individual designated to receive reports – even when the individual reporting the alleged harassment requests that no action be taken.

- **An investigation of the matter must be commenced immediately and completed promptly.**

The law requires the employer to promptly and effectively respond to all complaints -- even if the complainant requests that no action be taken or that the alleged harasser not be contacted.

Complainants should be advised that such a request cannot be honored.

The investigation should be undertaken by someone who is trained to handle harassment matters. Above all, the investigation should not be conducted by, or under the direction of, anyone who allegedly participated in the harassment. The investigation should be designed to develop the facts surrounding the alleged conduct to enable the company to determine appropriate remedial action.

- **The investigation should begin with a thorough interview with the complainant.**

The interview should begin with the interviewer assuring the complainant that unlawful harassment will not be tolerated. The complainant should be told that all harassment reports will be investigated and, if harassment is found to have occurred, appropriate remedial action will be taken. Similarly, the complainant should be assured that retaliation against any employee who reports harassment or who participates in an investigation is prohibited and will not be tolerated. Advise the complainant to report immediately any perceived retaliation.

During the interview, the investigator should obtain the following information:

(a) A detailed account of the alleged harassment;

(b) Identity of participants, witnesses and others with knowledge and any evidence the complainant believes supports the complaint; and

(c) The action which the complainant desires the company to take (including immediate action, if any). See Appendix – Sample Questions for Complainant Interview.

This information should be placed in a written statement signed by the complainant.

- **Determine whether any immediate action pending the investigation should be taken.**

In some cases, the complainant may request or the circumstances may warrant taking immediate action pending the investigation. Examples of such action include separating the complainant and alleged harasser by placing the alleged harasser on administrative leave, or temporarily transferring the alleged harasser. In no event should the complainant be placed on leave or transferred unless he or she specifically requests such action.

- **All witness should be identified and interviewed.**

These interviews should begin, as described above, by reviewing the policy against harassment and retaliation.

Again, written signed statements should be obtained. Advise witnesses that the matters discussed during the interview are confidential and should be not discussed with anyone.

- **Interview the alleged harasser.**

Confront the alleged harasser with the allegations and facts discovered during the investigation. Obtain a signed statement detailing his or her version of the facts along with the identity of witnesses or others with knowledge and any evidence which supports his or her version of the facts. Conclude the interview by reminding the alleged harasser that the company does not tolerate unlawful harassment. He or she should be told that all harassment reports will be investigated and, if harassment is found to have occurred, appropriate remedial action including discharge will be taken. Additionally, the alleged harasser should be instructed not to discuss the matter with any other employees and warned that retaliation against any employee who reports harassment or who participates in an investigation is prohibited and will not be tolerated.

- **Resolve credibility issues.**

In most cases, the complainant tells one story, the alleged harasser tells a different one. Although credibility disputes can be difficult to resolve, juries do this in every case (including the one that could arise from this harassment report) – companies should make every effort to do the same.

In resolving credibility issues, consider:

- Timing of the complaint
- Details provided by the complainant, witnesses and alleged harasser
- Whether corroborating evidence of any party's story logically should exist but does not
- The complainant's statement standing alone, if otherwise credible, may be sufficient to support a finding that the alleged harassment occurred
- Demeanor of the complainant, witnesses and alleged harasser
- Reputation for the truthfulness
- All other relevant circumstances

- **Upon completing the investigation, determine what action should be taken.**

Remedial action should be designed to eliminate harassment, remove any detriment suffered by the victim and deter future incidents by the harasser and others. Even if the allegations are found to have no merit, the company will be well-served to review the harassment policy with the alleged harasser and secure his or her representation that he or she understands it and will abide by it.

If harassment is found to have occurred, then appropriate disciplinary action up to and including discharge should be taken. Additionally, consideration should be given to what other remedial

action, if any, is necessary to eliminate the harassment and remove any detriment suffered by the aggrieved employee. Finally, the company should consider what other action, if any, is necessary to prevent future harassment.

- **Inform the complainant of the investigation's conclusion.**

Complainants frequently file lawsuits after making internal complaints when they believe that remedial action was not taken. Even companies that properly handle harassment complaints are exposed to subsequent claims when they fail to notify the complainant that responsive action was taken.

To minimize the likelihood of these claims, companies should notify the complainant when the investigation is completed. If harassment was found to have occurred, the complainant should be advised as to the remedial action that will be taken. If the investigation was inconclusive or no harassment was found to have occurred, then the complainant should be advised that the complaint was taken seriously, that the company does not tolerate or condone harassment, and that steps will be taken to ensure that conduct such as that alleged will not occur in the future. In all cases, the complainant should be advised to report immediately any subsequent perceived harassment or retaliation.

- **Documentation should be retained.**

All reports of alleged harassment, investigative statements and findings, counseling, disciplinary and other remedial action should be retained in a separate investigative file -- not the complainant's personnel file.

- **Periodically check with the complainant to ensure that the harassment has ceased.**

Harassment complaints frequently are accompanied by allegations that the harassment continued even after it was reported. These allegations expose you to liability for failing to take effective action or ignoring, tolerating or even condoning the harassment. To minimize the likelihood that the allegations will be

made, periodically check with the complainant to ensure that the harassment has ceased and no future action needs to be taken. Document these follow-up checks and the complainant's response.

By following these steps, the company may avoid liability for harassment by coworkers and, in some cases, supervisors. These steps also can prevent liability for claims brought by alleged harassers who have been disciplined as a result of a harassment complaint. Finally, these steps constitute a mechanism through which the company can resolve complaints in-house thereby avoiding the publicity and expense arising when employees seek remedies outside the company.

SAMPLE QUESTIONS FOR COMPLAINANT INTERVIEW

(1) What happened and how did you react? Be specific -- exact language used, threats to job security, promises of favorable treatment, physical touching. (Description must be detailed and be more specific than "he made advances.")

(2) When did the incident(s) happen? Where?

(3) How did this incident(s) make you feel? Was your work affected? How?

(4) Were there any witnesses to the incident(s)? Who are they?

(5) Has the complainant kept any written records or diaries relevant to the alleged harassment? Any expense reports, memos, tapes, notes, etc.? Does any written document or other evidence relevant to the alleged harassment exist?

(6) Who in the workplace knows the incident(s) happened? How do they know?

(7) Has the employee talked to anyone else at the company about the alleged harassment? If so, who? When? What was said?

(8) Has the complainant reported the alleged harassment to anyone in management? If so, what did that person do about it?

(9) Has the employee talked to anyone outside the company about the alleged harassment? Friends? Relatives? Doctors? Psychologists? If so, who? When? What was said?

(10) Was this the first time this type of incident(s) or harassment occurred? If not, complainant should provide a detailed account of each prior incident -- using above outline.

(11) Does the employee know of any other employees who have had the same or similar type of experiences with this supervisor? Co-workers?

(12) What does the complainant want done about the situation?

(13) Who does the complainant want the investigator to talk to?

(14) Does the complainant have any additional facts or information that would be helpful in an investigation?

(15) Are there any other issues the complainant wants to discuss?