

Memo

To: Sandy Weintraub
From: Gail E. Stevens
Date: November 30, 2018
Re: Supplementation based on committee's characterization of my comments

Thank you for attempting to read my comments during the Work Group meeting today. I was disappointed that you were prevented from doing so. Based on the Work Group's interpretation of Title VII standards and certain comments made in reaction to my feedback, you should consider the following in formulating a compliant policy:

- The perjury clause on page 3 of your proposed policy will likely have a chilling effect and should be qualified with a good faith, intentional standard.
- The addition of "injured worker" status is not vital, as you have a catchall, but it is a notable omission in light of past allegations against the Legislative Branch for discrimination based on an employee's filing of a workers' compensation claim, shared during a past training session at the capitol.
- The Oregon Legislature does not have the authority to circumvent minimum requirements under Title VII of the Civil Rights Act of 1964. The Faragher/Ellerth line of cases and their progeny require an employer to prevent and promptly correct sexually harassing conduct once management has notice of that conduct. Standards articulated under Title IX of the Education Amendment of 1972 obfuscate and distract from an employer's obligations under Title VII and are in no way applicable to Legislative Branch personnel policies.
- An employer is liable for a hostile work environment if the employer "knew or should have known about the conduct and failed to stop it," which amounts to a negligence standard. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 759 (1998). Regardless of Faragher/Ellerth, an employer will always be liable when its negligence leads to the continuation of a hostile work environment. *Vance v. Ball State Univ.*, 570 U.S. 421, 446 – 447 (2013).
- To comply with Title VII and ORS 659A.030, LBPR 27 requires an investigation upon notice of harassment, even if no "complaint" is generated, formally or informally. While that investigation need not be a formal, outside endeavor, legal standards require the Legislative Branch to explore actual or constructive knowledge of potential harassment. The proposed policy disregards that duty.
- I have attached the Commissioner's Complaint, filed on August 1, 2018, to include as part of the record, and certain statements by former interns and capitol employees, reported on November 15, 2018. Dian Rubanoff's related report is already a part of the Work Group's record.
- It is clear from the report that Senator Gelser provided notice of potential harassment well before management exercised its duty to investigate. A timely investigation would have provided both Senator Gelser and Senator Kruse with a more respectful and appropriate process

before the matter exploded in the press. Indeed, prompt, appropriate action at that time could have prevented harassment of future interns.

- As long as notice of potential harassment is substantiated and an accused party is allowed a meaningful opportunity to respond to those facts, which may or may not include information from an initially reporting party, due process concerns are satisfied. Additionally, members of the Legislative Assembly may be stripped of committee duties by leadership without a committee recommendation or floor vote.
- Accordingly, the Legislative Branch would be unable to assert that Senator Gelser “unreasonably” failed to take advantage of preventative opportunities when she expressly reported unwanted sexual touching to the Legislative Counsel and Human Resources Director, over a year before filing a complaint. The same would be true under your proposed system, which purports to provide more protection than the law.
- Simply stated, Faragher/ Ellerth never absolves an employer from its duty to prevent and promptly correct sexually harassing behavior about which the employer knows or should know.

Thank you again for your time and effort. I would appreciate your inclusion in the record of my original cover letter and comments, this response and the attachments.