



Office of the Inspector General  
U.S. Department of Justice



# **Review of the Handling of Sexual Harassment and Misconduct Allegations by the Department's Civil Division**

## **EXECUTIVE SUMMARY**

When federal employees engage in sexual harassment and misconduct, it affects their agency's reputation and credibility and can undermine the agency's mission. Sexual harassment and misconduct also may create a hostile work environment, which lowers productivity and morale. Due to the seriousness of this issue, the U.S. Department of Justice (Department, DOJ) has a zero tolerance policy for harassment, including sexual harassment. As a DOJ component, the Civil Division is required to uphold Department policies as well as federal laws and regulations governing the handling and discipline of misconduct incidents.

In July 2015, the Office of the Inspector General (OIG) completed a preliminary review in response to a complaint alleging that the Civil Division's Office of Immigration Litigation, District Court Section, had failed to properly discipline an attorney who had committed sexual misconduct. The OIG's preliminary investigation found that the Civil Division had imposed discipline on the attorney pursuant to its processes and therefore did not substantiate the allegation; however, the preliminary review revealed broader concerns regarding the discipline imposed by the Civil Division in incidents of sexual harassment and misconduct, as well as the Civil Division's failure to report alleged misconduct to the OIG. Following these concerns, the OIG initiated this review to examine how the Civil Division responds to sexual harassment and misconduct allegations and to assess whether penalties adequately and consistently address substantiated misconduct.

### **Results in Brief**

Although there were few reported allegations of sexual harassment and misconduct in the Civil Division from fiscal year (FY) 2011 through the first two quarters of FY 2016, we identified significant weaknesses in the Civil Division's tracking, reporting, and investigating of the 11 sexual harassment and misconduct allegations that we reviewed, as well as inconsistencies among penalties imposed for substantiated allegations. We believe that because each allegation of sexual harassment or misconduct requires consideration, the Civil Division must address these weaknesses and provide adequate guidance to ensure that it acts consistently with the Department's zero tolerance policy.

The Civil Division Office of Management Programs' Human Resources (OMP/HR) staff maintains paper records of the case files of the allegations it handles, which we found to be insufficient. Additionally, the Civil Division lacks consistent criteria for reporting sexual harassment and misconduct allegations to OMP/HR, including no minimum standard for preserving information to effectively maintain records and track allegations over time, other than the OMP/HR Officer's recollection. We initially received nine case files from OMP/HR related to allegations of sexual harassment and misconduct, but our interviews with Civil Division Branch Directors identified two additional allegations. In some of the cases we received, we were unable to reconstruct the facts, investigation, or adjudication because the information contained in the case files was inadequate. Furthermore, OMP/HR staff

could not articulate how the Civil Division would be able to manage its case file system in the absence of the HR Officer and her memory of events.

Prior to the OIG's 2015 investigation, the Civil Division had not referred a single sexual harassment or misconduct allegation case to the OIG, including two cases raising potential criminal concerns, as the *Inspector General Act of 1978* and federal regulations require. While the Civil Division currently has an informal practice of forwarding all allegations of sexual harassment and misconduct to the OIG, we found that the Civil Division lacks a consistent standard for reporting such cases to the OIG as well as to Civil Division leadership.

In addition, the Civil Division does not have its own internal policies governing the handling of sexual harassment and misconduct allegations, opting instead to follow broad federal law and regulations and Department policies. While we found that the Civil Division's handling of allegations conformed to most applicable regulations and policies, it was not consistent among cases or with the Department's zero tolerance policy.<sup>1</sup> Civil Division officials and managers we spoke with stated that investigations are conducted at the branch management level, with OMP/HR or the OMP Executive Director providing assistance. However, we found three allegations that were handled without informing or consulting OMP/HR.

Finally, while our sample of 11 cases is relatively small, we found reason for concern that the penalties and discipline imposed for misconduct varied and were less severe for the Civil Division's high-performing employees. The Civil Division does not have penalty tables or guidelines for handling substantiated cases of sexual harassment and misconduct, which we believe has affected the Civil Division's ability to impose consistent penalties and enforce the Department's zero tolerance policy. We determined that in general the penalties for substantiated allegations, including ones we found to be serious, were nothing more than written reprimands, title changes, and reassignment for cases in which the subjects of the allegations were supervisory/senior attorneys. Moreover, we found that Civil Division employees received performance awards while they were the subject of an ongoing sexual harassment or misconduct investigation or while disciplinary actions were in effect.

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<sup>1</sup> In response to a working draft of this report, the Civil Division stated its concerns regarding what it described as the OIG's overly broad use of the term "zero tolerance." The Civil Division noted that the Department and other agencies have stated on numerous occasions that they have a zero tolerance policy in the sense that they will not tolerate their employees engaging in sexual harassment, that they will take whatever measures are necessary to stop such misconduct when they are informed of it, and that they will make sure that appropriate remedies are available for the victims of such misconduct. The Civil Division also stated that this does not mean that the agency will apply a zero tolerance approach to taking discipline for every substantiated allegation; it said that management will undertake an individualized assessment in each case and reach a disciplinary determination after considering all the relevant factors, as required by law. However, as we note throughout our report, we believe that a zero tolerance policy means that all substantiated allegations should be addressed consistently and appropriately, which we found did not occur during the period of our review.

## **Recommendations**

We make four recommendations to the Civil Division to better and more completely track allegations of sexual harassment and misconduct, to ensure appropriate handling and reporting of allegations, and to provide guidance for consistent discipline in response to substantiated allegations. We believe that these recommendations will help the Civil Division better enforce the Department's zero tolerance policy on sexual harassment.

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# INTRODUCTION

## Background

Federal employees are held to high standards of integrity and conduct. When federal employees engage in sexual harassment and misconduct, it affects their agency's reputation and credibility and can undermine the agency's mission. Sexual harassment and misconduct may also create a hostile work environment, which lowers productivity and morale. The emotional stress for individuals who experience sexual harassment may affect their physical and mental health and may even have a financial impact if the victims leave their jobs, take leave without pay to avoid the harassment, or suffer retaliation for rebuffing their harasser.

The U.S. Department of Justice's (Department, DOJ) zero tolerance policy seeks to maintain a work environment that is free from any form of harassment, including sexual harassment. To enforce this policy, the Department treats sexual harassment as misconduct and requires management to respond to allegations of sexual harassment promptly and effectively to eliminate such behaviors from the workplace.<sup>2</sup>

In August 2014, the Office of the Inspector General (OIG) received a complaint alleging that the DOJ Civil Division's Office of Immigration Litigation (OIL), District Court Section, had failed to properly discipline an attorney who had committed sexual misconduct. The complainants further alleged a larger pattern of inadequate responses to complaints of sexual harassment and misconduct within OIL. In July 2015, the OIG completed a preliminary review of findings that did not substantiate the allegations that OIL's management had failed to take timely disciplinary action or that there was a larger pattern of failing to respond to incidents of sexual misconduct. However, the OIG did have concerns regarding the sufficiency of the discipline imposed and the Civil Division's failure to report the alleged misconduct to the OIG as Department regulations require. The OIG initiated this review to further assess how the Civil Division responds to sexual harassment and misconduct allegations made against its employees, as well as whether penalties adequately and consistently address substantiated misconduct.

## The Civil Division

The Civil Division represents the United States, its departments and agencies, members of Congress, Cabinet Officers, and other federal employees in any civil or criminal matter within its scope of responsibility. Civil Division litigation falls generally into the following categories involving:

- national policies,

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<sup>2</sup> See Janet Reno, Attorney General, memorandum to Department of Justice Employees, Prevention of Sexual Harassment in the Workplace, June 29, 1993, as amended by Janet Reno, Attorney General, memorandum to Heads of All Components, Prevention of Sexual Harassment, December 14, 1998, and reaffirmed by DOJ Policy Memorandum 2015-04, Prevention of Harassment in the Workplace (October 9, 2015) (all in Appendix 2).

- cases so massive and lengthy that they would overwhelm the resources of any individual field office,
- filings in national or foreign courts,
- multiple jurisdictions, and
- removal of illegal aliens.

The Civil Division's legal practice includes both defensive and affirmative litigation. Each year, thousands of lawsuits are filed against the government as a result of its policies, laws, domestic and foreign operations, and entitlement programs, as well as law enforcement initiatives, military actions, and counterterrorism efforts. In affirmative litigation, the Civil Division brings suits on behalf of the United States, primarily to recoup money lost through fraud, loan defaults, and abuse of federal funds. In addition, Civil Division attorneys advise other DOJ components and client agencies to ensure that the government's litigation position is unified, consistent, and successful.

An Assistant Attorney General oversees the Civil Division, which has approximately 1,400 employees, the majority of whom are attorneys. The Civil Division comprises six subcomponents, each led by a Deputy Assistant Attorney General (DAAG):

1. Appellate Staff,
2. Commercial Litigation Branch,
3. Federal Programs Branch,
4. OIL,
5. Consumer Protection Branch, and
6. Torts Branch.

Management in each subcomponent includes one or more Directors, who report to the DAAG, as well as Deputy Directors and/or Assistant Directors. In addition, the Office of Management Programs reports directly to the Assistant Attorney General and includes the human resources staff for the Civil Division.

## **Department Policies and Regulations on Sexual Harassment and Misconduct**

The legal framework governing the discipline of federal employees, including Civil Division employees, is contained in 5 U.S.C. § 7501 et seq., 5 C.F.R. Part 752, and established case law. Agencies may impose discipline when an employee's misconduct interferes with the agency's ability to carry out its mission.<sup>3</sup> Additional policies and procedures directing how the Department handles discipline and adverse actions are described in Human Resources Order DOJ 1200.1 (Order). This Order establishes the roles and responsibilities of management officials seeking to

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<sup>3</sup> 5 U.S.C. § 7501 et seq.

impose formal discipline and describes the mechanics of the inquiry, notice, adjudication, and grievance process applicable to most Department employees.<sup>4</sup> The Order also outlines the rights of employees who appeal their discipline in administrative proceedings before the Merit Systems Protection Board or mediate the decision in binding arbitration.<sup>5</sup> Finally, the Order describes the record retention and training requirements applicable to the disciplinary system.

The Department's policy is to maintain a zero tolerance work environment that is free from harassment, including sexual harassment, in all DOJ components. Although the policy does not provide guidance from a disciplinary standpoint, in the enforcement of this policy harassing conduct does not need to be repeated or severe enough to be legally actionable before the Department will address it. Department management must take steps to prevent harassment from occurring, respond to allegations of harassment quickly, and take appropriate corrective action against any employee who engages in harassment. Finally, the policy provides that no employee should be subjected to retaliation for reporting or participating in an inquiry about harassment (see Appendix 2 for more information).

Although the laws, regulations, and policy described above provide the general framework for the Department's disciplinary system, it is within each component's discretion to tailor its system to meet its organizational needs. The Civil Division, however, does not have internal policies, procedures, or guidelines for reporting, investigating, and adjudicating allegations of sexual misconduct; rather, it relies on federal law and regulations, as well as the Department's policy guidelines. We further discuss the Civil Division's lack of internal policies and procedures in the Results of the Review.

#### *Definition of Sexual Harassment and Misconduct*

According to the Department's policy, sexual harassment includes any unwelcome verbal or physical conduct of a sexual nature that affects an individual's work performance or any employment decisions, such as hiring, firing, promotions, awards, transfers, or disciplinary actions that result from submission to or rejection of unwelcome sexual conduct.<sup>6</sup> According to the Justice Management Division's Office of Equal Employment Opportunity (JMD EEO), sexual harassment can also be any activity that creates an intimidating, hostile, or offensive work environment for

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<sup>4</sup> Human Resources DOJ Order 1200.1, Part 3, Section B.3. All Department employees are covered by this policy, except for those specifically excluded by law or order, such as employees excluded from procedural protections under 5 U.S.C. § 7511. Employees covered by collective bargaining agreements may be subject to additional procedures. See <https://www.justice.gov/jmd/hr-order-doj12001-part-3-laboremployee-relations> (accessed April 27, 2017).

<sup>5</sup> The Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive Branch that was established by Reorganization Plan No. 2 of 1978, which was codified by the *Civil Service Reform Act of 1978*, Pub. L. No. 95-454, 92 Stat. 1111. The *Civil Service Reform Act* authorized the Merit Systems Protection Board to hear appeals of various agency decisions, most of which are appeals from agencies' adverse employment actions.

<sup>6</sup> Reno, memorandum to Department of Justice Employees; Reno, memorandum to All Department Components; DOJ Policy Memorandum 2015-04.

members of one sex, whether such activity is carried out by a supervisor or by a coworker. 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, pressuring another employee for a date, making sexual advances, or unwelcome touching.

### *The Disciplinary Process*

Federal agencies have a duty to maintain an orderly and productive work environment to ensure that their missions are carried out in an efficient and effective manner.<sup>7</sup> To maintain the confidence and trust of the public, federal agencies establish disciplinary systems that address and correct employee misconduct and communicate acceptable behavior to employees. The system should be implemented uniformly and result in consistent and reasonable disciplinary decisions.

The Order states that each component has different management requirements that must be addressed in determining appropriate penalties for offenses. This Order grants each component the authority to establish, but does not require the establishment of its own Schedule of Disciplinary Offenses and Penalties and states that management shall consider penalties imposed for similar offenses within individual work units when determining appropriate disciplinary measures. Penalties imposed for substantiated allegations can be informal, minor corrective actions, including oral admonishments or letters of admonishment. Formal corrective actions include disciplinary actions, such as a written reprimand or a suspension of 14 days or less, and adverse actions, such as a suspension over 14 days, removal from federal service, or reduction in pay or grade.<sup>8</sup> Generally, in adjudicating formal discipline, a designated deciding official weighs all the evidence offered through a Department proposal letter, the subject employee’s written reply, and considers the Douglas Factors to make the ultimate decision about the penalty (see Appendix 3).<sup>9</sup>

### *Requirement to Report Misconduct Allegations to the OIG*

The Department’s regulations require its components to report to the OIG “any allegations of criminal or serious administrative misconduct on the part of a Department employee.”<sup>10</sup> Given the volume of allegations and the OIG’s limited

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<sup>7</sup> 5 U.S.C. § 2301.

<sup>8</sup> Formal reprimands are included in an employee’s official personnel file for up to 3 years for non-bargaining unit employees or 2 years for bargaining unit employees. Documentation of adverse actions becomes a permanent record and remains in an employee’s official personnel file unless canceled by a third party or settlement agreement.

<sup>9</sup> Under civil service law, there are 12 factors, known as the Douglas Factors, which should be considered in determining the appropriateness of a disciplinary penalty. See *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981).

<sup>10</sup> 28 C.F.R. § 45.11 (2006). See also 28 C.F.R. § 0.29c (2001), which states “(a) Reporting to the OIG. Evidence and non-frivolous 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, except as provided in paragraph (b) of this section.”

resources, the OIG is unable to handle all of the misconduct allegations that it receives. Accordingly, when the OIG receives an allegation of misconduct, it determines whether the matter warrants independent investigation by the OIG or should be referred back to the component for its handling. Allegations of misconduct involving Department attorneys and law enforcement personnel that relate to the exercise of their authority to investigate, litigate, or provide legal advice are, by statute, excluded from the OIG's jurisdiction. Such allegations are referred to the Department's Office of Professional Responsibility.

## **Previous Reviews on Sexual Harassment and Misconduct**

In February 2014, the OIG issued a report on the consistency, timeliness, and outcomes of the four phases of the discipline process of the U.S. Attorney's Offices and the Executive Office for United States Attorneys.<sup>11</sup> This report examined the following: (1) the reporting of alleged misconduct, (2) the investigation or inquiry into the alleged misconduct, (3) the adjudication of misconduct, and (4) the implementation of discipline. While the OIG found that some aspects of the U.S. Attorney's Offices and Executive Office for United States Attorneys' discipline system worked well, improvements were needed in several critical areas, which included maintaining an updated table of case precedents with penalties for sexual harassment.

In March 2015, the OIG issued a report that assessed how the Department's four law enforcement components (the Bureau of Alcohol, Tobacco, Firearms and Explosives; the Drug Enforcement Administration; the Federal Bureau of Investigation; and the U.S. Marshals Service) respond to sexual harassment and misconduct allegations made against their employees.<sup>12</sup> This report examined the nature, frequency, reporting, investigation, and adjudication of such allegations. Although the OIG found that there were relatively few reported allegations of sexual harassment and misconduct in these components, the handling of these allegations revealed some significant systemic issues with the components' disciplinary and security processes, such as inconsistent reporting of allegations, investigation criteria, and penalties, requiring corrective action across the four law enforcement components.

## **Purpose and Scope of the OIG's Review**

The OIG assessed how the Department's Civil Division responded to allegations of sexual harassment and misconduct made against its employees. We focused our review on allegations of sexual harassment and misconduct from fiscal year (FY) 2011 through FY 2015 and the first two quarters of FY 2016. We reviewed federal law, regulations, and DOJ policies and interviewed the Civil Division's Office of Management Programs staff, JMD EEO staff, and the Deputy Assistant Attorney General and Director(s) from each Civil Division branch. We also reviewed case files involving sexual harassment or misconduct provided by Civil Division's Human Resources staff. See Appendix 1 for more information.

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<sup>11</sup> DOJ OIG, *Review of the USAOs' and EOUSA's Disciplinary Process*, Evaluation and Inspections Report I-2014-001 (February 2014).

<sup>12</sup> DOJ OIG, *The Handling of Sexual Harassment and Misconduct Allegations by the Department's Law Enforcement Components*, Evaluation and Inspections Report 15-04 (March 2015).

## RESULTS OF THE REVIEW

### **Civil Division Tracking of Sexual Harassment and Misconduct Allegations Is Inadequate, which Risks Compromising the Department's Zero Tolerance Policy**

The Civil Division Office of Management Programs' Human Resources (OMP/HR) told us that its staff maintains case files on all substantiated or unsubstantiated allegations of misconduct reported to it. However, the OIG identified one harassment allegation during this review that was not reported to OMP/HR, and further found that the Civil Division does not have guidance to ensure that all sexual harassment and misconduct allegations are reported to OMP/HR. Additionally, for cases reported to OMP/HR, the Civil Division's case file system cannot accurately determine the number of allegations or verify basic facts, including final outcomes. The Civil Division also lacks a consistent standard for timely reporting sexual harassment and misconduct allegations to the OIG, and Civil Division leadership is not made aware of all substantiated allegations. As a result, neither the Civil Division nor the OIG can accurately determine the total number of sexual harassment and misconduct allegations or whether the Civil Division has addressed all allegations appropriately, which risks compromising the Department's zero tolerance policy.

#### *The Civil Division Cannot Accurately Demonstrate the Number of Sexual Harassment and Misconduct Allegations or Verify Basic Facts, Timelines for Processing Allegations, or Final Outcomes*

We found that the Civil Division does not consistently and effectively track, record, or maintain adequate information on allegations of sexual harassment and misconduct. Interviews with Civil Division Branch Directors yielded two examples of allegations that the OMP/HR did not initially provide to us in response to our request for all sexual harassment and misconduct allegations.<sup>13</sup> In addition, OMP/HR maintains case files on employees with disciplinary concerns to memorialize and track all allegations of misconduct, whether substantiated or unsubstantiated.<sup>14</sup> We found that case files are maintained as paper records with no other mechanism except the OMP/HR Officer's recollection to track allegations of misconduct. Also, the Civil Division has no specific guidance on when and how an allegation of sexual harassment or misconduct is to be memorialized or what such

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<sup>13</sup> We initially received nine case files from OMP/HR related to allegations of sexual harassment and misconduct, but our interviews with Civil Division Branch Directors identified two additional allegations for which OMP/HR had not provided files. We did not receive one of these case files until we informed OMP/HR of the Branch Director's comment, and the other case was handled at the branch level and never reported to OMP/HR.

<sup>14</sup> We use the term "case file" to indicate one incident with an allegation of sexual harassment or misconduct, without distinguishing whether the allegation became a case. In addition, each incident may have more than one allegation.

documentation should contain. As a result, Civil Division management may be limited in its ability to find precedents in its case file system.

### Inconsistent Reporting of Allegations

We found that documents and information about sexual harassment and misconduct allegations exist in different locations and OMP/HR's case files do not contain complete information concerning all allegations of misconduct among Civil Division personnel. Civil Division Branch Directors told us that supervisors sometimes maintain their own records concerning allegations of misconduct that they consider to be within their discretion.<sup>15</sup> For example, the record of one of the two allegations that was not included in the Civil Division's initial response to the OIG's request for all sexual harassment and misconduct allegations was maintained at the branch level and not with OMP/HR because the Branch Director did not send the allegation to OMP/HR. The relevant Branch Director explained to us that he and his deputies decided to deal with the issue purely within their office because it did not seem to rise to the level of an "allegation of misconduct." Multiple supervisors told us and demonstrated with documentation that they kept emails, correspondence, and notes from meetings concerning alleged misconduct on an informal basis to maintain a record for management's decision making in the future.<sup>16</sup>

No Civil Division supervisor could identify training or guidance on how to distinguish between allegations that fall solely within their discretion and those that must be reported to OMP/HR. When we asked about training or guidance to address these types of cases, one Branch Director said, "Check with [the HR Officer], that is really all we've got." Although the HR Officer stated that she was confident that Civil Division supervisors were reporting *all* allegations of sexual harassment and misconduct to OMP/HR, the HR Officer also told us that a Branch Director may deem a matter to be minor and handle it themselves, as there is no Civil Division policy requiring a supervisor to report all allegations to OMP/HR. When we asked about the possibility of confusion among Civil Division supervisors as to whether to report allegations to OMP/HR, the current Civil Division Executive Director explained that the Civil Division entrusts a certain amount of discretion to supervisors in what to report "because there are a lot of grey areas" and "that is the nature of sexual harassment."<sup>17</sup> This official further explained that Civil Division supervisors are trained and provided with policies, adding that, "They know what the law and rules are." Moreover, when we asked how the Civil Division interprets the Department's zero tolerance policy, this official stated that "when someone says zero tolerance, you really can't enforce that ... it's good to say it and it's good for

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<sup>15</sup> The term "supervisor" encompasses Branch Directors and Assistant Directors.

<sup>16</sup> In our review of the case files, we did not find evidence that these documents were provided to OMP/HR.

<sup>17</sup> The current Executive Director started in this role in February 2016. Given the HR Officer's unique role, experience, and knowledge of the process within the Civil Division, we did not find it necessary to interview the prior Executive Director, who retired in January 2016.

awareness, but when it comes down to analyzing employee misconduct, thought has to be given.”

This inconsistent understanding of when to report allegations raises concerns, as our review found three cases in which Civil Division supervisors knew of and acted to address a sexual misconduct allegation without first reporting the allegation to OMP/HR. In at least one of these cases, a Civil Division employee repeated the same inappropriate behavior following branch management’s first attempt to address an allegation independent of OMP/HR. Based on these cases, we question whether the Civil Division’s reporting pattern demonstrates compliance with the Department’s zero tolerance policy that the “Department will not wait for a pattern of offensive conduct to emerge before addressing claims of harassment.”

#### Ineffective Tracking of Allegations and Case Files

Although we did not identify any applicable federal law or regulation or Department policy specifying how allegations should be tracked, we found the Civil Division’s tracking system, which was based on the HR Officer’s memory, to be insufficient. The HR Officer explained that this system had proven effective due to the low number of allegations and case files relating to sexual harassment and misconduct.<sup>18</sup> However, in response to our request for all sexual harassment and misconduct case files, the Civil Division failed to produce one case file related to an allegation that a Branch Director later brought to our attention.<sup>19</sup> The HR Officer produced the omitted case file and explained that she “didn’t recall this [allegation] to be a sexual harassment issue.” After examining the details of the allegation, the HR Officer agreed that it was a sexual harassment matter. OMP/HR staff could not articulate how the Civil Division would track sexual harassment and misconduct allegations through the case file system without the HR Officer’s memory and oversight. We believe that overreliance on a single individual to remember all allegations risks compromising the case file system should that individual be unable to perform her duties for any reason.<sup>20</sup>

We also found that OMP/HR maintains case files as paper records, filed by each employee’s last name. In our review of sexual harassment and misconduct allegations, we found eight case files filed under the name of the alleged perpetrator of the offensive conduct. In one unsubstantiated case, the records were maintained under the name of the alleged victim. In another case, in which we could not determine whether the Civil Division had substantiated the allegation, OMP/HR maintained the record file under the name of the alleged victim. All of the case files lacked any marking or mechanism that could be used to identify the case file as one related to allegations of sexual harassment or misconduct. Because of

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<sup>18</sup> We identified within the scope of this review 10 case files and 1 allegation without an OMP/HR case file.

<sup>19</sup> As noted earlier, 1 of the 11 allegations never became an OMP/HR case file because the Branch Director did not send the allegation to OMP/HR.

<sup>20</sup> During the course of this review, the Civil Division informed the OIG that the HR Officer retired on December 30, 2016.

the limited case identifiers and inconsistent filing practice, we do not believe that this case file tracking method is conducive to identifying all incidents of past misconduct, which impedes the Civil Division's ability to identify patterns of similar misconduct from different individuals over time and to discover possible systemic concerns within the Civil Division. When discussing the HR file system with us, the HR Officer emphasized that the file system's main purpose was to assist in her personal recollection of cases and their details.

For comparison, we found that the Justice Management Division's Equal Employment Opportunity (JMD EEO) staff uses an electronic case tracking system that records several fields for each case they maintain.<sup>21</sup> JMD EEO staff can sort cases by field categories to identify misconduct by type, time frame, or specific individual.<sup>22</sup> The OMP Executive Director spoke favorably of using such an electronic tracking system; but she told us that costs, along with the relatively small size of the Civil Division, rendered procuring such a system infeasible from a financial perspective. Also, the use of any electronic system raised significant concerns about security. However, with JMD considering the acquisition of such an electronic personnel file tracking system, the OMP Executive Director said she thought that the Civil Division could "tag along" in upgrading to electronic tracking.

#### Incomplete Case Files

We reviewed 10 case files that the Civil Division deemed to be within the scope of the review.<sup>23</sup> Our examination of these case files identified no apparent minimum documentation or required content, no consistent or standardized entries, and no uniform characteristics. The majority of the case files consisted of emails between OMP/HR and various parties related to the allegations. In some case files, those emails allowed reconstruction of the facts, investigation, and adjudication of the case, as well as the timeliness of processing the case within OMP/HR and its outcome. However, reconstruction of the remaining case files was not possible. In two cases, the OIG assessment of the written records in the case files could not even establish whether or not OMP/HR had substantiated the allegations. Table 1 below reflects our examination of the case files and their content.

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<sup>21</sup> JMD EEO uses ICOMPLAINT, a case management system specifically for tracking and managing EEO complaints and cases.

<sup>22</sup> The Executive Office for United States Attorneys and the Department's law enforcement components maintain similar electronic tracking systems, as reported in previous OIG reviews.

<sup>23</sup> As noted earlier, we learned of one allegation without a case file within the scope of this review.

**Table 1**  
**OMP/HR Employee Relations Case Files**

<b>Case File</b>	<b>Type of Sexual Harassment or Misconduct Alleged</b>	<b>Timeline of Reporting, Investigation, and Adjudication</b>	<b>OIG Assessment of the Written Record</b>	<b>Disciplinary Outcome</b>
1	Stalking	Discernable	Unsubstantiated by Civil Division	None
2	Inappropriate verbal comments	Discernable	Substantiated by Civil Division	Written letter of admonishment
3	Arrested for public sexual conduct while off duty	Discernable	Substantiated by Civil Division	Resigned
4	Inappropriate comments to, and subsequent resignation of, staff member	Unclear	Unable to determine	Oral counseling
5	Peeping on multiple occasions	Unclear	Substantiated but deemed not sexual misconduct by Civil Division	Oral counseling
6	Inappropriate touching and comments	Discernable	Substantiated by Civil Division	Title change, written reprimand, and transfer within the Civil Division
7	Inappropriate relationship with subordinate, computer hacking, and catfishing *	Discernable	Substantiated by Civil Division	Title change, written reprimand, transfer within the Civil Division, and separation of subject and victim
8	Inappropriate email communications and unprofessional behavior	Discernable	Substantiated by Civil Division	Written reprimand, 10 days of administrative leave
9	Demeaning and inappropriate comments over email for several years	Unclear	Substantiated by Civil Division	Title change and written reprimand (later removed from records)
10	Inappropriate relationship/stalking	Unclear	Unable to determine	Unable to determine

\* "Catfishing" is the deceptive practice of luring someone into a relationship by means of a fictional online persona.

Source: OIG analysis of OMP/HR case files

The disorganized nature of case file content made it difficult to reconstruct how OMP/HR had processed the cases. We found that case files with a substantiated allegation of misconduct consistently contained a written reprimand letter that assisted in reconstructing the events leading to the allegation of misconduct. However, reprimand letters rarely assisted in understanding the investigative and adjudicative process leading to the disciplinary outcome. We found understanding the investigative process from the case files substantially more difficult, and sometimes impossible, for cases in which OMP/HR had not

substantiated an allegation. Such case files often consisted of little more than a few email exchanges.

The contents of the case files also demonstrated little attempt at structured process standardization. For example, no case file recorded any attempt to consult or rely on precedents within the Civil Division or elsewhere. While our review of the reprimand letters in three substantiated cases found that the Civil Division appeared to have considered the Douglas Factors during the adjudication process, no case file explicitly recorded a Douglas Factor analysis that we could review or consult for comparison with another case of alleged misconduct.<sup>24</sup> The HR Officer told us that “each case is different, each person is different” and that she relied on her own memory to standardize outcomes. We discuss the Civil Division’s adjudication of investigations and penalties for substantiated cases, including its use of the Douglas Factors, later in this report.

Due to case file content limitations, the OIG was unable to fully evaluate the Civil Division’s disciplinary process for consistency and reasonableness, including timeliness (see the text box). We believe that the Civil Division could significantly lessen its reliance on the HR Officer’s memory if case files were maintained at a sufficient level of basic content and analytical rigor. Case files with standardized, basic content would also enable the Civil Division to compare case outcomes to make process improvement easier. Without such measures, the Civil Division risks prolonged or delayed handling of allegations in the future, which could undermine the Department’s zero tolerance policy by delaying appropriate corrective measures or even allowing harassing conduct to continue.

#### **Timely Handling of Allegations**

Department policy requires that management must respond promptly to sexual harassment and misconduct allegations. Based on our review of case files, we found no consistent or minimum standards in the retention of documents to illustrate the timeliness of the Civil Division’s investigation or adjudication of allegations.

In the four cases with sufficient documentation, it appeared that the Civil Division had responded promptly to the allegations. In each of these cases, a case file was opened or an interview was conducted by either OMP/HR or a supervisor within 6 calendar days of receiving the allegation. Adjudication was completed or discipline imposed within 3 months of receiving the allegation, with two of the cases being concluded within 2 weeks. While these cases generally appeared to be completed in a reasonable amount of time, incomplete data and a lack of specific timeliness standards prevented us from making an overall determination of the Civil Division’s timely handling of allegations.

Source: OIG analysis of OMP/HR case files

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<sup>24</sup> As we discussed in the Introduction, civil service law provides 12 factors, known as the Douglas Factors, which should be considered in determining the appropriateness of a disciplinary penalty, although recording of the analysis is not required.

*The Civil Division Lacks a Consistent Standard for Reporting Sexual Harassment and Sexual Misconduct Cases Allegations to the OIG*

Department employees are required, with one exception, to report to the OIG all non-frivolous allegations of criminal or serious administrative misconduct by any Department employee.<sup>25</sup> We found that prior to the OIG's 2015 investigation, out of seven case files addressing allegations of sexual harassment or misconduct, Civil Division management and OMP/HR had not referred a single case to the OIG.<sup>26</sup> These seven case files included one case involving allegations of an employee repeatedly grabbing multiple employees' buttocks and breasts at a public event and another case involving allegations of a supervisor's sexual harassment of an attorney, including computer hacking.<sup>27</sup> Though federal regulations implicitly allow some discretion as to what constitutes "serious administrative misconduct" that must be reported to the OIG, these cases indisputably met that standard under Department practice and our review of Civil Division case files shows a troubling historical trend of not reporting allegations to the OIG and the limitations of relying on manager discretion.

We found that Civil Division personnel varied in their understanding of the OIG reporting requirement and its application to cases of sexual harassment and misconduct. Initially, the HR Officer stated that in the past she had believed that a report had to be made to the OIG when the misconduct amounted to a felony. The HR Officer later amended her reporting requirement to "whenever an allegation could be reported to the police." When asked how she decided when an allegation could be reported to the police, the HR Officer said that she conducted a fact-finding investigation to ascertain the alleged victim's intent regarding contacting law enforcement, rather than consulting with any Department personnel on the legal categorization of the alleged conduct. The HR Officer told us that she was not sure who within the Civil Division was required to report an allegation to the OIG, but she believed that the Civil Division Security Office would make such a report.

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<sup>25</sup> Under 28 C.F.R. § 45.11 (2006), all DOJ employees "have a duty to, and shall, report to the Department of Justice Office of the Inspector General, or to their supervisor or their component's internal affairs office for referral to the Office of the Inspector General: (a) Any allegation of waste, fraud, or abuse in a Department program or activity; (b) Any allegation of criminal or serious administrative misconduct on the part of a Department employee (except those allegations of misconduct that are required to be reported to the Department of Justice Office of Professional Responsibility pursuant to § 45.12); and (c) Any investigation of allegations of criminal misconduct against any Department employee."

<sup>26</sup> In July 2015, the OIG completed a preliminary review of findings in response to a complaint alleging that the Civil Division's Office of Immigration Litigation had failed to properly discipline an attorney who had committed sexual misconduct. Michael E. Horowitz, Inspector General, U.S. Department of Justice, memorandum to Principal Deputy Assistant Attorney General, Civil Division, Allegations that the Civil Division, Office of Immigration Litigation Failed to Properly Discipline a Member of Management for Sexual Misconduct, July 28, 2015. Three of the 10 case files identified above were initiated after 2015.

<sup>27</sup> We note that even though this allegation implicates potential criminal activity under 18 U.S.C. § 1030 and/or other statutes, the Department's Office of Professional Responsibility did not receive a referral from Civil Division resulting from this conduct.

Another Civil Division official later clarified that its Security Office reporting policy follows the Department's policy on self-reporting and therefore it has no special requirement to report allegations of misconduct to the OIG beyond that incumbent on all Department employees.<sup>28</sup>

We found that the Civil Division does not have a formal standard to determine whether to report harassment and misconduct allegations to the OIG. After the OIG completed its 2015 preliminary investigation, as discussed in the Introduction, the previous OMP Executive Director made it a personal practice to forward all matters of sexual harassment and misconduct to the OIG. The current OMP Executive Director confirmed that this informal practice remained in place and that she believes "when in doubt, send it to the IG." Civil Division Branch Directors we spoke with said that they understood that complaints of sexual harassment and misconduct could be made to the OIG; but, as one Branch Director said in dismissing the idea of reporting to the OIG as a practical course of action, "I always call [the HR Officer]." Civil Division supervisors and Deputy Assistant Attorneys General (DAAG) uniformly indicated a practice of relying on OMP/HR to elevate cases of misconduct to the appropriate level of investigative review.

Finally, we had difficulty determining from our review of case files whether the Civil Division had forwarded to the OIG allegations made to OMP/HR. In some cases, we had to make an inference from notes and emails within the case file to determine whether the Civil Division had handled a misconduct investigation internally or whether the OIG had also investigated it. To ascertain when the Civil Division actually reported cases to the OIG, we compared Civil Division case files to the OIG Investigations Division's data. We found that the Civil Division had provided case files for four of the allegations that the OIG received directly from the Civil Division or its employees. Table 2 below reflects the Civil Division's reporting to the OIG regarding the cases within the scope this review.

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<sup>28</sup> According to Department policy, attorneys, including those within the Civil Division, must self-report to their supervisor and to their component's Security Program Manager any arrest by law enforcement or "on or off-duty allegations of misconduct." Supervisors and managers have a separate duty to report certain misconduct to the OIG or, in specific circumstances, to the Office of Professional Responsibility. See James L. Dunlap, Department Security Officer, memorandum to JMD Senior Managers, Self-Reporting of Arrests and Allegation of Misconduct, September 10, 2004.

We note that a component's Security Program Manager is also responsible for reporting misconduct to JMD's Security and Emergency Planning Staff (SEPS), which maintains the attorney's background investigation. According to the Civil Division, "Every situation is different; thus, allegations of misconduct are evaluated on a case-by-case basis as to whether or not they should be reported to SEPS. Again, the Division would look to the Department's memo for guidance on when misconduct should be reported." Based on our review of case files, we found that only one case was reported to SEPS.

**Table 2**

**The Civil Division’s Trends of Reporting Sexual Harassment and Misconduct Cases to the OIG**

Case File	Type of Sexual Harassment or Misconduct Alleged	Reported to the OIG?	Method of Reporting	OIG Action
1	Stalking	Yes	Civil Division Executive Director	Investigated
2	Inappropriate verbal comments	No		
3	Arrested for public sexual conduct while off duty	Yes	Civil Division Executive Director	Investigated
4	Inappropriate comments to, and subsequent resignation of, a staff member	No		
5	Peeping on multiple occasions	Yes	Employee complaint	Investigated
6	Inappropriate touching and comments	Yes	Employee complaint	Investigated
7	Inappropriate relationship with subordinate, computer hacking, catfishing *	No		
8	Inappropriate email communications and unprofessional behavior	No		
9	Demeeaning and inappropriate comments over email for several years	No		
10	Inappropriate relationship/ stalking	No		

\* “Catfishing” is the deceptive practice of luring someone into a relationship by means of a fictional online persona.

Source: OIG analysis of OMP/HR case files and OIG Investigations Division data

*Civil Division Officials Are Not Fully and Timely Notified of Substantiated Allegations of Sexual Harassment or Misconduct or Any Trends Related to Them*

We found that substantiated allegations of sexual harassment and misconduct are not consistently reported to the DAAGs or other Civil Division leadership. Several Branch Directors stated that the Civil Division has not offered guidance as to when an allegation relating to sexual harassment or misconduct should be reported to their DAAG. One Branch Director stated that he would let the DAAG know about sexual harassment and misconduct when he felt it was needed, but otherwise he believed that any DAAG would just as well let him handle allegations. Another Director said that he would not tell the DAAG, explaining that human relations management matters are handled within the branch. Also, a former Chief of Staff to the Civil Division’s Assistant Attorney General explained to us the criteria for elevating serious allegations to Civil Division leadership: “If Senior Management thought there was a serious issue, it would be on [the Chief of Staff’s] radar screen.” Moreover, the former Chief of Staff stated that he had relied on OMP/HR and the OMP Executive Director to handle allegations appropriately.

Without guidance, reliance on OMP/HR and the OMP Executive Director to discern when an allegation should be elevated to the attention of the Civil Division leadership creates a risk of the same trend of non-reporting that we found in our case review for allegations made to the OIG prior to 2015. We believe that the Civil Division should establish criteria for determining when senior management is

notified of these types of cases. Such criteria adheres to the Department's view that "robust policies, effective and appropriate follow-up, investigation, and enforcement of the zero tolerance policy" will maintain the high standards of integrity and conduct the Department expects of its employees.<sup>29</sup>

### **Penalties Imposed for Substantiated Allegations of Sexual Harassment and Misconduct May Not Be Consistent with Upholding the Department's Zero Tolerance Policy**

While the Civil Division lacks internal policies and procedures for handling allegations, the investigation and adjudication of allegations are generally done in a timely manner and appear to conform to most applicable federal regulations and Department policies. However, the penalties imposed are neither consistent among cases nor with the Department's zero tolerance policy.<sup>30</sup>

*The Civil Division Does Not Have Policies and Procedures for Handling Allegations, which Leaves Its Managers without Any Guidance for Determining How an Allegation Should Be Investigated*

We found that the Civil Division does not consistently handle the investigation of allegations of sexual harassment and misconduct. The Civil Division relies on general Department policies, such as Human Resources Order DOJ 1200.1, which provides guidelines for imposing formal discipline. OMP officials told us that they follow the Department's policies rather than creating and following Civil Division policies because the Civil Division is such a small component within the Department. However, we found that no Department policy requires a formal investigation of any allegations, including allegations of sexual harassment or misconduct, reported to managers. Rather, Department policy allows managers the discretion to determine the appropriate procedures or to seek assistance. Civil Division officials and supervisors all stated that investigations are conducted at the branch management level, with OMP/HR or the OMP Executive Director providing assistance. However, we found three allegations that were handled at the branch management level. For these three allegations, OMP/HR was neither informed nor

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<sup>29</sup> DOJ Policy Memorandum 2015-04, Prevention of Harassment in the Workplace (October 9, 2015).

<sup>30</sup> In response to a working draft of this report, the Civil Division stated its concerns regarding what it described as the OIG's overly broad use of the term "zero tolerance." The Civil Division noted that the Department and other agencies have stated on numerous occasions that they have a zero tolerance policy in the sense that they will not tolerate their employees engaging in sexual harassment, that they will take whatever measures are necessary to stop such misconduct when they are informed of it, and that they will make sure that appropriate remedies are available for the victims of such misconduct. The Civil Division also stated that this does not mean that the agency will apply a zero tolerance approach to taking discipline for every substantiated allegation; it said that management will undertake an individualized assessment in each case and reach a disciplinary determination after considering all the relevant factors, as required by law. The Civil Division noted that this "is an important distinction to make when discussing zero tolerance, one that should be well understood and considered when evaluating whether the Civil Division did not comply with the Department's policy." However, as we note throughout our report, we believe that a zero tolerance policy means that all substantiated allegations will be addressed consistently and appropriately, which we found did not occur during the period of our review.

consulted, resulting in branch management independently investigating allegations and imposing informal discipline.

In one case, a female attorney alleged that a male attorney had peered through a window above her closed office door while she was pumping breast milk. A few months earlier, the same male attorney allegedly peered into the office of a different attorney while she was pumping breast milk. The complainant's supervisor emailed the branch's Assistant Director in charge of personnel matters, stating, "FYI — It happened again. [Complainant] was pumping in her office." Based on our review of the case file, the branch's Assistant Director appears not to have informed or consulted with OMP/HR regarding the allegation. The investigation into the allegation consisted of the male attorney's supervisor speaking with him. Thereafter, his supervisor accepted the male attorney's explanation of the incident as an honest mistake and imposed on him an informal disciplinary action of oral counseling.

We believe that had the branch supervisors sought OMP/HR's assistance in this case the allegation may have been more fully investigated, particularly since this was the second incident of a similar nature branch supervisors were made aware of. Our review of the case file revealed that the female attorney had reported the incident to the JMD EEO staff shortly after branch supervisors had already imposed oral counseling. In her correspondence with JMD EEO, the female attorney included additional supporting documents of inappropriate behavior, dating back to 2009, of the male attorney directed toward female coworkers or interns. Accordingly, we question whether branch managers have complied with the Department's zero tolerance policy "to take immediate and appropriate corrective action to address all allegations of harassment."

*The Civil Division Does Not Have Offense Tables or Penalty Guidelines to Address Sexual Harassment and Misconduct, which Results in Inconsistent Penalties for Substantiated Allegations and Enables a Pattern of Transferring Individuals with Substantiated Misconduct within the Department*

We have concerns as to whether the penalties imposed by the Civil Division for substantiated misconduct allegations are consistent with the zero tolerance policy that the "Department will tolerate no form of harassment and will take immediate and appropriate corrective action to address it." Department policy does not require litigating divisions to have offense tables or penalty guidelines, but states that managers must consult with their HR representative when determining formal discipline.<sup>31</sup> We found that, when Civil Division branch supervisors determine that formal discipline may be warranted, they follow Department policies and that, when imposing discipline, they notify and consult OMP/HR. Of the six allegations in our case sample that were substantiated and discipline was imposed, we determined that OMP/HR was involved in the adjudication process. However, as the HR Officer told us, she relied on her own memory of cases to standardize the

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<sup>31</sup> Human Resources Order DOJ 1200.1 requires supervisors to consult with their HR office before proposing formal discipline.

outcomes of current allegations; thus, penalties are informed by the HR Officer's experience but are not necessarily appropriately consistent or systematic.

In addition, Civil Division OMP officials told us that Douglas Factors are used in lieu of penalty tables, although there was no documentation in the case files regarding the Douglas Factors. The Douglas Factors include the employee's job level and past work record, including performance on the job. And Civil Division OMP Officials stated that if an attorney has a lot of experience and is proficient in litigation, these factors must be weighed with the allegation in terms of the discipline imposed. Thus, it appears that the discipline imposed by the Civil Division could be less severe for high-performing employees. Moreover, we found that penalties in substantiated cases appeared to result from discussions between the HR Officer and branch supervisor, thus potentially negating any attempt at standardization by the HR Officer.

Finally, the Civil Division appears to have a pattern of transferring individuals with substantiated misconduct to other branches of the Civil Division or within the Department. According to the HR Officer, this pattern represents an effort to create physical distance between an assailant and a target of sexual harassment, as well as to give the assailant a chance to improve their conduct. Other Civil Division officials informed us that this pattern evolved in response to the difficulty of removing an employee, even in cases of severe sexual harassment and misconduct. However, a Civil Division manager described a perception among division staff that employees with substantiated misconduct are "flushed" into other areas of the Department and identified the practice as "pass the trash." While such a transfer does allow an employee with substantiated misconduct a chance to reform their conduct in a new environment, when combined with a lack of sufficient precautions, it also allows another opportunity for the same or aggravated sexual misconduct, places other Department employees at unnecessary risk of becoming victims to that misconduct, and appears to be in conflict with the Department's zero tolerance policy. Our concerns are illustrated in the three cases below.

#### Case A

A GS-15 attorney who occupied a senior, supervisory position in the division was alleged to have made sexually charged and offensive comments and to have groped the breasts and buttocks of two female trial attorneys without their consent during an office happy hour. This senior official had previously received a written reprimand and diminution of title for sending emails of a sexual nature to coworkers. Immediately after the second misconduct incident, the senior official began a scheduled detail to another Department component, apparently with no notice to the component of the misconduct allegations. After branch supervisors and OMP/HR investigated the allegations, the senior official's formal discipline included a written reprimand for inappropriate touching, a further change in title, and relief from supervisory duties. He received no suspension or loss in pay or grade, despite the prior misconduct and the seriousness of the second incident, with the deciding official commenting that a suspension "would unnecessarily deprive the government of [the senior official's] litigating services." The Civil

Division transferred the senior attorney to a different office within the Civil Division upon his return from the detail.

We also noted that this case presented potential criminal assault violations, yet we found no evidence in the case file that a referral was made to the OIG or any other law enforcement entity. In light of the senior official's prior misconduct and the seriousness of the second incident of sexual harassment and misconduct, we concluded that this case demonstrated the Civil Division's inadequate adjudicative decision-making.<sup>32</sup> Similarly, the fact that an individual within Civil Division leadership who had knowledge of this misconduct history recommended this employee for another sensitive position within the Department demonstrates an inadequate appreciation by the Civil Division of the Department's zero tolerance policy.

### Case B

A GS-15 senior attorney admitted to stalking another attorney and hacking into her personal email account. The senior attorney then conducted a "catfishing" operation on the other attorney, resulting in his revelation to the other attorney several weeks later that he had used a fictitious online profile to entice her. Although the senior attorney received a written reprimand and diminution of title, was restricted for 1 year from entering the building in which the attorney he had stalked worked, and was moved to a different section within the Civil Division, he received no suspension or loss in pay or grade. Moreover, there was little documentation in the case file to determine how management had decided on a written reprimand. The HR Officer assisted in drafting the letter and spoke with branch supervisors, but the case file does not show the how much guidance the HR Officer's level of involvement provided. Soon after the senior attorney's 1-year restriction from entering the stalked attorney's building ended, the Civil Division reassigned him to a different section of the Civil Division. Like Case A, this case raises potential criminal concerns, yet we found no evidence that a referral was made to the OIG or any other law enforcement entity.

### Case C

A GS-9 employee was alleged to have made inappropriate comments on one occasion regarding a female employee's body. Upon investigation by branch supervisors and OMP/HR, the employee received a letter of admonishment, which does not constitute formal discipline. Although the letter did not go into the

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<sup>32</sup> The Douglas Factors imply escalating penalties for repeated conduct. Specifically, the Douglas analysis encourages consideration of an employee's "past disciplinary record," whether an offense was "frequently repeated," whether the employee "had been warned about the conduct in question," and "adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee." See *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). We have concerns that the Civil Division's failure to use these factors in its Douglas analysis led it astray in demonstrating how it came to this disciplinary conclusion.

Further, the Civil Division's transfer of the employee to a detail with another Department component, without first investigating and adjudicating the disciplinary matter, may have put other DOJ employees at unnecessary risk of sexual harassment or sexual misconduct.

employee's official personnel file, it was recorded in the OMP/HR case files. The Branch Director said that he had decided on this level of penalty as a result of his experience as a reviewer for other general misconduct matters (but not for sexual harassment matters). He also met with the HR Officer regarding his recommended penalty, and she concurred with it. She felt that the proposed penalty was in line with the misconduct and would be appropriate. The substantiated misconduct in Case C was significantly less flagrant than the misconduct in Cases A and B, but the disciplinary response in this case was only slightly less severe than the penalties imposed in those cases. This leads us to further question whether the penalties imposed on the senior attorneys in Case A and Case B set the bar too low, thereby reducing the range of penalties that could be applied in less serious cases.

Adding to the risk that the Civil Division may impose less severe penalties for substantiated cases of sexual harassment and misconduct for high-performing employees, as we discuss above, we found inconsistencies with the penalties imposed during informal discipline. Department policy does not require consulting with the component's HR office for informal discipline. In three of the four sampled allegations in which informal discipline was imposed, OMP/HR was neither informed nor consulted. In these three allegations, the informal discipline imposed was oral counseling. In the allegation with OMP/HR involvement, the individual was issued an informal memorandum to file, maintained in Civil Division's case file system. As a result, we are concerned that for the informal discipline, of which OMP/HR is not informed, there are insufficient process controls to ensure that allegations resulting in an informal response can be tracked — this makes it less likely that progressive disciplinary action would result in cases of repeated low-level sexual harassment; raises the possibility of inconsistent treatment of similar allegations; and, where progressive discipline is imposed, could make it more difficult to sustain without adequate records, if it were challenged. This is inconsistent with the intent of the Department's zero tolerance policy.<sup>33</sup> Further, the failure to inform OMP/HR of the informal discipline impedes the Civil Division's ability to ensure that penalties are standardized across cases.

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<sup>33</sup> In response to a working draft of this report, the Civil Division stated that informal discipline is provided on an informal basis and in an informal manner through verbal counseling or in written format. The Civil Division also stated that informal discipline does not have to be reported to HR and thus it is inaccurate to say that informal discipline is inconsistent with the intent of the Department's policy. The Civil Division further stated that it should be noted that 5 CFR Part 752 sets forth a documentation requirement only for "formal discipline," which it said supports its position that informal counseling does not always need to be documented. The Civil Division said it was not asserting that management should not document situations in which there is informal discipline, but that "it would be inappropriate to require management to memorialize every allegation that results in informal discipline." As we note in our report, by not memorializing informal discipline, the Civil Division risks repeated instances of inappropriate behavior, inconsistent treatment of similar allegations, and potential difficulties defending disciplinary outcomes should they be challenged.

*Civil Division Employees with an Ongoing Sexual Harassment or Misconduct Investigation or Who Had Disciplinary Actions Received Performance Awards, which Could Deter the Reporting of Future Allegations*

We found that Civil Division employees received performance awards while a sexual harassment or misconduct investigation was ongoing or while disciplinary actions were in effect.<sup>34</sup> For example, the senior official (Case A) who received formal discipline in the form of a letter of reprimand for groping two colleagues subsequently received performance awards during the period that the disciplinary letter was in the senior official's official personnel file.<sup>35</sup> Similarly, the senior attorney (Case B), who admitted to stalking another attorney and hacking into her computer, subsequently received a performance award, despite the fact that a formal letter of reprimand for misconduct remained in his official personnel file. And the male attorney (Case File 5 in Tables 1 and 2 above) who allegedly peeped into the offices of female colleagues received a performance award even though he had recently been counseled regarding the conduct underlying those allegations.

We found that the Civil Division adheres to federal regulations and criteria established in Department policy when nominating an employee for a performance award.<sup>36</sup> According to the Civil Division, Branch Directors are required only to certify that an employee nominated for an award has performed at the "Excellent" or "Successful" level in the same position and grade for at least 6 months and has not received a promotion, performance award, or quality step increase within the previous 6 months. Branch Directors must forward a nomination form to their DAAG for signature; but, as noted above, the DAAGs are not fully and timely notified of substantiated sexual harassment or misconduct allegations. The HR Officer told us that performance and conduct are separate and that the criteria for performance awards are applied across the board regardless of whether an employee has engaged in misconduct. However, she further explained that no one is entitled to an award and that the decision to give an award is left to management's discretion. In addition, the HR Officer stated that only Honor Awards and the Attorney General Awards are vetted. A Civil Division manager said that it was his understanding that there is no review of award decisions and that when he was responsible for award decisions he submitted a spreadsheet of names and amounts to OMP/HR. This Civil Division manager also questioned the practice of awarding and publicly recognizing an employee who has been recently

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<sup>34</sup> The Civil Division holds an annual awards ceremony that recognizes the achievements of its staff. Distributed at the Civil Division Awards Ceremony is a program that lists all of the employees who received a performance award during that year. The performance award is either a cash award or a quality step increase. The Civil Division Awards Ceremony program has a section entitled "Performance Awards Recognition" that lists the name of all the recipients without the dollar amount. We reviewed the 2014, 2015, and 2016 Civil Division Awards Ceremony programs and found the names of several employees whose sexual harassment or misconduct case files we had reviewed.

<sup>35</sup> As stated earlier, formal reprimands are included in an employee's official personnel file for up to 3 years.

<sup>36</sup> The Civil Division adheres to 5 C.F.R. § 451.104 (2007) and the criteria set forth in Human Resources Order DOJ 1200.1.

disciplined, stating that it may “reinforce the general perception that coming forward to report an allegation of [sexual harassment or misconduct] will not result in any meaningful consequence.” We agree with this concern.<sup>37</sup>

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<sup>37</sup> The OIG previously found that the Department’s law enforcement components, including the Bureau of Alcohol, Tobacco, Firearms and Explosives; the Drug Enforcement Administration; the Federal Bureau of Investigation; and the U.S. Marshals Service, have a policy regarding when an employee may be promoted, receive an award, or receive a favorable personnel action after having been disciplined for misconduct. See DOJ OIG, *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*, Evaluation and Inspections Report 16-01 (October 2015).

## CONCLUSION AND RECOMMENDATIONS

### Conclusion

While the Civil Division's handling of allegations of sexual harassment and misconduct appears to follow federal law, regulations, and most Department policies, the Civil Division needs to improve its tracking of allegations and ensure consistent adjudication to enforce the Department's zero tolerance policy. The Civil Division Office of Management Programs' Human Resources (OMP/HR) case file system does not include all documents relevant to the disciplinary process. While OMP/HR has the most extensive information in its system due to its advisory and recordkeeping roles, the Civil Division's decision to leave the handling of allegations to the discretion of its supervisors risks that important facts and allegations will not receive appropriate attention from OMP/HR or Civil Division leadership. Also, OMP/HR's case file system lacks any minimum documentation standards that would ensure that the handling of sexual harassment and misconduct allegations remains consistent in the event of unexpected personnel changes. Overreliance on a single individual, the OMP/HR Officer, to remember all previous allegations risks compromising the case file system should that individual's memory fail or should she be unable to perform her duties. These deficiencies have resulted in inadequate tracking of case files related to sexual harassment and misconduct. As a result, neither the Civil Division nor the OIG can determine an accurate number for sexual harassment and misconduct cases or whether the Civil Division has addressed all allegations appropriately. We believe that because each allegation of sexual harassment or misconduct requires appropriate consideration, the Civil Division must address these weaknesses and provide adequate guidance to ensure that it acts consistently with the Department's zero tolerance policy.

The small number of case files within the scope of our review, as well as the lack of information and incomplete case files, limited our evaluation of the Civil Division's disciplinary process related to sexual harassment and misconduct, including an evaluation of investigations and adjudications and whether they were completed in a timely manner as such cases require. In addition, in some cases it was difficult to determine whether the allegations were substantiated because many of the case files had no statement of substantiation or other record of findings. However, where we were able to analyze the disciplinary process, we generally found that Civil Division personnel were processing misconduct cases in a timely manner. In addition, the Civil Division is now appropriately referring misconduct allegations to the OIG, though it had not followed such a practice in the past.

Additionally, Civil Division OMP/HR, managers, and attorneys may be limited in their searches for case precedents that could assist them in their advisory function and help ensure consistent penalties in similar situations. Overall, these deficiencies hamper the Civil Division's ability to carry out its disciplinary process and ensure that it responds to sexual harassment and misconduct allegations in a manner that would successfully eliminate such misconduct from the workplace.

In substantiated cases for which the available records allowed us to evaluate the imposed penalties, we determined that the outcomes generally did not consist

of more than a written reprimand, title change, and reassignment in cases in which the subjects of the allegations were supervisory/senior attorneys. Even in cases that implied criminal behavior, the Civil Division chose not to impose more serious discipline, report the allegations to the OIG, or conduct further investigation. Further, the lack of penalty guidelines specifying the range of penalties in substantiated cases prevents the Civil Division from imposing consistent penalties and enforcing the Department's zero tolerance policy for sexual harassment and misconduct. Finally, providing performance awards to Civil Division employees with an ongoing sexual harassment or misconduct investigation or while disciplinary actions are in effect may deter the reporting of future allegations and risks sending employees a message that Civil Division management does not take such complaints seriously.

### **Recommendations**

To improve the Civil Division's handling of sexual harassment and misconduct allegations and enforce the Department's zero tolerance policy, we recommend that the Civil Division:

1. Create a system to track all allegations of sexual harassment and misconduct, to include minimal standards for case file content.
2. Develop policies or guidance consistent with Department policy on processing allegations of sexual harassment or misconduct that ensures reporting the allegations to the OIG, the Civil Division's leadership, and the Office of Management Program's Human Resources.
3. Develop consistent penalty guidelines for substantiated allegations of sexual harassment and misconduct.
4. Consider developing policy guidance regarding performance awards given to and public recognition of an employee who is under investigation or has recently been disciplined for misconduct, including sexual harassment.

## **METHODOLOGY OF THE OIG REVIEW**

In this review, the OIG evaluated the Civil Division's policies, procedures, and guidelines for reporting, investigating, and adjudicating allegations of sexual misconduct, with an emphasis on sexual harassment and other misconduct made against its employees. We determined the extent to which allegations of sexual misconduct were accurately and timely reported, as required by Department regulations and Civil Division policies. We also evaluated whether offense tables and penalty guidelines are adequate to address sexual harassment and misconduct allegations in a consistent manner. We focused our review on allegations of sexual harassment and misconduct from fiscal year (FY) 2011 through FY 2015 and the first two quarters of FY 2016. Our fieldwork, from May 2016 through November 2016, included interviews, data analysis, and document reviews. The following sections provide additional information about our methodology.

### **Standards**

The OIG conducted this review in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation* (January 2012).

### **Interviews**

We interviewed the current Civil Division Executive Officer and former Human Resources Officer. We interviewed all six Civil Division branch Deputy Assistant Attorneys General. We interviewed 12 Branch Directors, including at least 1 from each Civil Division branch. We also interviewed two Justice Management Division Equal Employment Opportunity staff members to determine whether they had received any allegations of sexual harassment and misconduct from Civil Division employees that had not been reported to the Civil Division.

### **Case File Review and Data Analysis**

We reviewed case files related to substantiated and unsubstantiated allegations of sexual harassment and misconduct for FY 2011 through FY 2015, as well as the first two quarters of FY 2016 (October 1, 2015, to March 31, 2016), within each Civil Division branch. We reviewed 10 case files provided by the Civil Division as falling into the scope of the review. We reviewed the case files to determine: (1) the type of sexual harassment alleged; (2) whether the timeline of the reporting, investigation, and adjudication was discernable; (3) whether we could establish the allegations as substantiated or unsubstantiated based only on the written records; and (4) the disciplinary outcomes.

During our interviews with Civil Division Branch Directors, we identified two allegations that were not initially provided in response to our document request. The Civil Division's Office of Management Programs subsequently provided us with a case file for one of the allegations but did not have a case file related to the other allegation. We also reviewed Civil Division branches' internal case files related to allegations of sexual harassment and misconduct.

To determine the referral of allegations, we performed cross-reference analyses of the case files provided by the Civil Division against data from the OIG's Investigations Division and the Department's Office of Professional Responsibility.

### **Policy and Document Review**

We reviewed policies, procedures, and guidance addressing sexual harassment and misconduct, including Attorney General Janet Reno's memorandum on Prevention of Sexual Harassment in the Workplace, June 29, 1993, as amended on December 14, 1998, and reaffirmed by DOJ Policy Memorandum 2015-04, Prevention of Harassment in the Workplace, October 9, 2015, and Human Resources Order DOJ 1200.1. We also reviewed prior inspections, reviews, or reports issued within the previous 5 years pertaining to sexual harassment and misconduct within the Department.

**DOJ POLICIES ON PREVENTION OF HARASSMENT IN THE  
WORKPLACE**



**Office of the Attorney General  
Washington, D. C. 20530**

October 9, 2015

MEMORANDUM FOR ALL DEPARTMENT OF JUSTICE EMPLOYEES

FROM: THE ATTORNEY GENERAL *[Handwritten signature]*

Subject: Prevention of Harassment in the Workplace

**POLICY MEMORANDUM # 2015-04**

**PURPOSE:** Renews policy that the Department will tolerate no form of harassment and ensures that no employee is subjected to retaliation because he or she has alleged unlawful harassment or assisted in any inquiry about such allegations. The policy directs managers and supervisors to take immediate and appropriate corrective action to address all allegations of harassment and retaliation and to be accountable for failure to do so.

**SCOPE:** All Department components

**POLICY:** The Department of Justice will maintain a zero tolerance work environment that is free from harassment (including sexual harassment) based on sex, race, color, religion, national origin, gender identity, age, disability (physical or mental), genetic information, status as a parent, sexual orientation, marital status, political affiliation, or any other impermissible factor. The Department also will ensure that no employee is subjected to retaliation because he or she has alleged unlawful harassment or assisted in any inquiry about such allegations. Managers and supervisors must take action quickly to respond to allegations of harassment or retaliation.

I want to take this opportunity to reiterate the Department of Justice policy of maintaining a work environment that is free from harassment (including sexual harassment) based on sex, race, color, religion, national origin, gender identity, age, disability (physical or mental), genetic information, status as a parent, sexual orientation, marital status, political affiliation, or any other impermissible factor. It is also the Department's policy to ensure that no employee is subjected to retaliation because he or she has alleged unlawful harassment or assisted in any inquiry about such allegations. The Department will tolerate no form of harassment and will take immediate and appropriate corrective action to address it.

Harassing conduct is defined as any unwelcome verbal or physical conduct that is based on any of the above-referenced characteristics 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.

To enforce this zero tolerance policy, the Department will treat harassing conduct as misconduct, even if it does not rise to the level of harassment actionable under Title VII of the Civil Rights Act of 1964, as amended. The Department will not wait for a pattern of offensive conduct to emerge before addressing claims of harassment. Rather, the Department will act before the harassing conduct is so pervasive and offensive as to constitute a hostile environment. 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. The Department will not tolerate retaliation against any employee for making a good-faith report of harassing conduct or for participating in any inquiry about such a report.

Any employee who believes that he or she has been subjected to harassment should report such behavior immediately to a supervisor or higher level manager, the personnel officer in their office, or the individuals identified by their office to manage harassment allegations. Employees may also seek assistance from their Equal Employment Opportunity Office, the Office of Professional Responsibility, or the Office of the Inspector General. In addition, employees in a collective bargaining unit may seek assistance through appropriate provisions of their collective bargaining agreement. Employees who want to file a formal complaint of harassment and preserve their legal rights must contact their component's Office of Equal Employment Opportunity within 45 days of the alleged unlawful harassment. The Department will protect the confidentiality of employees bringing harassment claims to the extent possible.

DOJ managers and supervisors must set the example in their organization by ensuring that the workplace is free of such behavior. Every manager and supervisor must:

- Be mindful of the potential for harassment in his or her work environment;
- Take all necessary steps to prevent harassment from occurring;
- Ensure that, if harassment does occur, it is eliminated in a manner that is prompt and effective but minimizes the effect on the victim to the extent possible;
- Be unbiased and not retaliate against employees who report harassing conduct or participate in any inquiry about such a report; and
- Take appropriate steps to hold those who engage in harassing conduct accountable.

Appropriate corrective action will be swift against any DOJ employee who engages in harassment. Likewise, disciplinary action will be taken against supervisors and managers who either condone or fail to act promptly to report or correct harassing conduct brought to their attention.



Office of the Attorney General  
Washington, D.C. 20530

December 14, 1998

MEMORANDUM FOR THE HEADS OF ALL COMPONENTS

FROM: THE ATTORNEY GENERAL *[Signature]*  
SUBJECT: The Prevention of Sexual Harassment

I am taking the opportunity afforded by three recent Supreme Court decisions to review with you existing Department of Justice (Department) policy and management obligations regarding sexual harassment in the workplace. I also want to advise you of recent initiatives by my Advisory Committee on the Prevention of Sexual Harassment, and the elimination of the required Points of Contact Program. Further, I am asking that you designate an individual to serve as the coordinator for the prevention of sexual harassment in your organization, if you have not already done so.

The Supreme Court Decisions

Recently, the Supreme Court issued three decisions concerning sexual harassment in the workplace. In Oncale v. Sundowner Offshore Services, Inc., the Court held that harassment on the basis of sex, where both the harasser and the victim are the same sex, is prohibited by Title VII. In Faragher v. Boca Raton and Burlington Industries, Inc. v. Ellerth, the Supreme Court held that when a manager or supervisor sexually harasses an employee and the harassment results in a "tangible employment decision" (such as discharge, demotion or undesirable reassignment), the employer has violated federal law. Other types of illegal sexual harassment by supervisors and managers are treated as hostile environment harassment. The Court held that the employer will not be held responsible for hostile environment harassment by its managers or supervisors if it: (1) exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the victim of harassment unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The Attorney General's Advisory Committee on the Prevention of Sexual Harassment has reviewed these decisions and has determined that the Department of Justice's current sexual harassment policies and procedures, which are summarized below, are consistent with them.

Existing Departmental Policies and Procedures

The Department has procedures for reporting and processing complaints of discrimination including sexual harassment. Through its Equal Employment Opportunity (EEO) offices, the Department provides for EEO counseling of all aggrieved individuals. By regulation, all complaints must be fairly and thoroughly investigated and final agency decisions issued in a fair and timely manner.

In October 1997, I approved a Plan for the Prevention of Sexual Harassment in the Department. Each component and office, board and division (OBD) has in place a sexual harassment prevention plan that is consistent with the Department's plan. These plans require managers and supervisors to be held responsible for ensuring nondiscrimination in their offices. The plans require management to take appropriate action against individuals found to have engaged in unlawful harassment. Action is also required against supervisors who allow such conduct to persist in their organizations. In addition, the plans require periodic training and outreach to ensure that all employees, supervisors, and managers understand their rights and responsibilities with respect to the prevention and eradication of sexual harassment.

Any employee who believes that he or she has been subjected to harassment should report such behavior immediately to a supervisor, any higher level manager, the personnel officer in their office, or to individuals who may have been identified specially by their office to receive sexual harassment reports. Employees can also seek assistance from their Office of Equal Employment Opportunity, the Office of Professional Responsibility, or the Office of the Inspector General. In addition, employees in a collective bargaining unit may also seek assistance through appropriate provisions of their collective bargaining agreement.

Advisory Committee Initiatives

To ensure that the Department has addressed sexual harassment comprehensively and in response to a request for additional assistance from some of the litigating divisions, the Advisory Committee has undertaken several initiatives to

supplement and complement the Department's existing sexual harassment policies and procedures:

- Development of an all employees memorandum to be distributed with pay checks in January 1999, that will explain the holdings of the new Supreme Court

decisions and reaffirm the Department's "zero tolerance" policy with respect to harassment. The memorandum is Attachment 1 hereto.

- Development of a plan to ensure that the OBDs that do not have in-house investigators are given the necessary resources to ensure proper handling of harassment complaints made directly to managers and supervisors. The Justice Management Division (JMD) will provide trained investigators to assist these OBDs in the investigations of sexual harassment complaints when needed. Further information concerning this program will be forthcoming in the near future from the JMD Personnel Staff.
- Survey of components' training initiatives and development of additional sexual harassment training resources to ensure proper training of all employees, managers, and supervisors. Attachment 2 is a list of training vendors approved by the General Services Administration (GSA). This list will be updated and reissued each July by the EEO Staff.

#### Update on Ombuds Program Proposal

Last year, I approved in principle the creation of an ombuds program that would enable employees to discuss harassment and other workplace problems in confidence and without fear of retaliation. With the assistance of the Office of Legal Counsel (OLC), the Advisory Committee is addressing legal issues concerning the confidentiality of ombuds programs. Until we have resolved these issues, no final decision will be made regarding implementation of an ombuds program. I have asked the Advisory Committee to brief me concerning these issues by the end of the year.

#### Role of Coordinators for the Prevention of Sexual Harassment

While the Advisory Committee and the Justice Management Division have taken a leading role in developing sexual harassment guidance and resources, I want to take this opportunity to remind you that principal responsibility lies with the component heads for the prevention of sexual harassment within their organizations. As managers, you have an obligation to respond promptly and effectively to all allegations of inappropriate conduct, including any form of harassment. This response must, at a minimum, include appropriate action to ensure that any harassing conduct ceases, in a manner that minimizes the effect on the victim to the extent possible. This obligation of

managers continues to exist even when an employee invokes other avenues of relief within the Department, including the administrative Equal Employment Opportunity process.

To assist you in fulfilling this obligation, I am asking each of you to designate a coordinator for the prevention of sexual harassment, if you have not already done so. This person will serve as a resource for you and your managers as you address any allegations of harassing behavior or conduct within your component. All allegations of harassment made to supervisors and managers must be immediately reported to the coordinator. Managers and supervisors must also report their response to each allegation to the coordinator, who will monitor to ensure that responses to credible allegations of harassment are prompt and effective. Please provide the name of the coordinator to Anna Rosario ((202)616-4809) within 30 days of receipt of this memorandum. Training for the coordinators will be scheduled by the Justice Management Division EEO Staff by January 1, 1999. The EEO Staff will also provide periodic guidance to the coordinators.

Each coordinator for the prevention of sexual harassment should maintain, at a minimum, records of all communications regarding the Department's and your component's sexual harassment policy, all related training provided to your managers and employees, as well as records reflecting all allegations of harassing conduct and management's response.

#### Elimination of POC Program Requirement

A year ago it became clear through our surveys that the Points of Contact (POC) program established in 1994 is not working as intended in most parts of the Department. Accordingly, I have accepted the Advisory Committee's recommendation that the components no longer be required to maintain a POC program. However, any component that continues to use a POC program or a similar program must: (1) abide by the principles set forth in the April 25, 1994 component heads memorandum establishing the program, and (2) must ensure that all points of contact are trained to carry out their responsibilities properly.

#### Training

Training is a key element of an effective sexual harassment prevention plan. As head of the component, it is your responsibility to communicate directly to managers, supervisors and employees what is expected of them in terms of how they treat one another and to emphasize that decisive action will be taken

to investigate and correct problems. In addition, training programs must:

- be offered on a regular basis;
- conducted by individuals who have in-depth knowledge of the subject matter;
- be tailored to the organization in order to address specific and general concerns;
- familiarize employees with the Department's and component's policies against sexual harassment;
- give employees working knowledge of what constitutes sexual harassment;
- provide the names and telephone numbers of persons to contact to discuss any concerns they may have;
- encourage dialogue and effective communication between employees at all levels; and
- inform employees of what they can do to help prevent sexual harassment and to end harassing behaviors when they occur.

Particular emphasis should be given to the training of managers, supervisors, and sexual harassment coordinators in preventing, investigating, and addressing sexual harassment. In addition, you must also ensure that persons working in the areas of EEO, employee relations and employee assistance are trained to effectively advise victims and supervisors on matters regarding sexual harassment. I am also asking you to summarize your training efforts on an annual basis as part of your EEO reports, to help ensure that the Department's training on the prevention of sexual harassment is both sufficient and consistent across components.

Finally, component heads should issue periodic reminders to all employees on sexual harassment policy, and provide other up-to-date information, as appropriate.

#### Conclusion

As the Supreme Court's decisions strongly suggest, an employer will be held accountable for failing to exercise reasonable care to prevent and correct promptly any harassing behavior. These decisions underscore the importance of effective implementation of each component's sexual harassment plan. I hold each of you responsible for ensuring full implementation of your component's plan, as well as assessing the effectiveness of the plan you adopted.

Attachments

EXHIBIT  
D



Office of the Attorney General  
Washington, D. C. 20530

June 29, 1993

MEMORANDUM FOR DEPARTMENT OF JUSTICE EMPLOYEES

FROM: THE ATTORNEY GENERAL

*Janet Reno*

SUBJECT: Prevention of Sexual Harassment in the Workplace

Since joining the Department, I have had an opportunity to meet and work with many of the fine men and women who dedicate so much of their time and effort to upholding this agency's tradition of professionalism and excellence. I am proud to be a part of this great institution and to have the privilege of serving our country and its citizens. In order to preserve this great tradition, I believe that we must create and maintain an environment in which all employees can perform their work free of any improper conduct such as discrimination and harassment, including sexual harassment. Discrimination or harassment of any kind simply will not be tolerated in a Department charged with enforcing the law and protecting the rights of all Americans.

Sexual harassment -- subjecting employees to unwelcome sexual conduct as a condition of their employment -- is illegal. It is a form of sex discrimination prohibited by Title VII of the 1964 Civil Rights Act. It is also completely antithetical to the ideals of this great Department.

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. Sexual harassment can also be any activity which creates an intimidating, hostile or offensive work environment for members of one sex, whether such activity is carried out by a supervisor or by a co-worker. 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.

Sexual harassment continues to be one of the most troublesome human resource management issues facing us today. Despite all the information, regulations, policies, and training that have been made available to employees and managers on this

topic, we know that problems still persist. I firmly believe that it requires the cooperation of everyone in the workplace if we are to successfully deal with this critical problem. We must take a proactive approach to dealing with sexual harassment. We must educate our employees to ensure that everyone has a clear understanding of this issue.

I am committed to taking all necessary steps to ensure that no employee of the Department is subjected to such harassment. Any employee who believes that he or she has been subjected to sexual harassment should report such behavior immediately to the supervisor, or a higher level official. Employees can also seek assistance from their Office of Equal Employment Opportunity, the Office of Professional Responsibility, or the Office of the Inspector General. I assure you that the matter will be dealt with promptly and impartially and that employees will not suffer any form of reprisal or retaliation.

An employee who engages in improper conduct will be subject to appropriate disciplinary action. Supervisors who either condone or fail to act promptly to correct inappropriate conduct brought to their attention will be subject to disciplinary action.

I will hold supervisors and managers responsible for enforcing this policy. I expect each manager in the Department to set the example in his or her organization by ensuring that the workplace is free of such behavior. Every manager must be aware of his or her work environment and the potential for problems.

I expect the head of each component to conduct an extensive campaign to ensure that all employees and managers are aware of their responsibilities in this area, and that they understand the penalties that may be imposed if they fail to adhere to these policies. I have asked Stephen R. Colgate, Assistant Attorney General for Administration, to work with component heads to assist them in implementing this policy.

I ask each one of you to join me in this important effort. We must ensure that the Department is a model among public and private employers. Differences in gender, race, color, national origin or religion must be fully respected. Together, we can achieve this goal.

**DOUGLAS FACTORS**

The Merit Systems Protection Board in its landmark decision, *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct.

Although not an all-inclusive list, the following factors must be considered when relevant in determining the severity of the discipline:

1. The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties;
6. The consistency of the penalty with those imposed on other employees for the same or similar offenses;
7. The consistency of the penalty with any applicable agency table of penalties;
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. 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;
10. The potential for the employee's rehabilitation;
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

## THE CIVIL DIVISION'S RESPONSE TO THE DRAFT REPORT



U.S. Department of Justice

Civil Division

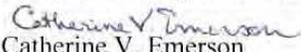
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 Washington, DC 20530

May 26, 2017

**MEMORANDUM**

TO: Nina S. Pelletier  
Assistant Inspector General  
Evaluations and Inspections  
Office of the Inspector General

FROM:   
Catherine V. Emerson  
Executive Officer  
Civil Division  
U.S. Department of Justice

SUBJECT: Civil Division's Response to the OIG Formal Draft Report, "Review of Handling of Sexual Harassment and Misconduct Allegations by the Department's Civil Division."

Thank you for providing us with the opportunity to respond to the Office of the Inspector General's (OIG) formal draft report entitled, "Review of Handling of Sexual Harassment and Misconduct Allegations by the Department's Civil Division." Please find below our responses to the four recommendations provided in the draft report.

**Recommendation 1:** *Create a system to track all allegations of sexual harassment and misconduct, to include minimal standards for case file content.*

**Response:** Concur. Shortly after the arrival of the new Executive Officer in January 2016, Civil Division leadership on its own initiative, took several steps to improve the overall efficiency of the employee relations program.

One of these steps entailed hiring additional staff to manage the employee relations program. In May 2016, the Civil Division hired a Senior Advisor who has an extensive background in employee relations to assess the program, and then in December 2016, the Division hired a seasoned Employee and Labor Relations Specialist, who previously participated in employee relations program audits, to solely work with supervisors and managers in addressing allegations of misconduct and improve employee relations program processes.

After arriving to the Division, the Employee and Labor Relations Specialist reviewed each of the case files managed by the former Human Resources Officer for sufficiency of content. After the internal review was conducted, a low-cost mechanism for tracking and organizing the case files was created. Additionally, a new method for maintaining files was established to ensure that going forward, all necessary supporting documents are captured in case files and easily referenced. As a result of this effort, all reported allegations can be now be searched based on employee names and/or categories of offenses to ensure consistency of penalties and that case file records are complete. Based on this information, we request that you close this recommendation.

**Recommendation 2:** *Develop policies or guidance consistent with Department policy on processing allegations of sexual harassment or misconduct that ensures reporting the allegations to the OIG, the Civil Division's leadership, and the Office of Management Program's Human Resources.*

**Response.** Concur. The Civil Division agrees with the OIG on the importance of ensuring that supervisors and managers have guidance on how the Division will investigate and address allegations of misconduct, and who should be notified about allegations of misconduct.

As pointed out in previous meetings with the OIG, in 2015, the Division, through the former Executive Officer, issued an email to all Deputy Assistant Attorney Generals, Office Directors, a Special Master, and Counsel to the AAG about (1) the obligation to report any allegations of criminal wrongdoing or serious administrative misconduct by Department employees to the OIG, with the pertinent regulation quoted; (2) the Department's policies on preventing sexual harassment in the workplace, responding to domestic violence, sexual assault, and stalking, and off-duty employee misconduct, with copies of these policies; and (3) the importance that the Division places on its obligations to comply with these policies and Management's responsibilities to respond to harassment and misconduct in a manner that is successful in eliminating it from the workplace. This written reminder also instructed the Directors to discuss with their Deputy Assistant Attorney General or the Executive Officer any questions or concerns they have about the policies generally or about a specific situation in particular. This guidance is in accordance with current Department policy. To remind supervisors and managers of their obligation to report allegations of sexual harassment, the Civil Division intends to issue similar guidance based on current or revised Department policy regarding this subject on a recurring basis.

To further help achieve this objective, the Division's Employee and Labor Relations Specialist will also provide guidance on how to handle sexual harassment and misconduct allegations during quarterly employee and labor relations trainings. In fact, during a recent March 2017 session of an employee and labor relations training course for supervisors, a portion of the training focused on when and how supervisors and managers should report misconduct, to include sexual harassment, to the OIG and HR. The Civil Division will continue to provide this guidance during each training session to supplement the Division's and Department's guidance on reporting and addressing sexual

harassment allegations. Based on this information, we request that you close this recommendation.

**Recommendation 3:** *Develop consistent penalty guidelines for substantiated allegations of sexual harassment and misconduct.*

**Response:** Concur. The Civil Division's position is that penalty tables or strict penalty guidelines that prescribe a penalty for certain types of misconduct limit supervisors' and managers' ability to make individualized assessments of the appropriate responses to substantiated allegations of sexual harassment and misconduct. The Civil Division understands, however, that this recommendation does not require the implementation of a penalty table or guidelines that require specific penalties for sexual harassment. Furthermore, because certain employees within the Civil Division are unionized, implementation of Division-wide penalty tables would require negotiations with the union, which would result in unpredictable delay in satisfying the recommendation.

The Civil Division understands, however, that the recommendation might be satisfied by the issuance of a policy that guides the exercise of discretion by disciplinary officials in such matters. We also understand that the Department as a whole likely will be considering issuance of additional guidance for the handling of sexual harassment incidents, and the Civil Division has offered to participate in those efforts. Obviously, the Civil Division will be bound by and comply with any Department policy. Therefore, we concur with the recommendation with the understanding that the recommendation may be satisfied by issuance of a Department-wide policy, after which we would consider whether additional component guidance is necessary.

With those understandings, the Civil Division concurs in the recommendation. Additionally, to assist supervisors and managers in making these assessments and to provide guidance on similar penalties for like offenses within the Division, the Division's newly hired Employee and Labor Relations Specialist will also help to ensure proper reporting of the allegations to the OIG and Division leadership. By utilizing a consistent process in every case, including consideration of the *Douglas* factors when appropriate, the Civil Division strongly believes that the appropriate level of discipline will be administered as the facts of the case warrant in the meantime.

**Recommendation 4:** *Consider developing policy guidance regarding performance awards given to and public recognition of an employee who is under investigation or has recently been disciplined for misconduct, including sexual harassment.*

**Response:** Concur. The Civil Division intends to issue awards guidance by approximately August 2017.

Again, we appreciate the opportunity to respond to the draft report provided by your office. Should you need additional information, please do not hesitate to contact me.

## OIG ANALYSIS OF THE CIVIL DIVISION'S RESPONSE

The OIG provided a draft of this report to the Civil Division. The Civil Division's response is included in Appendix 4 above. Below, we discuss the OIG's analysis of the Civil Division's response and actions necessary to close the recommendations.

**Recommendation 1:** Create a system to track all allegations of sexual harassment and misconduct, to include minimal standards for case file content.

**Status:** Resolved.

**Civil Division Response:** The Civil Division concurred with the recommendation and stated that shortly after the arrival of a new Executive Director, Civil Division leadership took several steps to improve the overall efficiency of the employee relations program, including hiring additional staff to manage the employee relations program. For example, the Civil Division hired a Senior Advisor to assess the program and an Employee and Labor Relations Specialist solely to work with supervisors and managers in addressing allegations of misconduct and improve employee relations program processes. The Employee and Labor Relations Specialist reviewed each case file managed by the former Human Resources Officer for sufficiency of content. After the review, the Civil Division created a mechanism for tracking and organizing case files, and a new method for maintaining files to ensure that, going forward, all necessary supporting documents are captured in case files and easily referenced. As a result, all reported allegations can be now be searched based on employee names and/or categories of offenses to ensure consistency of penalties and that case file records are complete.

**OIG Analysis:** The Civil Division's actions are responsive to our recommendation. By August 31, 2017, please provide examples, such as screenshots, if applicable, of the Civil Division's mechanism for tracking and organizing case files that shows how to search for allegations based on employee names and/or categories of offenses. Also, please describe the Civil Division's new method for maintaining case files, including how all necessary supporting documents are captured in case files and easily referenced.

**Recommendation 2:** Develop policies or guidance consistent with Department policy on processing allegations of sexual harassment or misconduct that ensures reporting the allegations to the OIG, the Civil Division's leadership, and the Office of Management Programs' Human Resources.

**Status:** Resolved.

**Civil Division Response:** The Civil Division concurred with the recommendation and stated that it agrees with the OIG on the importance of ensuring that supervisors and managers have guidance on how the Civil Division will investigate and address allegations of misconduct, and who should be notified about allegations of misconduct. The Civil Division also referenced a 2015 email

from the former Executive Officer reminding all Deputy Assistant Attorneys General (DAAG), Office Directors, the Special Master, and the Counsel to the Assistant Attorney General about their obligation to report any allegations of criminal wrongdoing or serious administrative misconduct by Department employees to the OIG, with the pertinent regulation quoted; the Department's policies on preventing sexual harassment in the workplace, responding to domestic violence, sexual assault, and stalking, and off-duty employee misconduct, with copies of these policies; and the importance that the Civil Division places on its obligations to comply with these policies and management's responsibilities to respond to harassment and misconduct in a manner that is successful in eliminating it from the workplace. The Civil Division stated that this written reminder also instructed the Directors to discuss with their DAAG or the Executive Officer any questions or concerns they have about the policies generally or about a specific situation in particular, and that this guidance is in accordance with current Department policy.

The Civil Division stated that it intends to issue similar guidance based on current or revised Department policy on a recurring basis to remind supervisors and managers of their obligation to report allegations of sexual harassment. The Civil Division's Employee and Labor Relations Specialist will also provide guidance on how to handle sexual harassment and misconduct allegations during quarterly employee and labor relations trainings. During a March 2017 training course for supervisors, a portion of the training focused on when and how supervisors and managers should report misconduct, to include sexual harassment, to the OIG and HR. The Civil Division stated that it will continue to provide this guidance during each training session to supplement the Civil Division's and Department's guidance on reporting and addressing sexual harassment allegations.

**OIG Analysis:** The Civil Division's actions are responsive to our recommendation. By August 31, 2017, please provide a copy of the new guidance reminding supervisors and managers of their obligation to report allegations of sexual harassment and misconduct and indicate the frequency of the written reminders. Also, please provide a copy of the training materials for how to handle sexual harassment and misconduct allegations used during quarterly employee and labor relations trainings.

**Recommendation 3:** Develop consistent penalty guidelines for substantiated allegations of sexual harassment and misconduct.

**Status:** Resolved.

**Civil Division Response:** The Civil Division concurred with the recommendation and stated that penalty tables or strict penalty guidelines that prescribe a penalty for certain types of misconduct limit supervisors' and managers' ability to make individualized assessments of the appropriate responses to substantiated allegations of sexual harassment and misconduct. The Civil Division understands, however, that this recommendation does not require the implementation of a penalty table or guidelines that require specific penalties for sexual harassment. Furthermore, implementation of division-wide penalty tables

would delay satisfying the recommendation because of negotiations with unionized Civil Division employees. The Civil Division understands, however, that the recommendation might be satisfied by the issuance of a policy that guides the exercise of discretion by disciplinary officials in such matters. The Civil Division also understands that the Department as a whole likely will be considering issuance of additional guidance for the handling of sexual harassment incidents, and it has offered to participate in those efforts, as well as be bound by and comply with any Department policy. In the meantime, the Civil Division believes that it would be counterproductive for the Division itself and on its own to develop a division-only policy. Therefore, the Civil Division understands that the recommendation may be satisfied by issuance of a Department-wide policy, after which it would consider whether additional component guidance is necessary. Additionally, to assist supervisors and managers in making these assessments and to provide guidance on similar penalties for like offenses within the Civil Division, its newly hired Employee and Labor Relations Specialist will also help to ensure proper reporting of the allegations to the OIG and division leadership. In the meantime, by utilizing a consistent process in every case, including consideration of the Douglas factors when appropriate, the Civil Division strongly believes that the appropriate level of discipline will be administered as the facts of the case warrant.

**OIG Analysis:** The Civil Division's actions are responsive to our recommendation. If a Department-wide policy on penalty guidelines is issued to ensure that penalties for sexual harassment and misconduct are sufficiently reviewed and consistently applied across all components, please provide the OIG a copy of Civil Division's additional policy guidance or an explanation as to why division-specific guidance is not necessary. If no Department-wide policy on penalty guidelines is issued, please provide the OIG information on actions the Civil Division will take to resolve this recommendation.

**Recommendation 4:** Consider developing policy guidance regarding performance awards given to and public recognition of an employee who is under investigation or has recently been disciplined for misconduct, including sexual harassment.

**Status:** Resolved.

**Civil Division Response:** The Civil Division concurred with the recommendation and stated that it intends to issue awards guidance by August 2017, approximately.

**OIG Analysis:** The Civil Division's actions are responsive to our recommendation. By August 31, 2017, please provide a copy of the guidance on performance awards and describe on how the guidance will be implemented.

*The Department of Justice Office of the Inspector General (DOJ OIG) is a statutorily created independent entity whose mission is to detect and deter waste, fraud, abuse, and misconduct in the Department of Justice, and to promote economy and efficiency in the Department's operations. Information may be reported to the DOJ OIG's hotline at [www.justice.gov/oig/hotline](http://www.justice.gov/oig/hotline) or (800) 869-4499.*



Office of the Inspector General  
U.S. Department of Justice  
[www.justice.gov/oig](http://www.justice.gov/oig)