

# 2020 Annual Title IX Training Series Sexual Harassment October 14, 2020

Systemwide Title IX Compliance  
Office of the Chancellor  
The California State University

# Sexual Harassment

## 1096/1097

- Quid pro quo sexual harassment
- Hostile environment sexual harassment

## Addendum B

- Quid pro quo sexual harassment
- Hostile environment sexual harassment

# Quid Pro Quo - Definitions

## Addendum B

*f* An employee of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct

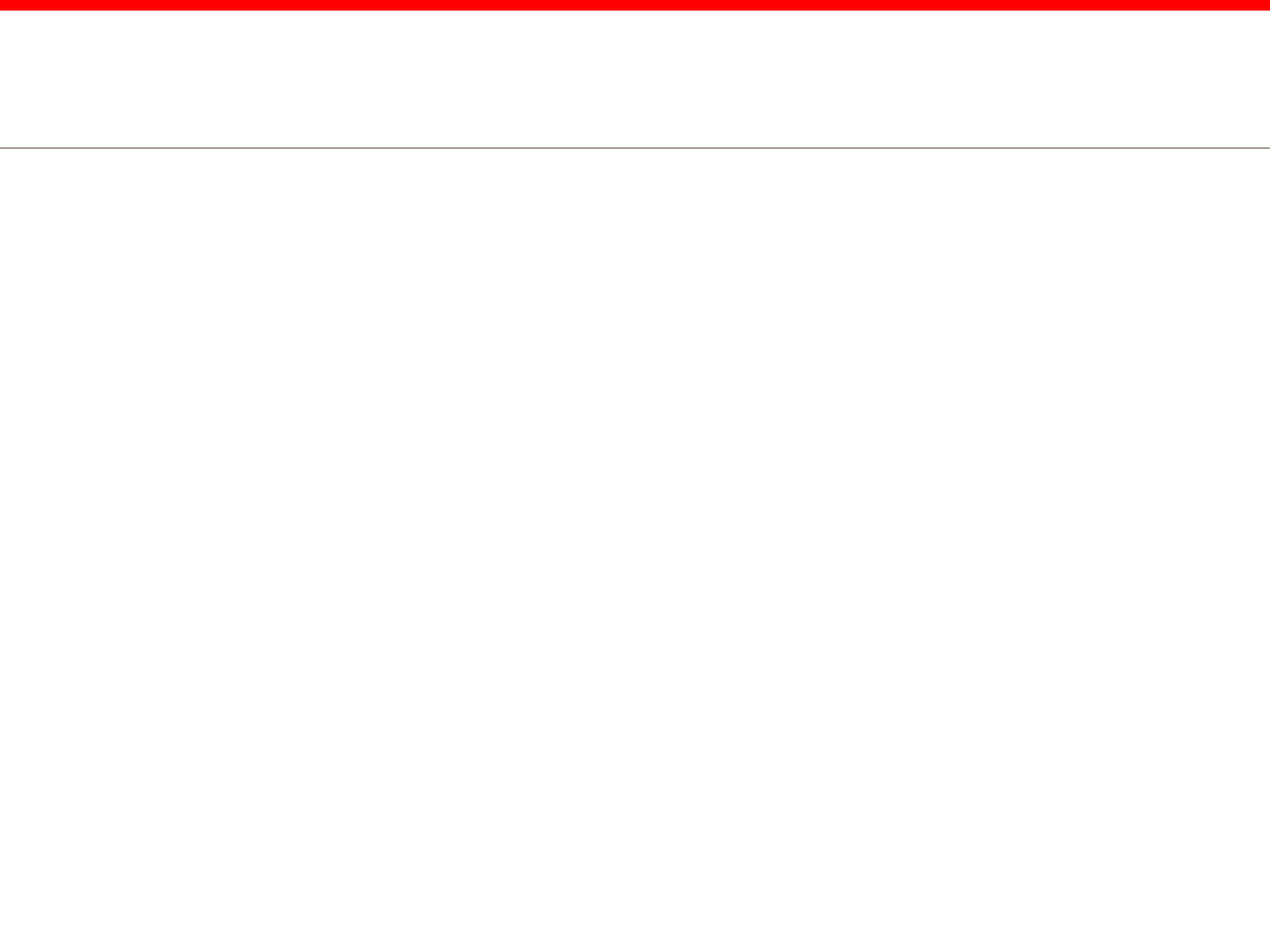
## EO 1096/1097

*f* Unwelcome verbal, nonverbal or physical conduct of a sexual nature where:

- Submission to, or rejection of, the conduct is explicitly or implicitly used as the basis for:

*f* (Students) for any decision affecting a CP's academic status or progress, or access to benefits and services etc...  
or

*f* (Employees) any decision affecting a term or condition of the CPs employment, or an employment decision



## Affecting Terms and Conditions of Employment – EO

*f* The test is not whether work has been impaired, but whether working conditions have been discriminatorily altered.

*f* [T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with ... work performance. To show such interference, “[one] need not prove that his or her tangible productivity has declined as a result of the harassment.” ...[i]t suffices to prove that a reasonable person subjected to the discriminatory conduct would find, vfpriprovnd, prthe h7orn

# “Hostile Environment” - Definition

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# Elements of Hostile Environment

## Addendum B

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*f* Was there conduct on the basis of sex?

*f* Was the alleged conduct unwelcome ?

Then, evaluating from the perspective of

– Reasonable person

*f* Was the conduct so severe, and





## What about conduct that is not sexual in nature but is based on sex or gender?

As noted by some commenters, sex-based harassment includes unwelcome conduct of a sexual nature but also includes unwelcome conduct devoid of sexual content that targets a particular sex. The final regulations use the phrase “sexual harassment” to encompass both unwelcome conduct of a sexual nature, and other forms of unwelcome conduct “on the basis of sex.” § 106.30 (defining “sexual harassment”).

(Preamble fn 670)

## “Unwelcome” – Add. B and EO

- f* EEOC - When welcome-ness is at issue, the investigation should determine whether the CP's conduct is consistent, or inconsistent, with the assertion that the sexual conduct is unwelcome. Acquiescence in sexual conduct at the workplace may not mean that the conduct is welcome to the individual.
- f* OCR – The Department interprets “unwelcome” as a “subjective element”. Therefore even if a CP “pretended to welcome the conduct,” the complainant’s subjective statement that they found the conduct to be unwelcome suffices to meet the “unwelcome” element.
- f* 2001 OCR Guidance (Rescinded) - Conduct is unwelcome if the student did not request or invite it and “regarded the conduct as undesirable or offensive.”



## What is Severe and Pervasive under Addendum B?

*f* Disseminating “revenge porn,” or conspiring to sexually harass people (such as fraternity members telling new pledges to “score”), ...particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement. (FR 30166)

*f* A single instance of unwelcome physical conduct may meet definitions of assault or battery prohibited by other laws, even if the incident does not meet one of the three prongs of the § 106.30 definition of sexual harassment. (FR 30166)

## Evaluating Effective Denial – Addendum B

*f* This element:

- does not require that a complainant has already suffered loss of education (FR 30169)
- Does require that a person’s “equal” access to education has been denied, not that a person’s total or entire educational access has been denied (FR 30169)

*f* Signs of enduring unequal educational access may include:

- skipping class to avoid a harasser,
- a decline in a student’s grade point average,
- having difficulty concentrating in class

*f* No concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant’s position of

“Effectively denied Complainant equal

# What is Objectively Offensive under Addendum B?

*f*

## Evaluating Severe Or Pervasive – EO 2001 OCR Guidance (Rescinded)

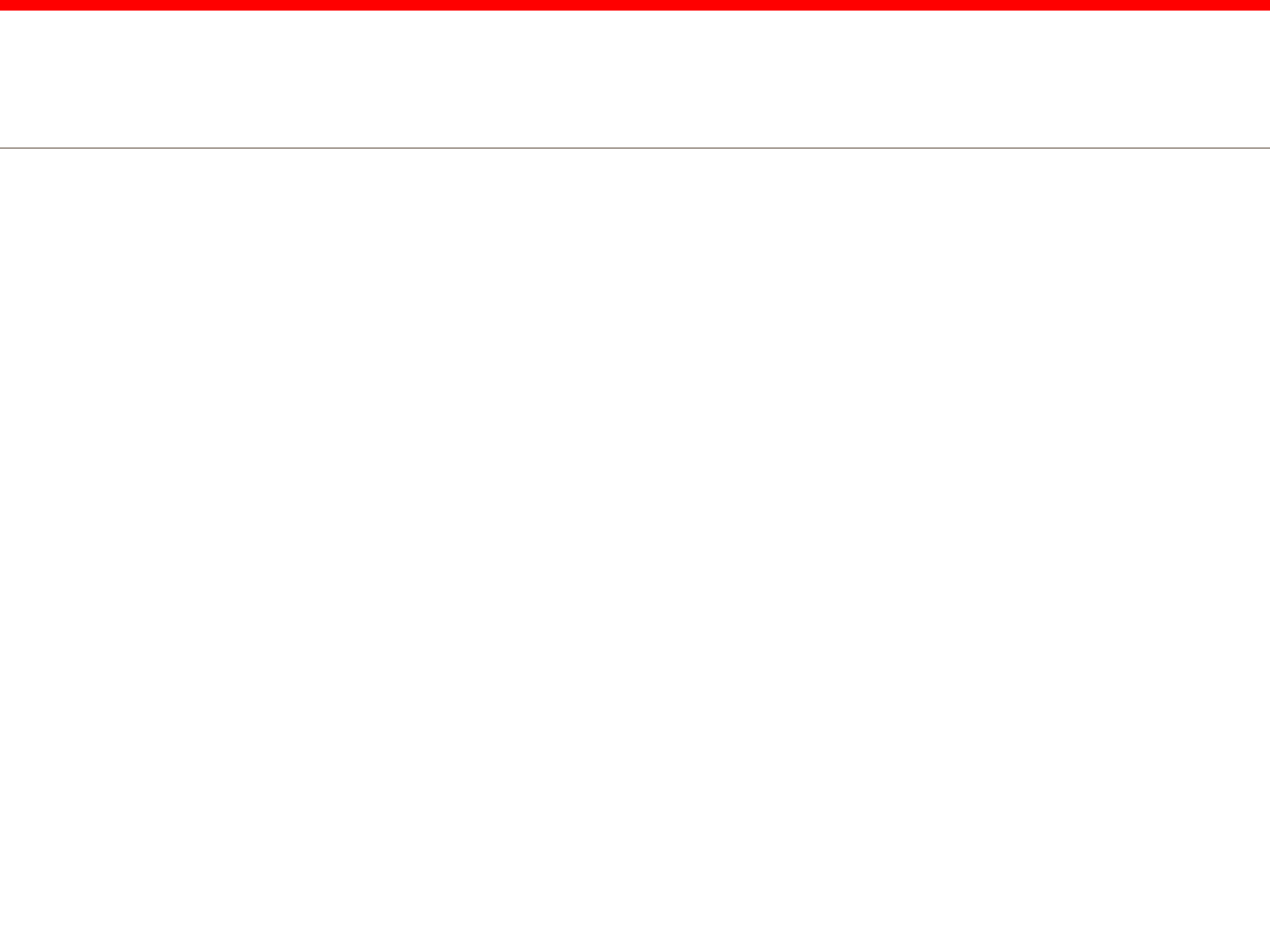
### *f*Factors to Consider:

- The degree to which the conduct affected one or more students' education.
- The type, frequency, and duration of the conduct.
- The number of individuals involved.
- The age and sex of the alleged harasser and the subject or subjects of the harassment.
- The size of the school, location of the incidents, and context in which they occurred.



## Additional Guidance on Severe Or Pervasive In Employment Context

- f* Cal. Prac. Guide – Can look to whether it is physically threatening or humiliating or a mere offensive utterance;
- f* Cal. Prac. Guide - Whether it unreasonably interferes with an employee's work performance.
- f* EEOC - A single, unusually severe incident of harassment may be sufficient to constitute a violation
- f* CA SB 1300 - A single incident of harassing conduct is sufficient regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment. (January, 2019)



# Intimidating, Hostile, or Offensive Environment

*f* “Does not need to be a descent into the Inferno”

*f* SB 1300 - It is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, [one] should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties.

*f* Look at totality of circumstances, including:

- Power differential between complainant and respondent
- Frequency of conduct
- Severity of conduct
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# Questions

# Scenarios

## Scenario #1

*f* Employee (Tracy) says they have been harassed for several months by a donor to the university who is also an alumni. Tracy says that the donor comes by at least once a week. Tracy says that the donor has attempted to solicit biographical information (address and telephone number) from the employee, complimented their appearance (in ways that made the complainant uncomfortable), and requested (y .kh( l)-1 (/6 EMC (ai)-1 gi ( and r)-3

## Scenario #2

- f* According to Devan, shortly after starting at CSU West, Devan noticed the environment in the residence hall was at times sexually charged. Male students were often referred to by offensive nicknames such as “Bitchy Ritchie” and “Nips.” Students also openly discussed the sexual activities of the Fed Ex delivery person and disparaged the female women that the Fed Ex delivery person associated with. The RA was present for many of the incidents and attempted to pretend these conversations were not happening, putting fingers in their ears to demonstrate blocking it out. Devan overheard students talk about how one female student dressed inappropriately.
- f* The RA stated that they were aware of the offensive nicknames and may have used them on occasion. Devan did not tell anyone that they were offended, nor did they make any formal or informal complaints for six months. Devan did tell the RA that the environment was not overly sexualized, but it was aggressive, disrespectful, and rude, and that they were surprised at the disrespect the students directed at the RA.

## Scenario #3

- f* Drew wants to file a complaint claiming that Jordan made three crude sexual references. Drew is a resident advisor and tells you that on Drew's first day, Jordan, also a resident advisor, told Drew that they were "really attractive." Drew said that they were not offended by this comment.
- f* One time, as they were meeting to discuss issues that occurred in the residence hall. Jordan told Drew that they had a body like their ex, but better. The first or second time Drew and Jordan worked together, a song came on the radio containing the lyrics "eating booty like groceries." Jordan asked Drew, "[D]oes your boyfriend eat that thang?" Drew replied that their boyfriend did not and did not know how to do so. Jordan answered, "I could teach him." Another time, while taking a walk around the campus, Drew recommended chocolate milk to help Jordan with muscle soreness. A few hours later, Jordan texted Drew that he loved chocolate milk, along with images of "tongue" emojis. This happened the same day as the comment Jordan made about his ex-girlfriend.
- f* When working out together at the gym on another occasion, Jordan pointed out Drew's groin area, which was wet with sweat, and commented, "Damn, that thing get wet like that."



## Scenario #4

*f* About two weeks after Parker assumed a position as a supervisor, they learned that “certain employees were circulating within the division...an unfounded, sexually-explicit rumor about them.” The rumor was that Parker “[had] a sexual relationship” with a higher-ranking manager, in order to obtain the management position. The rumor originated with another employee (um)-1.B6 rum

## Scenario #5

*f* Farley has filed a complaint because he believes he is being harassed by his supervisor (Alex). Farley identifies as a straight male and claims that he has been placed on a performance improvement plan and is being given different assignments than his colleagues. Farley's colleagues are predominantly female. Farley tells you that Alex never invites him to staff lunches, does not talk to him about his work (not )](m)-3.3 (()-3.

# Questions

