


**ALASKA STATE LEGISLATURE**  
**LEGISLATIVE AFFAIRS AGENCY**  
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**CONFIDENTIAL MEMORANDUM**

To: Senator Pete Kelly  
Senate President

From: Skiff Lobaugh  
Human Resource Manager 

Date: November 30, 2017

Subject: Investigatory Report for Incident June 15, 2017

**Investigation Introduction**

I was informed during a meeting on November 6, 2017 that there was "common knowledge" in the Legislature of an alleged harassment incident that occurred in front of the Speaker's Office. Later that morning I received information regarding the alleged incident in the form of two blog postings (#5 and #6 in the Materials List) stating that the incident occurred in June of this year. I promptly contacted the house staff employee (HSE) [REDACTED] who would have been the target of this alleged harassment. I asked the HSE if there had been an incident that may have violated the Legislative Council Policy on Sexual and Other Workplace Harassment. HSE stated that there had been an uncomfortable situation but she did not want to file a complaint. The next week I reviewed several more news reports including a blog with a written statement from a witness, Liz Raines, KTVA reporter, and an interview with James Brooks, Juneau Empire reporter. Since an employer may be held legally liable if they know of an alleged sexual harassment allegation and do not follow up, I requested an opinion from the Legislative Legal Services Division. I wished to know if there was enough information for me to start a formal investigation without first receiving a complaint. On Friday, November 17, 2017, I received notice that Legal Services had reviewed my inquiry and they recommended that I proceed with an internal investigation.

I reviewed the written material I had collected or received to determine if there had been alleged conduct that could be a violation of the Legislative Council Policy on Sexual and Other Workplace Harassment. I determined that an allegation that Senator Wilson used a cellphone to record "up-skirt" of HSE in front of the Speaker's Office on June 15, 2017, if substantiated, could be a violation of the policy. The interaction between Senator Wilson and HSE therefore became the focus of my investigation.

**Materials List**

Materials that were reviewed and considered during the investigation include, but are not limited to:

1. *U.S. Equal Employment Opportunity Commission, Enforcement Guidance, Vicarious Employer Liability for Unlawful Harassment by Supervisors*, modified March 29, 2010.
2. Security video footage on June 15, 2017, at around 4:50 pm, from the two cameras that have a view outside of the Speaker's Office.
3. KTVA Broadcast by Liz Raines on Thursday, November 9, 2017, 8:15 pm AKST. <http://www.ktva.com/story/36811003/house-calls-for-action-on-alleged-harassment-by-sen-david-wilson>
4. *Alaska Senator from Wasilla Denies any Wrongdoing with Staffer*, Juneau Empire Article Posted November 9, 2017.
5. *Local Reporter Exposes Sen. David Wilson's Sexual Harassment Cover-Up*, Alaska Landmine, dated November 10, 2017.
6. *Up-Skirt Cover-Up*, Alaska Landmine, dated November 6, 2017. – Article
7. *Sexual Harassment in Juneau*, Alaska Landmine, dated October 30, 2017.
8. *Legislative Council Policy on Sexual and Other Workplace Harassment*

**Evidence from Interviews, Witness Statements, and Video**

In the course of the investigation, I interviewed HSE and Senator Wilson. I also reviewed press reports regarding the issue, as the two known witnesses were reporters Liz Raines and James Brooks, who each published their eyewitness account of events. I also obtained permission from Legislative Council to review the Legislature's video surveillance of the alleged incident. Since the witnesses' accounts and the surveillance video were fairly consistent, I did not follow up with either of the eye witnesses in order to decrease the potential for breaching the confidentiality of the investigation. In addition, in a KTVA news report on November 9 Liz Raines states "...I told House Speaker Bryce Edgmon what I saw, afterwards, and while no one has asked me any questions about what happened, today I did tell Senate President Pete Kelly that I was a witness." I inferred from this statement that Liz Raines would report, as news, if any questions were asked of her.

Below are a list of events that are consistent in the interviews with Senator Wilson and HSE and with the statements of the reporters. Because all accounts are consistent on these points, I do not consider them to be in dispute:

- The incident occurred on June 15, 2017 in front of the Speaker's Office.
- Senator Wilson approached the office wondering about the loud music.
- HSE told Senator Wilson that the music was to make it hard to listen in on the caucus meeting.
- Senator Wilson took out a cellphone and commented on recording the meeting.
- HSE stood between the door and Senator Wilson.
- HSE said something about the Senator up-skirting her, and Senator Wilson left the area.

The real dispute, which was cleared up from the video surveillance footage, was regarding the cellphone usage and placement. When viewing the surveillance video, I consulted with [REDACTED] ( [REDACTED] ) to verify that my assessment of the video footage was correct (e.g. duration of event, location, and distances). [REDACTED] is the expert on the Legislative

surveillance system. The notes I took as facts while reviewing the surveillance footage are as follows:

- Senator Wilson was in front of the Speaker's Office talking with HSE on June 15, 2017.
- HSE moved to stand between Senator Wilson and the door to the Speaker's Office.
- Senator Wilson took out what appears to be a cellphone.
- Senator Wilson lowered the cellphone to a height level with the hemline of HSE skirt, at a distance of about one foot to two feet away from the skirt.
- Senator Wilson did not physically touch HSE or her skirt with his hand or his cellphone.
- The cellphone was angled towards both the HSE's skirt and the door of the Speaker's Office. The door was directly behind HSE. Senator Wilson was looking at the phone at this time, not at HSE or the door.
- The cellphone was at skirt level for four seconds. The cellphone was lowered at 4:58:19 pm and raised at 4:58:23 pm.
- Something was said, and Senator Wilson left the area. He headed towards the Senate Chambers side of the Capitol.

## Findings

The U.S. Equal Employment Opportunity Commission (EEOC) defines harassment as "...unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive." EEOC further states that "petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people." (See <https://www.eeoc.gov/laws/types/harassment.cfm>)

Sexual harassment has been defined in employment law in two ways. The first type is called quid pro quo. The quid pro quo form of harassment is when an individual's submission to or rejection of sexual advances or conduct of a sexual nature is used as the basis for an employment decision, or if an individual's submission to such conduct is made a term or condition of employment. The second type of harassment is called hostile work environment. This occurs when unwelcome sexual conduct unreasonably interferes with an individual's job performance or creates a hostile, intimidating, or offensive work environment. Though there is not a hard and fast test for hostile work environment sexual harassment, the EEOC recommends that human resource professionals follow the standards set by the U.S. Supreme Court in *Harris v. Forklift Systems*, 510 U.S. 17, November 9, 1993.

In *Harris v. Forklift Systems*, the court stated the employer should take into consideration: 1) the frequency of the discriminatory conduct, 2) the severity (is it discretionary or merely inappropriate), 3) if the conduct unreasonably interferes with an employee's ability to perform their job, and 4) how the conduct affects the employee's well-being.

The event was clearly not quid pro quo harassment, so I analyzed it as a potential hostile work environment sexual harassment claim by using the four factors set forth in the *Harris v. Forklift Systems* case. Those factors are as follows:

1. Frequency: From all accounts this was a one time incident.
2. Severity: The lowered cellphone never reached below the skirt's hemline. Also, the lowering of the cellphone seemed to be a result of Senator Wilson wanting to record the meeting, and not attempting to take a photograph up the skirt of HSE.
3. Interferes with employee's ability to do their job: Both Senator Wilson and HSE do not regularly interact with each other in the workplace and this incident has not affected and does not seem likely to affect HSE's ability to do her job. This is evidenced by the fact that the incident, though just recently brought to the attention of the Equal Employment Opportunity Officer, occurred five months ago, and the employee has been doing her job effectively during that time.
4. Affects employee's well-being: This event was very stressful for HSE at the time. From my interviews with her, I conclude that it is unlikely to have a significant negative effect on her well-being in the future.

The EEOC states that harassment does not violate federal law unless it involves discriminatory treatment on the basis of race, color, sex, religion, national origin, age of 40 or older, disability, or protected activity, such as retaliation, under the anti-discrimination statutes. Motivations behind conduct are not always easily determined; however, through the course of the investigation all of the witnesses stated similar motives.

- In my second interview with HSE, she stated that she thought Senator Wilson acted inappropriately but she was not sure of his motives, and she thought he was trying to get to the meeting. She did not think he was trying to do something sexual, but she thought that what he did was inappropriate and could have come across as something sexual.
- Liz Raines, in her released statement on the blog "Landmine" dated November 10, 2017, stated that "at one point, he pulled out his cell phone and started trying to press it to the door, indicating that he was going to record the conversations on the other side of the doors."
- During the news interview with James Brooks on Thursday, November 9, 2017, 8:15 pm AKST broadcast for KTVA news, he stated, "...it didn't seem like there was anything malicious in it, or anything like that, it came and went pretty quickly." And later, "what I saw was Senator Wilson, as I remember it, approaching the door and appearing to listen in or act like he was listening in."
- In my interview with Senator Wilson, he stated that he was having a playful conversation about listening in on and recording the meeting. He said it was at that point that he took out his cell phone and started to act like he was going to record.

Senator Wilson and the eye witnesses seemed to generally agree that Senator Wilson's motive in lowering the cellphone was to record the meeting and what was taking place behind a closed door, and that he did not have an unlawful discriminatory motive. The motive was to record the meeting that was in progress.

**Conclusions and Recommendations**

In conclusion, this event did not fit the definition of hostile work environment sexual harassment. Senator Wilson's conduct did not violate the Legislative Council Policy on Sexual and Other Workplace Harassment. This determination is based on the standards set in the Supreme Court decision of *Harris v. Forklift Systems* and my finding that Senator Wilson's conduct was motivated by an attempt to record the conversation through a closed door and did not have an unlawful discriminatory motive. This finding is further supported by the absence of more than one reported relevant incident. Hostile work environment sexual harassment claims are "based on the cumulative effect of individual acts." *National R. R. Passenger Corp. v. Morgan*, 536 U.S. 101 (U.S., 2002).

While my investigation did not find a violation of the Legislative Council Policy on Sexual and Other Workplace Harassment, this was nevertheless an uncomfortable situation, and one that was made more uncomfortable for HSE because of the unequal status, in the legislative workplace, of legislative staff and legislators. Legislators are elected officials who serve at the will of their constituents and are not easily made subject to discipline or removal from office by the legislature. Legislative staff employees are selected by individual legislators and serve at their will. A legislative staff employee can be released from employment by the legislator they serve without cause. In that climate there is extra pressure on employees to refrain from reporting or objecting to conduct they may perceive as inappropriate. What clearly made this specific situation uncomfortable was that HSE was placed in a position between doing what she was directed to do by the legislator who employed her, and simultaneously coping with actions and statements from another legislator that were to the contrary of her assigned duty. While Senator Wilson may have been acting with joking and friendly intentions his actions and comments still put the HSE in a stressful no-win predicament.