

Harassment Prevention Training for Supervisors and Officials (AB 1661)

League of California Cities Planning
Commissioners Academy

Friday, March 8, 2024, 10:15 am



HOUSEKEEPING

You **MUST** be signed
in

You must be present
for the full two-hour
training

You will receive your
certificate at the end
of the training

We also have
certificates for
attorneys for MCLE
credit

Contact Melissa
Kuehne
([mkuehne@ca-
ilg.org](mailto:mkuehne@ca-ilg.org)) with questions
or concerns

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- Together with our affiliates, we serve over 2,500 local agencies – cities, counties and special districts
- We provide practical and easy-to-use resources so local agencies can effectively implement policies on the ground



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Our mission is to help local government leaders **navigate complexity, increase capacity & build trust** in their communities



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Sexual Harassment Avoidance Training (2hrs)

BB&K Training

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Jacqueline M. Wade

Of Counsel

Jacqueline.Wade@bbklaw.com
(213) 787-2552

Jacqueline advises employers on complex legal issues, such as employee terminations and discipline, discrimination and harassment claims, wage and hour claims, medical leave and more. She also assists clients with foundational company policies and procedures, working to ensure clients are always compliant amidst today's ever-shifting employment law landscape. She has specific experience assisting clients on all issues related to the Fair Employment and Housing Act. Jacqueline drafts employee handbooks, policies, employment agreements and severance agreements.

Why Am I Here and Why Is This Training Important?



FIRST

- California law requires it – **AB 1825, AB 1661, AB 2053, SB 396**
- Employers, Local Government Agencies must take affirmative steps to prevent sexual harassment
(employee training, written policies, complaint procedures)
- **California is employee friendly.** Now stronger laws in place to:
 - Lower burden of proof to establish sexual harassment and a single incident can be sufficient. Lower burden to prove retaliation SB 497.
 - Expand personal liability for sexual harassment **including for elected officials**



SECOND



To know what constitutes harassment so you can recognize it and avoid it
and to help maintain a civil and respectful workplace



THIRD

To know what procedures to follow if you witness harassment, receive a complaint of harassment, or are harassed yourself



FINALLY

To know the potential consequences – including personal potential civil liability and discipline for employees, as well as liability for your agency

Disclaimer



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What We Will Cover Today

- ❖ Harassment
- ❖ Bullying & abusive conduct
- ❖ Discrimination
- ❖ Retaliation
- ❖ Complaint procedure
- ❖ Investigation process
- ❖ Consequences and liability
- ❖ Test questions
- ❖ Certificate



Civility



- Demonstrate respect
- Communicate meaningfully
- Engage in simple civilities

Harassment in Employment



UNDER CALIFORNIA AND FEDERAL LAW

Why are Sexual Harassment Claims So Prevalent?

SEXUALLY JOB DISCRIMINATION
SHAME FEAR HARASSMENT
SEXISM RAPE
ASSAULT INTIMIDATION
SILENCE ATTACK HELPLESS

#MeToo

CULTURAL ACCEPTANCE OF PREDATORY BEHAVIOR





NBC FIRES LAUER
DRUDGE REPORT



Who Does the Law Cover?

The law prohibits harassment of :

- Employees
- Applicants
- Unpaid Interns or Volunteers and
- Persons providing services pursuant to a contract (Independent Contractors)

By:

- Supervisors
- Co-workers
- Public officials
- Third-parties



Attention Public Officials



1. Since 2017 there has been an increased number of sexual harassment and misconduct complaints against public officials
2. Such complaints have resulted in an increase of officials who voluntarily or involuntarily left their positions
3. Enactment of AB 1661 making sexual harassment prevention training mandatory for local agency officials

What Is Harassment?



Sexual harassment is a form of sex discrimination

There are two kinds of sexual harassment:

- ❖ Quid pro quo
- ❖ Hostile work environment

*Sexual harassment need not be motivated by sexual desire

Quid Pro Quo “This for That”

- **QUID PRO QUO:**
A tangible employment action in exchange for participation in a sexual activity
 1. Is it sexual?
 2. Is it unwelcome?
 3. Is it a condition of employment?

CACI 2520



Scenario

Carla is a new clerk in the City’s planning department. She thinks she would benefit from a sit/stand desk. She approaches her supervisor, Mark, towards the end of a workday and makes the request.

He moves very close to her and responds with:

“I may be able to arrange that. How important is it to you? Why don’t we discuss it over dinner?”



What Are The “Terms And Conditions” of Employment?



Can include:

- ❖ Hours of employment
- ❖ Pay
- ❖ Physical setting
- ❖ Work assignments
- ❖ Geographic location
- ❖ Benefits
- ❖ Work environment

Scenario

A new engineer (Michelle) is excited about her first job in the City’s engineering department after graduating from college. On her first day, she meets the City Engineer (David). He welcomes her onboard. He says, “*you look really fit – do you run?*” She says she does.

He shares that he often runs during the lunch hour and asks her to join him. “*Bring your gear tomorrow – we’ll go together. I need to continue with your onboarding process, but I have another appointment right now and I can’t attend your welcome lunch. How about happy hour after work?*”

Perception Matters!

- ✓ Intent of the person making the comment or engaging in the behavior isn't what matters.

- ✓ The law views it from the perspective of the recipient
 - How did the recipient view it?
 - How would a reasonable person in those shoes view it?
 - Must be both subjectively and objectively offensive



Summary

Quid pro quo harassment occurs when people with power in the workplace make sexual demands on those with less power

Employees have the right to object to sexual behavior at work

- Obvious
- Subtle
- Even if the employees don't speak up at the time



Quiz Time!

Question #1

The Fair Employment and Housing Act prohibits harassment of which of the following persons?

- a. Employees
- b. Applicants
- c. Unpaid interns
- d. All of the above

Hostile Work Environment

- Unwelcome behavior
- Ongoing and severe or pervasive
- Unreasonably interferes with an individual's ability to do their job
- Related to a legally protected characteristic



Sexually Charged Hostile Work Environment

- NOT “HOSTILE” IN THE COMMON SENSE
- SEXUALLY CHARGED HOSTILE WORK ENVIRONMENT:
- CACI 2524



Unwelcome



The challenged conduct must be unwelcome “in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.”

Henson v. City of Dundee, 682 F.2d. 897 (11th Cir. 1982)

Does an Employee have to Communicate To the Potential Harasser That Conduct is “Unwelcome?”

NO ... an employee is not required to tell them that conduct is unwelcome.



Scenario

Wait...it's “funny” ...right?

For the past few years, Michael likes to make “*that’s what she said*” jokes every day, creating a sexual innuendo any time the opportunity presents itself. He thinks everyone loves his jokes. His subordinate, Pam, files a complaint against Michael after she gets written up for excessive tardiness. She never told him that she found his jokes offensive.

<https://www.youtube.com/watch?v=1mipOFszqNE>



What are the Ways of Communicating Unwelcome?

- Outright rejection
- Non-verbal communication
- Verbal cues
- Body language
- Consistent refusal to participate



Does it matter if...

- What if they laughed at my jokes?
- What if someone is hypersensitive?
- What if we're just trying to have fun?
- What if no one ever told me they were offended?
- What if someone only complained after a bad review?
- What if I just directed my comments to my friends?



Can it be “Welcome” and Still Inappropriate?

YES.

Scenario:

In the break room, two co-workers, Brad and Steve, discuss a staff member. Brad mentions that “Susan” is “easy on the eyes,” has “junk in the trunk,” and “fills out her tight-fitting sweaters nicely.” Steve laughs and agrees. The planning director walks in and overhears this part of the conversation.



Is This Sexual Harassment?

Can staring become sexual harassment?

Yes... A court has found that leering at another employee can be sexual harassment.



Examples of Types of Sexual Harassment that May Create a Hostile Work Environment



Verbal: Making or using sexual, derogatory, or other offensive comments, epithets, slurs, and jokes, sexual advances or propositions.

Written: Suggestive or obscene letters, notes, e-mails, text messages, or invitations.

Physical: Unwelcome touching, massaging, or interfering with or blocking movement.

Visual: Leering, gestures, displays of sexually suggestive objects or pictures, cartoons, posters, or e-mail.

Recap

Unwelcome conduct is behavior that is

- Not wanted
- Not requested
- Not willingly reciprocated



Remember: Observers can be offended, even if they are not targeted or directly involved in the unwelcome activities and even if they've never told you they're offended.

Hostile Work Environment

- Unwelcome behavior
- Ongoing and severe or pervasive
- Unreasonably interferes with an individual's ability to do their job
- Related to a legally protected characteristic



What is “Hostile” Anyway?

Must be ongoing and “severe” or “pervasive.”

How do you know???



Scenario

Jose, an elected official, has daily briefings with his staff. He is a hugger and greets each of his staff members with a hug. Linda does not appreciate these hugs.



Hostile Environment Sexual Harassment

Factors considered by the courts:

- ❖ Whether conduct was verbal or **physical**, or both
- ❖ Frequency of conduct – sporadic/rare or **often/repeated**
- ❖ Whether the harasser was a co-worker or **supervisor**
- ❖ Who participated – was it reciprocated or **not**
- ❖ Whether conduct was directed at a group or an **individual**



What if There's No "Target"?

Does conduct have to be directed to a particular person to constitute harassment?

Not necessarily...



Scenario

In a busy City hall office, planning commissioner members rate female co-workers. Their conversations include comments about physical appearance, nicknames they've given them, and scores from 1-10. This conduct occurs over a period of a few months.

Anna, a female coworker, hears all of this. She never participates in the conversations or says anything.

During her performance review some months later, Anna is given critical marks on teamwork and her interpersonal relationships. She then reports that she feels harassed.

Environment

- It's not about intent.
- An employee's environment can be "hostile" without being a direct target.



Male Sexual Harassment in the Workplace



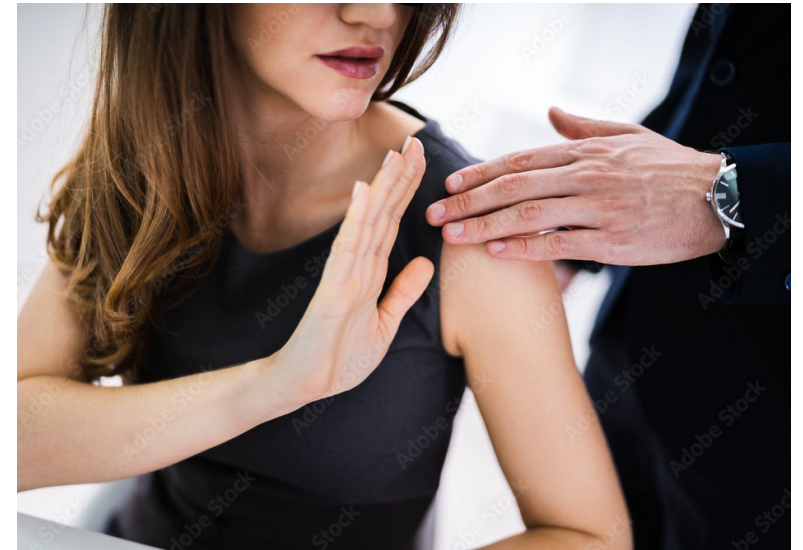
1. Harasser does not have to be gay or lesbian for behavior to constitute sexual harassment
2. Jobs where Male Sexual Harassment Commonly Occurs – Concentration of Men
 1. Construction
 2. Manufacturing
 3. Hospitality
 4. Waste Management
 5. Sales
3. Examples
 1. Referring to colleagues by female pronouns
 2. Sexual taunting
 3. Simulate sexual acts

Hostile Work Environment

- Unwelcome behavior
- Ongoing and severe or pervasive
- Unreasonably interferes with an individual's ability to do their job
- Related to a legally protected characteristic

Scenario

Supervisor Joseph routinely meets with new staff member Katrina in his office with the door closed. He “friends” her on Facebook and shares posts he finds interesting. He calls her after hours to discuss work projects. He shares details of his personal life, including his experiences with woman he’s talking to on Bumble. He does not treat the male staff of his team this same way.



Perception of the Recipient Matters!

- ✓ Intent of the person making the comment or engaging in the behavior isn't what matters.
- ✓ How did the recipient view it?
- ✓ How would a reasonable person in those shoes view it?



Hostile Work Environment

What it Isn't

- Boss is “mean” to me/yells at me
- My co-workers don't invite me to lunch with them
- I got written up for being late
- I got a bad performance review
- I find my supervisor very annoying



Technology and Harassment

- ❖ Internet
- ❖ E-mail
- ❖ Voice mail
- ❖ Text messages
- ❖ Instant messages
- ❖ Blogs / networks
- ❖ Social media



Special Problem Area: Public Events



- Board Meetings
- Official Events
- Extra scrutiny
- Recorded
- Social Events
- Casual, Fun
- Alcohol

Electronic Communications

- Blurs lines between work and personal
- Tests the boundaries
- Nature of communication more informal
- E-mails
 - Forwarding
 - Beware “auto-fill”
 - Similar issues with text messages
- Tolerate more



Scenario

Boss:

Just a quick note to thank you for your help today! It's much appreciated.

Worker:

No problem – happy to help.

Boss:

Really, I wouldn't know what to do without you.

Worker:



Boss:

Sooo happy you're on my team. Don't you go transferring on me now! I look forward to seeing you every day!

Boss:



What Just Happened?



Boss' perspective: Thank you e-mail with appreciation and kind words to the worker.

Worker's perspective: Boss is coming on to me.

It's confusing... Whose perspective governs?

Lesson

- Social media and electronic communications impact the work environment.
- Agency/employer policies.
- All methods of interaction must be compliant with the harassment policy.



Quiz Time!

Question #2

Which of the following is not a factor considered by the court in determining whether harassment occurred?

- a) the frequency of the conduct
- b) the harasser's intent in engaging in the conduct
- c) the relationship between the parties
- d) the severity of the conduct

Harassment by Third Parties

Employers & Local Gov't Agencies are required to protect workers from harassment by third parties:

- ❖ Customers
- ❖ Members of the public
- ❖ Vendors, contractors
- ❖ Other third parties



If employer knew or should have known of the harassment and failed to take immediate corrective action to stop the harassment.

Scenario

Local Gov't Agency sponsors a charitable event every month which employees and several appointed & elected officials attend. The agency outsources its lighting equipment. The same vendor comes in every month for the past few years to set up and take down the lighting. Each time he comes he compliments your staff member, Jenny, and has repeatedly asked her out. Jenny was amused at first, but has told you that she is now very uncomfortable with these advances. The vendor is scheduled to arrive later. What should you do?



Working with the Public

- Exert reasonable control
- Cannot always be regulated
- Attempt to address issues



Compliments in the Workplace



Scenario

Commissioner greets fellow commissioner member with a compliment each time they meet, routinely commenting on her appearance, her hairstyle, her clothing, and her physique. Is this problematic?



Circumstances and Context Matters

- Example: “You look *really* nice today.”
 - Kindness
 - Seduction/Love
 - Disrespect
 - Sarcasm
 - Which is it?
- Be aware of differences in perception



Takeaways for Compliments

- Be tactful
- Be appropriate
- Don't be too personal
- Don't be too physical
- Focus on work-related compliments



Workplace Romance

So, what about workplace romance...

Statistics show...



How About a Date?

Can an employee ask another employee on a date?

Yes . . . But once the employee says no, continuing to express interest can constitute sexual harassment.



Workplace Romance

- Right to privacy
vs.
Need for harassment-free environment
- Boundaries may change over course of relationship
- Area sometimes governed by employer policy



Workplace Relationships and Consent

Scenario:

After a long day, supervisor Sherry says to her associate, Adam: “Thanks for hanging in there with me. We should go next door and get something to eat. On the company.” Adam declines and says he needs to get home. Sherry persists and says, “just one beer.” When Adam hesitates, Sherry adds: “We can talk about your upcoming review.”

Adam agrees to go.

Was it consensual???



Importance of Power



What is consent?

Defined: To agree or give permission



Can A Consensual Relationship Result in Harassment Claims?

YES

Other employees who feel harmed by preferential treatment in the workplace can file a claim.



Scenario

Marcia and Daniel are talking in the hallway. Marcia is City Planning Director. Daniel is a staff member on Marcia's team. Marcia and Daniel are dating. Marcia asks Daniel if he wants to go to a fundraising dinner with her this weekend. She says to him, "You'll brighten it up." And she adds, "you'll get to meet some of our most important officials. It will be a step up."

Daniel says that sounds awesome.

Daniel's co-workers overhear this conversation and are frustrated that they cannot attend the fundraising dinner.



Paramour Preference

Hostile work environment can exist even if the complainant is not the “official” target and even if no unwelcome harassing conduct has occurred.



Risks of Relationships

- ❖ Ending the relationship could prove awkward.
- ❖ What started as consensual may change.
- ❖ Additional issues with manager/subordinate relationships:
 - Other employees can claim favoritism.
 - The subordinate could later claim harassment.
 - Consent is difficult to establish.



Quiz Time!



Question #3

A group of employees attend a conference together, and some inappropriate conduct occurs between a manager and a subordinate. Does the employer need to address this situation even though it occurred off-duty?

Off-Duty Conduct

Can an Employer Be Responsible for Conduct that Occurs Off-Duty

Yes...

If the conduct impacts the work environment, the employer must consider what happens off-duty



Off-Duty Conduct

Is the employer liable for situations that occur off-premises?

- A few friends who work together meet for happy hour after work
- A Department head invites all department employees to meet for a drink after work
- The agency sponsors a charitable event where staff members, elected and appointed officials attend



Scenario

Co-workers (Diane and Carl) run into each other at the dog park on the weekend. They talked and shared stories about their dogs. They took some pictures of their dogs playing and then exchanged cell numbers so they could share their pictures.

Diane texted Carl later that day.
“Thanks for a fun time today!”



Diane texted Carl the next day – asking if Carl wanted to meet up again. He said he was busy. Diane then suggested coffee. Carl did not respond. Diane called Carl later that night. He didn’t answer her call.



Scenario (cont'd)

Carl mentions this to you, almost in passing and in an almost joking way, that Diane has stalker tendencies.

He tells you the story.

What do you do?



Employer Liability for Off-Duty Conduct



- “In order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent.”
- *Myers v. Trendwest Resorts, Inc.*, 148 Cal. App. 4th 1403, 1421 (Cal. Ct. App. 2007)

What are the responsibilities of supervisors/agency leaders when off-duty conduct occurs?

- ✓ Set a positive example: be professional and respectful, and be conscious of your own words, actions and dress.
- ✓ Think twice before asking personal questions or making personal comments.
- ✓ Don't ignore issues
- ✓ Be proactive
- ✓ Involve your own manager or HR early and often...



Hostile Work Environment



- Unwelcome behavior
- Ongoing and severe or pervasive
- Unreasonably interferes with an individual's ability to do their job
- Related to a legally protected characteristic

Other Protected Characteristics

Scenario:

In the parking lot, two younger employees see a gray-haired co-worker getting out of his car. They know he's recently undergone cataract surgery. They say to him, "how's the old, blind guy? Come on, Pops, let's head in together."



Other Protected Characteristics

Scenario:

In a correctional facility, one of the officers has a speech impediment – a significant stutter. His co-workers tease him routinely. They mock him over the intercom and during staff meetings.



It's Not Always About Sex...

- Harassment may be based on sex or other protected characteristics
- Many characteristics are protected under both state and federal law
- Harassment on any of these bases is prohibited if it creates a hostile work environment

Protected Characteristics Under Federal Law

An employer may not discriminate against an employee based upon the employee's:

- Age (ADEA) 29 U.S.C. § 621
- Race (Title VII) 42 U.S.C. § 2000e, et seq.
- Color (Title VII)
- National Origin (Title VII)
- Gender (Equal Pay Act 29 U.S.C. § 206(d), Title VII)
- Interpreted to include transgender status
- Religion (Title VII)
- Mental or physical disability (ADA) 42 U.S.C. § 12101 et seq.



Protected Characteristics Under California Law

- Race*
- National Origin
- Color
- Ancestry
- Sex
- Sexual Orientation
- Gender Identity/ Expression



FEHA Cal. Govt. Code

- Age
- Genetic Information
- Physical and Mental Disability
- Religious Creed
- Medical Condition
- Marital Status
- Veteran

* Includes hairstyles, such as braids, locks, and twists.

SB 396 – Gender Identity, Gender Expression & Sexual Orientation

- Steve spends time with the women at work, he likes to knit and cook, and people have described him as effeminate; Steve’s co-workers repeatedly tell him that he is “just one of the girls” and make fun of his mannerisms and hobbies?
- Could this be harassment? On what basis?
- Megan has recently “come-out” in the workplace. Her boss asks her about dating repeatedly and makes crude remarks about her sexuality. He tells her they are not competing for the same women.
- Could this be harassment? On what basis?



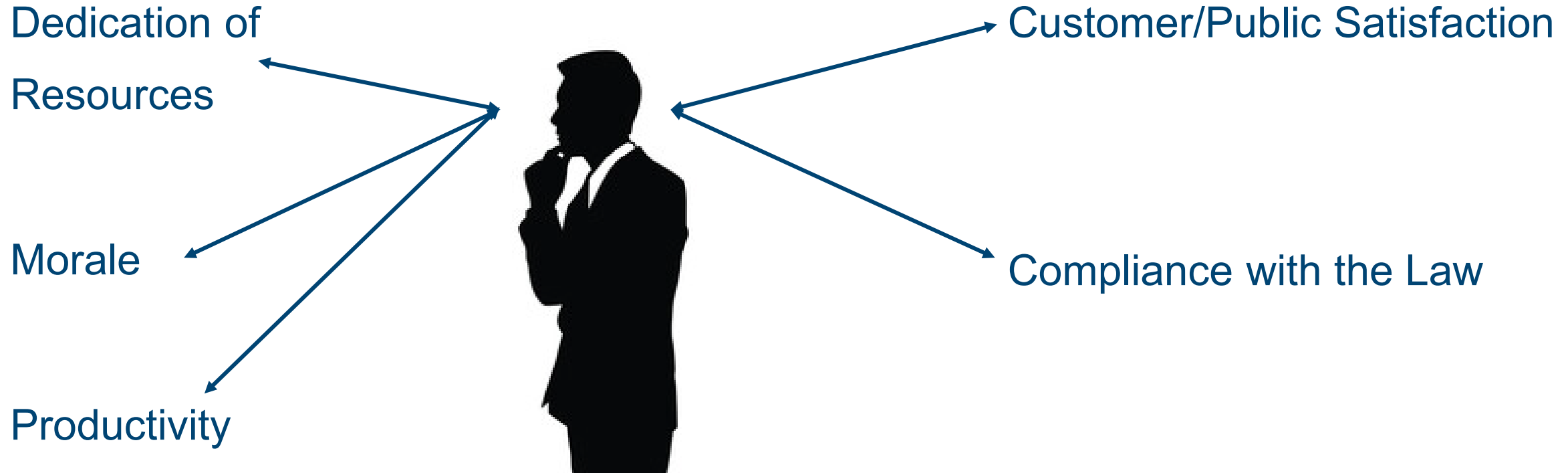
Abusive Conduct and Bullying

Jane works for Brutus. Brutus is loud, yells, and insults everyone. He chides Jane, Joe, Steve, and Martha. Everyone is afraid of him.

Is there a problem???



Reasons Employers Are Concerned About Bullying/Abusive Conduct In the Workplace



AB 2053 – Healthy Workplace Bill



- Effective January of 2015
- Requires the 2-hour Sexual Harassment Training to include a component addressing “abusive conduct” in the workplace.
- Does not create liability for workplace bullying that is not tied to a protected category.
- Does create a venue for discussing the importance of civility in the workplace and the prohibition of abusive communications and conduct or “workplace bullying.”

Abusive Conduct Defined

- Conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests
 - Abusive conduct is “workplace bullying”
- Examples:
 - Repeated verbal abuse (including teasing, name calling)
 - Verbal or physical conduct that a person would find threatening, intimidating, or humiliating (including pranks)
 - Sabotage or undermining of a person's work performance (including spreading rumors)

Workplace Bullying Defined

- Verbal abuse or offensive conduct/behavior in the workplace that is threatening, humiliating or intimidating to a co-worker or other employee or which prevents the co-worker or employee from doing their job
- Behavior must still be repeated or severe – usually a single insult will not constitute abusive conduct.
 - Know the difference between “having a little fun” and workplace bullying

Scenario



Finance Manager has a conversation with the Accounting Specialist in the hallway at City Hall. She says to him, “your e-mail doesn’t even make sense. I’ve never seen anything like this. Do you think this is a joke? When you give me garbage, I can’t do anything with it.”

Her tone is elevated and short. Other employees as well as City residents witness this exchange.

<https://www.youtube.com/watch?v=YFGoz1uEjos>

Compare “Harassment” with “Abusive Conduct/Bullying”

- Abusive conduct and bullying doesn't have to be based on a “protected characteristic”
- Abusive conduct and bullying are not unlawful like “harassment”
- Abusive conduct and bullying likely violate a code of conduct policy (even if the harassment policy is not violated)
- “Equal opportunity” harassers can be bullies
- Importance of employer/agency policy

Effects of Abusive Conduct

On the Victim

- Feeling embarrassed or stigmatized
- Social isolation
- Depression, anxiety, headaches, nausea, insomnia, burnout
- Workplace bullying affects
EVERYONE

On the Workplace

- Loss of productivity and morale
- Increased stress and job dissatisfaction
- Reduced creativity and willingness to take initiative
- Damaged communication and trust
- Increased employee turnover and absences

What Are Your Responsibilities As Agency Leaders?



- Be sensitive to your co-workers' attitudes
- Be familiar with applicable policies

Behavior Patterns to Personally Avoid:

- Yelling at employees
- Making insulting comments or statements
- Publicly admonishing anyone
- Sending an abrasive email, especially with a reply all or copying others unnecessarily
- Making passive aggressive comments with an underlying message loaded with anger or sarcasm

Quiz Time!

Question #4

Illegal harassment under the Fair Employment and Housing Act only means sexual harassment.

- True
- False

WHAT IS DISCRIMINATION IN EMPLOYMENT?

Discrimination in Employment



UNDER CALIFORNIA AND FEDERAL LAW

Scenario

Two City managers, Cindy and Joe, have a conversation about hiring someone for a Parks Maintenance position. Cindy feels the best candidate is Donna. Joe says:

“We’ve never had a woman in the job before. It’s a pretty physical job, and I wouldn’t want her to get hurt. Plus, what if she gets pregnant? I’m just trying to be responsible here.”



Is That Discriminatory?

Should employers consider gender differences to protect employees?

- No, gender should not be a factor if the applicants otherwise have the experience, qualifications, and skills needed for the job.



Protected Categories in California

- Race*
- National Origin
- Color
- Ancestry
- Sex
- Sexual Orientation
- Gender Identity/ Expression



FEHA Cal. Govt. Code

- Age
- Genetic Information
- Physical and Mental Disability
- Religious Creed
- Medical Condition
- Marital Status
- Veteran

* Includes hairstyles, such as braids, locks, and twists.

An employer **MAY NOT** treat an employee differently

- Based upon “protected characteristics” of the employee
- In a way that affects the employee’s “terms and conditions of employment”

Scenarios

1. An employee wears a head scarf in religious observance and is told she can no longer do that because a member of the public complained? What should the agency do?
2. A female has always served as the executive assistant, and now a male employee has applied for this position. One Board member thinks this position should be filled with a female. What should the agency staff do?
3. A pregnant employee wants to attend management training that has been offered to others in similar positions, but some people are concerned she may not come back after her maternity leave. Can that be taken into consideration?

How to Avoid Discrimination in the Workplace

Do not take protected categories into consideration when making job related decisions

Do not base job-related decisions on stereotypes about gender, race or other protected categories

Make decisions based on merit



What is Discrimination Based on Gender Identity/Expression?

Treating an employee differently because of their:

- **Gender Identity**: A person's internal understanding of their gender, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person's sex assigned at birth, or transgender.
- **Gender Expression**: A person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth. This can include how a person dresses, acts, speaks or interacts with others.
- **Note**: A transgender individual has a gender identity that differs from his/her sex at birth, but may or may not have a gender expression that differed from his/her sex at birth.

Scenario

1. The agency has an employee who was previously referred to as Bryan and now has asked to be called Brianna. Brianna now dresses as a woman and has asked to start using the women's bathroom. What should staff do?
2. What should they do if another worker complains that Brianna is using the bathroom?

Harassment or Discrimination Occurs... Now What???

What if You've Been the Problem?

What if one of your subordinates or co-workers accuses you of harassment?



What if You've Been the Problem?

Scenario:

Let's imagine you were welcoming City employee back to work after a pregnancy leave of absence. On her first day back, you give her a hug. You ask about how she's feeling. You ask if she's getting much sleep. You ask if she's still breastfeeding. You ask if she's still able to work the same hours.

The employee, on the spot, tells you that you're being too personal and that your questions are bordering on harassment.



What if She Never Said Anything to You?

Scenario:

What if, instead of telling you directly, the employee went straight to human resources or your manager because of this exchange.

Does it matter that the employee never told you that your statements were offensive?

NO.



Steps to Take

- ✓ If you're personally accused, be proactive.
- ✓ Go to your supervisor/manager and/or HR right away.
- ✓ Share your side of the story.
- ✓ Be honest and cooperate in any inquiry.
- ✓ Follow established policy and complaint procedure.
- ✓ Be aware that in some circumstances, you may have to be separated from the person who has complained until the situation has resolved.



What if You've Been a Victim?

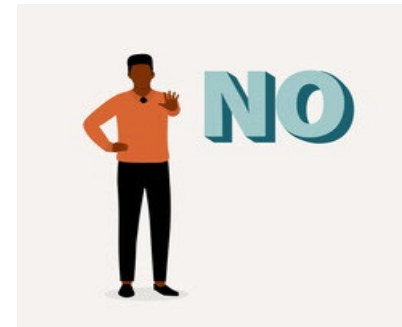
Scenario:

You feel you're being targeted in the workplace. You've asked for accommodation for a disability, and you feel that your manager is targeting you as a result.



Steps to Take If You Experience Harassment

- ✓ Be familiar with applicable policies
- ✓ If comfortable, make certain the other person is aware that conduct is not welcome
- ✓ If you experience discrimination or harassment, report the conduct immediately per policy complaint procedure



Reporting Obligation

- Follow employer policy
- Report harassment/discrimination immediately to:
 - ✓ Supervisor/Manager
 - ✓ Director/Counsel
 - ✓ HR



Quiz Time!

Question #5

City planning director potentially harassing conduct against an employee in a wheelchair. The employee engaging in the conduct works in a different department. Does the director still need to report the conduct?

- Yes
- No

Steps to Take if You Receive a Complaint of Harassment



- Be familiar with the policy
- Prompt reporting of complaint
 - Mandatory report
 - Send it through appropriate channels
- Documentation/Allow process to proceed – internal v. outside investigation
- Check-in with employee who reported
- Ask yourself “What are your responsibilities as a representative for your agency?”

Format of the Complaint

Can you insist on a written complaint?

COMPLAINT FORM

Please write your
complaint in the box
below

Write legibly



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Quiz Time!

• Question #6

- If a worker reports harassment to her supervisor but requests that nothing be done, must the supervisor respect her wishes?
- Yes
- No

Can A Worker Report Harassment And Ask That Nothing Be Done?

NO...

Knowledge by the Employer/Supervisor requires action.



Can A Worker Report Harassment Anonymously?

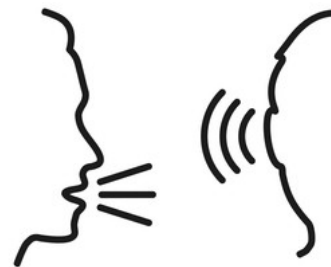
YES – but...

Harassment can be reported anonymously - but that may impair the ability to conduct a thorough investigation



Does A Worker Get To Hear All The Details of the Investigation?

NO . . . The specific results of the investigation may contain confidential personnel information. Depending upon the impact of the harassment, the worker may only be given general information such as “An investigation was conducted, the allegations were found to be proved/not proved and appropriate action was taken.”



Can The Worker's Identity Be Kept Secret From The Alleged Harasser?

MAYBE... but confidentiality cannot be guaranteed

- For the employer to conduct a thorough investigation, the worker's identity may need to be disclosed
- Should there be litigation concerning the report and the response, a court can order the identity disclosed



What Does An Investigation Look Like?



- Required by law and by policy
- Must be prompt, objective, and thorough
- Breadth and scope of investigation depends upon the complaint
- Coordinated/handled by someone else

What does an Investigation look like?



- The Complainant is interviewed
- Generally a second person is present
- The questioning is focused on getting details.
- The Complainant is asked whether there are other employees that would have information about complaint
- Notes are kept
- The interview may be recorded
- The Complainant is encouraged to keep the matter confidential
- The Complainant is informed about the process
- Necessary witnesses are interviewed
- Complainant and witnesses are informed of no retaliation for participating in investigation
- A report is prepared with findings

What if You Are Interviewed In a Harassment Investigation?

- ✓ Be open, honest, and specific
- ✓ Answer the questions thoroughly
- ✓ Do not form opinions based upon the questions asked of you
- ✓ Do not discuss the investigation with others
- ✓ Do not let personal relationships stop you from doing what is right



What Can Happen To The Person About Whom A Complaint Is Made ?



IT DEPENDS... upon the seriousness of the charges, the results of the investigation, and the personnel record of the person about whom a complaint is made

Must be **appropriate corrective action**

- Actions taken can include:
- Nothing
- Reprimand
- Suspension
- Transfer
- Demotion
- Termination

What if the Worker Who Complained Quits Before the Investigation is Complete? Can/should the Investigation Be Stopped?

NO.

If a worker who has complained resigns, the employer/agency still has a duty to complete the investigation.



What Can Happen To the Worker Who Complains?

Nothing – if the worker tells the truth

BUT... A worker can be disciplined, up to and including termination, for knowingly filing a false claim and/or failing to be truthful during an investigation



Retaliation – BEWARE!

The law prohibits employers from retaliating against employees who complain of harassment, oppose prohibited conduct or participate in a harassment investigation.

Workers are expected to report any perceived retaliation.



Claims of retaliation will be investigated the same way harassment complaints are investigated. if the worker tells the truth

BUT... A worker can be disciplined, up to and including termination, for knowingly filing a false claim and/or failing to be truthful during an investigation

Retaliation

Retaliation Defined:

Retaliation has been defined as negative action taken against an employee or others after they took part in legally protected activity.



Retaliation: Frequent Bases for the Claim

- Discipline/Separation/transfers
- Denying a promotional opportunity
- Refusing to investigate a new complaint because the employee has complained before
- Changes in work schedule, conditions, or assigned tasks
- Poor performance reviews
- Unfriendly / cold shoulder treatment in the workplace



Scenario

Victoria is on the administrative staff of the agency and reported concerns of discrimination. An outside investigation was conducted. She says all of her co-workers are ignoring her and giving her the cold shoulder since she submitted her complaint.

.



How to Prevent / Stop Co-Worker Retaliation?



Who is Protected?

- Who is protected?
 - The complainant
 - Anyone who participates in the investigation
- Beware of BOTH ...
 - Obvious employer retaliation
 - More subtle co-worker retaliation

Can A Worker Be Disciplined After Making a Complaint?

YES – but...

An employee can be disciplined after making an harassment complaint if discipline is clearly warranted and unrelated to the complaint

Beware!! SB 497 Rebuttable Presumption of retaliation if an employee is disciplined or discharged within ninety days of protected activity



Who May Be Liable for Discrimination, Retaliation & Harassment?

Discrimination & Retaliation:

- The employer is liable for discriminatory or retaliatory employment decisions.

Harassment:

- The **employer** (for both supervisor and co-worker harassment) AND
- The **harasser** himself or herself



Who Are the “Enablers”?

- Supervisors/Managers who turn a blind eye to incivilities
- Elected/Appointed/Public Officials who don't model civil behavior
- Organizations that do not actively promote civility as a core value
- Co-workers who don't “call out” incivility when they see it

Personal Liability of the Harasser

- Public officials, supervisors, co-employees may be held personally liable to the victims of sexual harassment;
- Individuals who have engaged in harassing conduct may be held liable for compensatory and punitive damages – Even if employer not liable
- Sexual harassment is generally found to be outside the course and scope of employment, so an employer may not defend the harasser in a lawsuit or indemnify the harasser for an adverse judgment



Employer/Agency Liability for Harassment



Harassment by Supervisors



Under California and Federal law, an employer is **STRICTLY LIABLE** to a victimized employee for a hostile work environment created by a supervisor with “immediate (or successively higher) authority over the employee.”

- **“Supervisor”** – broad definition under the FEHA “Any individual having the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action . . . If the exercise of that authority is not of a merely routine or clerical nature, but requires the use if independent judgement.”

Harassment by Co-Workers and Third-Parties

An employer is liable for harassment committed by a non-supervisory employee or other individual if:

- The employer “knew or should have known” about the harassing conduct; and
- The employer failed to take immediate and appropriate corrective action.

EMPLOYER LIABILITY FOR OFF DUTY CONDUCT



- “In order for the employer to avoid strict liability for the supervisor’s actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor’s actions regardless of whether the supervisor was acting as the employer’s agent.” *Myers v. Trendwest Resorts, Inc.*, 148 Cal. App. 4th 1403, 1421 (Cal. Ct. App. 2007)

Accountability

- A **Supervisor or Agency Leader** who is (or should be) aware of potential harassment must take action
- Bear in mind policy accountability is often stricter than legal accountability



Statute of Limitations for Filing FEHA Complaint



- Three years after the alleged unlawful harassment/discrimination/retaliation occurred
- 1 year to file suit upon receipt of Right to Sue notice from DFEH
- What about reoccurring harassment?
 - Continuing Violation
 - Conduct ends or is brought to an end, or
 - Further effort on your part to end the conduct would be futile

Responsibilities of Supervisors/Managers/Board Members/Elected and Public Officials



- Take working relationships seriously
- Be proactive – address bullying and abusive conduct before it evolves to harassment
- Document complaints
- Try to prevent retaliation
- Lead by example...



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Questions?

Jacqueline M. Wade

Jacqueline.Wade@bbklaw.com | (213) 787-2552

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