

Harassment Prevention Training

*League of California Cities Annual
Conference*

Friday, October 9, 2020



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- Please TYPE any questions into the question box at any time during the webinar.
- The moderator will read your questions during the question period at the end of the webinar.



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Harassment Prevention Training League of California Cities Annual Conference 2020

Presented by: Rebecca Green

Why are we here?

- **AB 1825** – All supervisory employees must attend two hours of sexual harassment prevention training every two years.
- **AB 1661** – All elected local agency officials must attend two hours of sexual harassment prevention training every two years.
- **SB 778** – All non-supervisory employees must attend one hour of sexual harassment prevention training every two years.
- **AB 2053** – Sexual harassment prevention training must include a component on the prevention of abusive conduct.
- **SB 396** – Sexual harassment prevention training must include a component on harassment based on gender identity, gender expression, and sexual orientation.

Prevention is mandatory!

- **The law requires employers to take affirmative steps to prevent unlawful harassment.**
 - Ensure all employees are properly trained.
 - Adopt policies designed to prevent harassment.
 - Inform employees of their rights.
 - Employers must post a poster on discrimination in the workplace, including the illegality of sexual harassment, in a “prominent and accessible” location.
 - Employers must post a poster on transgender rights in the workplace in a “prominent and accessible” location.

Understanding Harassment

- You need to know what constitutes unlawful harassment so you can recognize it and avoid it.
- Many people do not understand what harassment means. This results in harassment being both under-reported and over-reported.
 - Harassment is under-reported when employees do not understand their right to a harassment-free workplace.
 - Harassment is over-reported when employees use the word “harassment” to mean any kind of unpleasant or unfair treatment.

Educate yourselves!

- **You should know what procedures to follow if you:**
 - Witness harassment
 - Receive a complaint of harassment
 - Experience harassment
- **The more you know, the better you can protect yourself, your subordinates, your coworkers, and the Agency.**

Know your policy!

Employers are allowed to adopt harassment prevention policies that are more stringent than the law. It is important to read and understand such policies because they may require more from you than the law does. For example, your employer may:

- Adopt a zero-tolerance policy on any kind of sexually inappropriate material.
- Require employees to attend harassment prevention training more often than the law requires.
- Adopt policies prohibiting abusive conduct, even though abusive conduct is not yet prohibited by law.

Be equipped to take action!

- Know the potential consequences of harassment, including discipline in the workplace and potential civil liability.
- Know your individual responsibilities to prevent and address harassment.
- Communicate to employees whom you manage or supervise what their rights and responsibilities are.

Consequences of Unlawful Harassment

- Unlawful harassment costs employers collectively over \$2 billion per year – and the cost goes up every year.
- But monetary costs are only one consequence.

Non-Monetary Consequences

- Stigmatization of the complainant and accused harasser
- Absenteeism
- Lower productivity
- Low morale
- Workplace strife
- Emotional cost to the victim

Anti-Harassment Law

The federal and state governments have enacted laws protecting employees against harassment.

Federal Anti-Harassment Law

- Harassment based on a person's sex or race has been illegal since 1964 (Civil Rights Act), but not widely recognized until much later.
- In 1986, the U.S. Supreme Court held that sexual harassment in the workplace is a form of sex discrimination prohibited by the Civil Rights Act. (*Meritor Savings Bank v. Vinson*)
- Many Americans had never heard of sexual harassment until 1991.

California Anti-Harassment Law

- The California Fair Employment and Housing Act (FEHA) was passed in 1959.
- The California Constitution (ratified in 1879) prohibits discrimination on the basis of race, and is now interpreted to prohibit race-based harassment as well.
- Other laws are occasionally used as the basis for harassment claims:
 - California Family Rights Act (1993)
 - Workers Compensation laws
 - Labor Code

Harassment is illegal if on the basis of:

- Race (including characteristics historically associated with race, such as hair texture and style – SB 188)
- National Origin
- Color
- Ancestry
- Sex
- Sexual Orientation
- Gender Identity/Expression
- Physical or Mental Disability
- Religion or Creed
- Medical Condition
- Genetic Information
- Marital Status
- Pregnancy or Pregnancy-Related Condition
- Veteran or Military Status
- Age

Hypothetical

George, a supervisor in the Finance Department, constantly screams at Alberto, his assistant. He tells Alberto he is stupid and lazy, and humiliates him in front of his coworkers, even when Alberto has done nothing wrong. One day, George threatens Alberto, “if you don’t do what I want, I’m going to make sure you never have a job again.” Alberto suspects that the reason George has singled him out is that George used to date Alberto’s sister, and she cheated on him. Is George engaging in unlawful harassment?

- a) Yes
- b) No
- c) I need more information!

Hypothetical

Melinda and Ana are friendly coworkers in the Finance Department. They both have the same title of “senior supervisor.” One day, Melinda tells Ana that she has started dating someone new. Ana is very excited and asks “what’s his name?” Melinda says that actually *her* name is Kristen.

After that day, Ana never speaks to Melinda directly, but constantly makes negative comments about gay and lesbian people in Melinda’s presence. Is this unlawful harassment?

- a) Yes
- b) No
- c) I need more information!

What Is Sexual Harassment?

- **Sexual harassment is a form of sex discrimination.**
- **There are two kinds of sexual harassment:**
 - Quid pro quo
 - Receipt of a workplace benefit in exchange for a sexual favor; or
 - Denial of a workplace benefit as retaliation for refusal of sexual advances.
 - Hostile work environment

Definition of Sexual Harassment

- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when submission to or rejection of 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.
- (The EEOC standard defines sexual harassment under federal law, and is often invoked by California state courts.)

Quid Pro Quo Sexual Harassment

- The conduct is unwelcome; and
- The conduct is sexual in nature; and
- Submission to or rejection of sexual advances affects the terms and conditions of employment, including:
 - Hiring and firing
 - Pay raises/bonuses
 - Better work assignments
 - Promotions

Hostile Work Environment

- **The conduct is unwelcome; and**
- **The conduct is sexual in nature; and**
- **The conduct**
 - unreasonably interferes with an individual's work performance; or
 - creates an intimidating, hostile, or offensive work environment.

Major difference between “quid pro quo” and hostile work environment

- A single incident of quid pro quo harassment can be sufficient for a sexual harassment claim.
- “Hostile work environment” harassment requires that the conduct is severe or pervasive.
 - Severe can mean one inappropriate touch.
 - Pervasive can mean less severe conduct occurring more frequently.

Forms of Sexual Harassment

- **Verbal**

- Sexually explicit language
- Request for sexual favors
- Unwanted comments on a person's appearance
- Obscenities, jokes, comments using gender stereotypes

- **Physical**

- Unwanted touching
- Does not have to rise to the level of assault, or even be overtly sexual

- **Visual**

- Pictures, posters, office decorations
- Cartoons, other “humorous” depictions

What is unwelcome conduct?

The challenged conduct must be unwelcome "in the sense that the employee did not solicit or incite it. . . ."

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

- An employee does not have to say “no” in order to prove that the conduct was unwelcome or unwanted. If an employee complains of sexual harassment, the burden is on the accused person to prove that the conduct was *not* unwelcome.

Hypothetical

Ted and Lily work together. One day, Ted walks past Lily's desk and says in a hushed voice, "If you give me a shoulder rub, you'll get a good bonus this year." Is this unlawful harassment?

- a) Yes
- b) No
- c) The answer depends on whether Ted frequently makes comments like this.
- d) The answer depends on whether Ted supervises Lily.

Hypothetical

Carol and Dan work together. Carol asks Dan out on a date. Dan has had a crush on Carol for awhile and accepts the invitation. They have a nice first date, but Dan isn't interested in going out again. When Carol asks him on another date, he says no. Carol starts wearing provocative clothing at work. She often walks past Dan's desk and asks him whether he likes the way she looks. Dan tells her to stop because her behavior makes him uncomfortable. Carol's behavior becomes more aggressive. She frequently stands close to Dan and tells him to look at her. She also brings in photos of herself in bathing suits and form-fitting clothing that is not appropriate for work. She sometimes leaves the photos on Dan's desk. Dan is so distracted by her behavior that his work performance starts to suffer. He cannot concentrate, and tells his supervisor that he is having anxiety attacks as the result of Carol's behavior.

Is this unlawful harassment?

If so, when did the harassment start?

Is the conduct unwelcome?

- **Conduct may begin as welcome, but then become unwelcome.**
- **The person engaging in the conduct has the duty to ensure that his/her behavior is welcome.**
 - Employees may not feel comfortable telling their supervisor to stop.
 - Courts use the “reasonable person” standard.
 - When an employee exercises control over another employee (e.g., supervisor-supervisee relationship), it is important to be especially vigilant of conduct that may make the subordinate employee uncomfortable.

Friendly versus “Unwelcome”

- **To determine if your behavior is unwelcome, ask yourself the following:**
 - Is there equal power between me and the person I am interacting with?
 - Is there equal initiation and participation between me and the person I am interacting with?
 - Does the person I am interacting with give any verbal or visual signs of discomfort with my conduct?
 - The person on the “receiving” end of the conduct need not ask the person engaging in the conduct to stop in order for it to constitute “unwelcome conduct” under the law.

Is the conduct sexual in nature?

- Depictions of persons in non-work appropriate clothing
- Depictions of persons engaging in sexual or romantic acts
- Discussions of physique, appearance, or sexual or romantic acts
- Requests of another employee to engage in sexual or romantic acts
- Repeated requests to go on a date
- Requests for physical contact, even if not overtly sexual (e.g., hugging, shoulder rubs)
- Jokes involving sex or gender, sexual orientation, gender identity or gender expression
- When in doubt, don't do it!

Gray Areas

- While courts try to use an objective, “reasonable person” standard to determine whether conduct rises to the level of harassment, the safest approach is to remain well outside of the gray areas.
- Safest approach: Avoid physical contact with coworkers.
- Safest approach: Avoid commenting on coworkers’ physical appearance.
- Safest approach: Avoid discussions of a sexual nature with coworkers unless directly related to work.
- Do not comment on or ask questions about a person’s sexuality, sexual orientation, gender identity, or gender expression, unless that person raises it first. Be respectful!

Could this be unlawful conduct?

- **An employee talks about his sex life in front of 10 people. Only one person is offended.**
- **An employee is talking to a trusted friend on the job about her sexual fantasies. Another employee overhears.**
- **An employee notices that his coworker seems stressed, so he gives the coworker a shoulder massage without asking.**
 - What if a gay man does this to a female employee – does that make a difference?
- **An employee tells jokes about a friend who recently transitioned from the gender he was assigned at birth.**
- **An employee always hugs his coworkers.**
 - Hugs male and female employees equally – does that make a difference?
- **An employee imitates the accent of someone who was born in a different country. The employee says it's okay because she was imitating her own grandmother.**
- **An employee makes fun of a co-worker who uses a wheelchair. The co-worker laughs.**

What am I allowed to do?

■ Can I ask another employee on a date?

- Under the law, yes, but employers are allowed to adopt policies prohibiting romantic relationships between coworkers.
- Once your coworker says no, continuing to express interest may constitute sexual harassment.

■ Can I hug my coworkers?

- Be careful! If you have a workplace friend and you both initiate hugging and participate equally in the physical contact, then you may be on safe ground. But you may be making other employees uncomfortable by hugging them, even though you are not making sexual advances and don't intend to make anyone uncomfortable.
- Why not err on the safe side?

Many people do not know

- Harassment can occur between any two coworkers, regardless of their position.
- Women can sexually harass men.
- Sexual harassment can occur between two women or two men.
- Sexual harassment need not be motivated by sexual or romantic desire.
- Harassment based on a person's gender identity, gender expression, or sexual orientation is prohibited regardless of motive. You can be "woke" (open-minded/progressive) and still be liable for offensive conduct.
- "I was joking" is never a defense.

Harassment By Third Parties

- **Employers are required to protect employees from harassment by third parties, even if they cannot control the behavior of third parties:**
 - Customers
 - Clients
 - Members of the public
 - Vendors, contractors, suppliers
 - Other third parties
- **The employer may be liable if it knew or should have known of the harassment and failed to take immediate corrective action to protect the harassed employee.**

Procedures

- What should you do if you experience or witness harassment?
- (Hint: **DO SOMETHING!**)

What should you do if you experience harassment?

- If you feel comfortable doing so, tell the person to stop.
- Report the conduct immediately.
- If you do not feel comfortable reporting the conduct to your immediate supervisor, report it to any supervisor or manager, to Human Resources, or to any person designated by your employer to receive complaints.
- The law permits you to report the conduct to the EEOC or DFEH without reporting it internally.
- Retaliation for reporting harassment is illegal. You cannot be punished for making a good faith report of conduct you believe to be unlawful harassment.

What should you do if you observe harassment?

- If you believe you have witnessed harassment, you must report it to your supervisor or other person designated by your employer.
- If you are a supervisor, you should discuss the situation with the person you believe was subjected to harassment to make sure he or she understands that the issue is being addressed. Ask the person whether he or she feels comfortable in the current situation, and if not, discuss what measures can be taken to make the person feel comfortable while the incident is being investigated.

Reporting the Harassment

- **You've decided to report harassment that you have seen or experienced. What should you do?**
 - Be honest; do not let your personal bias interfere with what you say.
 - Do not exaggerate, but be thorough and include all the details.
 - Be specific. (Who, What, Where, When)
 - Keep the matter confidential.
 - Let the person in charge of handling the matter (e.g., your supervisor, CEO, or Human Resources personnel) do whatever needs to be done to investigate or otherwise address the issue.

Employers' Duty to Investigate

- **When an employer receives a harassment complaint or report, it must take action to conduct a prompt and thorough investigation and to promptly respond to the charge.**
 - Not necessary that the complaint/report be in writing.
 - Not the employer's duty to determine at the outset whether harassment has occurred.
 - Interim measures should be taken to ensure that the complainant/victim is not subjected to further harassment. This may include separating the employees. The separation cannot be punitive towards the complainant.

Harassment Investigations

- **Must be conducted by someone able to be impartial.**
- **Confidentiality should be maintained to the extent possible, but absolute confidentiality should never be guaranteed to the complainant.**
- **The investigation must be completed, even if one of the parties involved leaves employment. A written report should be prepared.**
- **Everyone who participates in the investigation should be given the admonitions not to retaliate and not to discuss the investigation with others.**
- **Retaliation is a serious offense that warrants discipline and can subject the employer to liability whether or not the investigator concludes that harassment has occurred.**

What can happen to me if I complain?

- **Nothing – if you tell the truth**
 - **BUT...** You can be disciplined, up to and including termination, for knowingly filing a false claim and/or failing to be truthful during an investigation.
- **You cannot be disciplined or face any negative consequences for making a complaint in good faith, even if the investigation concludes that no unlawful harassment occurred.**
- **If you are retaliated against for complaining about harassment, you may report the retaliation directly to the DFEH or the EEOC.**

Sound anti-harassment policies are critical!

- Protect employees who may experience harassment
- Prevent employees from engaging in harassment
- Help supervisors communicate clear expectations
- Easier to justify disciplinary action if policy is clear
- Defense to litigation
- Smaller damages awards
- Despite mandatory trainings and advancements in the law, some people really do not understand what harassment is or why it is not acceptable, and need to have a written policy in front of them.

Typical Provisions In Anti-Harassment Policies

- Definition of harassment (err on the broader side!)
- Zero tolerance
- A list of persons to whom harassment must be reported
- What the employer will do upon receipt of a complaint
- Assurance of no retaliation
- List of possible consequences for engaging in prohibited harassment

Employer Liability

- Harassment by officers and directors acting within the scope of their employment
- Strict liability for a hostile work environment created by a supervisor with “immediate (or successively higher) authority over the employee.”
- An employer is liable for harassment committed by other employees 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)

Off-Duty Conduct

■ Is this unlawful workplace harassment?

- A few coworkers meet for a drink after work. One of them inappropriately touches another.
- A department head invites all department employees to meet for a drink after work. The department head uses an offensive slur to refer to a gay coworker who is not present.
- Two employees are hanging out on their break in the lunchroom, and one of them shows the other graphic photos on her phone.
- The agency invites all employees to a holiday party. Attendance is completely optional. At the party, a female employee makes fun of a male employee for “dressing like a girl.”

Gender-Based Harassment

- 50% of individuals who identify as transgender or whose gender does not conform to traditional male/female binary categories say that they have been harassed in the workplace.
- California law requires employers to allow employees to use the restroom that matches their gender identity, regardless of their biological sex.
- California law requires employers to allow employees to wear clothing that matches their gender identity or gender expression, regardless of their biological sex.

Gender-Based Harassment that is not Sexual Harassment

- Harassment based on someone's gender identity, gender expression, or sexual orientation is unlawful even if it is not sexual harassment.
- Gender-based harassment may include: negative comments about transgender or other people whose gender identity or gender expression is different from the sex they were assigned at birth; slurs, insults, stereotypes, offensive jokes; refusal to address a coworker by their preferred gender pronoun; refusal to accept a person's gender identity or gender expression including refusal to accommodate how they dress or what bathroom they use.

Supervisors: Your Obligations When a Complaint is Made

- Be familiar with your policies and follow them.
- You must take action, even if you do not believe the complainant. (Generally this will mean you contact a human resources professional or legal counsel.)
- The breadth of the response depends upon the complaint.
- All complaints must be investigated, even if the person making the complaint does not want anything to be done.

What happens in an investigation?

- The complainant is interviewed.
- The questioning is focused on obtaining specific facts that can be proven or disproven by evidence, including witness accounts.
- The complainant is asked whether there are other employees who would have information about the incident(s). Additional witnesses are interviewed.
- The complainant and witnesses are instructed to keep the matter confidential.
- The complainant is informed about what will happen next.
- Witnesses cannot be retaliated against.
- A report is prepared with factual findings.
- Your employer determines whether to take any remedial or disciplinary action.

Can an employee report harassment and ask that nothing be done?

- NO

- Knowledge by the employer/supervisor requires action.

Hypothetical: An employee whom you supervise tells you that your supervisor has been making offensive comments about her race. She asks you not to tell anyone, because if your supervisor finds out that she told, you will both be fired. She says that if anyone else asks her about it, she will deny everything she told you. What do you do?

Does a complainant get to know all the details of the investigation?

- **NO**

- The details of the investigation may contain confidential personnel information. Depending upon the impact of the harassment, the employee may only be given general information such as “An investigation was conducted, the allegations were sustained/not sustained, and appropriate action was taken.”
- The employee who complained and the person against whom the complaint was made have the right to learn the results of the investigation. They do not have the right to know who participated in the investigation or what the witnesses said.

What happens after the investigation?

- It usually 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.
- Your supervisor may have discretion to impose different levels of discipline depending on the severity of the offense.
- If the investigation concludes that no harassment occurred, a good faith complainant is still protected from retaliation.
- It may be beneficial to separate the complainant and the person complained against, but the separation may not be punitive towards the complainant.

What can happen to the person accused of harassment?

- **Actions may include:**

- Nothing
- Mandatory counseling/sensitivity training
- Change in work location/supervisory duties
- Reprimand
- Suspension
- Transfer
- Demotion
- Termination
- Civil lawsuit or criminal prosecution

Retaliation Strictly Prohibited

- **The law prohibits retaliation against employees who complain of harassment, oppose prohibited conduct, or participate in a harassment investigation.**
- **Conduct that may constitute retaliation includes:**
 - Demotion, suspension, reduction in pay, termination
 - Disparate treatment by others in the workplace
 - Change in duties or intangible benefits
 - Hostility or ostracization based on the employee's protected activity
- **Beware of perceived acts of harassment. The employee who has filed a complaint will be more sensitive to treatment perceived as negative.**
- **Claims of retaliation should be investigated the same way harassment complaints are investigated.**

Common Employer Pitfalls

- An employer cannot always control the behavior of its employees. Despite advancements in the law, increasingly clear guidance from the courts, and the development of better employer policies, harassment still occurs. Employers cannot turn a blind eye and put the responsibility to prevent harassment entirely on individual employees. Employers are responsible for preventing harassment to the best of their ability.

Pitfall #1

- **Mishandling of claims or concerns expressed by employees:**
 - Failure to take action when the complaint is made
 - Reluctance to address the issue
 - Failure to conduct a thorough investigation
 - Failure to take appropriate action against the perpetrator

Pitfall #2

- **Failure to document the investigation and actions taken - AND keep the records**
 - Employer must be able to justify the investigation findings.
 - Employer must be able to justify the remedial action taken, or lack of remedial action.
 - Employer must be able to demonstrate that it took steps to properly investigate and protect the complainant.

Pitfall #3

- **Improperly dealing with the complainant**

- Exercise caution when taking ANY action that concerns the complainant - particularly during or immediately after the investigation.

Hypothetical: Sarah made a harassment complaint against her supervisor in June. The investigator concluded that the supervisor treated Sarah poorly but did not harass her. Sarah has always been a good employee, but right after the harassment investigation occurred, the quality of her work declined, hurting the department's operations. Can her supervisor warn Sarah that her work needs to improve?

- a) Yes, because no harassment occurred.
- b) Yes, because her performance has genuinely declined.
- c) No – this is retaliation.

Pitfall #4

■ Ignoring later interactions

- If an employee is found to have engaged in unlawful harassment but is not terminated, it is important for the employer to keep its eye on the employee. The more complaints against the employee, the more liability for the employer.
- An employer has an increased risk of liability if it knew or should have known that an employee previously engaged in harassing conduct, and it did not take appropriate preventive action.

Pitfall #5

- **Failure to keep employees informed:**
 - Failing to keep all employees up to date about their rights and responsibilities concerning workplace harassment;
 - Failing to implement anti-harassment policies;
 - Failing to conduct periodic reviews of anti-harassment policies. Laws change regularly, and anti-harassment law is a rapidly evolving area.

Supervisors' Responsibilities

- **As a supervisor, you should be prepared to:**
 - Explain your employer's policies.
 - Assure other employees of your employer's commitment to a harassment-free workplace.
 - Explain the investigation and follow-up procedures.
 - Explain confidentiality.
 - Advise employees of the significance of being honest and forthright in investigations.
 - Acknowledge that an employee has done the right thing by coming forward.
 - Protect employees from retaliation.
 - Set a good example in how you speak and act!

What can I do (Supervisors and Non-Supervisors)?

- **Set a positive example! Be professional and respectful, and be conscious of your own words and actions.**
- **Think twice before asking personal questions or making personal comments. When in doubt, don't do it.**
- **Don't assume that you have the right to "express your opinion," if your opinion may single out individuals based on their sex, gender, gender identity or gender expression, sexual orientation, or other protected characteristics.**
- **Don't assume that jokes and gestures meant to be friendly are inoffensive to others, even if you mean no harm.**
- **If you say something offensive or hurtful, apologize. "I'm sorry, but...." is not an apology!**

What can I do (Supervisors and Non-Supervisors)?

- Know your employer's policy.
- Don't accept offensive behavior.
- Voice your concerns.
- Support people who are being harassed by cooperating in investigations and keeping them confidential.
- Do not ignore a rumor or informal complaint of harassment.

Hypothetical

Louise and Jeannette are both department heads (in different departments). Louise confides in Jeannette that she is having an affair with another department head. She says she doesn't really want to continue the relationship, but she feels uncomfortable breaking it off because it will be awkward for them to work together afterwards. Jeannette asks Louise if the relationship is consensual. Louise tells her, "yes, but I wish I could end it." Is Jeannette obligated to report this conduct?

- a) No, because Jeannette does not supervise Louise.
- b) No, because Louise and the employee with whom she is having an affair are at the same level.
- c) No, because the relationship is consensual.
- d) Yes, because the relationship is unwanted.
- e) Yes, because all workplace relationships might potentially constitute sexual harassment.

Hypothetical

Ted, a manager in the Recreation Department, often tells sexual jokes in the lunchroom. The jokes are not directed at anyone in the workplace. Mike, a manager in a different division in the same department, finds the jokes funny, and sees that most of his other coworkers laugh at the jokes. Then one of Ted's direct reports, Kelly, tells Mike that the jokes make her feel harassed because she is female. Mike tells her that she is being too sensitive because the jokes are about males and females. He does not tell anyone what Kelly told him, and does not confront Ted. He thinks "if I do nothing, Kelly will get over it soon." Did Mike do anything wrong?

- a) No, because the jokes are not specifically aimed at men or women.
- b) No, because Mike does not supervise Kelly.
- c) Yes, because all sexual jokes constitute sexual harassment.
- d) Yes, because Mike is a supervisor and is required to report all complaints of harassment.

Hypothetical

Rosa manages the Human Resources Department. An employee tells her that she saw Richard corner Mary at the holiday party and try to make Mary reveal her sexual orientation. Rosa has been close friends with Richard for many years and does not believe that he would ever do anything offensive. Richard has been working for the agency for 15 years and has never had a single complaint against him. Rosa believes that the employee who reported the incident is lying. Is Rosa obligated to investigate or report the complaint?

- a) Yes, if Rosa can confirm that there were other witnesses to the incident.
- b) Yes, because Rosa is obligated to act on all reports of potential harassment, even if she does not believe they occurred.
- c) No, because Rosa is 100% certain that Richard is a good person.
- d) No, because Rosa does not think the employee who reported Richard is telling the truth.

Abusive Conduct

- Employees are required to receive training to prevent abusive conduct, even though abusive conduct is not illegal.
- The Legislature has defined abusive conduct as: “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 may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person’s work performance. A single act shall not constitute abusive conduct, unless especially severe and egregious.” (AB 2053/Govt. Code § 12950.1)

What is Abusive Conduct?

- Abusive conduct is different from unlawful harassment in that it need not be based on a protected status.
- Abusive conduct is more than “bad boss behavior.”
- Conduct need not rise to a level where it would create criminal or civil liability in order to be considered “abusive” in the workplace.
- We don’t yet know what a court would consider abusive because abusive conduct is not yet prohibited by law.
- Employers are permitted (and encouraged) to develop their own definitions of abusive conduct, and to prohibit abuse of fellow employees.

Questions?



Thank you!

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