

Harassment Prevention Training for Supervisors and Officials (AB 1661)

Northern California
New Mayors and Council Members Academy

Wednesday, January 18, 2023, 9:00 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 Taylor Buck (tbuck@ca-ilg.org) with questions or concerns

ILG IS NONPROFIT, NONPARTISAN & HERE TO HELP

- ILG is the nonprofit training and education affiliate of three statewide local government associations
- 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



OUR PROGRAMS AND SERVICES

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Services

Education & Training

Technical Assistance

Capacity Building

Convening

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

Harassment Prevention Training for Mayors, Council / Board Members & Supervisory Employees

Anastasia Bondarchuk & Jenica Maldonado

Renne Public Law Group

January 18, 2023

WHY ARE WE HERE?



- **Required By Law** – Every two years, supervisors and non-supervisory employees must participate in training regarding sexual harassment, harassment, discrimination and abusive conduct prevention:
 - 2 hours for supervisors
 - 1 hour for non-supervisory employees
- **Workplace Best Practice**
 - Creating an inclusive environment
 - Responding to employee expectations post #MeToo
 - Consistent with public service mission

Audience Participation Tool – Menti

- To participate in interactive Q&A throughout this presentation:
 - Go to www.menti.com
 - Enter the code: **8629 0112**
 - Or join via the QR code below
- Once you are signed up, you will be prompted to answer poll questions throughout the presentation.



Training Schedule & Overview

- **Real Life Examples**
- **Defining Workplace Misconduct**
 - *Relevant Laws*
 - *Abusive Conduct/Bullying*
 - *Discrimination*
 - *Harassment*
 - *Retaliation*
- **Supervisors' Obligation to Respond**
- **Prevention**
- **The Role of Implicit Bias**

Real Life Examples

Real Life Examples

NY Governor Andrew Cuomo

- Accused of misconduct and predatory behavior by almost a dozen women, including 26 y/o staffer
- State AG investigation
- Impeachment inquiry by State Assembly
- Demands to step down resulted in Cuomo's resignation on August 10, 2021



Real Life Examples

Former Windsor Mayor Dominic Foppoli

- Allegations by four women of groping, rape and other forced sexual acts occurring between 2003 and 2019, during Foppoli's first term as mayor
- Council vote to demand resignation
- Foppoli resigned following Palm Beach investigation

The screenshot shows a news article from the San Francisco Chronicle. The title is "Windsor Mayor Foppoli resigns after sexual assault allegation by reality TV star Farrah Abraham". The byline is "Alexandria Bordas, Cynthia Dizikes, Julie Johnson" and the date is "May 21, 2021 | Updated: May 21, 2021 9:53 p.m.". Below the text is a large photograph of Windsor Mayor Dominic Foppoli. He is wearing a dark suit, a white shirt, a white bow tie, a white face mask, and a white cowboy hat. He is also wearing a blue sash with the word "MAYOR" in white letters. He is holding a rope. The background shows trees and a clear sky. There are social media sharing icons in the top right corner of the photo. Below the photo is a caption: "Windsor Mayor Dominic Foppoli, shown at an event last year, has announced that he will resign from office effective immediately. Jessica Christian/The Chronicle".

Real Life Examples

California State Treasurer Fiona Ma

- In July 2021, former staffer sued Ma for sexual harassment, racial discrimination and disability discrimination
- Gifts
- Termination and replacement by less qualified white female
- Litigation is ongoing, with trial scheduled for October 2023



1 16. In May 2020, Ms. Ma began renting a home through Airbnb instead of renting hotel
2 rooms for Plaintiff and other employees. The home was located at 30 Danrobin CT, Sacramento,
3 CA. At the home, Plaintiff, Ms. Ma and Ms. Jopanda each had their own room. While staying at
4 the Airbnb home, Ms. Ma exposed her bare rear end again to Plaintiff. A few weeks later, Ms.
5 Ma climbed into Plaintiff's bed while Plaintiff was attempting to sleep in it. Once noticing Ms.
6 Ma in her bed, Plaintiff pretended to sleep out of fear and confusion.

Cost of Sexual Harassment

Cal Matters Report

- In June 2020, Cal Matters released report identifying four-then current lawmakers, two former lawmakers and a dozen legislative employees showing substantiated cases of sexual harassment over the last decade
- Allegations included tight hugs, raunchy office banter, flirtatious text messages, groping, showing porn on government computers, talking about sex, vulgar name calling and comments regarding clothing
- Six-figure settlements resulted in some cases

INSIDE THE CAPITOL, OPEN REPORTING

Lawmakers named as California Legislature—at last—releases some sexual harassment records

BY LAUREL ROSENHALL
FEBRUARY 2, 2018 UPDATED JUNE 23, 2020



Photo via Pixabay

Cost of Sexual Harassment - Employer Liability

A Federal District Court Approved an \$18 Million Settlement with Activision Blizzard

- In September 2021, the EEOC filed a workplace discrimination and harassment lawsuit against Activision Blizzard, publisher of popular video games including World of Warcraft, Overwatch, and the Call of Duty franchise.
- The lawsuit alleged that:
 - A two-year investigation concluded that the company allowed a “frat bro” culture to create an environment that allowed sexual harassment to subsist with impunity.
 - Widespread complaints from women included their appearance regularly commented on and being groped by male employees, as well as being pursued romantically by male supervisors.
 - One female employee committed suicide on a work trip with her supervisor.



**COURT APPROVES EEOC'S \$18 MILLION SETTLEMENT
WITH ACTIVISION BLIZZARD**

*Current and Former Employees Encouraged to Make a Claim of Sexual Harassment,
Pregnancy Discrimination, or Retaliation with the EEOC*

Impact on Victims

- “To put a number on it, a study published Wednesday by Time’s Up and the Institute for Women’s Policy Research (IWPR), “[Paying Today and Tomorrow](#),” sought to nail down what people who had been harassed ended up paying. Victims interviewed faced expenses anywhere from tens of thousands to hundreds of thousands of dollars.”


workplace

Bloomberg Equality

The High Financial Price Paid by Victims of Sexual Harassment

A new study tries to quantify the cost in lost earnings—and lost opportunity.

By [Bryce Covert](#)
July 21, 2021, 2:00 AM PDT Updated on July 21, 2021, 10:20 AM PDT



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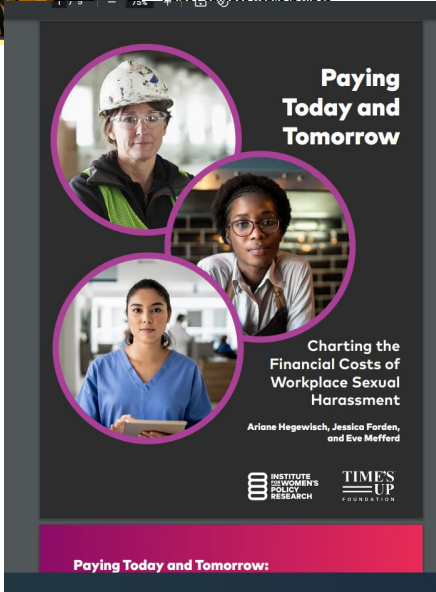
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Paying Today and Tomorrow

Charting the Financial Costs of Workplace Sexual Harassment

Arlene Hegewisch, Jessica Forden, and Eve Mefford

INSTITUTE FOR WOMEN'S POLICY RESEARCH **TIMES UP FOUNDATION**

Paying Today and Tomorrow:

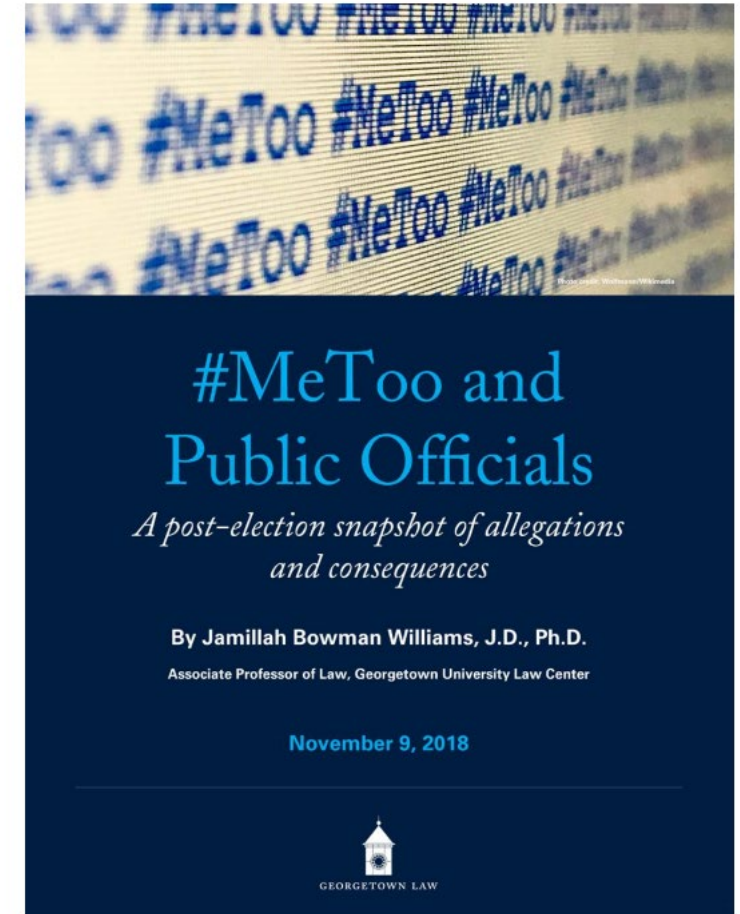
Relevant Studies

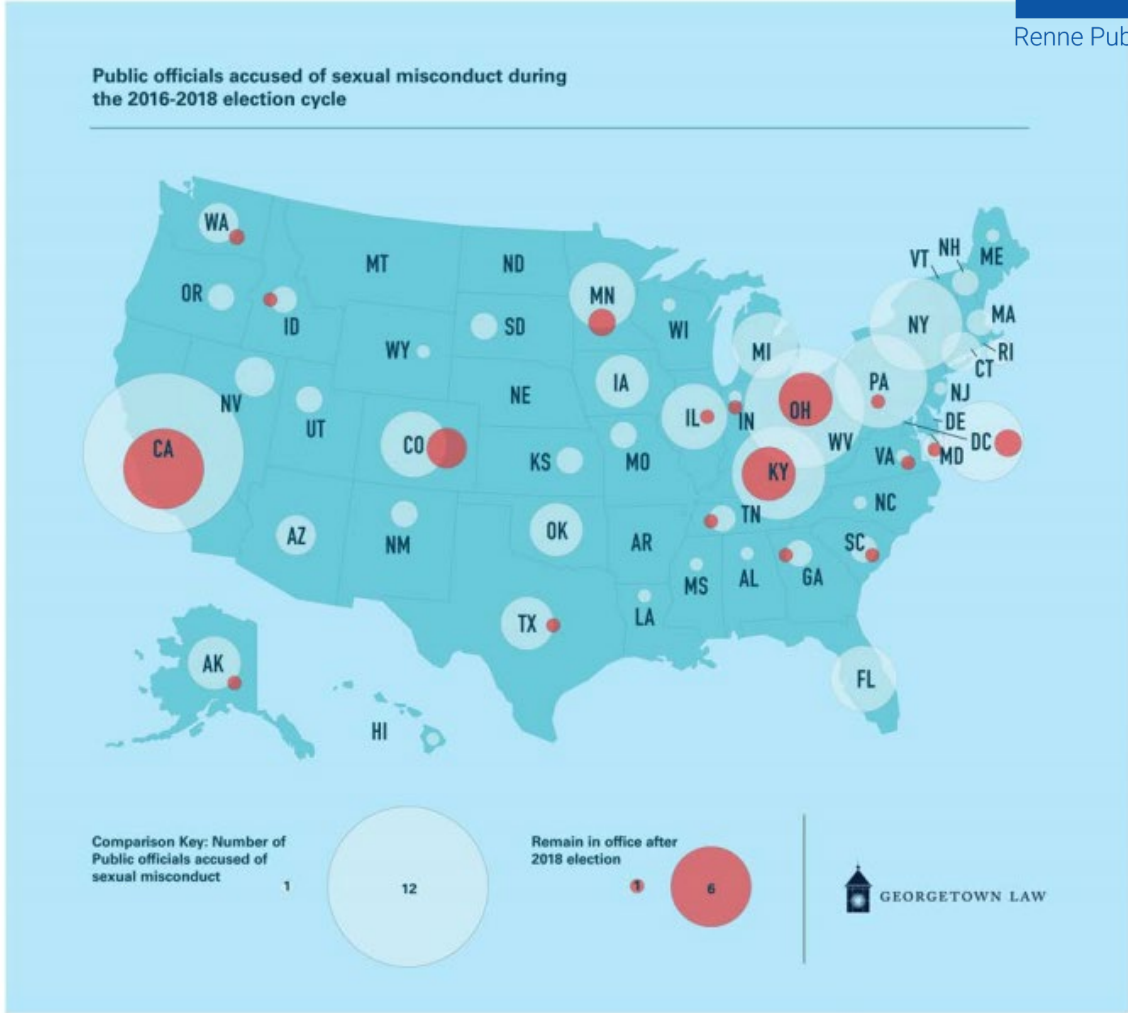
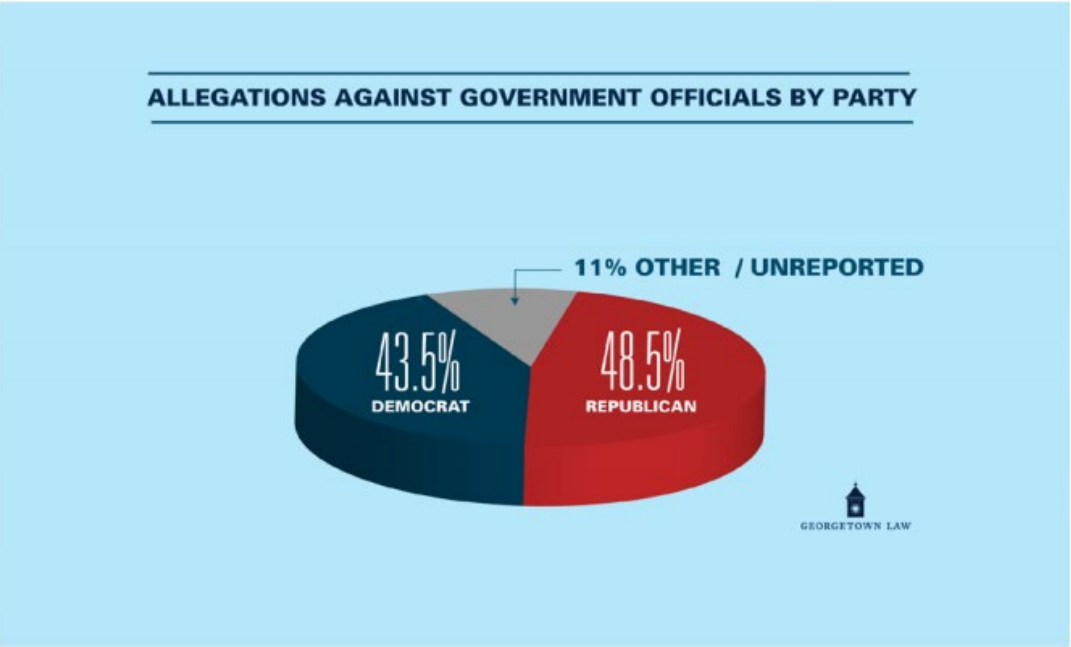
Georgetown Study & #MeToo Timeline

Cost of Sexual Harassment: Victims

- Between November 2016-October 2018, through review of local and national media reports, Georgetown identified 138 government officials publicly accused of committing sexual harassment, assault, misconduct, or violence against women.
- Seventy percent (70%) of those accused resigned or were ousted from their positions.
- #MeToo spurred several spikes in reporting accusations against public officials. In particular, reports rose in October 2017, after NYT reporting regarding Harvey Weinstein. Reporting dropped in the wake of the Kavanaugh hearings.

See Jamillah Bowman Williams, J.D., Ph.D., “#MeToo and Public Officials, A post-election snapshot of allegations and consequences,” Georgetown Law Report, dated November 9, 2018, available at: <https://www.law.georgetown.edu/wp-content/uploads/2018/11/MeToo-and-Public-Officials.pdf>





Source: <https://www.law.georgetown.edu/wp-content/uploads/2018/11/MeToo-and-Public-Officials.pdf>

Five Years and a Pandemic Post #MeToo

A Decrease in Sexual Harassment Claims

- #MeToo indisputably made a mark on the rate of sexual harassment claim filings. In the wake of the #MeToo movement, sexual harassment claims filed with the U.S. Equal Employment Opportunity Commission (EEOC) spiked, increasing from 6,696 claims in 2017 to 7,609 and 7,514 in 2018 and 2019, respectively—an approximately 12 percent increase since 2017.
- The trend changed in 2020.
 - After the onset of the pandemic, the number of sexual harassment charges filed with the EEOC decreased to 6,587.
 - In 2021, they decreased further to 5,581, dropping approximately 26 percent from the 2018 and 2019 numbers. That is to say, in 2021, the EEOC received fewer sexual harassment claims than it had immediately prior to the start of the #MeToo movement.
- The EEOC also reported that from 2017-2021, the percentage of sexual harassment charges filed by males remained fairly steady, suggesting that the rate of harassment claims decreased proportionally across the sexes.

Audience Participation Tool – Menti

Audience Poll:

Have claims of sexual harassment increased or decreased in workplaces that transitioned to remote work.

- a) Increased
- b) Decreased
- c) Remained the same



If you have lost connection, join using this QR code:

The State of Workplace Harassment 2021

Key Findings of Employee Survey

- **44% have experienced harassment at work.** They've experienced personal harassment and bullying, discriminatory harassment and bias, and online harassment and cyber bullying.
- **38% still experienced harassment remotely,** through email, video conferencing, chat apps, or by phone. Additionally, 24% believe harassment continues or gets worse through remote work channels.
- **53% say their workplace immediately addresses harassment.**
 - However, 12% see no action from their workplace, and 14.7% aren't aware of any action taken. Additionally, only 54% of respondents have had their issues fully resolved.

The State of Workplace Harassment 2021

Key Findings of Employee Survey

- **34% have left a job because of unresolved harassment issues.**
 - 26% have remained at a workplace despite there being ongoing issues of harassment.
- **Only 50% have reported harassment.**
 - 18% said that even though they experienced or witnessed harassment, they did not report it. Reasons include: fear of retaliation, that nothing would be done about it, or that they wouldn't be believed.
- **85% are more likely to report harassment if they have an anonymous channel.**
 - Respondents believe that they and their co-workers would be more encouraged to report with an anonymous reporting tool or platform.
- **Only 72% believe their workplace wants harassment reported.**
 - 28% say their workplace does not encourage employees to raise issues of harassment.

Defining Workplace Misconduct

Relevant Laws



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Employees v. Elected Officials



Relevant Laws

Rules Applicable to All Employed

- Title VII of the 1964 Civil Rights Act (42 U.S.C. 2000e)
- California Fair Employment and Housing Act (FEHA) (Gov. Code 12900 et seq)
- Cal. Civil Code § 51.9 (personal liability for elected officials)
- Equal Pay Acts (29 U.S.C. 206(d); Labor Code 1197.5)
- Court Decisions
- Collective Bargaining Agreements
- Local Laws
- Employer's Policy – BROADER than laws

Relevant Laws

Rules Applicable to Elected Officials

- Local agency officials must attend bi-annual sexual harassment training (AB 1661/Gov. Code § 53237.1)
- Elected officials who have the authority to hire, or fire are supervisors under FEHA
- Public agencies face liability if elected officials violate FEHA in light of public agency's obligation to protect employees from harassment by employees and nonemployees alike
- Elected officials can be personally liable for harassment (Civil Code § 51.9)

Defining Workplace Misconduct

Workplace Bullying

Workplace Bullying – Hard To Define

The Society for Human Resource Management (SHRM) defines workplace bullying as:

“repeated inappropriate behavior, either direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment.”

Workplace Bullying - Defined

Workplace Bullying Institute:

Workplace Bullying is repeated, health-harming mistreatment by one or more employees of an employer: abusive conduct that is either verbal abuse; or behaviors which are threatening, intimidating, or humiliating; or work sabotage, in some combination.

Workplace Bullying: Abusive Conduct – FEHA

- “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,” such as:
 - Repeated infliction of **verbal abuse**, such as derogatory remarks, insults, epithets
 - Verbal or physical conduct that a reasonable person would find **threatening, intimidating, or humiliating**
 - Gratuitous **sabotage** or undermining of a person’s work performance
 - A single act can be abusive conduct only if “especially severe and egregious”
- Not unlawful under FEHA when the bullying is not motivated or based on a protected class

Why Employers Should Address Bullying:

- Negative Productivity Impacts
- Bad Reputation, Publicity, and Recruitment
- Increases Turnover
- Can be perceived as unlawful with gender harassment
- Worker's compensation claims
- Leaves of absence

Example: Workplace Bullying Or Discrimination?

- Female Supervisor of Division of Emergency Communications dispatchers refused to assist and train newly employed dispatcher Jane Doe, addressed her with vulgar name-calling, told Doe to go home early from midnight shift to set her up for discipline.
- Other employees made a formal complaint about the abusive Supervisor causing Jane Doe to be reassigned to another trainer. Knowledge of complaint resulted in continued abuse and retaliation by Supervisor. Jane Doe suffered months of hazing and bullying.
- Predominately female employees on midnight dispatcher shift were subservient to Supervisor and Jane Doe came to understand that she was expected to adapt to this culture. Other male employees were not harassed or bullied to the same extent as the female employees.
- Bullying culture included: “persistent psychological intimidation,” “belittling comments,” “persistent baseless criticism of work,” “withholding resources necessary to work successfully,” and “eye-rolling, sighing, whispering, tongue-clucking and other body language designed to undermine... and send the message that... Doe was not a welcomed member of [Supervisor’s] clique.”

Doe v. City and County of San Francisco (N.D. Cal. 2011) 835 F.Supp.2d 762

Abusive Conduct Policy



- Some MOUs have language on a cause for discipline:
“Disrespectful or discourteous conduct toward a City officer or official, another employee, or a member of the public [while representing the City].”

Defining Workplace Misconduct

Discrimination

Discrimination – Definition

- To “discriminate” against someone means to treat that person differently, or less favorably, for some reason.
- Unlawful discrimination occurs when one person treats another differently or unfavorably based on a **protected category** under the law.



Audience Engagement – Word Cloud Activity

PROMPT: Text up to **three protected categories** into Menti within 30 seconds.

If you have lost connection, join using the QR code:



Answer: What Is A Protected Category?

- Race
- Color
- Religious creed
- Ancestry
- National Origin
- Genetic characteristics
- Sex (includes pregnancy, childbirth, breastfeeding or related medical conditions including abortion)
- Gender Identity
- Gender Expression
- Sexual Orientation (heterosexuality, homosexuality, and bisexuality)
- Marital (and parental) status
- Political affiliation
- Religion
- Age (40 and older)
- Physical Disability
- Mental Disability
- Medical Condition (HIV/AIDS, including all aspects of childbearing)
- Military and Veteran status

Gender Expression v. Gender Identity

- **Expression** - A person's gender-related appearance and/or behavior whether or not stereotypically associated with the person's assigned sex at birth
- **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

Transgender

- General term that refers to a person whose gender identity differs from the person's sex assigned at birth.
- A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth.
- A transgender person may or may not identify as “transsexual.”

Transitioning

- A process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth, such as:
 - Change in name and pronoun usage
 - Change in facility usage
 - Change in participation in employer-sponsored activities (e.g., sports teams, team-building projects, or volunteering),
 - Undergoing hormone therapy, surgeries, or other medical procedures.

Other Protected Categories

- **Workplace Injury**
- **Requesting/Taking Family/Medical Leave**
- **Opposition to unlawful discrimination/ harassment**
- **Perception that the person has any of the previously listed characteristics or that the person is associated with a person who has, or is perceived to have, these characteristics.**

When Can Discrimination Arise?

- Hire/Fire
- Promote/Demote
- Assign job duties/ training programs
- Discipline
- Compensation or benefits
- “Terms, conditions, or privileges of employment”
- Person’s status as an employee

What about characteristics that didn't make the list?

For example:

- Physical attractiveness?
- Tattoos and piercings?
- Beard?

Discrimination: EEO Violation Challenge

Question:

Including maximum experience requirements in a job posting is a potential EEO violation?

Yes or No?

Discrimination: EEO Violation Challenge

Question:

Is it legal for an employer to have a physical strength requirement.

Yes or No? It depends?

Discrimination: EEO Violation Challenge

Question:

May an employer require applicants to submit a photo?

Yes or No? It depends?

Discrimination: EEO Violation Challenge

Question:

Younger employee makes remark to older boss along the lines of “OK, Boomer.” Any EEO problem?

Yes or No? It depends?

Discrimination: EEO Violation Challenge

Question:

An employee's requested pronoun use protected under California EEO. For example, employee asks boss to use "they/them" in reference to employee moving forward? For example, Employer

Yes or No?

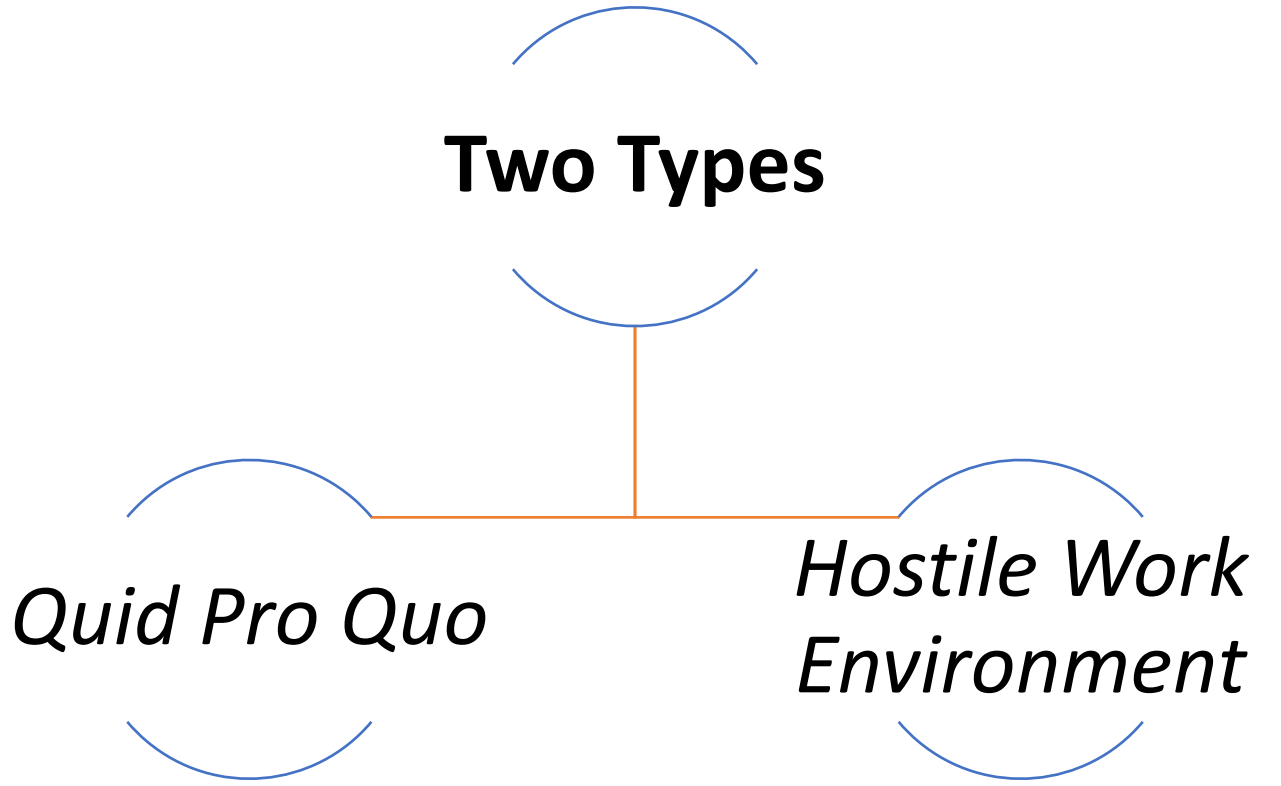
Defining Workplace Misconduct

Harassment

Harassment – Defined

- **Sexual harassment** is a *form* of discrimination based on sex/gender
- Individuals of **any gender** can be the target of sexual harassment. Sexual harassment may involve harassment of a person of the same gender as the harasser, regardless of either person's sexual orientation or gender identity
- Unlawful harassment does not need to be **motivated by sexual desire**
- Harassment based on other protected categories is also prohibited

Harassment - Defined



Quid Pro Quo – Defined

- **Quid Pro Quo**, i.e., “this for that,” refers to sexual harassment when someone conditions a job, promotion, or other work benefit on an employee’s submission to sexual advances or other conduct based on sex

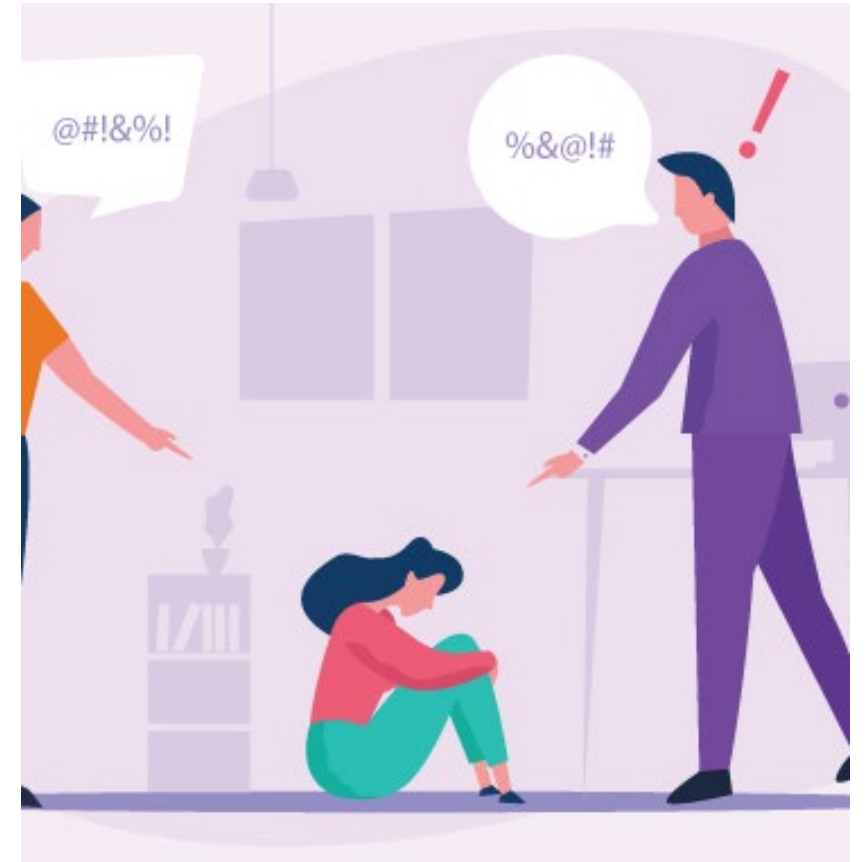


Quid Pro Quo – Defined

- **Legal Standard:** in court, a plaintiff must show a term of employment was expressly or implied conditioned upon acceptance of a supervisor's unwelcome sexual advances and identify a tangible retaliatory conduct (*i.e.*, because of the rejection of a sexual overture, the defendant subjected the plaintiff to tangible retaliatory conduct).
- Tangible retaliatory conduct is something that materially affects the terms, conditions, or privileges of employment.

Hostile Work Environment– Defined

- A hostile work environment occurs when unwelcome comments or conduct based on sex or another protected category **unreasonably interfere with an employee’s work performance** or creates an **intimidating, hostile, or offensive work environment**.
- The harassment must be **severe or pervasive** to be unlawful.
- A **single act** of harassment may be sufficiently severe to be unlawful.
- An employee may experience harassment even if the conduct is **not aimed at them directly**.



Hostile Work Environment Test

1. Is there harassment?

- Directed at or witnessed by victim, widespread sexual favoritism

2. Is it based on protected status?

- If not, is it Abusive Conduct?
- “Sexual desire” need not be motivation for sex harassment

3. Does it meet the subjective test?

- Did the victim actually consider the work environment to be hostile or abusive?

4. Does it meet the objective test?

- Would a reasonable person with the same protected status have considered it to be hostile or abusive?

5. Is it severe or pervasive?

- Did it harm the victim?

6. Did it violate policy?

- Always: Is it necessary?

2019 Changes To Standards For Hostile Work Environment

- Plaintiffs do not need to show their productivity has declined – just that the harassment made it “more difficult to do the job.”
- Single incident of harassing conduct can show a hostile environment.
- Stray remarks can show discriminatory intent (i.e., may be relevant circumstantial evidence” of a hostile work environment)
- Legal standard for sexual harassment does not vary by workplace.

Example: Hostile Work Environment – Sexual Favoritism

- Male supervisor harassed female district attorneys with unwanted touching of hips, thighs and buttocks, offensive and graphic sexual comments, sexually suggestive gestures
- Women who engaged in sexually explicit banter with him and let him touch and grope them received better cases and ratings
- Plaintiff rejected advances and was criticized, given bad assignments, and verbally abused (“difficult b*tch”)
- *Beth Silverman v. County of Los Angeles* - \$700,000 settlement (Aug. 21, 2017)

Employer Obligation

- Employer's duty is "to take all reasonable steps necessary to prevent discrimination and harassment from occurring."
- Consider enacting an **abusive conduct policy** if one does not exist
- Demand and model RESPECT and CIVILITY
- Manage by positivity
 - Check in with employees
 - Pause before reacting
 - Celebrate successes

Do You Have an Obligation To Report?

YES!

How?

Familiarize yourself with your organization's policy

When?

As soon as you become aware of it

To whom?

See your organization's policy. Usually, HR.

“Harassment ... shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.” Cal. Gov't Code 12940(j)(1).

Audience Engagement – Hypothetical

You are an elected official.

In the process of conducting interviews for a Council appointee – City Attorney, you direct staff to interview and provide feedback about candidates.

While reviewing the interview notes, you notice the following comment from one of the interviewers regarding one of the candidates: “Too old?”

Audience Engagement – Hypothetical

Department Manager Mike and Subordinate Sam work for the fictional town of Cali-ville. Mike, who is openly gay, made sexually advances against Subordinate Sam. When Sam rejected Mike's advance, a few days later, Mike made the following offhand comment using a sarcastic tone, "you're lucky that you're a pretty good employee; otherwise, I'm not sure if I'd keep you around." A few months later, Sam quit after he was assaulted by a co-worker; Mike was not involved in the incident. Sam later sued the company for quid pro quo sexual harassment. How did the court rule on his claim?

- A) The court found Cali-ville liable, on the basis that Mike engaged in quid pro quo sexual harassment against Sam.
- B) the court found Cali-ville liable, not based on quid pro quo harassment, but based on a hostile work environment theory.
- C) The court did not find Cali-ville liable for either type of sexual harassment, because Mike did not actually fire Sam for rejecting his sexual advance.
- D) The Court did not find Cali-ville liable for quid pro quo harassment because Mike's comment, made a few days later, wasn't really threat against Sam's job.

Answer via Menti on your device

Audience Engagement – Hypothetical

Correct Answer -

- **B) the court found Cali-ville liable, not based on quid pro quo harassment, but based on a hostile work environment theory.**

See Doe v. United Parcel Service, Inc., 2018 WL 10374625, Sept. 5, 2018 (finding that an “unfulfilled threat can support a hostile work environment harassment claim, but not a quid pro quo harassment claim); *see also Hughes v. Pair*, 46 Cal.4th 1035, 1049 (2009) (“But a claim involving ‘only unfulfilled threats...should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct.”)

Defining Workplace Misconduct

Retaliation

Retaliation

- **Retaliation is an adverse employment action or action that would deter complaining**
 - FEHA: Discharge, expel, call, or threaten to call ICE, or otherwise discriminate
 - Title VII: Adverse actions “must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination”
- **Protected Activity includes filing a complaint, testifying, or assisting in any related proceeding**
 - Employees have the right to complain of unlawful discriminatory or harassing treatment in the workplace.
 - Both state and federal law also prohibit retaliation against anyone who **provides information during, or participates in, an investigation or lawsuit.**
 - Witnesses to harassment are protected.
 - Only need a “reasonable, good faith belief he or she was opposing an unlawful employment action”
- **Retaliatory actions, such as demotions, pay raise denials, criticism for bringing complaints or termination are prohibited and can result in large jury awards**

Question: Was It Retaliation?

During the course of an investigation into rumors of sexual harassment by Employee Relations Director Joe, employee Jane is interviewed and asked whether she had witnessed “inappropriate behavior” on the part of Joe.

Jane describes several instances of sexually harassing behavior, including the following:

- Once, Joe had answered her greeting of “Hey Joe, [w]hat's up?” by grabbing his crotch and saying “[Y]ou know what's up”.
- Next, he had repeatedly “put his crotch up to [her] window.”
- Further, on one occasion he had entered her office and “grabbed her head and pulled it to his crotch.”

Jane had not previously reported these incidents as they occurred. Two other employees also reported being sexually harassed by Joe. Jane was subsequently terminated for embezzlement.

Is this retaliation?

Question: Was It Retaliation?

Your direct report complained to you about a violation of City Policy. Now that employee is due for a performance evaluation.

What are the risks of a negative performance evaluation, if any?

Retaliation Claims Can Proceed Even When Harassment Claim Fails

- An employee who brings a claim or participates in an investigation is protected even if the underlying harassment claim turns out to be meritless.
- In one case, the Ninth Circuit Court of Appeal dismissed a female employee's sexual harassment lawsuit because the conduct was not severe or pervasive, but permitted the employee's retaliation claim to proceed after the president claimed he was "tired of listening" to her complaints and fired her.

Defining Workplace Misconduct

Supervisors' Obligation to
Respond & Prevention

Employer's Role

- Employers in California have an affirmative duty to take reasonable steps necessary to prevent and promptly correct discriminatory and harassing conduct.
- Employers must create a work environment free from prohibited employment practices
- Employers have basic responsibilities under the discrimination laws:
 - Comply with Posting and Notice Requirements
 - Create and Distribute Harassment Prevention Policies
 - Provide Training
 - Ensure Effective Complaint Mechanism Is in Place and that Employees Are Aware of It
 - Conduct Investigations
 - Correct and Remedy Harassment in the Workplace
 - Don't Punish Employees for Reporting Discrimination

Supervisor's Role In Preventing And Responding To Harassment And Discrimination

Supervisors have basic responsibilities under the discrimination laws

- Know your policy
- Maintain and respect boundaries
- Don't discriminate or harass
- Listen and observe
- Intervene in real time
- Implement temporary corrective action
- Take all reports seriously
- Report and make complaints of discrimination and harassment
- Don't punish employees for reporting discrimination and harassment

Poll - Menti

Should you report harassment if it is just hearsay?

YES

NO

Poll - Menti

Should you address sexual harassment when it doesn't happen at work?

YES

NO

Conducting An Investigation

- Employers are required by law to use qualified personnel to conduct **impartial, timely, fair, and thorough** investigations that provide all parties due process and reach reasonable conclusions based on the evidence collected.
- California regulations require an investigative process that provides all parties appropriate "**due process.**" Although this is not specifically defined by the regulations, due process generally means:
 - Giving parties notice of what is being alleged against them;
 - Providing a meaningful opportunity to fully respond to the allegations being made;
 - Being thorough and complete;
 - Performing a fair and unbiased investigation; and
 - Acting in a timely manner.

Conducting An Investigation

- To fully and effectively conduct an investigation:
 - (1) interview the complainant, the alleged harasser, any witnesses to the conduct and any other person who may have relevant information.
 - (2) Plan in advance since a poorly planned investigation may expose both the organization and the investigator to liability.
 - (3) Communicate the determination to the complainant and the alleged harasser.
- **If you find that harassment occurred, provide a prompt and effective remedy to the complainant, and take disciplinary action against the harasser.** Ensure that no further harassment occurs.
- Remember, you must **also prevent retaliation** against the complainant or any other employee who participated in the investigation

Defining Workplace Misconduct

Role of Implicit Bias

Implicit Bias - Defined

- Not a legal doctrine, but a concept from social/psychological and behavioral science.
- Thoughts and feelings are “implicit” if we are unaware of them or mistaken about their nature.
- We have a bias when, rather than being neutral, we have a preference for (or aversion to) a person or group of people.
- Thus, we use the term “implicit bias” to describe when we have attitudes towards people or associate stereotypes with them *without our conscious knowledge*.
- Take the Test: <https://implicit.harvard.edu/implicit/takeatest.html>

Implicit Bias Example

- Boss has season tickets to local baseball team, but cannot make the game tonight.
- Employee A is male and shares the same race as the boss. Employee A hates baseball because it is too slow.
- Employee B is pregnant, female and is of a different race than the boss. Employee B loves the local team and regularly attends baseball games.
- Boss offers tickets to Employee A assuming that he would be more interested in attending the game than Employee B who he assumes needs to get home to her family.

Critique of Use of Implicit Bias Evidence in Court

- Courts have not yet reached a consensus as to whether this evidence should be admissible. Should evidence of implicit bias become admissible, would courts begin to penalize unconscious biases as opposed to conduct?
- Lawyers and courts could analyze the implicit biases of jurors in addition to the parties in discrimination cases. What unconscious preferences would be selected as strategic or advantageous for the employee and for the employer?

Why Employers Should Conduct Implicit Bias Training

- Builds an inclusive and welcoming culture.
- Focus on *interrupting* rather than *eliminating* implicit biases.
- Encourages employees to think critically and introspectively about their interactions.
- Helps employees perceive their employer or supervisor as fair.
- Reducing bias in hiring and promotion helps to prevent discrimination claims.

Resources

- Human Resources
- Civil Rights Department (formerly California Department of Fair Employment and Housing)
 - <https://calcivilrights.ca.gov/>
 - https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2020/03/Sexual-Harassment-Fact-Sheet_ENG.pdf
 - <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Workplace-Harassment-Guide.pdf>
- Federal Equal Employment Opportunity Commission
 - https://www.eeoc.gov/eeoc/newsroom/wysk/harassed_at_work.cfm
 - https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm

THANK YOU

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