

Harassment Prevention: AB 1661 Training

*League of California Cities Planning
Commissioners Academy*

Wednesday, March 16, 2022

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 Kim Danko
at [kdanko@ca-
ilg.org](mailto:kdanko@ca-ilg.org) with
questions or
concerns

ILG IS NON-PROFIT, NON-PARTISAN & HERE TO HELP

- ILG is the non-profit 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



**California Special
Districts Association**
Districts Stronger Together

OUR PROGRAMS AND SERVICES

Program Areas

Leadership & Governance

Civics Education & Workforce

Public Engagement

Sustainable & Resilient Communities



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



Liebert Cassidy Whitmore

Preventing Workplace Harassment, Discrimination and Retaliation

League of California Cities 2022 Planning
Commissioners Academy | March 16, 2022

Presented By:

Heather R. Coffman

Agenda

- Overview of Laws and Policies Related to Discrimination, Harassment, and Retaliation
- Protected Classifications
- What is Unlawful Discrimination, Harassment, and Retaliation?
- Types of Unlawful Harassment
- Duties of a Supervisor
- Bullying/Abusive Conduct in the Workplace
- Addressing Unlawful Discrimination, Harassment, and Retaliation in the Workplace



True or False?...

Elected Officials are required to participate in harassment prevention training.



True or False?...

Anti-harassment laws do not apply to volunteers and interns.



True or False?...

Employees who report harassment must put their complaint in writing.



True or False?...

If the employer is investigating a claim of harassment and the harassment stops, the employer may discontinue the investigation?



Overview of Laws and Policies Related to Discrimination, Harassment, and Retaliation



Sources of Law

- **Federal Law**

- Equal Pay Act of 1963
- Title VII of the 1964 Civil Rights Act
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- 42 U.S.C. §§ 1981 and 1983

- **California Law**

- Fair Employment and Housing Act (FEHA)
- California Equal Pay Act

Required Training for Elected Officials

- If a local agency provides any type of compensation, salary, or stipend to a local agency official of that agency, then all local agency officials of that agency shall receive sexual harassment prevention training and education pursuant to this article. A local agency may also require any of its employees to receive sexual harassment prevention training and education pursuant to this article.
- Each local agency official, or employee who is so required, shall receive at least two hours of sexual harassment prevention training and education within the first six months of taking office or commencing employment, and every two years thereafter.

California Government Code §§ 53237, 53237.1 (“AB 1661”) (2017)



Administrative Agencies

- **U.S. Equal Employment Opportunity Commission (EEOC)**
 - Federal Agency Administering Title VII, ADA, and ADEA Employment Discrimination Laws
- **California Department of Fair Employment and Housing (DFEH)**
 - State Agency Administering FEHA Employment Discrimination Laws

Agency Policy

- The agency's policy against harassment, discrimination and retaliation
 - Prohibits employees and non-employees from discriminating, harassing and retaliating based on any protected status (all must be listed)
 - Protects applicants, volunteers, independent contractors and employees from being subject to prohibited conduct
 - Provides a complaint procedure for employees to report violations for the Agency to Investigate
 - Identifies DFEH/EEOC resources including website or link to training
 - Provides confidentiality to extent possible
 - Appropriate remedies for sustained violations

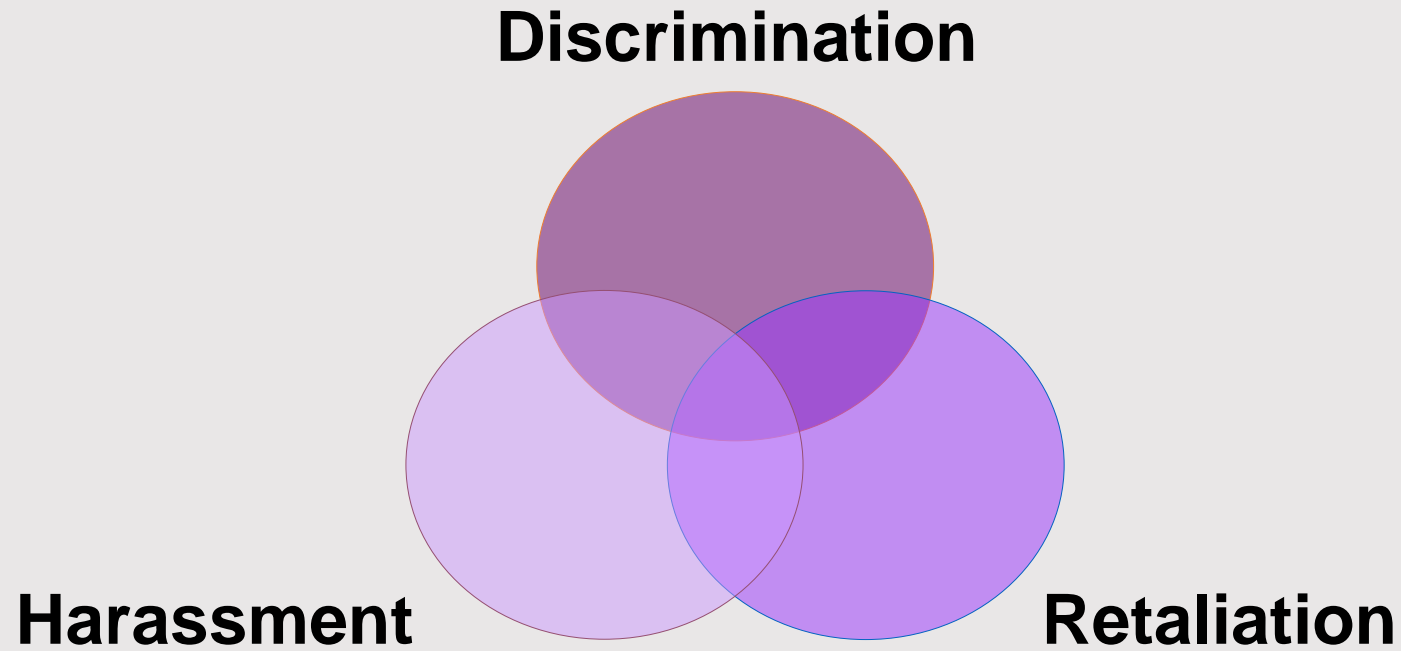
Agency Policy

- Zero Tolerance
 - Single violation of agency's policy can subject employee to appropriate disciplinary action even if violation would not establish liability or be a violation of state/federal law
- Distribution of Policy
 - Review with and provide to new and current employees with acknowledgement form to ensure receipt
 - Post in the workplace/intranet
 - Update policy when appropriate and notify employees of update

What is Unlawful Discrimination, Harassment, and Retaliation?



Unlawful Discrimination, Harassment and Retaliation



Unlawful Discrimination

Elements of Unlawful Discrimination

- An adverse employment action taken based on a protected classification

Adverse Employment Action =

- Action taken within the course and scope of employment
 - Hiring, firing, demotion, failure to promote, assignment of job duties, etc.

Unlawful Harassment

- Harassment is **NOT** within the course and scope of employment
- Verbal, visual, or physical actions that are unwelcome and directed to or related to an employee's protected classification
- Includes actions by/towards employees, independent contractors, vendors, and other non-employees

Unlawful Retaliation

Elements of Unlawful Retaliation

- Protected activity – broad standard
 - Reporting discrimination or harassment
 - Participating in an investigation
 - Refusing to follow order reasonably believed to be discriminatory
- Adverse action – broad standard
- Causal connection



Case Study

Jody is a clerk in the Planning Department. She files a sexual harassment claim against Planning Commissioner Jamison based on a conversation they had while Jody was at the front desk. While the agency investigates Jody's allegations, Commissioner Jamison believes he's been falsely accused. He refuses to work with Jody on time-sensitive projects, tells employees she is a "*no good liar*" and tells her supervisor that she has a "*poor work ethic.*" As a result, Jody's supervisor rates her as "Needs Improvement" and she does not get a step increase for the year.

What are the implications of Commissioner Jamison's conduct?



Protected Classifications



Protected Classifications

- Sex/Gender/Gender Identity/Gender Expression
- Sexual Orientation
- Race/National Origin/Color
- Disability/Medical Condition
- Genetic Information/Characteristics
- Religious Creed
- Marital Status
- Military/Veteran Status
- Age (40 Years of Age and Older)
- Opposition to Discrimination/Harassment
- Association/Perception

Gender Identity / Expression

Employers **Must**:

- Permit employees to use the restroom that corresponds to the employee's gender identity/expression
- Refer to employees using the employee's preferred name, gender, and pronouns
- Designate single occupancy facilities using gender-neutral signage

Gender Identity / Expression

Employers **Must Not**:

- Enforce dress codes more harshly against an employee based on their gender identity/expression
- Discriminate against an applicant for failing to designate a gender or designating a gender that is inconsistent with the applicant's sex assigned at birth
- Inquire about or require documentation or proof of an individual's sex or gender

Types of Unlawful Harassment



Two Types of Harassment

1. Quid Pro Quo ("Economic")



2. Hostile Work Environment ("Environmental")



Quid Pro Quo Sexual Harassment ("Economic" Harassment)

Elements of "Economic" Harassment:

- Job benefits promised;
- Explicitly or implicitly;
- In exchange for:
 - Sexual favors; or
 - Denied if sexual favors are not given.

Case Study

Sonya is the Finance Manager and oversees Accountant Leo among others at the agency. Leo's current assignment includes preparing department budgets – a highly coveted duty that involves overtime. At one time, Sonya and Leo briefly dated, but Leo ended the relationship because they have to work together. Sonya still regularly flirts with Leo in the workplace and makes comments to him that they should “*get back together.*” Irritated by the flirting, Leo confronts Sonya and tells her to stop. Sonya tells Leo she'll just reassign him to the less desirable job duties of audits at the agency (which has no overtime) if he does not “*chill out.*”

Is Sonya liable for quid pro quo sexual harassment?



Case Study

Program Analyst Mary finds sexually offensive language on the wall in the unisex restroom at the office. Mary is immediately offended and complains to her supervisor.

Is this quid pro quo sexual harassment?

If not, could this still constitute unlawful harassment in the workplace?



Hostile Work Environment ("Environmental" Harassment)

Elements of "Environmental" Harassment:

- Protected classification
- Physical, verbal, or visual conduct
- Objectively and subjectively offensive (unwelcome)
- Severe **or** pervasive
 - Single incident may establish liability under FEHA
- Unreasonably interferes with work

Hostile Work Environment (“Environmental” Harassment)

2019 Changes to California Law:

- Decline in productivity not required to establish harassment – it is sufficient that the conduct *“so altered working conditions as to make it more difficult to do the job”*
- A single incident of harassing conduct may be sufficient to create a hostile work environment
- Totality of the circumstances matter, including “stray remarks” by nondecision makers
- Standards do not vary by workplace
- Rarely determinable “on paper” alone



Physical Conduct

Obvious Examples:

- Criminal conduct
 - Rape
 - Sexual assault
 - Touching/groping
- Physical intimidation



Physical Conduct

Less Obvious:

- Massage
- Hugs



Case Study – Verbal Conduct

Although Georgia was assigned at birth as a male, she recently began presenting as a female, consistent with her gender identity. She notified her co-workers of her new changed presentation as she previously presented as male, named George. Rick and John refuse to refer to Georgia by her name or female pronouns and still call her “George” and frequently ask “him” why “he” uses the women’s restroom and wears skirts.

Have Rick and John created a hostile work environment?

Verbal Conduct

- Sexual comments
- Jokes
- Mocking accent
- Teasing
- Slurs



Case Study – Visual Conduct

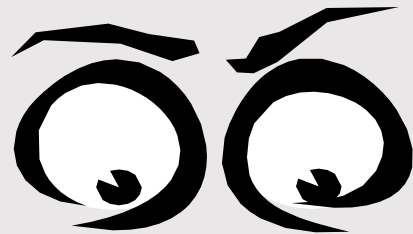
Ron arrives to work and finds a noose hanging in his office's doorway, with his co-workers and supervisor in the hallway looking at it and doing nothing. As an African-American, Ron is extremely offended and also embarrassed in front of his co-workers.

Has Ron been subjected to a hostile work environment?

Visual Conduct



Posters
Calendars
Magazines



Staring / Leering

Racial or Religious
Cartoons



Sexual Conduct /
Affection Between Other
Employees at Work



Emails

Gestures



“Gray” (Borderline) Areas

- “Private” and “consensual” relationships between supervisors and subordinates? (**Warning:** not for long!)
- Off-duty conduct
- Invitations to lunch, drinks or dinner
- References to appearance or dress
- Casual touching of non-intimate body parts
 - Hands on shoulders
 - Hands on waist
 - Hand on arm or leg

Duties of a Supervisor



Who is a “Supervisor”?

- Anyone who has any responsibility or discretion to lead others

Government Code § 12926(t)



Supervisor's Duty to Respond

*“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.”*

Government Code § 12940(j)(1)

Supervisors have an obligation to report harassment, discrimination, and retaliation of which they become aware.



Case Study

Margaret supervises a team of five employees, four of whom are male, and one of whom is female. Today, Margaret overheard the male employees standing around the water cooler speculating on how their female colleague must be “*in bed.*” The female colleague was not in the office and did not overhear the discussion.

Does Margaret have an obligation to take action even though the female employee was not there to overhear the discussion?



Duty to Respond

- Report observed/overheard conduct
- Forward complaints/issues to management and Human Resources promptly, including:
 - Third-party complaints
 - Verbal complaints
 - Rumors

Remember:

The word “*harassment*” need not be used to trigger your duty to act

Supervisor's Duty to Respond

Don't Ignore the Response!

- Take immediate action and report/ follow-up on any harassment, discrimination, or retaliation complaints received
- Cooperate in the investigation
- Prevent further harassment
- Assure no retaliation



Bullying and Abusive Conduct



Bullying/Abusive Conduct is Improper in the Workplace

- “Bullying/abusive conduct”
 - Conduct in the workplace with malice that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests
 - Includes verbal abuse, derogatory remarks/insults, threatening/intimidating/humiliating physical or verbal conduct, or undermining of a person’s work performance
- Bullying/abusive conduct issues are generally covered by the agency’s standards of conduct rules and such rules should be enforced

Bullying v. Unlawful Harassment

Both unlawful harassment and bullying consist of offensive conduct that is either pervasive or severe, and thus goes beyond mere incivility...

So, what's the difference?



Bullying v. Unlawful Harassment

**Protected
Classification**



Difference Between Unlawful Harassment and Bullying

- Unlawful harassment is directed at membership in a protected classification
 - Therefore, it is unlawful
- Bullying is **NOT** necessarily directed at membership in a protected classification
 - Therefore, bullying is **NOT** unlawful
- **While not necessarily unlawful, bullying/abusive conduct towards employees in the workplace is entirely inappropriate and should not be tolerated**



Addressing Unlawful Discrimination, Harassment, and Retaliation in the Workplace



What Can the Agency Do?

- Appropriate corrective action
 - Conduct prompt and thorough investigation
 - (Confidentiality is limited)
 - Keep the victim informed
 - Discipline perpetrator appropriately
 - Preventative training to prevent future violations
 - Re-publish/update agency policy

Options for Resolution

- Follow the agency's harassment policy complaint procedure
- The alleged victim can also take the following actions:
 - Report to the U.S. Equal Employment Opportunity Commission (EEOC)
 - Report to the California Department of Fair Employment & Housing (DFEH)
 - Lawsuits in State or Federal Court

Consequences – Agency Liability

- The **agency** is liable for:
 - The conduct of **supervisors** who engage in unlawful harassment, discrimination, or retaliation
 - Failing to take all reasonable steps necessary to prevent harassment from occurring

Consequences – Personal Liability

- **ALL** employees can be personally liable for engaging in unlawful harassment
- **Supervisors** can also be personally liable for condoning unlawful harassment or failing to act in response to an unlawful harassment complaint

Consequences – Damages

Damages Can Include:

- Back pay
- Emotional distress
- Punitive damages (individual employees)

What If You Are Accused?

- Refer the accuser to human resources, or upper management
- Report the accusation to your commission chair, human resources, or upper management
- Refrain from **ANY** action that could be interpreted as retaliation
- Seek constructive counseling from human resources/upper management
- Cooperate in the investigation
- Follow the agency's policy



Prevention

- Never play favorites
- Report all complaints immediately
- Take all complaints seriously
- Monitor the workplace
- Follow the agency's policy
- Be a good role model!

***The Ultimate Goal is to Establish a
Workplace Defined By Courtesy,
Sensitivity, and Respect***



Thank You!

Heather R. Coffman
Associate | San Francisco

415.512.3000 | hcoffman@lcwlegal.com

www.lcwlegal.com/people/heather-coffman/



Liebert Cassidy Whitmore