



Anti-Harassment Training for Supervisors and Managers - California

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Course Overview

Introduction

Welcome to “Anti-Harassment Training for Supervisors and Managers.”

Harassment in the workplace is not a new issue, nor, unfortunately has the presence of it in America’s workplaces diminished. Stories of bullying, sexual harassment, and insensitive behavior are prevalent in the news and in social media.

The 2018 Hiscox Workplace Harassment Study shows that at least one out of three employees have been harassed. Among women, the statistic is even higher, correlating with the survey’s most common form – gender or sexual harassment.

To prevent harassment, we need to understand it. For many people, sexual harassment is an emotionally charged topic, loaded with confusion and uncertainty. Additionally, abusive conduct such as bullying can have many forms. But with a little insight, harassment can be more readily identified and appropriately addressed.

This course is designed to provide a comprehensive explanation of what harassment is, how it can occur in the workplace, current legal positions, and how management can maintain a harassment-free workplace.

Some of the specifics we’ll be covering include: behaviors that constitute sexual harassment, other types of harassment including abusive conduct, what constitutes a hostile work environment, and how to handle complaints.

By the end of this course, you will be able to:

- Identify workplace behavior that might be considered harassment
- Explain the legal and other consequences of harassment
- Describe your role and responsibility in creating a work environment free from harassment
- Define your responsibility to respond effectively to complaints of harassment or retaliation
- State what actions to take against sexual harassment
- Describe sound policies and procedures on harassment

Harassment Overview

Workplace Harassment Defined

The Equal Employment Opportunity Commission, the EEOC, defines harassment as unwelcome conduct that is based on race, color, religion, gender, pregnancy, national origin, age (40 or older), disability or genetic information.

Disrespectful or offensive behavior by supervisors, employees, coworkers, students, or third parties, is inappropriate and, in some cases, may be an abuse of authority.

These behaviors are classified as either harassment or abusive conduct. No matter which category the behavior falls, the impact is always negative. When abusive and demeaning behavior is tolerated in our workplaces or campuses, we all suffer.

Harassment is a behavior, and adults are responsible for their own behavior and its consequences. This course will help to define the boundaries of appropriate behavior, which will help to prevent harassment in the workplace.

Respect in the Workplace

We each have the responsibility to treat others with respect and an obligation to maintain a workplace that's respectful for all. If you stay aware of your responsibility, and conduct yourself in a professional manner, you will have taken an important step toward eliminating harassment. But changing behavior requires more than just knowledge. You need to recognize the likely consequences of negative behavior and base your actions accordingly. The balance of risks and rewards is heavily stacked against offenders. Many people have lost their jobs, faced disciplinary action, and ruined their careers by engaging in acts of harassment.

To prevent such incidents from occurring, it is important to recognize and avoid behaviors that are not acceptable in today's workplace; to know what to do if you encounter unwelcome conduct at work; and how to respond if you become aware of such behavior occurring within the organization.

Legal Implications of Harassment

Because of its prevalence, harassment has become a dominant concern of employers, schools, and other organizations. It is one of the most litigated areas of the law. Virtually all major companies, government organizations, colleges and universities, and even the military, now have harassment policies in place. But how the definition of harassment is interpreted, and the parameters of what constitutes harassment, remain controversial.

The EEOC states that harassment becomes unlawful where

- 1) enduring the offensive conduct becomes a condition of continued employment, or

2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, gender, pregnancy, religion, and national origin.

Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

With the ever broadening definition of harassment used in the courts, companies and managers must be exceptionally diligent in preventing and dealing with harassment issues in a thorough and expeditious manner.

Effects of Harassment on the Victim

Effects of harassment can vary depending on the individual, and the severity and duration of the harassment. Any form of harassment, whether verbal or physical, has the power to cause psychological harm. Psychological research has revealed that severe or chronic harassment can manifest in victims as:

- Anxiety
- Nervousness
- Stress
- Depression
- Tiredness
- Lack of confidence
- Humiliation, and
- Nightmares

Backlash and victim blaming can further aggravate the effects.

Many victims of harassment will not report it for extended periods of time, if at all. This occurs for many reasons. In the case of sexual harassment, victims often wrongfully blame themselves. They feel helpless, hopeless, and/or powerless. They don't know how to report the harassment. They think that their complaint won't be taken seriously. They don't trust their own perceptions of what happened — maybe they feel they may have "misunderstood" the harasser's intentions. They don't want to cause problems or are afraid of the harasser.

Very often, victims say they don't trust "the system" — they don't think their workplace will support them if they report the harassment. Sometimes that mistrust will even extend to family and friends, believing that their family and friends will not support them. Many times, they feel embarrassed. Oddly enough, victims can rationalize the harassment. They may minimize it and decide that they don't want to get the harasser into trouble. Finally, victims sometimes

experience psychological blocks, which lock them into being a victim and prevent them from taking control of the situation.

For any gender, harm caused by sexual harassment is often extreme, including humiliation, loss of dignity, psychological injury, physical injury, and damage to one's professional reputation and career. Inevitably, victims face a choice between their work and their self-esteem. Sometimes, they face a choice between their jobs and their own safety.

Unwelcome Behavior

Examples of Unwelcome Behavior

Situations and people vary greatly, so how can you know in advance if a behavior is unwelcome?

Here are some general **guidelines to avoid committing unwelcome behavior**:

- Respect the people around you
- Think before acting
- Imagine how other people might be feeling
- Be sensitive to diverse perspectives
- Exercise common courtesy, and
- Think twice before making any joke

Some **questions to ask yourself** are:

- How would I feel if I were in the position of the recipient?
- Would my spouse, parent, child, sibling, or friend like to be treated this way?
- Would I like my behavior published in the organization newsletter?
- Could my behavior offend or hurt other members of the work group?
- Could someone misinterpret my behavior as intentionally harmful or harassing?

If you are unsure if something might be welcome, don't do it. There is no risk in not doing something.

Let's take a closer look at unwelcome behaviors by examining various situations and determining whether the behavior is welcome, unwelcome, or if it depends on other circumstances.

The Difference Between Abusive Conduct and Harassment

Harassment takes a wide variety of forms from mild to severe. The behavior may range from a harmful joke to physical assault. Whether a particular behavior is defined as illegal harassment depends largely on whether the behavior is unwelcome. Unwelcome behavior is exactly what it says it is: it is behavior that is not welcome, not solicited, and not wanted by the offended person. While you may perceive your behavior to be friendly and harmless, a coworker or

student may find it offensive. It is important to consider if your actions could be reasonably perceived as offensive.

Most adults who pause to think about it can distinguish between what might be perceived as welcome or unwelcome behavior and how others might react.

Unwelcome behavior is classified in two ways — abusive conduct and harassment. Most of your employees will be familiar with harassment, particularly sexual harassment, but abusive conduct is not as well-known. Both are types of unwelcome behavior, but what exactly is abusive conduct?

Abusive conduct is 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. A onetime offense is not considered abusive conduct, unless severe and outrageous.

Your boss losing her temper with you one time is not considered abusive conduct. An example of abusive conduct would be if your boss blows up on you using profanity while verbally attacking you and your work.

Or a company partner repeatedly loses his temper with you causing you to feel nervous and making it difficult to work on projects. Another example is your coworkers constantly stopping by your office and making fun of you for working hard. Or they repeatedly put you down for working with your boss on a project. These comments have nothing to do with work but do become an obstacle to you getting things done.

Everyone knows that abusive conduct is unacceptable behavior. So why do people still do it? It's possible that the attackers don't realize the impact of their behavior or that it places them on a destructive path of hurting themselves and others. Think about it. Abusive conduct attacks people, but it does not attack their race, sex, nationality, religion, or color, which are protected characteristics under Title VII law. Continuous abusive conduct combined with attacks against those protected characteristics will result in legal issues, as in those associated with sexual harassment.

Let's make this applicable. Remember the company partner with the bad temper? His behavior does not create a healthy workplace; it's abusive conduct, not harassment. However, if while yelling, he added racial slurs, then he has shifted from attacking the person to attacking the employee's race, which is a protected characteristic. Attacks on a person's protected characteristics is classified as harassing behavior.

Let's look at some situations that may or may not rise to the level of illegal harassment, based on such characteristics as race, age, religion, sexuality, and disability.

Jeremy, a new employee, likes to be the center of attention. He loudly shares his opinions, including racial and ethnic biases and other intolerances. Following a team meeting where Jeremy is particularly obnoxious, Joanne takes him aside, tells him she finds his comments offensive, and asks him to stop. Jeremy doesn't stop being loud, rude, or boorish after Joanne's request, but he leaves out derogatory references to protected groups. Jeremy's loud and opinionated remarks may not be a severe form of harassment, and since he stops the behavior immediately when asked, his offensive comments would probably not be considered pervasive. It is highly likely that a reasonable person within Jeremy's work group would not judge this behavior as unlawful harassment.

Sadie, who is Jewish, works in the receiving department where antisemitic attitudes and remarks are commonplace. Several of her coworkers go beyond just telling stories and jokes with offensive Jewish stereotypes and are openly intimidating and threatening to Sadie. Sadie complains to her supervisor, but her supervisor takes no action. Sadie is surrounded by hostile conduct. The offensive behaviors appear to be highly pervasive from not just one, but several of the employees. The severity of this conduct might be considered medium rather than high, but the frequency is high and complaints to her supervisor have been ignored. It is highly likely a reasonable person in Sadie's situation would judge this behavior as illegal religious harassment.

Harassing behavior shows great disrespect. Nobody is likely to accidentally or deliberately harass someone he or she respects. Despite some claims of oversensitivity, most adults understand the meaning of harassment — just as they know the meaning of teasing. An attitude of consideration and respect toward all those with whom we come in contact will go a long way toward creating an atmosphere that excludes illegal harassment.

Unwelcome Humor

Most of us love a good laugh. Humor can relieve tension and energize us but teasing and sarcasm are high-risk ways of communicating. Does this mean that all fun is out of order in the workplace? Absolutely not. But if the fun is at the expense of another person or group of people, it's risky. "It was just a joke" is not an excuse for harassment.

People often have such different perspectives on behaviors that it is easy to offend someone through ill-considered attempts at humor, teasing, or sarcasm. Before taking any risks, make certain that your behavior — whether in person, by phone, via email, text, or social media — is welcome. A careless mistake may become very costly to the respect others have for you and to your financial and job security.

Sexual Harassment

EEOC's Definition of Sexual Harassment

It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.

Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Your State's Definition of Sexual Harassment (CA)

Sexual harassment is defined as unwanted sexual advances, or visual, verbal or physical conduct of a sexual nature. This definition includes many forms of offensive behavior and includes gender-based harassment of a person of the same sex as the harasser. The following is a partial list of prohibited behavior:

Visual conduct: This encompasses leering, making sexual gestures, and displaying sexually suggestive objects or pictures, cartoons or posters.

Verbal conduct: Is defined as making or using derogatory comments, epithets, slurs and jokes. Verbal abuse of a sexual nature, graphic verbal commentaries about an individual's body, as well as sexually degrading words used to describe an individual are also included.

Physical conduct: Examples include touching, assault, and impeding or blocking movements.

Quid pro quo: This is the act of offering employment benefits in exchange for sexual favors.

Retaliatory Action: Making or threatening retaliatory action after receiving a negative response to sexual advances.

How Common is Sexual Harassment?

Sexual harassment is common throughout workplaces; in all occupations and professions; educational backgrounds; age, racial and ethnic groups; and income levels. Most reported cases involve a male harassing a female, but sexual harassment can also be a female harassing a male, or either men or women harassing members of their own sex.

The prevalence of sexual harassment can only be guessed as most instances go unreported. After the U.S. Equal Employment Opportunity Commission (EEOC) defined sexual harassment in 1980 and began to formerly accept complaints, only a handful of cases were filed in the early 80s. However, in 1986, a Supreme Court ruling decided that sexual harassment was covered by the 1964 Civil Rights Act, holding employers liable for the harassment of employees. This opened the doors for more claims to be filed. From 1991 to 1992, for example, the number of cases jumped fifty percent. And over the past 30 years, the EEOC has filed approximately 400,000 complaints.

In 2016, the EEOC released a comprehensive study of workplace harassment in the United States, which concluded that “anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace.”

Between 2016 and 2017, the number of sexual harassment charges filed with the EEOC shows a decline. However, the least common response of either men or women to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint. Two studies found that approximately 30% of individuals who experienced harassment talked with a supervisor, manager, or union representative. In other words, based on those studies, approximately 70% of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct.

As shown in the 2018 Hiscox Study, although men face harassment, women are the most likely victims. Men file about 15 percent of workplace sexual-harassment charges with the EEOC. Although such claims are most commonly brought by women against men, male employees can bring claims against women and workers can also bring same-sex harassment claims under federal and state anti-discrimination laws. EEOC statistics show that workers overall have brought more harassment claims since the #MeToo movement began.

Categories of Sexual Harassment

In the workplace, you’ll observe harassing behavior expressed through words, actions, touch, symbols, or images.

Verbally harassing behavior is anything that is sexually suggestive in the form of obscene or insulting stories, comments, sounds, or words. Examples of verbal sexual harassment include: derogatory comments based on gender or of a sexual nature, or comments about clothing or about a person’s body. Giving a man a compliment because of his watch is not sexual harassment. Commenting or complimenting on a man’s body and about how his physique helps

in his sex life is off limits and unprofessional. This category of harassment also includes sexual or gender based jokes or teasing; requests for sexual favors; repeated requests for dates; grunts, catcalls, hoots, and sucking noises; tales of one's sexual partner; and turning work discussions to sexual topics.

Included in the physical category is "accidentally" brushing sexual parts of the body; indecent exposure; uninvited neck massages; pressing or rubbing up against a person; stalking; grabbing, kissing, or stroking; and actual or attempted sexual assault.

Visual behaviors include staring at others' body parts; inappropriate posters, cartoons, drawings, calendars, and pinups of a sexual nature; electronic or computer graphics of a sexual nature; sexually expressive or revealing clothing; and sexually suggestive knickknacks or objects.

It's necessary to spell these out so that you're aware of what unacceptable behavior is.

Quid Pro Quo

Quid pro quo is Latin for "this for that" or "something for something." It refers to an exchange. In this case, the exchange is between a person in authority and his or her subordinates.

One party is asked to provide sexual favors in exchange for something else, such as grades, favorable treatment in work assignments, recommendations, pay, or promotion. Examples of quid pro quo: "Have sex with me and you'll get a raise," or "Have sex with me or you won't get a raise." Quid pro quo is usually more severe and occurs less frequently than hostile work environment sexual harassment.

Quid pro quo occurs when employment decisions and conditions are based upon whether an employee is willing to grant sexual favors. Some of the working benefits that can be made conditional on sexual favors are: hiring, promotions, salary increases, shift or work assignments, and performance expectations.

For example, Marissa's boss asks her to work late with him to complete a project. While they are alone after hours, her boss repeatedly tries to rub his hand against her thigh, and attempts to kiss her. She resists his advances and tells him she is not interested. The boss eventually stops the behavior and leaves, telling her to finish the project herself. Neither person mentions the incident again. However, the following week, Marissa's boss gives her an undeserved poor review, and denies her an expected pay raise.

Other examples are:

- When Ryan refuses the advances of his department chair, she assigns someone else to the summer course he has been teaching for years.
- The Operations Manager tells the summer intern that she will be hired on as a regular employee if she would agree to go out with him.

- A week after Matt ends his relationship with Chad — who is also his supervisor — Chad tells Matt his position has been cut and fires him.
- When April requests time off from work, her supervisor tells her that she can “earn” time off by granting him sexual favors.

A person does not have to prove that they suffered an economic loss — such as being denied a promotion or a raise — to prove quid pro quo sexual harassment. It's enough to show a threat was made or reasonably implied. According to federal guidelines, a single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits.

Hostile Work Environment

A hostile work environment is one in which unwelcome conduct of a sexual nature creates an intimidating, offensive, or disruptive work environment for one or more members of the company. Examples of this conduct may include: sexually explicit talk, text or emails, sexually provocative images, comments on physical attributes, or inappropriate touching. Harassment can take many forms, including sexual harassment, threats of violence, namecalling, or other harassing conduct. Harassment creates a hostile environment and can violate antidiscrimination protections. The following example could be construed as hostile work environment sexual harassment.

Tripp and Angela are coworkers in adjacent cubicles. Tripp frequently enters Angela's area, sits down, and begins describing details of his sex life. He also tries to encourage her to participate in the discussions. She tells him that she would rather not hear these stories. And he takes the opportunity to tell her that he could “help her release all of her prudish sexual inhibitions.” He will not stop these unwelcome conversations, regardless of how often Angela asks. She is hesitant to file a complaint because, other than this behavior, Tripp is pleasant and helpful.

Angela and Tripp are coworkers, and Tripp is not asking Angela to exchange sexual favors for better working conditions. So, his behavior is not quid pro quo sexual harassment. It could, however, be considered hostile work environment sexual harassment.

A hostile environment situation may also be created by conduct that is genderspecific, but not necessarily sexual in nature. When Hadi informs her supervisor she is pregnant, he becomes angry. He tells her that, if she cared at all about the department or her colleagues, she would just resign rather than disrupt everything by going on maternity leave. The supervisor often points out in meetings that Hadi won't be able to do certain projects because “she will be on her little vacation.” He takes assignments away from her, citing her inability to follow through because of her coming leave. As she progresses in her pregnancy, he mocks her by imitating how she walks, and how she sits or rises from a chair. Hadi's work environment has become abusive based on her pregnancy, and both her work and her health are affected. The supervisor's behavior is unacceptable and very likely a case of hostile work environment sexual harassment.

Here is another example: Deena works in the office of the maintenance department. She keeps her hair cut very short, dresses in men's clothing and does not wear makeup or jewelry. Mr. Ellis, one of the managers in the department, calls her "Dean." He frequently comments that she should dress in a more "feminine" manner and that the men prefer to have "pretty girls" in the office. Mr. Ellis has also called Deena a derogatory term for "lesbian" on several occasions.

Although Mr. Ellis's comments are not sexual in nature, they may nonetheless constitute harassment on the basis of sex. His comments deride Deena for her failure to conform to stereotypes about how women should dress and appear. Discrimination on this basis is prohibited by federal and most state laws.

A hostile environment can result from many different types of abusive acts, if they are based on any protected category.

Paul is an employee with a disability who works for the housekeeping department. Some of the employees, and even some of his coworkers, think it is funny to tease him about his disability. They call him insulting names and interfere with his work by intentionally spilling liquids or emptying trash cans in areas Paul has just cleaned. These behaviors make Paul's environment abusive and hostile and are a violation of the law.

Other Forms of Sexual Harassment

Sexual harassment does not occur just between a male boss and a female subordinate. Sexual harassment may occur in a variety of circumstances: between peers; by a subordinate toward a supervisor; by women against men; between members of the same sex — men harassing men, women harassing women; and by a third party, such as a vendor, customer, or contractor, against an employee.

Sexual harassment often involves people of unequal authority, but it can occur between employees of equal rank and among other peers. Peertopeer harassment is often not difficult to stop. A direct and clear request to the offender to stop the behavior is generally effective. If the request to the offender does not stop the behavior, the next step is to ask a supervisor to intervene. Once asked, the official is obligated to take appropriate action.

It is possible for a subordinate to harass a supervisor, although this is not very common. It may occur when the offender is particularly intimidating or if the victim is unable to exert the authority of his or her position. This type of harassment must be taken just as seriously as any other. If the behavior continues after requesting the offender to stop, the target of the harassment must seek help from a higher level of management.

Unwelcome behavior does not have to involve people of the opposite sex to qualify as sexual harassment. In a unanimous ruling in March 1998, the U.S. Supreme Court ruled that samesex sexual harassment is illegal. In 2001, California affirmed the prohibition against samesex

harassment in the precedential case of Department of Fair Employment and Housing (DFEH) v. Jarvis heard before the Department of Fair Employment and Commission.

Under federal and state law, harassing behavior toward someone of the same sex can be sexual harassment if the behavior is unwelcome, sexual in nature, based on the person's gender, or on his or her failure to conform to gender stereotypes. The criteria are the same as with sexual harassment between people of the opposite sex.

People offended by a hostile work environment need not be direct participants or targets of the hostile behavior. They can be third parties.

The most critical factor in determining if behavior is sexual harassment is whether it is unwelcome. In an office environment, people are not free to completely remove themselves from unpleasant situations. In these circumstances, behavior that is comfortable between direct participants may be unwelcome to third parties who cannot avoid observing it. An example of third-party harassment may include direct conversations about sex in the hearing range of those to whom it is unwelcome. Such behavior is unacceptable. Another type of harassment that may be referred to as "third-party harassment" is harassment of an employee by someone who is not an employee. This may include harassment toward an employee by a contractor, vendor, visitor, or customer. The company may be held liable for harassment by third parties, especially if management is made aware of it. In this case, the company is expected to take action to stop the harassment and prevent its recurrence.

Intent vs. Impact

When dealing with behaviors and choices that could lead to a sexual harassment complaint, your intent is irrelevant. It is only the impact of your choice that has relevance. This could be the impact on the work or school environment, or the offended individual. Regardless of intent, behavior will be judged on its impact.

Remember, the statement "I didn't mean anything by it" is not a valid defense of harassing behavior.

For example, Joey loves to tell funny stories and keep the spirit of good cheer alive in the lab. One morning, he spies Jessica looking a little tired and depressed. To cheer her up, he tells her a silly story with sexual innuendo. Jessica looks offended and moves away hurriedly. Joey didn't mean any harm, but what one person may intend as genuine friendship — even if in a clumsy way — can be perceived quite differently by another. Does this mean that an unintentional slight can contribute to hostile environment sexual harassment? Yes, it does. It is the impact of the behavior, not the intent, that matters with regard to sexual harassment.

The following is an example of intent versus impact. In this example, the way the behavior is taken by the recipient is very different from how it is intended. The impact of the behavior has an unintended negative effect, which makes the action at risk for being sexual harassment.

Jorge walks over to Sue's desk, carrying flowers.

Jorge, leaning against her desk: Good morning, Sue! You look pretty today. Good thing I bought these, they match your shirt perfectly.

Sue, sighing: Jorge, I told you to stop bringing me things. The poetry, the cards, the gifts . . . it's getting out of control.

Jorge: Ah, come on, I just want to show you what a great guy I am so you'll give me a chance.

Sue, getting frustrated: I've told you, I don't date people I work with!

Jorge, straightens and puts the flowers down, smiling: I'm not going to give up on you yet. I'll break you down someday!

He winks, then leaves. Sue takes the flowers and throws them in the trash. Another coworker, Lucy, walks by.

Lucy: Are those from Jorge?

Sue: Yeah. I keep telling him I don't want them, but he brings them anyway. He's asked me out eight times, even though I keep saying no.

Lucy: What are you going to do?

Sue, shrugs: I don't know, but it's actually starting to scare me how persistent he is.

Considering the "Reasonable Person Standard", Severity, and Duration

If unwelcome behavior of a sexual nature causes someone to take offense, it will be judged based on whether a "reasonable person" would find it offensive. This standard of a reasonable person has arisen from court attempts to interpret what behaviors should reasonably be considered sexual harassment.

Since not everyone interprets behaviors in the same way, the courts find that, in order to be illegal, the conduct must be severe or pervasive, and offensive to a reasonable person in similar circumstances. Under this standard, onetime unwelcome behavior will seldom qualify as sexual harassment, unless it is sufficiently severe as judged by a reasonable person.

Remember that since there are no clear-cut rules defining a "hostile and threatening environment," courts generally look at the severity or pervasiveness of the behavior, as judged by a "reasonable person." Each situation must be judged on its own factors, including severity and duration, and viewed from the paradigm of "what would a reasonable person think?"

For the past three months, Jennie, the Computer Help Desk Specialist, has received unwanted, personal instant messages from the IT Director on a daily basis. These IMs often contain details of his sexual fantasies, including those related to having sex with her in his office. Since IM is a

required means of communication within the organization, Jennie cannot turn it off. But when these offensive IMs appear, she does not respond. Her boss does not persist, nor does he mention them when he and Jennie are face-to-face.

Is this behavior severe, mild, or somewhere in between? Is it frequent, a rare occurrence, or somewhere in between? Would a reasonable person judge this behavior as sexual harassment?

Every day Jennie is experiencing offensive behavior. It is pervasive in that it has continued over several months and on a regular basis. In the absence of physical contact or actual demands for sex, the behavior may rank as only moderately severe. Jennie makes the mistake of ignoring the behavior instead of protesting it, so there is not the added severity of the behavior continuing following a complaint. It is likely that a reasonable person would judge this behavior as sexual harassment.

A young employee in a new job allowed herself to be kissed and fondled by her boss, when he cornered her after hours. The employee only submitted out of fear of being fired or demoted if the boss's advances were refused. Afterwards, the employee made sure she was never alone with her boss and vowed she would not let it happen again.

Is this behavior severe, mild, or somewhere in between? Is it frequent, a rare occurrence, or somewhere in between? Would a reasonable person judge this behavior as sexual harassment?

The sexual conduct is not pervasive if it occurred only once. However, it is fairly high on the severity scale. It is probable that a reasonable person would judge this behavior as sexual harassment.

Allan, a chemical supply salesman, manages distribution of an extremely limited solvent used in upper level biochemical labs. Cindy is a purchasing agent responsible for securing this product for her lab. Cindy has repeatedly been the target of Allan's insistence on unwanted lunch dates, where he engages in offensive sexual language and innuendo. Cindy has complained to her boss about Allan's behavior, but was only told how important it is to the lab that this supply of solvent not be interrupted.

Is this behavior severe, mild, or somewhere in between? Is it frequent, a rare occurrence, or somewhere in between? Would a reasonable person judge this behavior as sexual harassment?

This unwelcome behavior is frequently repeated, so it is pervasive. The salesman's behavior is verbally offensive but does not involve physical contact or requests for sex. Cindy is uncomfortable enough to complain to her employer, so the behavior may be considered medium on the severity scale. It is likely that a reasonable person may judge this behavior as sexual harassment.

Recently, Mason had his work station relocated from an office he shared with two likeminded coworkers, to an open area on the maintenance shop floor. Since he was hired a year ago, Mason's work station had been covered in printed materials showing nude or near nude women in sexually explicit poses. Mason's new work location is in full view of anyone entering the shop floor. Several of his coworkers, both male and female, have found Mason's materials offensive. As a result, Mason replaced the offensive materials with photos of popular actresses and super models more fully clothed.

Is this behavior severe, mild, or somewhere in between? Is it frequent, a rare occurrence, or somewhere in between? Would a reasonable person judge this behavior as sexual harassment?

Mason's sexually explicit materials are likely to be considered low on the sexual conduct meter. They are not a pervasive form of sexual conduct as he removed them immediately when asked and replaced them with acceptable materials. It is highly likely that a reasonable person would not judge this behavior as sexual harassment.

Victim Impact

There is no universal response to sexual harassment; different victims respond differently. One response is for the victim to quit his or her job. Other individuals may stay because they want or need their jobs. Reactions vary greatly and become more drastic as the harassment continues. People often initially ignore it. They hope that it's a onetimeonly incident, or that it will stop. That may progress to avoidance.

Employees experiencing harassment attempt to lessen the incidents by avoiding the harasser as much as possible, which could involve avoiding any place where the harasser might be. This strategy has only limited success and has a costly effect on the work performance and morale of the victim. When avoidance fails, the victim will often play along. This coping strategy manifests itself by members of the targeted group attempting to become gender neutral. For women, this means trying to become "one of the boys." The idea is to fit in and not be seen as an object of sexual attention. Victims will then begin taking overt actions to stop the harassment.

The impact of the experience can be severe. There are clusters of typical symptoms of victims of sexual harassment. Sexual harassment usually manifests itself with symptoms of high stress and anxiety. A victim's job performance suffers as avoidance tactics take up time and attention that would otherwise be spent on workrelated items. Performance also suffers, as the victim's feelings of increased helplessness and hopelessness impact morale and productivity. A fear of failure and/or ridicule becomes part of the context of doing the job. Inwardly, many victims end up suffering from depression. Depressive symptoms appear both at home and in the workplace.

It is common for victims to experience sleep disturbances and nightmares. Some additional physical responses include headaches, lethargy, gastrointestinal distress, skin problems, fluctuations in weight, sleep disturbances, nightmares, phobias, panic reactions, and sexual problems. The emotional effects of illegal harassment can be devastating as well. Harassed

employees often experience anxiety, shock, denial, anger, fear, irritability, insecurity, embarrassment, feelings of betrayal, confusion, feelings of powerlessness, shame, selfblame, and isolation. Many of these impacts may develop into longterm effects.

One of the most damaging effects of sexual harassment is that the victim will experience a change in viewpoint. The working world becomes an unwelcome, hostile place to be. The person who has experienced sexual harassment — especially prolonged and physical violence — will view the working world differently. There will often be a lower level of trust. A lessening of social contacts in the workplace. A different attitude toward presenting herself or himself to new employees and supervisors. There could also be longterm problems with selfesteem, in relation to people and job responsibilities.

Company Impact

Sexual harassment can have very damaging effects in the workplace environment. It is not unusual for employers to sustain significant, unnecessary losses every year due to workplace harassment. These losses take the form of absenteeism, increased staff turnover, and reduced productivity. Morale declines and divisiveness increases among coworkers. Workers' compensation and unemployment claims increase, along with the potential for litigation. Additionally, the intangible costs of damaged individual or organizational reputations and credibility can take years to rebuild.

The following examples are from actual cases that appeared in either federal or state courts, but company and individual names have been changed.

An EEOC case against Big Barrel, Inc., was settled in March 2006. It involved sexual harassment, racial harassment, and retaliation involving fifty-one former or current employees of three of its restaurants. The settlement amount was quite large, primarily due to the fact that the discriminatory behaviors had been reported on numerous occasions, and supervisors did nothing to stop it.

Another EEOC suit was settled in 2005 for just over a million dollars. The Los Angeles District Office alleged that River Brewery — one of the largest brewers in California — and its affiliates, engaged in a pattern or practice of sexually harassing female workers, and making job assignments based on sex. Defendants also retaliated against women who complained about harassment. A brewery supervisor, assistant supervisor, and some of the male crew leaders, harassed female migrant workers, most of whom were Spanishspeaking. Also, River Brewery admitted that only men had been hired into the more desirable yearround positions. Women were employed only in seasonal positions. This was a case of employees being subjected to sexual harassment, employment discrimination based on gender, and retaliation. All of which were considered in the final settlement amount.

Sally, a corporate sales manager at All Hours Gym between 1995 and 1997, alleged that she was subjected to sexual harassment by managers, salesmen, and personal trainers at the club, and was retaliated against for complaining. According to her complaint, the harassers were

never disciplined. After she reported the harassment, she was written up for various transgressions and ultimately terminated for not being a team player. The arbitrator awarded her 1.18 million dollars in compensatory damages and 1.25 million in punitive damages. The arbitrator also awarded 1.1 million in attorney fees.

The costs of sexual harassment are great. As these examples suggest, when companies fail to prevent or address harassment in the workplace, those costs can come with a lot of zeroes.

Employee Impact

One group that is often overlooked when discussing the effects of sexual harassment is nonvictim employees. These individuals can also feel the negative impact of harassment, sometimes to devastating effect — for themselves and for the company. These effects include, but are not limited to, decreased job satisfaction, poor performance, loss of job or promotion, absenteeism, and an employee quitting.

Bullying

The Truth About Bullying

Bullying is a hot button issue that continues to emerge in the national dialogue. While it initially focused on children and schools, advocates sought to expand the conversation to include bullying in the workplace. It can be argued that bullying in the workplace comes at a high price and employers should do more to prevent it.

The cost of bullying in the workplace includes:

- a reduction in productivity,
- low morale,
- increased absenteeism and turnover, and
- higher medical and workers' compensation claims.

In its report, the Senate Committee on Labor and Industrial Relations cited research conducted by the Workplace Bullying Institute. Their research found that 19% of Americans have suffered abusive conduct at work, another 19% have witnessed it and 61% are aware that workplace bullying happens.

Bullying is a national problem that is increasing. State and local lawmakers have acted to prevent bullying and protect victims. Through laws and model policies, each state addresses bullying differently. Bullying, cyberbullying, and related behaviors may be addressed in a single law or may be addressed in multiple laws.

Bullying is illegal when it violates federal or state laws prohibiting discrimination and harassment in the workplace. These laws protect employees from harassment based on protected characteristics, such as race, color, national origin, religion, sex, age, or disability. If a workplace

bully is targeting an employee based on a protected characteristic, that could qualify as illegal harassment.

Employers and employees should have clear expectations regarding what is and is not considered acceptable behavior and what the consequences are on the bully. As with sexual harassment, a mechanism for reporting and investigating bullying should be in place and used when required.

Identifying Bullying

Workplace bullying takes many forms. Here are a few examples:

- Molly works in sales. Her job requires her to meet particular sales goals. In group sales meetings Molly's boss, John, insults her when she fails to meet her goals. Over the course of the next month, John continues to berate her in front of her colleagues and encourages them to join in on jokes that refer to her as stupid, incompetent or ugly. When Molly speaks to John about his behavior, he states that it is simply humor and she should get a thicker skin. Molly feels humiliated and has trouble sleeping.
- Michael works in an office. For weeks, his co-worker Thomas has made it clear he does not like Michael. When it is necessary for them to speak, Thomas stands over Michael or invades his personal space. In group meetings Thomas talks over Michael or interrupts him whenever Michael attempts to speak. On their lunch break Thomas encourages his co-workers not to sit with or speak to Michael. Thomas consistently and loudly gossips about Michael in front of co-workers. Michael now suffers from severe anxiety every time he walks into work.
- Joseph is an accountant at a large accounting firm and he is experiencing difficulties with his supervisor, Patricia. She has written him up several times for non-existent performance issues and consistently insulted the quality of his work even though colleagues insist his work is of high quality. Patricia has also assigned Joseph tasks with impossible deadlines and then berated Joseph loudly in front of his colleagues when the task is not completed. She has also repeatedly denied his requests for both training and leave. This has been going on for months. Joseph is stressed and has slipped into a depression.
- Stephanie is a nurse in a large medical office. For over a year, she has been having trouble with a co-worker named Dawn. Dawn has reported Stephanie numerous times to management falsely claiming that Stephanie made mistakes in her work. The claims were all dismissed. Stephanie has repeatedly found her tools and equipment either missing or moved around making it difficult for her to do her job. Stephanie regularly overhears Dawn talking with co-workers about how pathetic and stupid Stephanie is. Stephanie feels sick with anxiety and shame and has begun missing work.

The elements to look for in bullying are:

- 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.

It is up to employers and employees to self-monitor and ensure that no one in the workplace is suffering at the hands of a bully and that appropriate and adequate action is always taken.

What Managers Can Do

Preventing Harassment

It is everybody's responsibility to prevent harassment, and it requires everyone's cooperation. A solid harassment prevention program should include: a training program that includes objectives, such as learning the definition of sexual harassment, identifying other types of harassment, the legal issues involved in harassment, behaviors that constitute harassment, and what someone should do if they are harassed.

It should also include your company's reporting and grievance procedures, as well as information on how to contact the EEOC or applicable state agencies, and what each individual can do to prevent harassment.

Harassment thrives in environments with a weak reporting structure, authoritarian management, poor morale, or a chaotic physical environment. Perhaps the single most effective strategy for preventing harassment is for all employees to be on the lookout. When you witness behaviors and language that make other people in the office uncomfortable, be willing to speak up. As a general rule, harassment is not something that just happens. Harassment occurs when each of us, as individuals, fails to take responsibility for the wellbeing of the people around us.

Responsibilities of Managers/Employers (CA)

People who consider the behavior of others unwelcome need to take reasonable steps to stop that behavior. Some individuals may find it difficult, under certain circumstances, to speak up. However, everyone needs to take action against harassment at the company.

When the behavior is relatively mild, this may mean directly asking the offender to stop. Or asking someone in authority, such as the manager, or human resource representative, for help. If the behavior is severe, more immediate and assertive action is required. Individuals who deal with the public, or with personnel from other organizations, must always ensure that their own behavior is acceptable. You must report incidents of unwelcome behavior by others in accordance with company policy and procedures.

Managers exercise authority on behalf of the employer. This gives them important additional responsibilities regarding unlawful harassment, discrimination, or retaliation. First, all supervisors must exercise their authority to ensure that their workplace is free of any type of illegal harassment, including sexual harassment. They must take every complaint seriously and respond promptly to employees expressing concerns. Second, managers who engage in

unwelcome behavior toward others, including subordinates, take a very large personal risk. A court may find them personally liable, in addition to their employer's liability.

The United States Supreme Court affirmed that employers are responsible for the behavior of their supervisory employees. Particularly, managers who abuse their authority are considered to be acting on behalf of the employer. Management must provide reasonable supervision and must respond promptly when employees complain of unwelcome behavior. The employer is liable in quid pro quo cases — whether or not management knew the harassment was occurring — under the doctrine of strict liability. This is because quid pro quo sexual harassment is an abuse of the power invested in management to hire, fire, and reward or discipline employees. The extent of the employer's liability in hostile environment situations depends upon whether the employer had notice of the harassment — through either actual notice or constructive notice. Constructive notice means the employer should have been aware of the problem because it was observable.

For example: displays of pornography, rumors about a particular manager's attempts to date his subordinates, or sexually explicit jokes that are frequently told in the break room. If the employer should have noticed the behavior, or could have seen or heard the behavior, and did nothing to stop it, then the employer is liable.

California law states that all harassers, including both supervisory and non-supervisory personnel, may be held personally liable for harassment or for aiding and abetting harassment. The law requires employers to take reasonable steps to prevent harassment. If an employer fails to take such steps, that employer can be held liable for the harassment.

Discouraging Harassment

There are many things you, as a manager, can do to prevent harassment before it occurs. Discourage any behavior which may be discriminatory or harassing; such as offensive remarks or demeaning verbal, written, or visual jokes directed toward individuals or groups. You, personally, can set an example by being a model of the type of behavior standards you expect from your employees. Within your area of responsibility, try to create an atmosphere in which people feel comfortable addressing issues and participating in problemsolving.

Supervisor Scenario

You are the supervisor of a large workforce. In the department there is one employee, Don, who seems to be liked by everyone, including you. Don is always in a good mood, very personable, and extremely witty. However, you notice that his wit often includes sexual jokes, comments, or remarks that some may consider offensive. In situations such as these, do not wait to act. Formally tell Don that you'd like him to refrain from making sexual comments and jokes at work. Ask him into your office and explain to him that his behavior is inappropriate. Even though you and Don both know that many of his friends in the workplace enjoy his remarks, remind him that it is a large department, and he can't assume that everyone is as accepting. Ask Don to be sensitive to the fact that some people may be uncomfortable with that type of humor. Finally,

document your discussion, and follow up your comments by advising Don that he will be subject to disciplinary action if the behavior continues.

Taking Action

The law requires those in positions of authority to take action if they know of, or should have known of, discriminatory behaviors. This means you should not wait for a complaint to be filed before taking action. If you become aware of a harassing or discriminating situation, take action immediately to stop the inappropriate behavior. Ensure that all employees complete required training and receive a copy of the sexual harassment and nondiscrimination policies. Be sure that everyone is familiar with, and understands, complaint procedures, and that they are aware of their rights and responsibilities. This includes informing employees that they have a right to a harassment-free environment, and an obligation to report any incidents of harassment that they may experience or witness, without fear of reprisals for doing so.

Report Immediately and Follow Up

When a complaint is brought to a manager's attention, the manager should immediately report it according to the reporting structure outlined in the company's policy and complaint procedure. It is also important to be supportive of complainants, however, if an employee approaches you to discuss a harassing situation. You should never promise to keep a situation involving harassment "just between the two of you."

Every situation needs to be investigated and resolved as quickly as possible. Always conduct fair and thorough investigations, or fully cooperate with designated investigators. Commit any assistance or resources that are necessary to probe allegations of hostile, abusive, or offensive treatment. It is critical that a manager be diligent and timely in taking corrective action — whether it is to resolve a situational issue, discipline an offending employee, or correct any harm done to the complainant.

Additionally, following a complaint or investigation, continue to monitor the situation, to assure that the problematic behavior has ceased. Periodically meet with the complainant after the issue has been resolved and confirm that no retaliation has occurred. And always, without fail, protect the privacy of all parties by maintaining confidentiality as much as possible.

Confidentiality

If you report an incident of harassment, or ask for help on a question of discrimination, harassment, or retaliation, you are entitled to confidentiality — within certain limits. When an investigation is conducted, those involved will need to be interviewed. Confidentiality will be protected where possible. Some people may "need to know." In such cases, these people will be asked to keep matters confidential, where possible. If the complaint becomes a lawsuit, or the subject of an external investigation, any request for confidentiality may not be able to be honored. Personnel files may be demanded, and individuals may be interviewed or even

deposed. Otherwise, access to your files on the issue can and should be limited to a "need to know" basis.

Managerial Susceptibility

As a manager, you are particularly susceptible to sexual harassment claims because you are in a position of authority. If an employee directly accuses you of sexual harassment, you should listen carefully to understand what that person is feeling, and why he or she feels your behavior was inappropriate or offensive. Regardless of whether or not you agree with or understand the other person's point of view, you should respect his or her feelings. This means that you cease the behavior in question and apologize for making that individual feel uncomfortable. It took an enormous amount of courage for the employee to deal with the issue. You should appreciate that the employee has approached you directly and provided an opportunity to solve the problem informally. Tell him or her that you will avoid similar conduct in the future and be sure to follow through on your promise. If you feel your behavior was acceptable, or that you are being falsely accused, immediately discuss the situation with your manager or human resources.

If a formal complaint is filed against you, you should become as informed as possible regarding the allegations. Understand that a thorough investigation must take place, though it may be an unpleasant experience. Cooperate fully with the investigator, being honest when questioned about the alleged conduct. Beware of attempting to contact the complainant, either to try to apologize or to obtain an explanation of the complaint. Such behavior, in some circumstances, may actually be considered retaliation. Under no circumstances should you act in any way that might be construed as retaliation against the person making the complaint. Also, in order to protect the integrity of the investigation, do not discuss the matter with others who may be party to the investigation.

Be Supportive

In addition to your procedural responsibilities as a manager, you also have responsibilities as to the manner in which you deal with the employee being harassed. As a manager, it is your responsibility to behave toward the victim of harassment with empathy. Empathy is the ability to identify with and understand another's thoughts, feelings, and experiences. You must remember that these are traumatic experiences. Empathetic responses to complaints will ensure that you are not perceived as dismissive.

Let's take a look at an example:

Bernie is sitting in his office when Kara bursts in, crying.

Bernie: Kara, what's wrong?

Kara: Some of the men on the loading dock have been taunting me.

Bernie: What do you mean, "taunting"?

Kara: They make lewd comments and sexual gestures when I walk by, and one even cornered me so that I would have to brush past him as I walked by. It's been happening for awhile and I just can't take it anymore.

Bernie: Have any of them touched you?

Kara, shaking her head: But I'm afraid they might.

Bernie: Okay, I'm glad you told me, but I know these guys. They always mess around like that, but they don't mean anything by it. Believe me, they aren't going to hurt you. Just . . . try to avoid them if you can and I'll tell them to watch their language.

Kara, looking miserable, nods and leaves the office.

Bernie's response fell way short of effectively addressing the issue of Kara's complaint. First, Bernie didn't recognize, or didn't acknowledge, that this behavior may be unlawful sexual harassment. Instead, Bernie called it "messaging around." Not surprisingly, Kara didn't find it as innocent or playful as this term suggests. Second, Bernie didn't appear surprised by the behavior of the men. In other words, this is not the first time this behavior has come to the supervisor's attention. The only action Bernie apparently intends to take is to ask the men to "watch their language." No formal complaint will be filed, no investigation will follow, and there will not even be a consequence imposed on the men involved. But the most overlooked aspect of this situation — as in many cases of sexual harassment — was Bernie's lack of any genuine concern for Kara's fear and sense of violation.

Remember, sexual harassment is about the impact on the victim. Bernie's advice to "avoid them as much as possible" will do nothing to lessen Kara's fear of future encounters or erase the helplessness and humiliation she felt. Knowing the men involved are likely to behave this way in the future, Bernie's casual attitude shows a great disrespect — not only for Kara, but for other women in the organization who may be subjected to the same behavior. There is very little chance that Bernie's "talk" with the men will result in their stopping the objectionable behavior. In fact, it could be argued that this inadequate response on the part of the supervisor is actually a tacit endorsement of the inappropriate sexual behavior.

A great many sexual harassment cases are never reported. This is often because the target of the behavior fears that the reporting process itself will leave her or him feeling just as helpless and harassed as the unwelcome behavior. It requires courage on the part of the recipient to report sexual harassment and trust that such disclosure will lead to an improved work environment and will not result in retaliation. This is often the reason that many claimants feel they must resign under duress — also known as constructive discharge — and then file complaints with a government agency and the courts. It is the responsibility of the men and women in supervisory positions to prevent this outcome.

Let's take a closer look at this situation to see how it could have been better handled. Kara had come into Bernie's office, very upset after a humiliating and frightening encounter with some

male employees on the loading dock. Kara was pleading for help, but unfortunately got little assistance from Bernie. Not only did her supervisor ignore the fact that Kara may have been the victim of unlawful sexual harassment, but he seemed unaware that the incident caused her great emotional distress.

As a supervisor, you are in a unique position to make a real difference in people's lives. You are specifically responsible for reporting any known instances of harassment. But you can also bring compassion and empathy to those who have endured the dehumanizing experience of sexual harassment. The first step is being aware of what the victim of harassment might be going through emotionally, as a result of harassing behavior. Victims of sexual harassment experience a wide range of emotions, which may include depression, anxiety, anger, fear, confusion, shame, and isolation.

Let's see how you might apply these techniques to the situation with Kara. Her story is the same, but now you are her supervisor. Kara bursts into your office distraught and near tears. She says that she has been the subject of sexual taunts by some men working on the loading dock. You ask Kara for details. She says they made lewd remarks and sexual gestures toward her and one blocked her path and cornered her as she tried to get past them. "Did they touch you?" you ask. "No, but I was afraid they might," replies Kara.

Assume that you've already gotten the necessary details of the alleged sexual harassment, and fully intend to report the incident. You want to ensure that Kara feels that she is in a supportive environment, where she will be taken seriously. It is important for you to acknowledge and validate her feelings by responding appropriately. For instance, "It must have been very scary for you to have felt threatened by those men." When you listen carefully to a person's emotions, and reflect what you hear the person say, it communicates that you are actively attentive, and it invites the person to tell you more. Let's assume the conversation continues from this point. You should continue this empathetic approach. A supportive response by a supervisor to a complaint of harassment can work to everyone's advantage. The complainant feels his or her concerns have been taken seriously. The organization benefits by reducing the initial emotional impact of the sexual harassment on work productivity. And the supervisor creates an environment of trust, not only with the complainant, but with other employees who may be contemplating coming forward with their own allegations of harassment, discrimination, or retaliation.

Creating a supportive environment is one of the best ways to prevent sexual harassment in the workplace.

It is easy to be empathetic and supportive with a vulnerable, likable employee like Kara. But what about when the complaint comes from a problematic employee? This may mean an employee who is difficult to like on a personal level, or whose credibility you doubt. So, let's recreate the scenario and replace Kara with Mindy, a loud, critical, and argumentative employee.

Bobby is sitting in his office when Mindy throws open the door.

Bobby, startled: Min—

Mindy interrupts him, yelling: Do you know what those jerks on the loading dock are doing? It's just so typical of men — they think they can do whatever they want, and this company encourages them by letting them get away with it! What are you doing, hiring jerks like that?! They have been making sexual jokes and giving me wildly inappropriate gestures for weeks! What are you going to do about it?

Bobby: Okay, Mindy. Why don't you sit down and tell me exactly what's been happening with the men on the loading dock?

Mindy, sitting: Didn't I just tell you? They make lewd comments and sexual gestures when I walk by, and one even cornered me so that I would have to brush past him as I walked by. It's been happening for a while and I just can't take it anymore.

Bobby: Have any of them touched you?

Mindy: Not yet, but if any of them do, I'll make sure they regret it.

Bobby: I'm really sorry this has been happening, and I can understand why being subject to this kind of behavior could make you feel insulted and angry. Let's discuss what we can do, starting with filing a complaint, after which a thorough investigation will be made.

It may be difficult to feel supportive of someone like Mindy, but you need to put your personal feelings or opinions aside. It is your responsibility, as a supervisor, to take every complaint seriously, and to make the complaint process and subsequent investigation go as smoothly — and fairly— as possible for all parties. Even employees like Mindy have a right to work in a harassment free environment.

Regardless of your personal feelings about any individual — complainant or accused — involved in a harassment, discrimination, or retaliation complaint; regardless of whether or not you think the charge is legitimate; and regardless of your opinion as to the seriousness of the claim, all complaints must be reported, investigated and resolved in a fair and timely manner.

Policy and Procedure

Prevention Policy

Everyone plays a role in forming a healthy and productive working environment free of harassment. The law places part of that requirement on the employer. As an employer, there are reasonable preventive measures that can be taken to address workplace harassment. The three we'll discuss are an antiharassment policy, complaint procedures, and a prevention program.

Some states require that employers have an antiharassment policy. However, even if not required by law, it is crucial to have an antiharassment or a sexual harassment policy as both can help clarify what behavior is acceptable and unacceptable in the workplace. In general, company policies should have three parts:

1. a definition section that clarifies necessary terms and behaviors,
2. a report section that explains what steps to take when filing a complaint or notice, and
3. a discipline or consequence section that spells out what will be done if the policy is not followed.

For an example of these three elements, we're going to look at the U.S. Department of State's Sexual Harassment Policy.

In this document is a brief introduction, and then the document begins defining sexual harassment. This is the first element of a company policy — the definition section. Along with the definition, examples of sexual harassment are included. Notice how they specify behaviors, and identify where certain behaviors can originate. Look at the other two parts of this document.

What do you see?

The Department of State's Sexual Harassment Policy is a strong example of how to effectively write a sexual harassment policy. It has all the required policy parts. These two parts highlight the Department's responsibilities as an employer and the responsibilities of the employees. Under the employee responsibilities, the content clearly instructs individuals on how to appropriately handle sexual harassment in the workplace. It also specifies to report the behavior to a contact person. One thing that could be done to strengthen this policy is to clarify how an employee who witnesses harassing behavior should respond. Overall, this policy has excellent structure that clearly conveys how each party will respond to instances of harassment.

Again, an effective company anti-harassment policy defines harassment and harassing behaviors, specifies how to implement the complaint procedure, and explains the consequences of violating the policy. These steps help to eliminate harassment before it becomes an issue too large to handle within the office. Employers can have policies on sexual harassment and antiharassment, along with other policies addressing consensual relationships, abusive conduct, social media, and companywide training. If you're not familiar with your company policies, take time to read them and discuss them with your company's HR department.

Complaint Procedures

To ensure that harassment issues are handled consistently, confidentially, and promptly, companies should establish — and clearly communicate — a formal complaint procedure. This way, employees can feel comfortable bringing grievances to management's attention secure in the knowledge that their complaints will be handled appropriately.

Here are the general guidelines for establishing a complaint procedure.

One, identify who should receive complaints. A primary reason why many incidents of harassment in the workplace go unreported is that victims aren't sure whom they should report those incidents to, especially if the harasser is their direct supervisor.

Two, allow for verbal or written accounts of the incident. This way, the victim can relay the events in the manner that's most comfortable.

Three, maintain confidentiality. Only people with a strict need to know should be privy to harassment complaints.

Four, conduct prompt, thorough investigations of all complaints. Regardless of the severity or the people involved, all reported cases of harassment should be taken seriously and addressed accordingly.

Five, retaliation will not be tolerated. When someone is being sexually harassed, or is a witness to such behavior, they should be able to tell what they know without fear of retribution.

And six, take prompt corrective action. Complaint procedures should assure victims that the company will take whatever corrective actions are necessary to rectify the current situation, and to prevent harassment from happening in the future.

Investigation Procedures

In order to ensure that complaints of sexual harassment are handled directly, employers should have a formal investigation procedure in place. This starts by designating an investigation official. A person who is trained in conducting workplace investigations should be appointed to spearhead all investigations of harassment. This individual should be able to respond immediately to complaints, beginning an investigation within two business days.

Investigations should be fair and thorough. They should be unbiased, and should consider the rights and emotions of everyone involved. As much as possible, the circumstances of the investigation should be kept confidential.

Remedies for Victims

When someone is the victim of sexual harassment, it is essential to prevent a recurrence of the event. But the original incident has happened and cannot be undone. Yet companies can offer certain remedies. These actions — which are often financial in nature — are intended to help the victim cope with the event, and to help restore the integrity of the employer–employee relationship.

The most common form of relief is back pay. Back pay amounts to the wages lost as a direct result of harassment. This includes both salary and fringe benefits that would have been earned, either during the period of discrimination, or from the date of wrongful termination. Victims of harassment may also be entitled to reinstatement, a promotion, training, and

affirmative relief, which is a guarantee from the employer that the inappropriate behavior will cease.

If a sexual harassment complaint becomes a legal matter, the court may award compensatory damages to the victim, to compensate for emotional distress, pain, and suffering. If the employer refuses to reinstate an employee, that individual may be entitled to “front pay,” which is based on anticipated future losses. There may also be punitive damages, which are intended to punish the employer for intentional, malicious discrimination.

Post Accusation

False Claims

Both men and women sometimes attempt to file false claims of discrimination or harassment. Their reasons are many: psychological problems, the desire to get back at a manager or coworkers, the desire to gain status among peers, the attempt to earn money in a lawsuit, or perhaps an attempt to protect their jobs if they are performing poorly. False claims can lead to serious discipline and financial liability for the accuser. Once sexual harassment has been reported, a company is obligated to investigate all claims, including accusations that later turn out to be false.

Retaliation

Retaliation or threat of retaliation, against an employee after he or she has complained about or participated in an investigation of harassment is unlawful and can lead to serious consequences. Once the allegation of sexual harassment is raised, all people who have knowledge of the issue are required to cooperate fully in the company’s investigation. The U.S. Supreme Court established a definition of retaliation that includes any employer action that could discourage a reasonable employee from making or supporting a charge of harassment or discrimination. The Court stated that the standard is objective, based on the perspective of a “reasonable worker.” By necessity, the standard is flexible because the significance of any given act of retaliation is context-specific and may depend upon an employee’s professional and personal situation.

The Court gave two examples to clarify that the difference between “trivial harm” and “materially adverse” actions is context specific. For example: a schedule change might be immaterial to most workers, but materially adverse to a young mother with schoolage children. A supervisor’s refusal to invite an employee to lunch is usually trivial, except if the lunch is a weekly training session that contributes significantly to the employee’s professional advancement. In the past, an employer’s action against an employee who had engaged in protected activities, was not considered retaliation unless it resulted in the employee being terminated, demoted, or otherwise monetarily impacted. However, in 2006, the U.S. Supreme Court stated that any action against an employee that has the effect of discouraging employees from filing complaints of discrimination, constitutes retaliation. A charge of retaliation, unlike charges of harassment or discrimination, does not necessarily require an adverse effect only on an employee’s

employment situation. Other circumstances, outside of the workplace, may be taken into consideration in determining if an employer's action, against an employee who filed a discrimination claim, constitutes retaliation.

The following scenario illustrates such a situation:

Two employees, one of whom filed a claim of discrimination, and another who testified on the complaining employee's behalf in the investigation, are reassigned to work at another site, several blocks away from their current work location. All the job duties, pay, benefits, and working conditions are the same at both sites. One of the employees drives to work and going the extra distance may be slightly less convenient, but not materially adverse. Therefore, the reassignment would probably not be considered an act of retaliation.

The other employee, however, has a medical condition which prevents her from obtaining a driver's license. So, she takes a bus to work. The alternate location is not on a bus route, and therefore requires the employee to walk an additional threequarters of a mile each way. Under the explanation provided by the Court, this could very well be considered an act of retaliation.

Approximately onethird of all cases brought against employers claim retaliation. An individual does not need to prove the original claim of discrimination in order to win the retaliation suit. In fact, there is a much broader definition, meaning it may actually be easier to prove retaliation than harassment or discrimination. This is very important for managers to understand. Managers must take care not to treat employees who have made any complaint of harassment or discrimination differently than they treat any other employee. This also goes for employees who were part of an investigation or had involvement with any such complaint. It may be instinctive to treat employees who file complaints differently than others but doing so is against the law. This emphasizes the importance of keeping personal emotions under control and leaving them at the door when entering the workplace.

Retaliation Examples

In the following examples, would a reasonable person believe the behavior to be petty slights or retaliation?

After an employee complains about a supervisor's harassing behavior, the supervisor refuses to acknowledge the employee when they pass in the hall. Almost certainly a petty slight. Using the U.S. Supreme Court standard of "trivial harm" and "materially adverse," this action fails both tests. Even if the supervisor had routinely acknowledged the employee in similar circumstances, this action has no consequences beyond a personal slight to the employee. It is quite certain this would not be considered retaliation in its legal sense, even if it may be taken that way in a personal sense.

What if the supervisor, with little or no explanation, denies the employee's first, second, and third choices of a vacation week? This is an example of an issue that would very likely depend on other factors. It might be shown to be retaliation if this employee had recently filed a

complaint, or acted as a witness in an investigation, and was the only one denied first choice. Also, it would be important to know if it had been common practice to approve first choices, unless there were good reasons for not doing so. Was this the first case of such a denial? Considering the U.S. Supreme Court's "materially adverse" standard, unless there were material personal consequences caused by the denial — such as missing a prepaid trip, or an important personal event — the action may not amount to retaliation. If treatment like this could be shown to be different than treatment accorded other employees, and became a pattern of different treatment, the issue could escalate into actionable retaliation. The law mandates that employers treat all employees equally, and any variance which affects an employee who has voiced a complaint, or participated in an investigation, risks a charge of retaliation.

With the following employer actions, when the employee in question has filed a complaint of harassment, is there a clear case of retaliation?

The employer assigns the employee to a less desirable spot in the campus parking garage. Under the U.S. Supreme Court standards of "trivial harm" and "materially adverse," this almost certainly would not rise to legal retaliation. Unless the employee has a mobility impairment which is severely aggravated or inconvenienced by a more distant parking space. It is much more likely to send a message to all employees that the employer plays favorites. Parking spaces may be meaningful to individual employees for status reasons, but it is hard to imagine circumstances — except in the case of an individual with a disability or impairment — that would cause a change in parking space to rise to material retaliation.

The employee is reassigned from the preferred weekday daylight shift she held for five years, to an evening shift, which includes weekends. This change is clearly not petty and may meet the U.S. Supreme Court standards of "trivial harm" and "materially adverse." Therefore, unless it was made for good business reasons evident to all observers, and was acceptable to the employee, this change could be considered retaliation. However, the question does not indicate whether the employee was happy with the reassignment. For example, if she earned a nightshift pay premium and wanted that to help pay for her child's college education, or she liked the idea of working at night and was pleased with the change, it would not be retaliation.

The supervisor does not sign the birthday card for the employee when it is circulated, and leaves the cafeteria before the cake is served. Under the U.S. Supreme Court standards of "trivial harm" and "materially adverse," this almost certainly would be considered a petty slight. There are no materially adverse consequences to the employee, and the supervisor has as much right to leave an event of this nature for personal reasons, as others have to remain and enjoy the cake.

State Specific Harassment Policies and Laws (CA)

Protected Classes

The purpose of California's required harassment training is to ensure a respectful workplace. California law recognizes 17 different protected characteristics: race, color, national origin, sex,

sexual orientation, gender, gender identity, gender expression, religious creed, marital status, genetic characteristics, ancestry, mental disability, physical disability, medical condition, military/veteran status, and age.

Everyone has at least 12 of these characteristics. For example, everyone has a race, color, ancestry, gender, gender expression, gender identity, and sexual orientation. Since many characteristics apply to everyone, a single characteristic—or a select number of characteristics—cannot define a person. Promote a respectful working environment and do not reduce any person to one's characteristics.

Employers can no longer rely on a “catch-all” statement that states that the employer will not discriminate based on any category protected by the law. FEHA further defines "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientations" to include: a perception that the person has any of those characteristics; or that the person is associated with a person who has, or is perceived to have, any of those characteristics. It also includes "religious creed," "religion," "religious observance," "religious belief," and "creed" to include all aspects of religious belief, observance, and practice.

FEHA regulations provide definitions for the protected categories of: “Gender Expression,” “Gender Identity,” and “Sex.” In addition, the regulations provide definitions for the terms: “Transgender” and “Sex Stereotyping.” The definitions are as follows:

Gender Expression: a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth;

Gender Identity: a person's identification as male, female, a gender different from the person's sex at birth, or transgender;

Sex: has the same definition as provided in Government Code section 12926, which includes, but is not limited to, pregnancy; childbirth; medical conditions related to pregnancy, childbirth, or breastfeeding; gender identity; and gender expression;

Transgender: a general term that refers to a person whose gender identity differs from the person's sex 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;” and

Sex Stereotyping: an assumption about a person's appearance or behavior or about an individual's ability or inability to perform certain kinds of work based on myth, social expectation, or generalization about the individual's sex.

Sex, gender, gender identity, and gender expression are considered independent of the others. For example, the same person may have (a) the sex of male, which was assigned at birth, (b) the gender identity of female, and (c) the gender expression of masculine with variations like

butch, femme, transgender, genderqueer, or nonconforming queer. A transgender person “may or may not have a gender expression that is different from the social expectations of the sex assigned at birth.”

An additional, separate aspect of the same person is sexual orientation. Staying with our example, one can have the assigned sex at birth of male; the gender identity of female; a masculine gender expression; and an orientation of gay, lesbian, or heterosexual. In addition, one may change or transition one’s gender, gender identity, gender expression, and sexual orientation throughout life.

The law and company policies require that LGBT employees be treated with equal respect. Let’s take a look at Shayna’s situation.

Recently, Shayna’s boss, Jude, ran into her outside of work and was introduced to her girlfriend, Harriet — realizing for the first time that Shayna is gay. Since that day, Jude’s demeanor towards Shayna has changed. He is rude to her when they interact and withholds information she needs to do her job effectively. He often asks her how “Harry” is doing and refers to Shayna as “the office lesbo” to coworkers. About a week after the encounter, Jude relocates Shayna’s desk from a private cubicle to an undesirable open area — for no apparent reason — and gives her cubicle to a lower level employee. Shayna believes she is being harassed because of her sexual orientation, but a coworker disagrees and says she is just being paranoid and overly sensitive.

It is likely that Shayna is being illegally harassed because Jude makes negative references regarding Shayna being a lesbian. And because this behavior began immediately following his introduction to Shayna’s girlfriend, it’s highly likely he is treating her this way because of her sexual preference.

In California, under the Fair Employment and Housing Act, sexual orientation is a protected basis. Even if Shayna is unsure if she is being illegally harassed, if she is offended and uncomfortable with the way her supervisor is treating her, and if it is interfering with her ability to do her job, she should follow company policy and procedures to report the behavior. It is always better to discuss hostile working situations with the proper representative than to allow someone to convince you that you are just being overly sensitive.

Discriminatory Harassment

FEHA specifically prohibits discrimination against any job applicant or employee in hiring, promotions, assignments, termination, and terms and conditions or privileges of employment. It prohibits harassment of employees, applicants, and independent contractors, and requires employers to take all reasonable steps to prevent harassment from occurring. And it prohibits employers from limiting or prohibiting the use of any language in any workplace, unless justified by business necessity.

FEHA requires employers to reasonably accommodate employees' religious beliefs and practices and requires employers to reasonably accommodate employees with a disability in order to enable them to perform the essential functions of a job. It further requires employers to provide leaves of up to four months to employees disabled because of pregnancy or childbirth, and to provide reasonable accommodations requested by an employee — with the advice of her health care provider — related to her pregnancy, childbirth, or related medical conditions.

Finally, it prohibits retaliation against any person who has filed a complaint, participated in an investigation, or opposed any activity prohibited by the Act.

Harassment Policy Requirements

All employers must take the following actions to prevent harassment and correct it when it occurs.

- 1) Distribute copies of the Department of Fair Employment and Housing's (DFEH) Brochure 185 on Sexual Harassment or an alternative writing that complies with Government Code 12950.
- 2) Post copies of the Department's employment posters located on the FEH website.
- 3) Develop a harassment, discrimination, and retaliation prevention policy in accordance with 2 CCR 11023.

The policy must:

- Be in writing.
- List all protected groups under the FEHA.
- Indicate that the law prohibits coworkers and third parties, as well as supervisors and managers with whom the employee comes into contact, from engaging in prohibited harassment.
- Create a complaint process that ensures confidentiality to the extent possible; a timely response; an impartial and timely investigation by qualified personnel; documentation and tracking for reasonable progress; appropriate options for remedial actions and resolutions; and timely closures.
- Provide a complaint mechanism that does not require an employee to complain directly to their immediate supervisor. That complaint mechanism must include, but is not limited to including: provisions for direct communication, either orally or in writing, with a designated company representative; and/or a complaint hotline; and/or access to an ombudsperson; and/or identification of DFEH and the United States Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints.
- Instruct supervisors to report any complaints of misconduct to a designated company representative, such as a human resources manager, so that the company can try to resolve the claim internally. Employers with 5 or more employees are required to include this as a topic in mandated sexual harassment prevention training (see 2 CCR 11024).

- Indicate that when the employer receives allegations of misconduct, it will conduct a fair, timely, and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected.
- Make clear that employees shall not be retaliated against as a result of making a complaint or participating in an investigation.

4) Distribute its harassment, discrimination, and retaliation prevention policy by doing one or more of the following:

- Printing the policy and providing a copy to employees with an acknowledgement form for employees to sign and return.
- Sending the policy via email with an acknowledgment return form.
- Posting the current version of the policy on a company intranet with a tracking system to ensure all employees have read and acknowledged receipt of the policy.
- Discussing policies upon hire and/or during a new hire orientation session.
- Using any other method that ensures employees received and understand the policy.

5) If the employer's workforce at any facility or establishment contains ten percent or more of persons who speak a language other than English as their spoken language, that employer shall translate the harassment, discrimination, and retaliation policy into every language spoken by at least ten percent of the workforce.

6) In addition, employers who do business in California and employ 5 or more part-time or full-time employees must provide at least two hours of training regarding sexual harassment and harassment based on gender identity, gender expression, and sexual orientation every two years to each supervisory employee and to all new supervisory employees within six months of their assumption of a supervisory position.

Harassment Laws

In addition to federal laws prohibiting discrimination and harassment, some states have similar — and occasionally stricter — laws. When there is a difference between state and federal law, employers are required to follow the law which provides more protection to the employee. California law provides more protected classes of employees, no limits on employer liability, and more stringent employer defenses than federal law. Under California law, an employer is legally responsible to employees who have been sexually harassed by supervisors, no matter what steps have been taken to prevent or correct harassment.

The Fair Employment and Housing Council enforces California civil rights laws regarding discrimination in employment, housing, and public accommodations; pregnancy disability leave; family and medical leave; and hate violence.

The Commission engages in five primary activities: administrative adjudication; mediations; regulations; legislation; and public information and training.

The Department of Fair Employment and Housing (DFEH) accepts complaints of discrimination, investigates those complaints, issues accusations, and prosecutes those cases both before the Fair Employment and Housing Council and in court (FEHA Government Code Section 12930.)

As part of its routine investigation of any complaints filed, the DFEH now asks every employer subject to AB 1825 in every employment discrimination case whether it has provided its supervisors sexual harassment training.

Employers must provide sexual harassment prevention training in a classroom setting, through interactive E-learning, or through a live webinar. E-learning training must provide instructions on how to contact a trainer who can answer questions within two business days.

It is an unlawful employment practice for an employer to fail to take all reasonable steps necessary to prevent sexual harassment by employees in the workplace. It is also unlawful if the employer knows or should have known of such an incident and fails to take corrective action.

It is an unlawful to retaliate against anyone who has opposed sexual harassment practices or has filed a complaint, testified or assisted in any proceeding under FEHA. Employees are protected from retaliation if they complain about harassment or discrimination This is the FEHC Regulations (CA Code of Regulations, Section 7287.8).

Statute of Limitations

It is important to keep in mind that the California Fair Employment and Housing Act allows an individual to file a complaint of employment discrimination with the California Department of Fair Employment and Housing three years from the date of an alleged discriminatory act, including sexual harassment, at one of the employment office locations. If the matter falls within the Department's jurisdiction, an investigation will be conducted. FEHA provides a complete description of the complaint process, from filing to resolution. According to the Act, remedies available for employment discrimination include: back pay, hiring, promotion, reinstatement, outofpocket expenses, front pay, training, ceaseanddesist orders, and actual damages, including damages for emotional distress. The Department may also order reasonable accommodations, policy changes and administrative fines.

Conclusion

Summary & Implications

Remember harassment in the workplace is not a new issue, nor, unfortunately has the presence of it in America's workplaces diminished.

In this course you learned what harassment is, how it can occur in the workplace, current legal positions, and how management can maintain a harassment-free workplace.

We went over different behaviors that constitute sexual harassment, other types of harassment including abusive conduct, what constitutes a hostile work environment, and how to handle complaints.

As we have seen, harassment is pervasive in the American workforce. It is one of the most destructive forces for companies, offenders, and victims. Federal and state courts have both increased their enforcement of harassment laws and seen a dramatic rise in cases over the past ten years. By following the guidelines laid out in this course, you'll be able to foster a safe, productive workplace — one that's free from harassment of any kind.

Resources

Supporting Documents

[Posters, Brochures, and Fact Sheets](#)

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Sexual Harassment FAQs - State California -

<https://www.dfeh.ca.gov/resources/frequently-asked-questions/employment-faqs/sexual-harassment-faqs/>

2017 WBI U.S. Workplace Bullying Survey June 2017

Laws & Policies - <https://www.stopbullying.gov/laws/index.html>

Sample Anti-discrimination and Harassment Policies

<https://smallbusiness.findlaw.com/employment-law-and-human-resources/sample-anti-discrimination-and-harassment-policies.html>

<https://www.state.gov/s/ocr/c14800.htm>

Subject Matter Expert

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Kimberly Foster is the President and a principle consultant at Foster Assets, LLC. She has over 20 years of experience specializing in mid-size organizations to Fortune 50 companies providing guidance and leadership to senior managers in startup, growth and stable organizations. Her broad experience includes employment law, corporate risk management, employee relations, performance management, training and leadership development. She has experience in various industries including professional services, technology, insurance and financial services.

In her previous roles, she has developed, participated and implemented various client projects including HR compliance audits, policy development, internal investigations, employment law guidance and policy design. She has been a liaison to the DOL and EEOC. In addition, she participated in internal firm projects regarding state and federal compliance, and process improvement. Kimberly has also both developed and facilitated risk mitigation training.

Kimberly is currently the VP of Human Resources at VectorSolutions.

Kimberly has a BS in Psychology with honors from the University of Central Florida and a MA in Organizational Management from The University of Phoenix. She is a Certified through the state of NY in workplace investigations and is a certified Human Capital Strategist (HCS). She is a member of the Society for Human Resource Management (SHRM), and NY Human Resources Association (NY-HRA).