

# Sexual Harassment and Abusive Conduct in the Workplace

# Introduction

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- Practice Areas: employment, intellectual property, municipal law, real estate, business transactions/contracts, trusts and estates

# QUIZ

- 5 mins
- Answer quickly, go with gut/first impression
- Will review at end

# AB 1825

- As of 2005, California law mandates all organizations with 50+ employees and *all* public employers provide sexual harassment training to supervisors.
- 2 hours of training
- Every 2 years
- Employer must keep documentation (name, date, type, trainer, materials, certificates, sign-in sheet)

# AB 2053

- All California employers subject to the mandatory training requirement under AB 1825 must include a component on preventing “abusive conduct.”
- AB 2053 did not add abusive conduct as a protected category under FEHA; only amended training requirement
- Effective January 1, 2015

# SB 396

- Required training expanded to prevent sexual harassment to include gender identity, gender expression and sexual orientation
- Effective January 1, 2018

# SB 1343

- Amended FEHA regulations and requires businesses with five or more employees to provide sexual harassment prevention training to all workers by January 1, 2020
- Training is required every two years

# Learning Objectives

- Definition of sexual harassment
- Steps to address
- Reporting complaints
- Responding to complaints
- Employer's obligation to investigate
- Identifying retaliation
- Essential components of a sexual harassment policy
- Effects on co-workers/victims
- Abusive conduct





# What is Sexual Harassment?

# Definition

- Generally: unwanted sexual conduct that is one of two main types (or both):
  - Quid pro quo
  - Hostile environment



# Definition: California

- FEHA: harassment based on sex or of a sexual nature, gender, gender identity gender expression, marital status, sexual orientation, pregnancy, childbirth, or pregnancy-related medical conditions
- Expressly prohibits sexual harassment
- Protects job applicants and independent contractors
- Individual (personal) liability for perpetrators and aiders and abettors.
- \*California Constitution prohibits employment discrimination on the basis of sex

# Definition: Federal

- Title VII: prohibits discrimination on the basis of sex

# Types of Sexual Harassment

1. Quid pro quo
2. Hostile environment

# Quid Pro Quo

- Latin: “this for that”
- Easier to identify: a person in a position of authority, typically a supervisor, demands sexual favors as a condition of getting or keeping a job benefit.



# Examples: Quid Pro Quo

- Offer: I will give you the job or promote you if you go out on a date with me
- Threat: I will fire or demote you if you do not go out on a date with me



# Hostile Environment

- Harassment is serious and/or repeated
- Victim's work environment is made hostile, offensive, oppressive, intimidating, or abusive due to pervasive sexual harassment
- Reasonable person standard
- Employer can be liable for failing to prevent
- Retaliation can be hostile environment harassment!



# Examples of Behavior that Creates a Hostile Environment

- Verbal, physical or visual forms of harassment, that are sexual in nature, “sufficiently severe, persistent, or pervasive” and unwelcome
- A single, severe incident, such as a sexual assault.
- More commonly, a “hostile environment” is created by a series of incidents.
- Subjective in that the victim must perceive the work environment as hostile or abusive.

# “Affects working conditions or creates a hostile work environment”

- It may be sexual harassment if the conduct unreasonably interferes with work performance or creates an “intimidating, hostile, or offensive work environment.”
- It may be sexual harassment if repeated sexual comments make a person so uncomfortable at work that their performance suffers or they decline professional opportunities because it will put them in contact with the harasser.

# Severe or Pervasive

Harassing conduct is so severe or pervasive that it alters the work environment.

Severe

Pervasive



# Social Context is Important

## *Oncale v. Sundowner Offshore Services*

Determining whether a reasonable person would consider behavior to be severe requires “careful consideration of the social context in which the particular behavior occurs and is experienced by its target.”

“The real social impact of workplace behavior often depends on a constellation of surrounding circumstance, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”

# Harassment or Favoritism Toward Others = Hostile Work Environment

- Sexual harassment or favoritism directed toward a third party can cause a hostile work environment.

# When Do Actions Cross the Line?

- When in doubt, don't do it!
- Not all comments “tinged with offensive sexual connotations” are enough to be unlawful sexual harassment

# Harassment Because of Sex

- The harassing behavior was *because of* the target's sex or gender.
- Includes same-sex harassment.
- Does not have to be sexual in nature.
- Compare: Equal opportunity harasser;
  - Bully: engages in abusive conduct not based on gender

# Sexual Motive Not Required!

- *Unless quid pro quo*: requires a sexual motive
- Harassment can be based on gender, gender identity, gender expression, marital status, sexual orientation, pregnancy, childbirth, or pregnancy-related medical condition
- It can simply be negative conduct directed at a person due to a characteristic that meets the broad definition of sex
- Can be retaliation based on reporting someone else's behavior

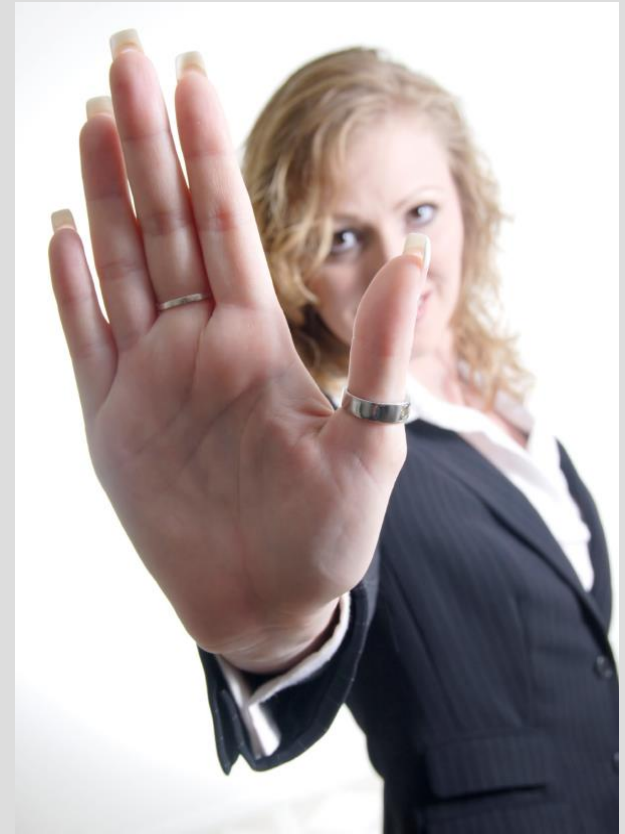


# \*Of a “Non-Sexual” Nature

- Non-sexual conduct may also be sexual harassment if you are harassed because you are female, rather than male, or because you are male, rather than female.
- For example, it may be sexual harassment if you are a woman working as a carpenter on an all-male job, and you are the only one whose tools are frequently hidden by your male co-workers.

# “Unwanted/Unwelcome”

- Conduct is NOT sexual harassment if it is welcome. For this reason, it is important to train employees to communicate (either verbally or in writing) to the harasser that the conduct makes you uncomfortable and you want it to stop.



# Generally, Four Types of Behaviors/Conduct

1. Physical Harassment
2. Verbal Harassment
3. Visual Harassment
4. Sexual Advances

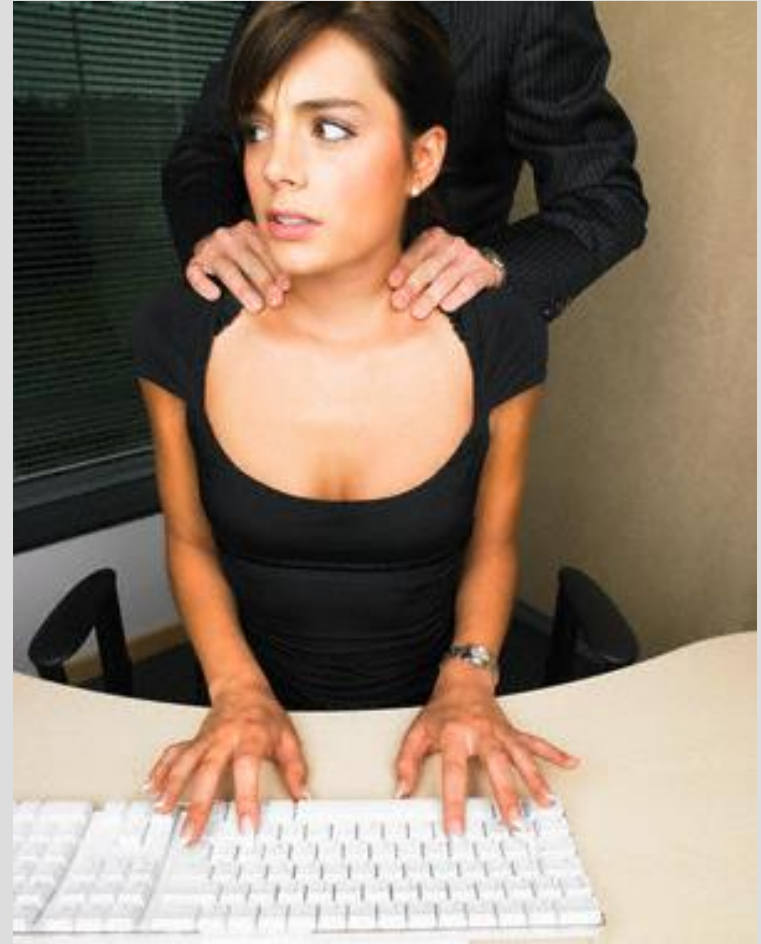


# Breaking down the definition: “Conduct”

- Visual: leering, sexual gestures, displaying sexually suggestive objects or pictures
- Verbal: derogatory comments, epithets, slurs and jokes
- Physical: touching, assault, impeding/blocking movements
- Quid pro quo: offering employment benefits in exchange for sexual favors
- Retaliation: taking or threatening to take retaliatory action after receiving a negative response to sexual advances

# Physical: Unwanted Touching

- Touching
- Patting
- Stroking
- Kissing
- Hugging
- Grabbing
- Impeding or blocking movement
- Assault



# Verbal/Written

- Comments about clothing, personal behavior or a person's body
- Sexual or sex-based jokes
- Requesting sexual favors or repeatedly asking a person out
- Sexual innuendos
- Spreading rumors about a person's personal or sexual life
- Threatening a person
- Sending emails or text messages of a sexual nature

# Nonverbal/Visual

- Looking up and down a person's body (leering or staring)
- Derogatory gestures or facial expressions of a sexual nature
- Following a person
- Displaying or showing someone posters, drawings, pictures, screensavers, emails or texts of a sexual nature

# Examples of Sexual Harassment

- Unwanted jokes, gestures, offensive words on clothing, and unwelcome comments and witty responses.
- Touching and any other bodily contact such as scratching or patting a coworker's back, grabbing an employee around the waist, or interfering with an employee's ability to move.
- Repeated requests for dates that are turned down or unwanted flirting.



# Additional Examples of Sexual Harassment

- Transmitting or posting emails, texts, or pictures of a sexual or other harassment-related nature.
- Displaying sexually suggestive objects, pictures, or posters.
- Playing sexually suggestive music.



# Exercise: Is this sexual harassment?



# Employee's Story

I was excited about my new assignment on a special department project. I was flattered when my boss suggested we discuss it over dinner. At first I felt uncomfortable about meeting him in a social setting but, deciding that I was being paranoid, agreed. During dinner, we began to discuss the new project. As the evening progressed, the conversation shifted to very personal topics, including my present and past boyfriends. I tried to shift the conversation back to something related to work but he kept drifting back to personal issues. Occasionally he touched my hand and told me he thought I was attractive. As we were getting ready to leave, he stood uncomfortably close to me and patted me on the arm. I felt nervous about the way he was relating to me but I was afraid to offend him by saying anything. Now I find myself avoiding him even though I respect his opinions and need his guidance to do well in my department.

# Supervisor's Story

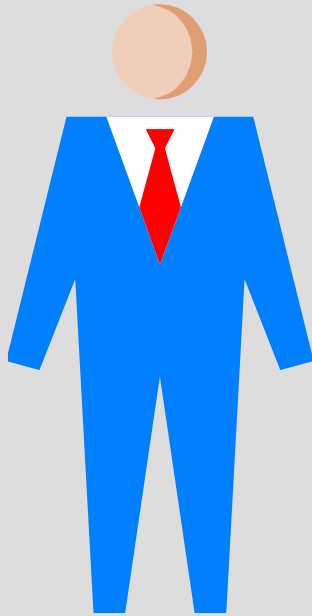
I was impressed with her work, and gave her a special assignment that would help her to expand her abilities as well as help the department move forward. I thought the project had real potential. I invited her to dinner so we could talk over her ideas in a more relaxed atmosphere. I thought this would be helpful since she seems very bright but is nervous and shy in group meetings. I enjoyed getting to know her better and I could tell the feeling was mutual. We had a good time and the discussion was productive. Since our meeting, I haven't seen much of her. I'm surprised that after such a promising start she seems less interested in my help. I guess she changed her mind about the assignment. It makes me wonder if she's really promotion material.

# What do you see?



- A fashionable young woman from a bygone era?
- An ugly woman with exotic taste in hats?
- Which one is the truth?

# The case of the lovelorn revenue agent



A true story

# Is this a hostile work environment?

Ellison and Gray are revenue agents in the same office. According to Ellison, Gray pesters her and hangs around her desk. Ellison declines an invitation to go out for drinks and suggests lunch the next week but then tries to stay away from the office during lunch time to avoid having to go. Sometime during the next week, Gray uncharacteristically wears a three piece suit and asks Ellison to lunch. She declines.

# Is it now?



- Gray gives Ellison the following note: “I cried over you last night and I’m totally drained today. I have never been in such constant term oil (sic). Thank you for talking with me. I could not stand to feel your hatred for another day.”
- Ellison leaves the room after reading the note and Gray follows her. Ellison leaves the building.

# What about now?

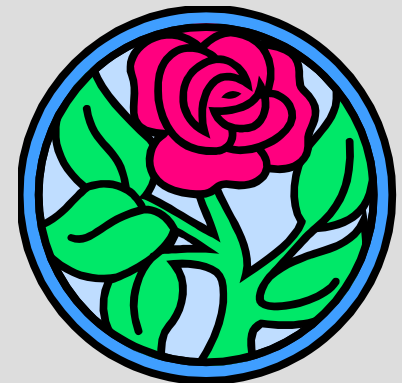


- Ellison gets Gray's note on Wednesday. He calls in sick on Thursday and Ellison is off Friday. The next Monday she starts four weeks of training out of town.
- Gray sends Ellison a three-page typed single spaced letter which states in part: "I know you are worth knowing with or without sex.... Leaving aside the hassles and disasters of recent weeks, I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and élan.... Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks... I will [write] another letter in the near future."



# Does Gray's intent matter?

- Suppose Gray sees himself as a modern day Cyrano de Bergerac wishing no more than to woo Ellison with his words? There is no evidence that Gray harbors any ill will toward Ellison.
- In his three page love letter, Gray offers to leave Ellison alone if she wishes.



# Other examples of conduct that can create a hostile environment

- The lovesick puppy syndrome
  - A suitor who will not take “no” for an answer
  - Maybe he or she hangs around, mooning over the unattainable beloved
- Invading body space
- Calling someone offensive or disrespectful terms (like “babe” or “honey”)
- Be sensitive to differing cultural norms



# Examples of conduct that does NOT create a hostile environment

- Conduct that a reasonable person, similarly situated would not find to be pervasive or severe
- Isolated instances of “mere offensive utterances”
- Asking a co-worker for a date and taking no for an answer

# Hypothetical #1

- Many male police officers were unhappy when Polly Police Officer joined the force.
- They spread untrue rumors about her abilities, singled her out for graveyard shifts, filed unsubstantiated complaints about her work, and spread rumors that she had slept with her superiors to receive desirable work assignments.
- When Polly complained, her supervisor acknowledged the double standard for male and female officers, but told Polly to live with it.
  - 1. Did any sexual harassment occur?**
  - 2. Why or why not?**
  - 3. If yes, who is liable?**

# Hypothetical #2

- During a driving test, a male supervising driving instructor asked Test Taker, a Japanese woman, whether she, like his Japanese wife, enjoyed sex. He asked about her sexual experiences and described his preferences. When they returned to the DMV she fled in tears.
  1. **Did sexual harassment occur?**
  2. **Did the instructor engage in any other conduct that would subject him to discipline?**

# Hypothetical #3

- Betty worked at a fast food restaurant. She went out socially with the male night shift supervisor. The supervisor picked her up at a grocery store near the restaurant. They had dinner and went back to his house where there was some sexual activity. She alleges that he raped her.
- The next day, she advised the manager of the restaurant of what had happened and quit her job.
  1. **Did sexual harassment occur?**
  2. **Why or why not?**
  3. **If yes, who is liable?**

# Who is protected from Sexual Harassment?

- Employees
- Independent contractors
- Job applicants

# Hypothetical #4

- Sally, a social worker, who was temporarily working under contract with Department of Corrections, complained of sexual harassment by the prison chaplain.
- The chaplain, while initially courteous, was interested in a sexual relationship with the complainant. Sally told him point blank that she had no interest in such a relationship.
- The chaplain persisted, harassing her at work and off duty: he appeared at complainant's home in the middle of the night; he suggested that she "might like it," if he raped her.
- Complainant was consistently clear with the chaplain that she was offended by his conduct. When she complained to Department officials, her contract was terminated.
- **As a contractor, can Sally file a complaint under the FEHA about sexual harassment?**



# Addressing Sexual Harassment in the Workplace

# Hypothetical

- Male supervisor with California Conservation Corps repeatedly put his arms around Carol to tickle her, even after she told him to stop. He tried to hug her and, after being rebuffed, followed her and tried again.
- Supervisor made remarks laced with sexual innuendo. Carol found the treatment to be offensive and demeaning. She was fearful of his intentions toward her.
- During an investigation, the supervisor stated that he knew sexual harassment was illegal, but protested that he never received training regarding sexual harassment prevention.

- 1. Did sexual harassment occur?**
- 2. Was CCC liable for the acts of the individual?**
- 3. Was the supervisor independently liable?**

# Who is liable?

- Strict Liability: Employers strictly liable for harassment committed by a supervisor or agent.
- Negligence: Employers liable for harassment committed by non-supervisor if they:
  - Knew or should have known of the harassing conduct; and
  - Failed to take immediate and appropriate corrective action.

# Personal Liability

- Personal liability where an employment relationship exists between harasser and victim.
- Regardless of whether harasser was a supervisor or manager.
- Peer-to-peer harassment can lead to liability for both the employer and the harasser.

“An ounce of prevention is worth a pound of cure.” - Benjamin Franklin

- Employers are required to take all reasonable steps to prevent harassment from occurring, such as:
  - Having a harassment policy.
  - Posting DFEH anti-discrimination and harassment poster in prominent and accessible location
  - Distribute DFEH information sheet/materials
  - Training employees on sexual harassment.
    - (Gov. Code, § 12940, subd. (k).)

# Essential Components of a Harassment Policy

1. In writing
2. Lists all current protected categories
3. Indicates that the law prohibits coworkers and third parties, as well as supervisors and managers, from engaging in conduct prohibited by FEHA
4. Creates a complaint process
5. Provides a complaint mechanism that does not require an employee to complain directly to his or her immediate supervisor

# Essential Components of a Harassment Policy

6. Instructs supervisors to report any complaints to a designated company representative (such as HR manager)
7. Indicates employer will conduct a fair, timely and thorough investigation
8. States that confidentiality will be kept *to the extent possible*, but is not guaranteed
9. Indicates that if misconduct is found, appropriate remedial measures will be taken
10. Makes clear that there will be no retaliation

# Complaint Process

- Should ensure:
  - designation of confidentiality to extent possible
  - a timely response
  - impartial and timely investigations by qualified personnel
  - documentation/tracking for reasonable progress
  - appropriate options for remedial actions and resolutions
  - timely closures



# Complaint Mechanism

- Should provide for:
  - direct communication, either orally or in writing, with a designated company representative, such as HR manager, EEO officer, or other supervisor
  - a complaint hotline
  - access to an ombudsperson; and/or
  - identification of the DFEH and the U.S. Equal Employment Opportunity Commission (EEOC) as additional avenues for employees to lodge complaints

# Reporting Complaints of Harassment

# Employees/Victims

- Tell the harasser that the conduct is unwelcome, offensive, and must stop immediately.
- Demonstrate that the conduct is unwelcome by walking away, avoiding interaction and using facial expression and body language.
- Report behavior to immediate supervisor, human resources officer, or appropriate member of management.

# Employees/Victims

1. Document
2. Report (pay attention to statutes of limitation)
3. Exhaust employer's remedies
4. Consider alternatives, such as resignation or transfer (shouldn't have to!)
5. Lawyer up!

# What Do I Do When Someone Complains?

## Employers/Supervisors

1. Listen actively: allow complainant to tell his/her story.
2. Keep parties separate: NEVER force a confrontation between complaining employee and alleged harasser.
3. Be candid with the parties and witnesses: complaints and interviews not confidential.

# How to Deal with Sexual Harassment? Employers/Supervisors

Implement an effective anti-harassment policy...  
and FOLLOW IT.

- Should include an effective complaint procedure.

Keep employees fully informed of their rights

- DFEH poster.
- DFEH information sheet.

# What is an Effective Investigation?

- Follow your own procedures
- Engage a qualified, impartial investigator
- Remain objective
- Investigate and obtain details
  - Frequency
  - Duration
  - Nature of incidents
- Explore relationship between the parties

# How to Interview Witnesses

- Admonish witnesses not to interfere with investigation
- Make credibility determinations based on:
  - Facts and documents gathered;
  - Demeanor; and
  - Motivations



# Outcome of Investigation

- Draw a conclusion
  - Is the complaint meritorious?
- Take appropriate corrective action
- Provide remedy to complaining employee.

# Identifying and Avoiding Retaliation

- Employer CANNOT retaliate against an employee for opposing or complaining of unlawful sexual harassment under FEHA
- Employee may:
  - Oppose any practice forbidden by FEHA: or
  - File a complaint, testify, or otherwise assist in a proceeding under FEHA against their employer, supervisor or coworker
- If employer retaliates, employer can be liable for unlawful employment retaliation

# Effects of Sexual Harassment

- On Harasser: damages, fees, costs
  - under FEHA, no ceiling on amount of compensatory or punitive damages!
- On Victim
  - stress, low self-esteem, anger, fear, illness
- On Employer
  - absenteeism, low morale, low productivity, turnover, liability for acts of supervisors
- On Coworkers

# Abusive Conduct

- 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
- Repeated infliction of verbal abuse, 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.

# Examples of Abusive Conduct

- Two younger employees often take and hide an older co-worker's prescription eyeglasses, which leaves the older employee disoriented and unable to effectively perform her work
- Is this abusive conduct?
- Is it sexual harassment?
- Is it illegal?

# Examples of Abusive Conduct

- A supervisor repeatedly insults an employee because of the employee's religious clothing
- Is this abusive conduct?
- Is it sexual harassment?
- Is it illegal?

# Examples of Abusive Conduct

- A large, muscular employee regularly corners and threatens to beat up a physically disabled employee unless the disabled employee calls the larger employee “daddy.”
- Is this abusive conduct?
- Is it sexual harassment?
- Is it illegal?

# Thank You!

- Questions?
- Review Test