

Preventing SEXUAL HARASSMENT

Understanding the Law

R. Sybil Villanueva | Associate Chief Counsel
California Department of Fair Employment & Housing
www.dfeh.ca.gov



DFEH
Training

WEBINAR

SEXUAL HARASSMENT CLAIMS ARE COSTLY

- Recent FEHC cases have resulted in awards of \$35,000-\$55,000 for emotional distress alone
 - Jury verdicts are likely to be higher.
- Lost wages.
- Lost staff time to investigate and resolve claims.
- Attorneys fees and defense costs.
- Lowered staff morale.



AN OUNCE OF PREVENTION

- **The Fair Employment and Housing Act (FEHA) requires:**
 - Two hours of sexual harassment training for all supervisory employees within six months of assignment.
 - Every two years thereafter.



every worker has a right to be
FREE FROM HARASSMENT



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EDUCATIONAL OBJECTIVES

- Recognize sexual harassment.
- Understand rights and responsibilities.
- Know legal remedies.



WHAT IS SEXUAL HARASSMENT?

- Unwanted visual, verbal or physical conduct that is sexual in nature;
- Requests for sexual favors; or
- Exposure to offensive conduct.



WHO IS PROTECTED FROM SEXUAL HARASSMENT?

- Employees.
- Independent contractors.
- Job applicants.



WHO IS LIABLE?

Strict Liability

Employers are strictly liable for harassment committed by a supervisor or agent.

Negligence

Employers are liable for harassment committed by a non-supervisor if they:

- Knew or should have known of the harassing conduct; and
- Failed to take immediate and appropriate corrective action.



HYPOTHETICAL #1

- 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?



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.



HYPOTHETICAL #2

- 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?



TYPES OF SEXUAL HARASSMENT

- Hostile Work Environment.
- Quid Pro Quo.



HOSTILE WORK ENVIRONMENT

1. Harassment directed at complaining party; or
2. Complaining party witnessed harassment of others.



HARASSMENT BECAUSE OF SEX

The harassing behavior was *because of* the complainant's sex or gender.

- Includes same-sex harassment.
- Does not have to be sexual in nature.
- Compare: Equal opportunity harasser.
 - Bullying.

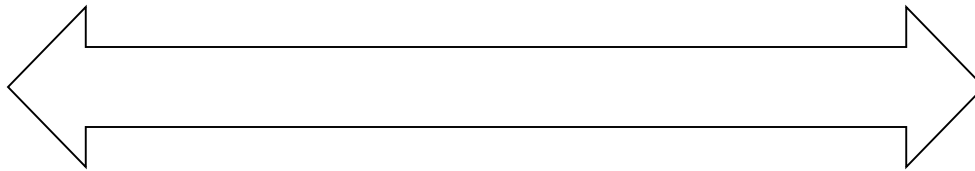


SEVERE OR PERVASIVE

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

Severe

Pervasive



SUBJECTIVELY SEVERE OR PERVASIVE

- The victim herself must perceive the work environment as hostile or abusive.



OBJECTIVELY SEVERE OR PERVASIVE

- A reasonable person would find the environment to be hostile or abusive.
 - Consider age, gender, work experience, education, and life experiences.



HOW CAN SEXUAL HARASSMENT OCCUR WITHOUT ANY TOUCHING OR SPEAKING?

- Leering.
- Staring.
- Making sexual gestures.
- Displaying sexually explicit objects, pictures, cartoons, graffiti, or posters.
- Sending graphic emails, text messages, or “jokes.”



HYPOTHETICAL #3

- 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?



THIS IS SEXUAL HARASSMENT

SEXUAL ADVANCES · PROPOSITIONS · INNUENDOS



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WHAT IS VERBAL HARASSMENT?

- Foul or obscene language.
- Derogatory comments.
- Explicit discussions about sexual activities.
- Comments about other people's physical attributes.
- Foul or obscene language.



UNWANTED TOUCHING IS SEXUAL HARASSMENT

- Kissing.
- Hugging.
- Grabbing.
- Impeding or blocking movement.
- Assault.



HYPOTHETICAL #4

- 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?



HARASSMENT OR FAVORITISM TOWARD OTHERS = HOSTILE WORK ENVIRONMENT

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



QUID PRO QUO HARASSMENT

- Something for something.
- “Quid pro quo harassment occurs when submission to sexual conduct is made a condition of concrete employment benefits.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 607.)



EXAMPLES OF QUID PRO QUO HARASSMENT

- An offer of employment benefits in exchange for sexual favors.
- Actual or threatened reprisal after rebuffing sexual advances.



“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.
- Training employees on sexual harassment.
 - (Gov. Code, § 12940, subd. (k).)



REMEDIES

- Lost salary or wages.
- Transfer.
- Purge of personnel file.
- Emotional distress.
- Punitive damages.
- Court-ordered policy changes and training.



FEHA vs. TITLE VII

FEHA

- Strict liability for managers and supervisors.
- No affirmative defenses.

TITLE VII

- Negligence theory only.
- Affirmative defense:
 - Employer exercised reasonable care; and,
 - Employee unreasonably failed to take advantage of opportunities to avoid harm.



FEHA COVERS MORE EMPLOYERS, PLUS INDEPENDENT CONTRACTORS

FEHA

- All employers covered, even those employing only one person .
- Includes independent contractors .
 - Persons providing services pursuant to a contract.

TITLE VII

- ≥ 15 employees.



HYPOTHETICAL #5

- 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 complaint'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?



HOW TO DEAL WITH SEXUAL HARASSMENT? EMPLOYEES

- 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.



HOW TO DEAL WITH SEXUAL HARASSMENT? EMPLOYERS

Implement an effective anti-harassment policy.

- Which includes an effective complaint procedure.

Keep employees fully informed of their rights.

- DFEH poster.
- DFEH information sheet.





The definition of sexual harassment includes many forms of offensive behavior.



Department of Fair Employment and Housing

- such as a lead, supervisor, manager or agent,
- the employer had no knowledge of the harassment;
 - there was a program to prevent harassment; and
 - once aware of any harassment, the employer took immediate and appropriate corrective action to stop the harassment.

Filing a Complaint

Employees or job applicants who believe that they have been sexually harassed may file a complaint of discrimination with DFEH within one year of the harassment.

DFEH serves as a neutral fact finder and attempts to help the parties voluntarily resolve disputes. If DFEH finds sufficient evidence to establish that discrimination occurred and settlement efforts fail, the Department may file a formal accusation. The accusation will lead to other public hearing before the Fair Employment and Housing Commission or a lawsuit filed by DFEH on behalf of the complaining party.

If the Commission finds that discrimination has occurred, it can order remedies including:

- Fines or damages for emotional distress from each employer or person found to have violated the law
- Hiring or reinstatement
- Back pay or promotion
- Changes in the policies or practices of the involved employer

Employees can also pursue the matter through a private lawsuit in civil court after a complaint has been filed with DFEH and a Right-to-Sue Notice has been issued.

For more information, see publication DFEH-159 "Guide for Complainants and Respondents."

For more information, contact DFEH toll free at (800) 884-1684
 Sacramento area: (916) 478-7200
 TTY number at (916) 706-2120
 or visit our Web site at www.dfeh.ca.gov

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State of California
 Department of Fair Employment & Housing

DFEH-160 (1/05)

Sexual Harassment

The Facts About Sexual Harassment

The Fair Employment and Housing Act (FEHA) defines sexual harassment as harassment based on sex or of a sexual nature; gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. The definition of sexual harassment includes many forms of offensive behavior, including harassment of a person of the same gender as the harasser. The following is a partial list of types of sexual harassment:

- Unwanted sexual advances
- Offering employment benefits in exchange for sexual favors
- Actual or threatened retaliation
- Leaving, making sexual gestures or displaying sexually suggestive objects, pictures, cartoons, or posters
- Making or using derogatory comments, epithets, slurs, or jokes
- Sexual comments including graphic comments about an individual's body, sexually degrading words used to describe an individual, or suggestive or obscene letters, notes, or invitations
- Physical touching or assault, as well as impeding or blocking movements



Department of Fair Employment and Housing

Discrimination and Harassment in Employment are Prohibited by Law

Laws enforced by the Department of Fair Employment and Housing (DFEH) protect you from illegal discrimination and harassment in employment based on:

- Race
- Color
- Religion
- Sex (pregnancy or gender)
- Sexual orientation
- Marital status
- National origin (including language use restrictions)
- Ancestry
- Disability (mental and physical, including HIV and AIDS)
- Medical condition (menopausal, characteristics)
- Age (40 and above)
- Denial of family and medical care leave
- Denial of pregnancy disability leave or reasonable accommodation

The California Fair Employment and Housing Act (Part 2.8 commencing with Section 12900 of Division 3 of Title 2 of the Government Code) and the Regulations of the Fair Employment and Housing Commission (California Code of Regulations, Title 2, Division 4, Sections 2850.0 through 2850.6):

- Prohibit harassment of employees, applicants, and independent contractors by any person and require employers to take all reasonable steps to prevent harassment. This includes a prohibition against sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.
- Prohibit employers from limiting or prohibiting the use of any language in any workplace unless justified by business necessity. The employer must notify employees of the language restriction and consequences for violation.
- Require that all employers provide information to each of their employees on the statute, flag duty, and legal remedies that apply to sexual harassment. Employers may either develop their own publications, which must meet standards set forth in California Government Code Section 12950, or use a brochure from the DFEH.
- Require employers with 50 or more employees and all public entities to provide sexual harassment prevention training for all supervisors.
- Require employers to reasonably accommodate as em-

ployee or job applicant religious beliefs and practices.

- Require employers to reasonably accommodate employees or job applicants with a disability in order to enable them to perform the essential functions of a job.
- Permit job applicants and employees to file complaints with the DFEH against an employer, employment agency, or labor union that fails to grant equal employment as required by law.
- Prohibit discrimination against any job applicant or employee in hiring, promotion, assignments, termination, or any term, condition, or privilege of employment.
- Require employers, employment agencies, and unions to preserve applications, personnel records, and employment referral records for a minimum of two years.
- Require employers to provide leaves of up to four months to employees disabled because of pregnancy, childbirth, or a related medical condition.
- Require an employer to provide reasonable accommodations requested by an employee on the advice of her health care provider, related to her pregnancy, childbirth, or related medical condition.
- Require employers of 50 or more persons to allow eligible employees to take up to 12 weeks leave in a 12-month period for the birth of a child, the placement of a child for adoption or foster care for an employee's own serious health condition, or to care for a parent, spouse, or child with a serious health condition. Employees are required to post a notice informing employees of their family and medical leave rights.
- Require employment agencies to serve all applicants equally, refuse discriminatory job orders, and prohibit employers and employment agencies from making discriminatory pay hiring inquiries or publishing help-wanted advertising that expresses discriminatory hiring preferences.
- Require unions not to discriminate in member admission or dispatching to jobs.
- Prohibit retaliation against a person who opposes, reports, or sues another person in opposing unlawful discrimination.

The law provides for administrative fines and remedies for individuals, including the following: hiring, front pay, back pay, promotion, reinstatement, cease and desist order, expert witness fees, reasonable attorney's fees and costs, punitive damages, and damages for emotional distress.

Job applicants and employees: If you believe you have experienced discrimination, you may file a complaint with DFEH.

Independent contractors: If you believe you have been harassed, you may file a complaint with DFEH.

Complaints must be filed within one year of the last act of discrimination/harassment, or, for victims who are under the age of 18, not later than one year of that person's eighteenth birthday.

For more information, contact DFEH toll free at (800) 884-1684, Sacramento area at (916) 478-7200, TTY number at (916) 706-2120, or visit our web site at www.dfeh.ca.gov

Government Code Section 12940 and Title 2 California Code of Regulations Section 2287 require all employers to post this document. It must be conspicuously posted in hiring offices, on employee bulletin boards, in employment agency waiting rooms, union halls, and other places employees gather. In accordance with the California Government Code and ADA requirements, this publication can be made available in Braille, large print, computer disk, or tape cassette as a disability-related reasonable accommodation for an individual with a disability. To discuss how to receive a copy of this publication in an alternative format, please contact DFEH at the numbers above.

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WHAT DO I DO WHEN SOMEONE COMPLAINS?

ADVICE FOR EMPLOYERS

- 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.



EMPLOYER'S DUTY TO INVESTIGATE

1. Conduct an immediate inquiry.
2. Encourage a written complaint.
3. Protect complaining party from retaliation.



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.



WHAT IF I STILL HAVE QUESTIONS? CONTACT THE DFEH!



THE END

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contact.center@dfeh.ca.gov
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Videophone (916) 226-5285



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