Preventing Sexual Harassment: Understanding the Law

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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
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.
SUBJECTIVELY SEVERE OR PERVERSIVE

- The victim herself must perceive the work environment as hostile or abusive.
OBJECTIVELY SEVERE OR PERVERSIVE

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
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.
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!

contact.center@dfeh.ca.gov
(800) 884-1684
THE END

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