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# Sexual Harassment & Abusive Conduct Prevention Training For Elected Officials & Staff AB 1825 & AB 1661

**Presenter: Camille Hamilton Pating**



May 1, 2017

# Overview

- **Understand Law and City Policies**
  - Abusive conduct (“bullying”)
  - Sexual and other harassment
    - Hostile work environment
    - Quid pro quo
    - Retaliation
- **Hypotheticals for Elected Officials & Staff**



# Takeaways for Supervisors

- ✓ Comply with recent legal requirements for employers
- ✓ Identify behavior and situations that require action
- ✓ Intervene appropriately and promptly
- ✓ Maintain respectful and professional work environment
- ✓ Consult City Attorney/Human Resources immediately



# The Golden Rules

1

“It’s a Workplace”

2

Intent vs. Impact

3

Consult City Attorney/Human Resources



# Mature Content



# Purpose of Training

## WHY ARE WE HERE?



# Costs of Harassment & Abusive Conduct

- Workplace disruption
- Gossip/damaged reputations
- Lower morale
- Employee turnover
- Bad publicity
- Lost productivity/absenteeism
- Personal liability
- Workers' comp claims
- \$\$\$\$\$\*





# Dean's Accuser Calls Berkeley Harassment Settlement an 'Insult'

*Ben Hancock, The Recorder*

April 17, 2017 | 1 Comments

SHARE

The woman who accused UC-Berkeley's settlement that left him with tenure and

Analysis

## 3 Lessons For Employers From The Fox Harassment Saga

By **Braden Campbell**

Law360, New York (April 14, 2017, 5:37 PM EDT) -- Bombshell sexual harassment allegations have generated some unwelcome headlines for Fox News recently, and lawyers say the cable news heavyweight's situation can offer some insight on how best to guard against — and hopefully stave off — similar problems. Here are three lessons employers can learn from the Fox News scandal.



# High-Profile Bad Publicity



Consider viral nature  
of bias suits with high  
dollar amounts.

Even if the employer  
prevails, the reputation  
cost is considerable.

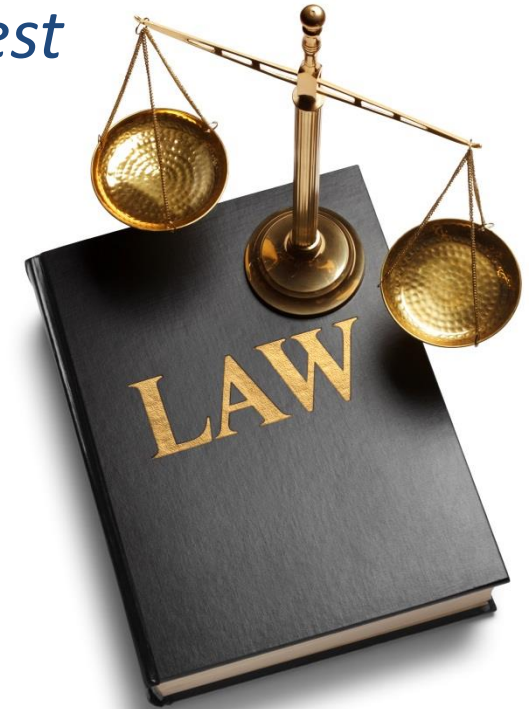
# Recent Harassment Payouts

## \$ *Chapourian v. Catholic Healthcare West*

- \$168 million jury verdict

## \$ *Turley v. ArcelorMittal*

- \$25 million (racial harassment)



! **Remedies** include back pay, medical expenses, lost benefits, pain and suffering, punitive damages, attorney fees

! **Individual/Employer liability**

# Requirement for Harassment Prevention Training

## **AB 1825**

- Codified at Cal Gov't Code § 12950.1
- Basics of regulations
  - Public agencies and private employers of 50+
  - At least 2 hours of sexual harassment prevention and correction training to all supervisory employees
  - Training must include practical examples aimed at instructing supervisors to prevent harassment, discrimination and retaliation

**Are Local Officials “Employees” subject to mandatory training requirements?**

# Robert Filner case



## Ex-San Diego mayor sentenced for harassment

Elliot Spagat, Associated Press

Published 1:46 p.m. ET Dec. 9, 2013 | Updated 2:07 p.m. ET Dec. 9, 2013



### STORY HIGHLIGHTS

- Bob Filner gets three months of home confinement, three years' probation
- Filner may not seek or hold elective office during probation
- Filner apologized during sentencing hearing

SECTIONS Q SEARCH

Los Angeles Times



LOCAL

## San Diego settles sexual harassment suit against ex-mayor for \$667,000



The \$667,000 that San Diego agreed to pay to settle a sexual harassment lawsuit against former San Diego Mayor Bob Filner was the largest the city has paid in litigation involving Filner. (Don Bartlett / Los Angeles Times)

# New California Law: Mandatory Harassment Prevention Training for Local Agency Officials

## AB 1661

- Basics of regulations
  - Clarifies that **local agency officials must complete at least 2 hours of sexual harassment prevention and correction training sexual harassment training**, like any other public employee.
  - Local agency officials who receive any compensation must now receive sexual harassment prevention training. A local agency may require *any* of its employees to receive sexual harassment prevention training.
  - A “local agency” for the purpose of this law includes cities, counties, special districts, and charter cities and counties. A “local agency official” means any member of the agency’s legislative body and any elected official of the agency.



# What Is Workplace Bullying ...and Why Should Employers Care?



# Recent California Law

## Abusive Conduct Prevention Training - AB 2053

- **Employment Discrimination or Harassment: Education and Training: Abusive Conduct**

- Adds an additional training obligation on employers covered under AB 1825
- These employers must now provide managers with training on the prevention of “abusive conduct.”





# Abusive Conduct Defined

- “Abusive conduct” is conduct *in the workplace*, *perpetrated with malice*, that a *reasonable person* would find *hostile, offensive, and unrelated to an employer’s legitimate business interests*.
- Like harassment, AB 2053 provides that *a single act is not abusive “unless especially severe and egregious.”*

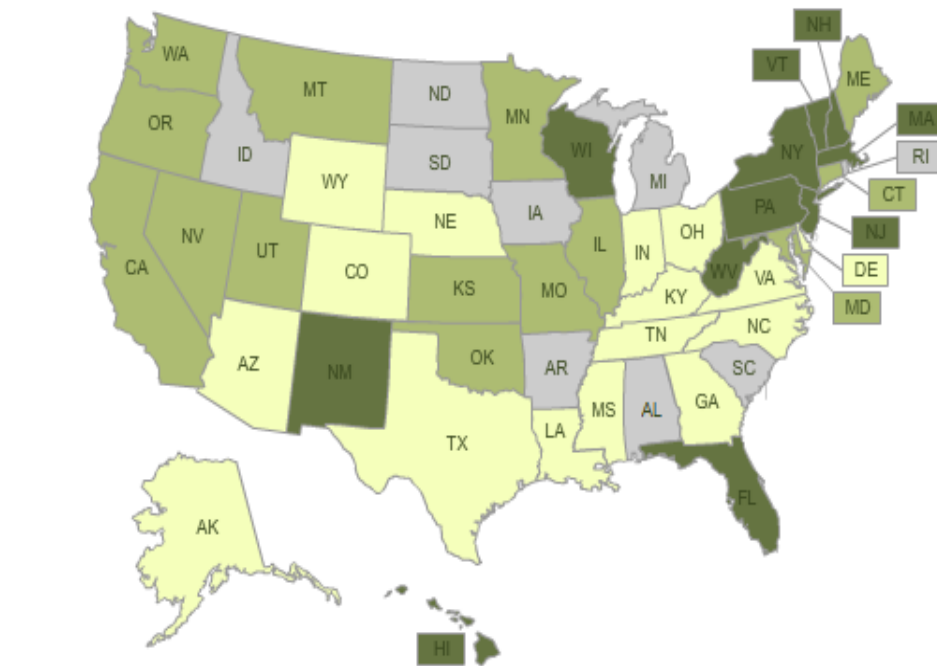
# Bullying vs. Harassment

- Harassment is **illegal employment discrimination** based on **protected status**
- Retaliation is **illegal employment discrimination** based on **protected conduct**
- Bullying is **repeated psychological or emotional abuse** occurring in the workplace which is **not based on protected status** and is **not illegal**
- Both may have similar impacts on victims and the work environment



# History: Healthy Workplace Bill (AB 1522)

- Never passed into law
- 29 states, 2 Territories have introduced it since 2003



<http://www.healthyworkplacebill.org/>

# Let's Practice



# Hypo 1: Trouble in The Office

Robert, the City Manager of the mid-size City, is known for his “salty” demeanor. He becomes upset when his administrative assistant Angela doesn’t do her work correctly. During one week, Angela arrives late, forgets to notify Robert of several urgent constituent requests, and incorrectly calendars an important meeting. Robert yells at her in the office: “What the f\*\*\* is wrong with you? Pull your head out of your @\$\$!”

The next day, Angela forgets to pick up lunch for Robert’s meeting with Councilmember Lee. Robert comes out of his office, throws money on Angela’s desk, and slams his office door. Councilmember Lee watches silently. After this incident, Angela calls in sick for a week. She then calls Councilmember Lee and says she will not come back if she has to report to Robert, because she’s afraid of him. Robert says his conduct isn’t abusive - he was just “frustrated” that Angela’s work “wasn’t done right.” Robert says he holds his staff to the same high standard as himself.

***Appropriately resolve any issues that are presented by this scenario using the California standard for Abusive Conduct.***

Source: *Pantoja v. Anton*, 198 Cal. App. 4<sup>th</sup> 87 (2011)

# Reasonable Person in Target's Position

“Careful consideration [must be given] to the social context in which particular behavior occurs and how it is experienced by its target... Common sense, and appropriate sensitivity to social context will enable courts and juries to distinguish ... conduct which a reasonable person in the plaintiffs' position would find severely hostile and abusive.”

*Citing Oncale v. Sundowner Offshore Services, Inc. 523 U.S. 75, at 81-82, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).*

# Recognize Bullying





# Best Practice: Identify Objective Red Flags

*Such as repeated instances of:*

- Personalized, demeaning comments or insults
- Criticism in public
- Verbal and physical outburst behavior (swearing, shouting, slamming doors)
- Verbal and nonverbal threats and intimidation
- Inappropriate criticism of another's work
- Rumors
- Ostracism and exclusion
- Questions? Consult Human Resources

# Abusive Conduct: Be Sure To Consider

- Abusive conduct is to be avoided, but is not yet illegal
  - Abusive behavior is different from
    - Someone who is simply not liked by others
    - Persons who just don't get along
- Look to intention
- Conduct – context, severity
- Distinguish proper supervision and discipline

**When in doubt,  
consult City Attorney/Human Resources**

# Sexual Harassment



# What is Sexual Harassment? (Federal - EEOC)

**Unwelcome sexual advances, requests for sexual favors, and other verbal, physical or visual conduct of a sexual nature constitute unlawful harassment when:**

- Submission made an explicit or implicit term or condition of employment
- Submission to or rejection used as the basis for employment decisions affecting an individual; or
- Conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment

# What is Sexual Harassment? (State – FEHA)

- “[U]nwanted sexual advances, or visual, verbal or physical conduct of a sexual nature.” Section 7291.1(f)
- **Partial list of violations:**
  - **Visual conduct:** leering, making sexual gestures, displaying of suggestive objects or pictures
  - **Verbal conduct:** making or using derogatory comments, epithets, slurs and jokes
  - **Verbal sexual advances or propositions**
  - **Physical conduct:** touching, assault, impeding or blocking movements



# Harassment & Women in the Workforce

- 40-60% women reported experiencing some form of sexual harassment during their careers
- \$4.4 million in lost wages and 973,000 hours in unpaid leave each year in the U.S.
- 90-95% of victims reported suffering from stress reactions, including: anxiety, depression, headaches, sleep disorders, weight loss or gain, nausea, lowered self-esteem and sexual dysfunction

Source: Equal Rights Advocates 2010

# How Common is Sexual Harassment ?

- 1 in 3 women between ages 18-34 report experiencing some form\* of sexual harassment at work
- 81% experienced verbal harassment
- 44% experienced unwanted touching and sexual advances
- 25% received unwanted texts or emails of sexual nature, or offensive comments through social media



Source: Huffington Post 2015

\*numbers are higher than 100% due to overlapping reports



# San Leandro

## Harassment/Discrimination Prevention Policy

### Harassment prohibited based on\*:

- Race
- Color
- Ancestry
- Religion or Creed
- Sex
- National Origin
- Marital Status
- Age
- Mental or Physical Disability
- Medical Condition
- Pregnancy
- Sexual Orientation
- Genetic Info
- Gender Identity or Expression
- Political Affiliation or Belief
- Military or Veteran Status
- \*=prohibited by SLHDPP

# California Regulations for Harassment

**Requires employers to have an anti-discrimination and harassment policy that meets each of the following requirements:**

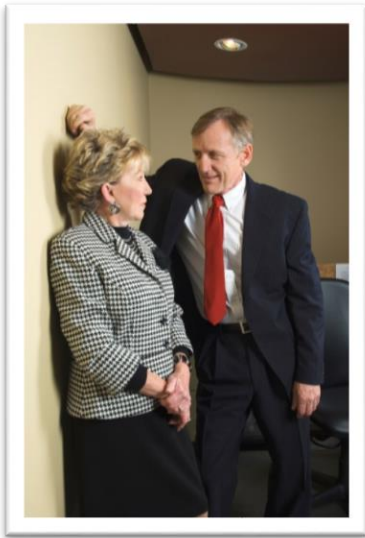
- Written policy.
- Lists ***each*** category of individuals protected by FEHA.
- Makes clear that FEHA prohibits coworkers, third parties, supervisors and managers from engaging in discriminatory, harassing, or retaliatory conduct.

# San Leandro Anti-Harassment Policy

## Examples of harassment:

- **Speech** – e.g. derogatory comments, slurs, lewd propositions
- **Visual Insult** – e.g. derogatory posters, photos, drawings, gestures
- **Physical Acts** – e.g. unwanted touching, blocking normal movements, interfering with work

# Physical Conduct

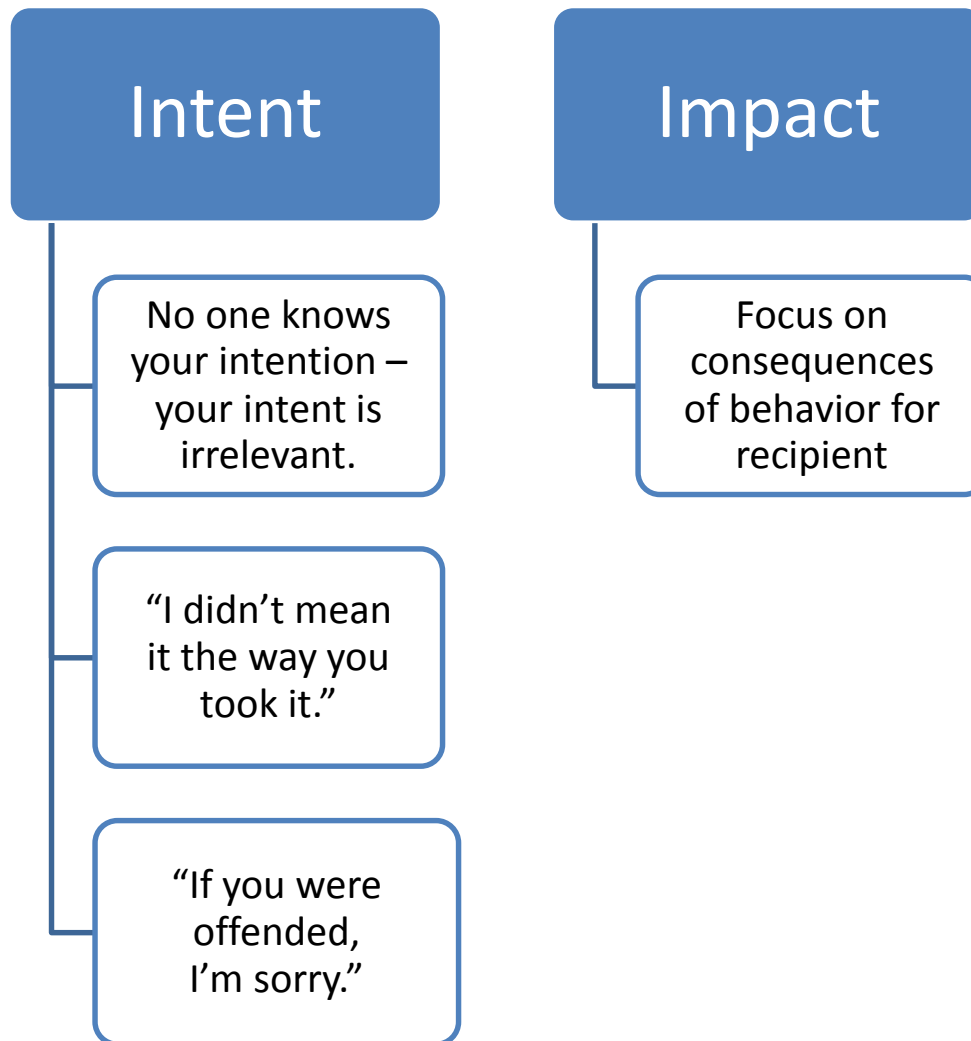


- Blocking egress
- Leering, staring, “elevator eyes”
- Obscene/hostile gestures
- Physical assault

- Unwanted “massage”
- Bumping, patting, grabbing, pinching, touching, rubbing



# Intent vs. Impact

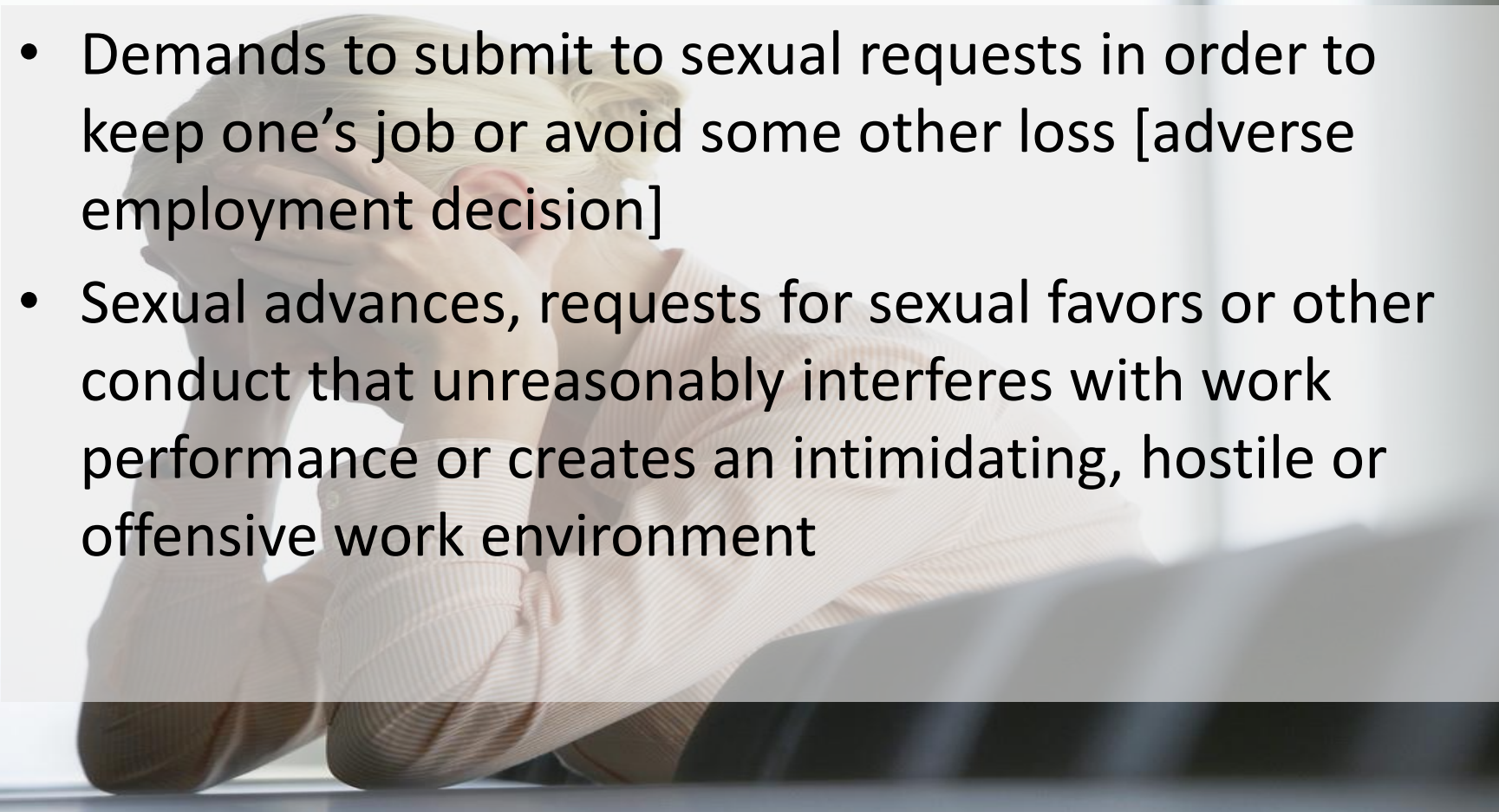


# Physical Conduct-Remember Intent vs Impact





# San Leandro Anti-Harassment Policy cont.

- 
- Demands to submit to sexual requests in order to keep one's job or avoid some other loss [adverse employment decision]
  - Sexual advances, requests for sexual favors or other conduct that unreasonably interferes with work performance or creates an intimidating, hostile or offensive work environment



# Reporting Procedures

- Anyone subjected to, or observes, an incident of possible discrimination or harassment is required to report the behavior
- Employees may report harassment to their supervisor or Department Head, or HR
- All complaints shall be treated seriously
- Informal resolution option
- Formal complaint process

# California Regulations for Harassment

- Recent California regulations (§11023 specifically) require all California employers with more than five employees to meet the following policy requirements regarding harassment, discrimination, and retaliation.



# California Regulations for Harassment

**Provide a complaint process to ensure complaints are:**

- Kept confidential  
(to the extent possible)
- Responded to timely
- Investigated by qualified personnel  
in a timely and impartial manner
- Documented and tracked



*Complaint process also must provide for appropriate remedial actions, resolution of complaints, and timely closure of investigations.*

# California Regulations for Harassment

- ✓ Establish a complaint mechanism, such as a complaint hotline or access to an ombudsperson.
- ✓ Provides employees option of complaining to someone other than an immediate supervisor.
- ✓ Instruct supervisors to report any complaints of misconduct to a designated employer representative so the employer can try to resolve the claim internally.



# California Regulations for Harassment

## **Employers Can Provide Policies to Employees by:**

- Providing electronic or hard copies to employees with an acknowledgment form for employees to sign.
- Posting on intranet using a tracking system to ensure all employees read and acknowledge receipt of the policies.
- Discuss the policies upon hire or during new-hire orientation sessions.
- If the native language of 10% or more of the employer's workforce is a language other than English, employer must draft the policy in both English and the employees' native language(s).

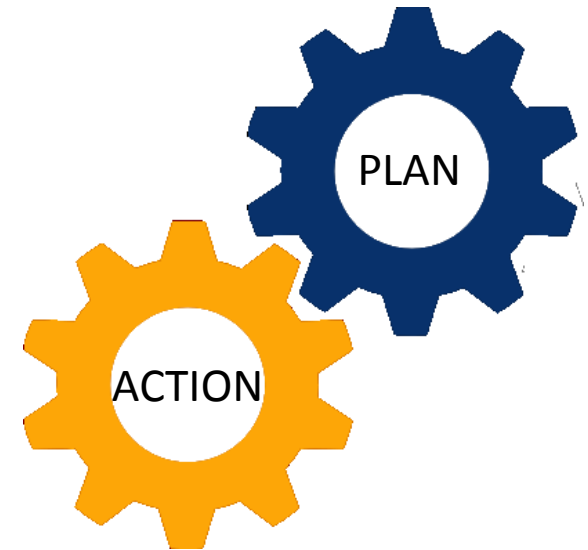
# California Regulations for Harassment

- Clarify that allegations of misconduct will be addressed through a fair, timely, and thorough investigation.
- Indicate that if misconduct is found during the investigation, appropriate remedial measures shall be taken.
- States employer will not retaliate against employees for lodging a complaint or participating in an investigation.



# Supervisor's Role

- ✓ **Take all complaints seriously**
- ✓ **Notify and get guidance from HR**
- ✓ **Document everything**
- ✓ **Respect confidentiality**





# Types of Harassment

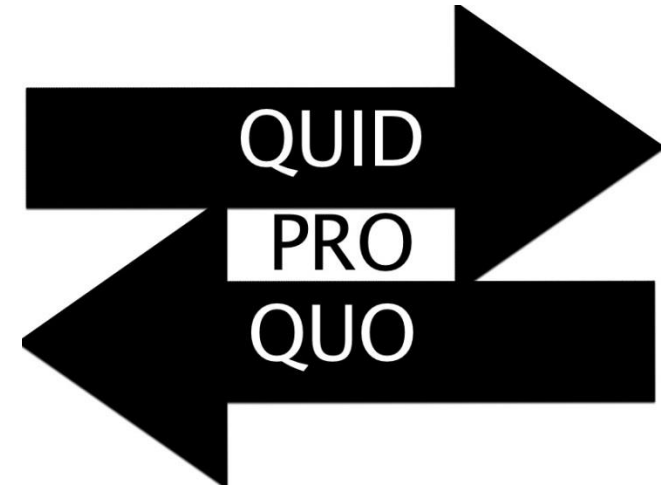
A close-up photograph of a person's hands holding a small, wrapped gift. The gift is red with a gold ribbon tied in a bow. The person is wearing a dark suit jacket over a light-colored shirt. The background is white.

*Quid pro quo*

# *Quid Pro Quo*: “This for That”

## Federal statute:

- Submission is made an explicit or implicit term or condition of employment
- Submission to or rejection is used as the basis for employment decisions affecting an individual



# *Quid Pro Quo*: “This for That”

- How do the participants experience the conduct?
- Consensual conduct is not harassment
- Harassment arises from lack of consent



# Let's Practice



# Hypo 2 : Relationship Becomes Harassment?



# Best Practice Takeaway

- Supervisors and direct reports should NOT be in dating relationships
- If a relationship develops, the Supervisor should immediately disclose to HR.
- Necessary reporting adjustments will be made.



# Takeaway: Best Practices

- Report at the first indication of coercive, questionable behavior.
- Even if conduct doesn't rise to quid pro quo, training or corrective action may be appropriate.
- Always alert Human Resources.





# Types of Harassment



## HOSTILE WORK ENVIRONMENT

# Types of Harassment

- Conduct is based on sex or protected status
- Severe or pervasive enough to create an environment that a reasonable person would find abusive
- Unwelcome conduct
- Perception of abusive environment by victim



# Objective Standard

- Considered abusive by “reasonable person” in the same position as victim
- Law doesn’t create a “general civility code”  
*Oncale v. Sundowner*, 523 U.S. 75 (1997)
- Consider social context

# Takeaway: Reasonableness of Conduct is Not Absolute

What is reasonable or abusive  
in one context *may not be in another*

- ✓ Audience
- ✓ Work environment
- ✓ Expectation of those exposed to conduct





# Best Practice: Conduct Based On Sex

- **DO** consider context in displaying visual items, sending emails and messages at work
- **DO** keep conversations at work especially about subordinates and co-workers professional
- **DON'T** make sexualized comments about appearance, clothing and body parts
- **DO** consider whether off-duty conduct violates policy or has a “nexus” to work
- ***When in doubt, consult City Attorney or Human Resources***



# Bonus: What Should You Do If You Feel Attracted To Someone at Work?

- A. OK to look  
but don't touch
- B. OK to look  
if they want you to look
- C. Don't look  
and don't touch
- D. All of the above
- E. None of the above





# Hostile Work Environment: “Severe or Pervasive”



# Determining Severe and/or Pervasive Conduct

- Look at totality of circumstances
- Frequency of conduct
- Period of time over which conduct occurred
- Context in which conduct occurred
- Whether conduct is physically threatening
- Whether conduct unreasonably interfered with employee's work performance



# Severe or Pervasive

- Must be severe OR pervasive enough
  - “to alter the conditions of employment”
- Single incident may qualify if severe
  - including physical violence or threat thereof
- Not “occasional, isolated, sporadic, or trivial”



# Who Can Make A Claim of Sexual Harassment?

- Male, Female and Trans victims
- Opposite gender and same sex interactions
- Employees who observed the conduct
- Contractors
- Members of the public



# Third Party Harassment

- ***Employees and persons who perceive offensive conduct***

- \**conversations*

- \**media*

- \**jokes*

- \**music*

- \**physical items*

- ***Sexual favoritism***



# Best Practice: Avoid Questionable “Banter”

- Be aware of prohibitions regarding verbal abuse, slurs, derogatory language
- Be aware of potential perceptions based on race, gender, religious affiliation
- Maintain a respectful and professional environment
- Consult Human Resources or City Attorney





# Is this Sexual Harassment?

- Is this conduct of a sexual nature?
- Is this conduct directed at a particular gender?
- How often is this sort of behavior happening?
- Is this conduct offensive to persons who witnessed it?
- Is the person to whom it was directed offended?
- Does the employee have to tolerate that type of conduct in order to keep his or her job?

# The Golden Rules Revisited

1

“It’s a Workplace”

2

Intent vs. Impact

3

Consult City Attorney/Human Resources



# Preventing Harassment

- Model good behavior
- Be aware of your own and others' reactions
- Encourage employees to speak up
- Do so respectfully, privately, appropriately



# Presenter



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