Sonoma County Office of Education

SEXUAL HARASSMENT & SEX DISCRIMINATION: MANAGERS’ OBLIGATIONS UNDER TITLE IX AND TITLE VII

September 24, 2018

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Personnel
Title IX & the Clery Act
Website Accessibility

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B.A. Humboldt State University, Geography magna cum laude (2007)
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School and College Legal Services (SCLS) is a joint powers authority serving school districts, county offices of education, SELPAs, and community colleges in over fifteen counties in Northern California. Our primary focus, as a preventative law firm, is helping clients avoid future costly legal problems. We are a collaborative office, working to ensure our clients receive the most legally defensible advice in the most efficient manner possible.
Sexual Harassment & Sex Discrimination:
Managers’ Obligations under Title IX and Title VII

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Agenda
I. Test Your Knowledge
II. Overview of Sexual Harassment & California Law
III. Title IX of the Education Amendments of 1972
IV. Title VII of the Civil Rights Act of 1964
V. Sexual Harassment Investigations

I. Test Your Knowledge
II. Sexual Harassment & California Law

Sexual Harassment & Applicable Laws

- Fair Employment and Housing Act (CA)
- Education Code (CA)
- Title IX of the Education Amendments of 1972 (Federal)
- Title VII of the Civil Rights Act of 1964 (Federal)

California Fair Employment and Housing Act (FEHA)

- Prohibits “discrimination” and “harassment” on the basis of sex, gender, gender identity, gender expression, or sexual orientation
- Employers have a duty to take “all reasonable steps necessary to prevent harassment from occurring” (Government Code § 12940(j)(1))
California Education Code § 231.5

• “It is the policy of the State of California … that all persons, regardless of their sex, should enjoy freedom from discrimination of any kind in the educational institutions of the state.” (Education Code § 231.5)

• Sexual harassment is prohibited as a form of sex discrimination

California Education Code § 220

“No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.”

Important Terms

• **Sex**: “male” or “female” sex categories (biological or physical characteristics, e.g., testicles for males, menstruation for females).

• **Gender**: socially constructed roles, behaviors, activities and attributes that society considers appropriate for men and women.

• **Gender identity**: one’s internal sense of being a man or woman. For transgender individuals, birth-assigned sex and their own internal sense of gender identity don’t match.

• **Gender expression**: all the external characteristics and behaviors that are socially defined as either masculine or feminine, such as clothing, grooming, mannerisms, speech patterns and social interactions.

• **Sexual orientation**: an individual's physical and/or emotional attraction to the same and/or opposite gender. "Gay," "lesbian," "bisexual" and "straight" are all examples of sexual orientations.
Sex Discrimination

What is sex discrimination?

Sex discrimination is discrimination (including harassment) on the basis of sex, gender, gender identity, gender expression, or sexual orientation.

(Attachments 3-5)

What is Sexual Harassment

“Prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature, made by someone of the same or opposite sex in the work or educational setting…”

(Attachment 3 – BP 4219.11 – Sexual Harassment; Attachment 4 – AR 4219.11 – Sexual Harassment; Attachment 5 – BP 4030 – Nondiscrimination in Employment)

Types of Sexual Harassment

• Quid Pro Quo

• Hostile or Abusive Work Environment
Quid Pro Quo

• “This for that”

• Occurs when a person in a position of authority makes educational or employment benefits conditional upon an individual’s willingness to engage in or tolerate sexual conduct.

Hostile or Abusive Work Environment

Occurs when “[t]he conduct has the purpose or effect of having a negative impact upon the individual’s work or has the purpose or effect of creating an intimidating, hostile, or offensive work environment. The conduct is sufficiently severe, persistent, pervasive, or objectively offensive so as to create a hostile or abusive working environment or to limit the individual’s ability to participate in or benefit from an education program or activity.”

Key Elements of Sexual Harassment

• Unwelcome – Unlawful harassment is based on unwelcome conduct.
• Sexual – Sexual in nature or gender-based (because of sex).
• Severe, Pervasive, Persistent or Offensive – Conduct must be sufficiently severe, pervasive, persistent, or offensive to alter the working conditions of the complainant.
Key Element: Severe or Pervasive

Severity

Frequency

Key Elements of Sexual Harassment

- Abusive/offensive, both objectively and subjectively:
  - Objectively: A reasonable person, similarly situated, would find the conduct abusive/offensive.
  - Subjectively: The victim actually finds the conduct abusive/offensive.

- Totality of the Circumstances

Examples of Verbal Conduct

- Unwelcome gender-specific epithets, comments or slurs
- Explicit discussions about sexual activities
- Foul or obscene language
- Graphic comments
- Jokes or stories
- Advances or propositions
- Spreading rumors of a sexual nature
Examples of Physical Conduct

• Unwelcome touching, assault, kissing, hugging, or grabbing
• Coercing intercourse or other sexual conduct
• Sexual gestures
• Any physical interference with work or school activities when directed at an individual on the basis of sex

Examples of Visual Conduct

• Wearing clothing with offensive or vulgar language
• Displaying posters or pictures of a sexual nature
• Showing other people sexually suggestive text messages or emails
• Watching pornographic or violent videos
• Drawing violent or derogatory images

Retaliation is Illegal

• Retaliation is adverse treatment toward someone because they filed a complaint or participated in an investigation:
  • Denial of employment benefits
  • Harassment/abuse
  • Spreading false rumors about someone
  • Threats
  • Making someone's life more difficult
• Retaliation subjects an individual to disciplinary action up to and including termination.

(Attachment 4, AR 4219.11)
Employer Liability Under FEHA

- An employer is liable to employees, students or third parties if the employer…
  1. Knows or should have known of harassment, and
  2. Fails to take effective measures to stop it.
- Strict liability for harassment by a supervisor

Personal Liability Under FEHA

An employee is personally liable for their own harassment - regardless of whether the employer knows or should have known of the conduct and fails to take immediate and corrective action.

III. Title IX of the Education Amendments of 1972
What Is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”


What Is Title IX?

• Title IX of the Education Amendments of 1972
• Established to combat discrimination against women in the educational system
• Two objectives:
  • Prevent use of federal resources to support discriminatory practices in education
  • Provide individuals with protection against those practices
• Title IX protects any “person” against sex discrimination – both males and females

Title IX: Who is Protected?

• Women and men
  • Including same-sex harassment
• Students and employees
• Applicants for admission or employment
• Third parties (e.g. unions)
Title IX: Where Does It Apply?

• Title IX protects students and employees in connection with all academic, educational, extracurricular, athletic, and other SCOE programs.

• Programs can take place in a SCOE facility, in a SCOE vehicle, at a program sponsored by SCOE at another location, or on a SCOE-sponsored field trip.

Requirements Under Title IX

• Once an institution knows or reasonably should know of sex discrimination, it must:
  • Investigate
  • End the discrimination
  • Prevent discrimination from occurring again

• Procedural requirements:
  • Adoption of certain policies
  • Adoption and publication of grievance procedures
  • Designation of a Title IX Coordinator
  • Fair and equitable investigations and proceedings

Responsible Employees

• A “responsible employee” is any employee:
  • Who has the authority to take action to redress sexual harassment;
  • Who has been given the duty of reporting incidents of sexual harassment to the Title IX Coordinator/designee; or
  • Whom a student could reasonably believe has this authority or duty.

• When a “responsible employee” knows or should have known of sexual harassment/discrimination, the district must take certain steps.
Title IX Protects Employees

- Title IX protects employees from sex discrimination in their employment.
- Title IX prohibits discrimination in:
  - Recruitment, advertising, and the application process
  - Hiring, upgrading, promoting, demoting, transferring, laying off, termination, returning from layoff, and rehiring
  - Pay, compensation, and fringe benefits
  - Job assignments, classifications, and structure
  - Leaves of absence
  - Selection and financial support for training
  - Employer-sponsored activities

Title IX Prohibits Sex-Based Harassment

- Sexual harassment is a prohibited form of sex discrimination.
- Two types:
  - Hostile educational environment harassment
  - Quid pro quo harassment
- Title IX prohibits sexual harassment by students, other employees, and third parties (such as visiting speakers and athletes).
- Title IX also prohibits same-sex sexual harassment.

Title IX Prohibits Sexual Violence

- Sexual violence = physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol or intellectual or other disability.
- SCOE may be notified directly or indirectly of a claim of sexual violence.
- Once SCOE knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to investigate.
Title IX Prohibits Gender-Based Discrimination

- Title IX prohibits gender-based discrimination, including:
  - verbal, nonverbal, or physical aggression,
  - harassment,
  - intimidation, or
  - hostility,
  - based on sex or sex stereotyping,
  - even if not sexual in nature.

Source: NYC Dance Project, upsocl.com

Title IX Prohibits Discrimination Based on Marital, Parental or Family Status

- SCOE may not treat employees or applicants differently based on marital, parental, or family status
- Discrimination on the basis of pregnancy, childbirth, and related medical conditions is prohibited
- Requires reasonable accommodation of lactation needs

Title IX Also Prohibits Retaliation

- Title IX protects complainants and other participants in the investigation/complaint process from retaliation.
- “Among the most important immediate responsibilities of an [institution] is to ensure that [individuals] who allege harassment…are not subject to retaliation.”
- If retaliation occurs, employer should take strong responsive action.
Enforcement of Title IX

- Title IX is enforced by the U.S. Department of Education, Office for Civil Rights (OCR).
- A possible penalty for violating Title IX is the loss of all federal funding.
- In 1979, the U.S. Supreme Court upheld a private right of action under Title IX.

IV. Title VII of the Civil Rights Act of 1964

Title VII

A federal law that prohibits employment discrimination based on sex, including sexual harassment
What is Title VII?
• Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin.
• The statute protects employees from:
  • discrimination based on sex, which includes sexual harassment, and
  • retaliation
• Cover employers with 15+ employees, including federal, state, and local governments.
• Enforced by the federal EEOC.

Title VII – Sexual Harassment
Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of the individual’s employment, (2) submission to or rejection of such conduct … is used as the basis for employment decisions affecting such individual or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment. (29 CFR §1604.11)

Title VII – Sexual Harassment Defined (EEOC Guidance)
• Sexual harassment based on sex includes gender identity, sexual orientation and pregnancy.
• It is also illegal to harass someone because they have complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit (retaliation).
Title VII Sexual Harassment Includes Transgender Harassment

• U.S. Court of Appeals ruled that Title VII’s gender-based discrimination protections apply to discrimination based on an employee’s transgender and transition status.
• “It is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex.”
• “Discrimination ‘because of sex’ inherently includes discrimination against employees because of a change in their sex.”


Title VII – Employer Liability

• Employers are liable for unlawful harassment when:

  • Harassment is by a supervisor that results in negative employment action (i.e., termination, failure to promote or hire), or

  • Harassment is by non-supervisory employees or non-employees over whom it has control if it knew or should have known about the harassment and failed to take prompt corrective action.

Title VII – Employer Liability

• Employer is also liable for hostile work environment harassment by employees who are not supervisors if employer was negligent in failing to prevent harassment.

• In assessing negligence, courts evaluate nature and degree of authority wielded by harasser, and whether employer:
  • did not monitor the workplace
  • failed to respond to complaints
  • failed to provide a system for registering complaints
  • effectively discouraged complaints from being filed
Title VII – Take it Seriously

- Employers must take harassment seriously
- An employer’s policy should be clear that:
  - Sexual harassment will not be tolerated
  - Complainants will be protected from retaliation
- Upper management sets the tone of the workplace:
  - Encourage all employees to stand up and speak out
  - Frequent and frank discussions about anti-harassment procedures
  - Consistently discourage inappropriate jokes, unwanted touching, etc.

V. Sexual Harassment Investigations

Investigation Fundamentals: First Steps

1. Review the applicable procedure
   - Enter the case into a complaint log
   - Map out the steps and timeline for the investigation based on the procedure
   - Make sure required notices are sent, including copies of the applicable procedure and other information required by the procedure
2. Develop an investigative strategy
   - Determine basic steps of the investigation
   - Determine who should be interviewed and what information should be reviewed
Investigation Fundamentals:  
Next Steps

3. Determine who will be part of the investigation team  
   • District employees  
   • Outside investigators

4. Conduct the investigation  
   • Begin promptly  
   • Determine who should be interviewed, and in what order  
   • Begin interviews with core people and broaden as needed  
   • Before interviewing, outline interview questions, including  
     elements of a particular complaint  
   • Before interviewing, review related documents/records

Investigation Fundamentals, cont’d.

4. Conduct the investigation, cont’d  
   • Prepare for interviews by identifying the following  
     elements:  
     • Identity of interviewer  
     • Identity of person to be interviewed  
     • Location, date, and time of interview  
     • Conduct interview in confidential setting  
     • Make arrangements to record interviews if possible

Investigation Fundamentals, cont’d

• Look for each element of the type of discrimination at  
  issue
• Did unlawful conduct occur?
• Was each prong of the allegation met?
• Sexual Harassment –  
  • (1) Unwelcome conduct that is  
  • (2) sufficiently severe or pervasive to  
  • (3) (a) significantly interfered with the employee’s job  
   performance OR  
  (b) create an intimidating, hostile or abusive  
   working/academic environment
Interviews

• Explain that district is required to investigate allegations of [sexual harassment, sexual violence, sex discrimination] and take appropriate action
  • State that no conclusions have been made
  • Try to put interviewee at ease (use trauma-informed guidelines)
  • Emphasize the expectation of best recollection and truthful answers
  • Start with broad/overview questions

Interviews

• Have interviewee describe the incident(s)/conduct in his/her own words
  • 5 W’s – who, what, when, where, why
  • Ask if interviewee has told interviewer everything he/she can remember
  • After each answer, ask: “is there anything else?”
  • Ask follow up questions, including questions to confirm chronology of events, to fill in any gaps in the 5 W’s
  • Don’t offer information or provide the answer

Interviews

• Ask about and for copies of any relevant documents, texts, emails, etc.
• At the end of the interview:
  • Ask whether there is anyone else the interviewee thinks should be interviewed about the incident/conduct
  • Provide your contact information and advise the interviewee to contact you with any additional information
  • Give the interviewee a copy of the relevant procedure
  • Caution against retaliation
  • Remind the interviewee to maintain confidentiality
  • Advise interviewee you may need to follow-up with him/her as investigation proceeds
Interview Documentation

• Take and keep notes of interviews and the entire investigation (telephone conversations, meetings)
• Include date, time, and place of interview
• Include who attended the interview, and how long it lasted
• Note information provided by witnesses, and if it is consistent/inconsistent with information provided by other witnesses
• Note any documents/evidence provided during interview
• Note names of any potential witnesses provided by interviewee

Preserve Evidence

• Take note of when, where, and from whom an item was taken
• Store all evidence in a secure location
• If any items are surrendered to law enforcement, take a picture of the item and note when, where, and to whom it was surrendered
• Photograph physical injuries and promptly arrange for appropriate first aid/medical attention
• Title IX regulations require institutions to keep records to send to OCR for compliance reviews
• Certain records must be sent to CDE

Findings of Fact and Conclusions

• Some evidence may not be in dispute
• Some evidence can be corroborated by the investigator
• Information from complainant or respondent may be corroborated by witnesses
• When information received from complainant and respondent differs on important points, make credibility determinations
• State what facts are determined to be true/untrue and what areas could not be determined (if any)
Findings of Fact and Conclusions, cont’d.

• Based on the facts and analysis, reach a conclusion:
  • The complaint lacks merit
  • The evidence was not conclusive and cannot support a determination as to the merits of the complaint
  • The alleged conduct occurred, but did not violate policy, applicable standards (whatever else the complaint process addresses)
  • The conduct occurred and violated a standard of conduct or a standard of policy
  • Prepare a report

VI. Check Your Knowledge

Questions?

Information in this presentation, including but not limited to PowerPoint handouts and presenters’ comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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PRE-TEST

ATTACHMENT 1
PRE-TEST

The following pretest allows you to assess your knowledge of sexual harassment issues. At the end of the training session, you will revisit your answers based on the information you received during training. (Answers appear in Attachment 10.)

1. A person (student or employee) who is concerned about the behavior of another must tell that person of the concerns before reporting it to a school official as sexual harassment.  

   T or F

2. A student who complains of sexual harassment by other students in her class should be required to withdraw and enroll in the class the next semester.  

   T or F

3. A school employee can be held personally liable for unlawful sexual harassment.  

   T or F

4. A school supervisor should take action if he/she actually knows about sexual harassment or if he/she reasonably believes that sexual harassment is at issue.  

   T or F

5. If an employee grabs another employee’s “private parts” just as a joke, the behavior isn’t harassment.  

   T or F

6. Sexual harassment based on gender identity is unlawful.  

   T or F

7. A supervisor should tell an employee who complains of sexually harassing conduct not to file a police report until the school has completed its investigation.  

   T or F

8. Name two steps the school can take to help prevent sexual harassment.

   ______________________________________________________
   ______________________________________________________

9. If you have any questions about your responsibilities with regard to sexual harassment, you should call ____________________________.
CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING: SEXUAL HARASSMENT: THE FACTS ABOUT SEXUAL HARASSMENT

ATTACHMENT 2
SEXUAL HARASSMENT

THE FACTS

Sexual harassment is a form of discrimination based on sex/gender (including pregnancy, childbirth, or related medical conditions), gender identity, gender expression, or sexual orientation. Individuals of any gender can be the target of sexual harassment. Unlawful sexual harassment does not have to be motivated by sexual desire. Sexual harassment may involve harassment of a person of the same gender as the harasser, regardless of either person’s sexual orientation or gender identity.

THERE ARE TWO TYPES OF SEXUAL HARASSMENT

1. “Quid pro quo” (Latin for “this for that”) sexual harassment is when someone conditions a job, promotion, or other work benefit on your submission to sexual advances or other conduct based on sex.

2. “Hostile work environment” sexual harassment occurs when unwelcome comments or conduct based on sex unreasonably interfere with your work performance or create an intimidating, hostile, or offensive work environment. You may experience sexual harassment even if the offensive conduct was not aimed directly at you.

The harassment must be severe or pervasive to be unlawful. That means that it alters the conditions of your employment and creates an abusive work environment. A single act of harassment may be sufficiently severe to be unlawful.

BEHAVIORS THAT MAY BE SEXUAL HARASSMENT:

1. Unwanted sexual advances
2. Offering employment benefits in exchange for sexual favors
3. Leering; gestures; or displaying sexually suggestive objects, pictures, cartoons, or posters
4. Derogatory comments, epithets, slurs, or jokes
5. Graphic comments, sexually degrading words, or suggestive or obscene messages or invitations
6. Physical touching or assault, as well as impeding or blocking movements

Actual or threatened retaliation for rejecting advances or complaining about harassment is also unlawful.

Employees or job applicants who believe that they have been sexually harassed or retaliated against may file a complaint of discrimination with DFEH within one year of the last act of harassment or retaliation. 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 civil complaint in state or federal court to address the causes of the discrimination and on behalf of the complaining party. DFEH may seek court orders changing the employer’s policies and practices, punitive damages, and attorney’s fees and costs if it prevails in litigation. 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.

If you have a disability that prevents you from submitting a written intake form on-line, by mail, or email, the DFEH can assist you by scribing your intake by phone or, for individuals who are Deaf or Hard of Hearing or have speech disabilities, through the California Relay Service (711), or call us through your VRS at (800) 884-1684 (voice).

To schedule an appointment, contact the Communication Center at (800) 884-1684 (voice or via relay operator 711) or (800) 700-2320 (TTY)
or by email at contact.center@dfeh.ca.gov.

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Contact the DFEH at (800) 884-1684 (voice or via relay operator 711), TTY (800) 700-2320,or contact.center@dfeh.ca.gov to discuss your preferred format to access our materials or webpages.

FOR MORE INFORMATION

Department of Fair Employment and Housing
Toll Free: (800) 884-1684
TTY: (800) 700-2320
Online: www.dfeh.ca.gov

Also find us on:
EMPLOYER RESPONSIBILITY & LIABILITY

All employers, regardless of the number of employees, are covered by the harassment provisions of California law. Employers are liable for harassment by their supervisors or agents. 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. In addition, an employer may be liable for the harassment by a non-employee (for example, a client or customer) of an employee, applicant, or person providing services for the employer. An employer will only be liable for this form of harassment if it knew or should have known of the harassment, and failed to take immediate and appropriate corrective action.

Employers have an affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct, and to create a workplace free of harassment.

A program to eliminate sexual harassment from the workplace is not only required by law, but it is the most practical way for an employer to avoid or limit liability if harassment occurs.

ALL EMPLOYERS MUST TAKE THE FOLLOWING ACTIONS TO PREVENT HARASSMENT AND CORRECT IT WHEN IT OCCURS:

1. Distribute copies of this document or an alternative writing that complies with Government Code 12950. This document may be duplicated in any quantity.
2. Post a copy of the Department’s employment poster entitled “California Law Prohibits Workplace Discrimination and Harassment.”
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 DFEP and the United States Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints.
4. 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 50 or more employees are required to include this as a topic in mandated sexual harassment prevention training (see 2 CCR 11024).
5. 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.
6. Make clear that employees shall not be retaliated against as a result of making a complaint or participating in an investigation.
7. 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.

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.

In addition, employers who do business in California and employ 50 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.

CIVIL REMEDIES

1. Damages for emotional distress from each employer or person in violation of the law
2. Hiring or reinstatement
3. Back pay or promotion
4. Changes in the policies or practices of the employer
SCOE BOARD POLICY 4219.11 – SEXUAL HARASSMENT

ATTACHMENT 3
The Sonoma County Superintendent of Schools prohibits sexual harassment of Sonoma County Office of Education employees and job applicants. The County Superintendent also prohibits retaliatory behavior or action against County Office employees or other persons who complain, testify or otherwise participate in the complaint process established pursuant to this policy and administrative regulation.

(cf. 0410 - Nondiscrimination in County Office Programs and Activities)  
(cf. 4030 - Nondiscrimination in Employment)

The County Superintendent or designee shall take all actions necessary to ensure the prevention, investigation, and correction of sexual harassment, including but not limited to:

1. Providing training to employees in accordance with law and administrative regulation
2. Publicizing and disseminating the County Office sexual harassment policy to staff
3. Ensuring prompt, thorough, and fair investigation of complaints
4. Taking timely and appropriate corrective/remedial action(s), which may require interim separation of the complainant and the alleged harasser and subsequent monitoring of developments

All complaints and allegations of sexual harassment shall be kept confidential to the extent necessary to carry out the investigation or to take other subsequent necessary actions. (5 CCR 4964)

Any County Office employee or job applicant who feels that he/she has been sexually harassed or who has knowledge of any incident of sexual harassment by or against another employee, a job applicant or a student, shall immediately report the incident to his/her supervisor, the principal/site administrator, County Office administrator or County Superintendent.

A supervisor, principal, or other County Office administrator who receives a harassment complaint shall promptly notify the County Superintendent or designee.

Complaints of sexual harassment shall be filed in accordance with AR 4031 - Complaints
Concerning Discrimination in Employment. An employee may bypass his/her supervisor in filing a complaint where the supervisor is the subject of the complaint.

(cf. 4031 - Complaints Concerning Discrimination in Employment)

Any County Office employee who engages or participates in sexual harassment or who aids, abets, incites, compels, or coerces another to commit sexual harassment against a County Office employee, job applicant, or student is in violation of this policy and is subject to disciplinary action, up to and including dismissal.

(cf. 4117.4 - Dismissal)
(cf. 4118 - Suspension/Disciplinary Action)
(cf. 4218 - Dismissal/Suspension/Disciplinary Action)

Legal Reference:
EDUCATION CODE
200-262.4 Prohibition of discrimination on the basis of sex
GOVERNMENT CODE
12900-12996 Fair Employment and Housing Act, especially:
12940 Prohibited discrimination
12950.1 Sexual harassment training
LABOR CODE
1101 Political activities of employees
1102.1 Discrimination: sexual orientation
CODE OF REGULATIONS, TITLE 2
7287.8 Retaliation
7288.0 Sexual harassment training and education
CODE OF REGULATIONS, TITLE 5
4900-4965 Nondiscrimination in elementary and secondary education programs receiving state financial assistance
UNITED STATES CODE, TITLE 42
2000d-2000d-7 Title VI, Civil Rights Act of 1964
2000e-2000e-17 Title VII, Civil Rights Act of 1964, as amended
2000h-2-2000h-6 Title IX, 1972 Education Act Amendments
CODE OF FEDERAL REGULATIONS, TITLE 34
106.9 Dissemination of policy
COURT DECISIONS
Department of Health Services v. Superior Court of California, (2003) 31 Cal.4th 1026
Management Resources:
OFFICE OF CIVIL RIGHTS AND NATIONAL ASSOCIATION OF ATTORNEYS
GENERAL
Protecting Students from Harassment and Hate Crime, January, 1999:
OPERATIONAL PROCEDURES
    SCOE Operational Procedures Manual (staff use)
WEB SITES
California Department of Fair Employment and Housing:  http://www.dfeh.ca.gov
U.S. Department of Education, Office for Civil Rights:
http://www.ed.gov/about/offices/list/ocr/index.html

Superintendent Policy SONOMA COUNTY OFFICE OF EDUCATION
approved:  September 16, 2013       Santa Rosa, California
SCOE ADMINISTRATIVE REGULATION 4219.11 – SEXUAL HARASSMENT
Definitions

Prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature, made by someone of the same or opposite sex in the work or educational setting when: (Education Code 212.5; 5 CCR 4916)

1. Submission to the conduct is made explicitly or implicitly a term or condition of the individual's employment.

2. Submission to or rejection of such conduct by the individual is used as the basis for an employment decision affecting the individual.

3. The conduct has the purpose or effect of having a negative impact upon the individual's work or has the purpose or effect of creating an intimidating, hostile, or offensive work environment. The conduct is sufficiently severe, persistent, pervasive, or objectively offensive so as to create a hostile or abusive working environment or to limit the individual's ability to participate in or benefit from an education program or activity.

4. Submission to or rejection of the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits, services, honors, programs, or activities available at or through the Sonoma County Office of Education.

"Verbal sexual harassment" includes, but is not limited to, unwelcome epithets, comments or slurs of a sexual nature.

"Physical sexual harassment" includes, but is not limited to, assault, impeding or blocking movement, or any physical interference with work or school activities or movement when directed at an individual on the basis of sex.

"Visual sexual harassment" includes, but is not limited to, derogatory posters, cartoons, drawings, obscene gestures, or computer-generated images of a sexual nature.

Other examples of actions that might constitute sexual harassment, whether committed by a supervisor, a co-worker, or a non-employee, in the work or educational setting, include, but are not limited to:
1. Unwelcome verbal conduct such as sexual flirtations or propositions; graphic comments about an individual's body; overly personal conversations or pressure for sexual activity; sexual jokes or stories; unwelcome sexual slurs, epithets, threats, innuendoes, derogatory comments, sexually degrading descriptions, or the spreading of sexual rumors

2. Unwelcome visual conduct such as drawings, pictures, graffiti, or gestures; sexually explicit emails; displaying sexually suggestive objects

3. Unwelcome physical conduct such as massaging, grabbing, fondling, stroking, or brushing the body; touching an individual's body or clothes in a sexual way; cornering, blocking, leaning over, or impeding normal movements

Prohibited sexual harassment may also include any act of retaliation against an individual who reports a violation of the County Office sexual harassment policy or who participates in the investigation of a sexual harassment complaint under the County Office's uniform complaint procedure (AR 1312.3), sexual harassment procedure (AR 5145.7), or the complaint procedure concerning discrimination in employment (AR 4031).

Training

Every two years, the Sonoma County Superintendent of or designee shall ensure that supervisory employees receive at least two (2) hours of classroom or other effective interactive training and education regarding sexual harassment. All newly hired or promoted supervisory employees shall receive training within six (6) months of their assumption of the supervisory position. (Government Code 12950.1)

The County Office's training and education program for supervisory employees shall include information and practical guidance regarding the federal and state laws on the prohibition against and the prevention and correction of sexual harassment, and the remedies available to the victims of sexual harassment in employment. The training shall also include all of the content specified in 2 CCR 11024 and practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation. (Government Code 12950.1; 2 CCR 11024)

In addition, the County Superintendent or designee shall ensure that all employees receive periodic training regarding the County Office sexual harassment policy, particularly the procedures for filing complaints and employees' duty to use the County Office's complaint procedures contained in AR 4031 - Complaints Concerning Discrimination in Employment.

Notifications

A copy of the County Office policy and this administrative regulation shall: (Education Code 231.5)

1. Be displayed in a prominent location in the main County Office administrative building or other area of the facility where notices of County Office rules, regulations, procedures, and standards of conduct are posted
2. Be provided to each faculty member, all members of the administrative staff, and all members of the support staff at the beginning of the first quarter or semester of the school year or whenever a new employee is hired (cf. 4112.9/4212.9/4312.9 - Employee Notifications)

3. Appear in any school or County Office publication that sets forth the school's or County Office's comprehensive rules, regulations, procedures, and standards of conduct for the County Office

All employees shall receive either a copy of information sheets prepared by the California Department of Fair Employment and Housing (DFEH) or a copy of County Office information sheets that contain, at a minimum, components on: (Government Code 12950)

1. The illegality of sexual harassment
2. The definition of sexual harassment under applicable state and federal law
3. A description of sexual harassment, with examples
4. The County Office's complaint process available to the employee (cf. 4031 - Complaints Concerning Discrimination in Employment)
5. The legal remedies and complaint process available through DFEH and the Equal Employment Opportunity Commission (EEOC)
6. Directions on how to contact DFEH and the EEOC
7. The protection against retaliation provided by 2 CCR 7287.8 for opposing harassment prohibited by law or for filing a complaint with or otherwise participating in an investigation, proceeding, or hearing conducted by DFEH or the EEOC

In addition, the County Office shall post, in a prominent and accessible location, DFEH's poster on discrimination in employment and the illegality of sexual harassment. (Government Code 12950)

Regulation SONOMA COUNTY OFFICE OF EDUCATION
approved: September 16, 2013 Santa Rosa, California
revised: August 21, 2017
SCOE BOARD POLICY 4030 – NONDISCRIMINATION IN EMPLOYMENT

ATTACHMENT 5
Sonoma COE  
Board Policy  
Nondiscrimination in Employment - SP  

BP 4030  
Personnel  

The Sonoma County Superintendent of Schools desires to provide a positive work environment where employees and job applicants are assured of equal access and opportunities and are free from harassment in accordance with law. The County Superintendent prohibits County Office employees from discriminating against or harassing any other employee or job applicant on the basis of the person's actual or perceived race, religious creed, color, national origin, ancestry, age, marital status, pregnancy, physical or mental disability, medical condition, genetic information, veteran status, gender, gender identity, gender expression, sex, or sexual orientation.

(cf. 0410 - Nondiscrimination in County Office Programs and Activities)  
(cf. 4032 - Reasonable Accommodation)  
(cf. 4033 - Lactation Accommodation)  
(cf. 4119.11/4219.11/4319.11 - Sexual Harassment)  
(cf. 4119.41/4219.41/4319.41 - Employees with Infectious Disease)  
(cf. 4154/4254/4354 - Health and Welfare Benefits)  
(cf. 5145.7 - Sexual Harassment)

Prohibited discrimination consists of the taking of any adverse employment action against a person, including termination or denial of promotion, job assignment, or training, or in discriminating against the person in compensation, terms, conditions, or other privileges of employment based on any of the prohibited categories of discrimination listed above.

The prohibition against discrimination based on the religious creed of an employee or job applicant includes any discrimination based on the person's religious dress or grooming practices or any conflict between the person's religious belief, observance, or practice and an employment requirement. The prohibition against discrimination based on the sex of an employee or job applicant shall include any discrimination based on the person's pregnancy, childbirth, breastfeeding, or any related medical conditions. (Government Code 12926, 12940)

Harassment consists of any unwelcome verbal, physical, or visual conduct that is based on any of the prohibited categories of discrimination listed above and that is so severe or pervasive that it adversely affects an individual's employment opportunities, has the purpose or effect of unreasonably interfering with the individual's work performance, or creates an intimidating, hostile, or offensive work environment.

The County Superintendent also prohibits retaliation against any County Office employee or job applicant who complains, testifies, assists, or in any way participates in the County Office complaint procedures instituted pursuant to this policy.
Any County Office employee who engages in prohibited discrimination, harassment, or retaliation or who aids, abets, incites, compels, or coerces another to engage or attempt to engage in such behavior in violation of this policy shall be subject to disciplinary action, up to and including dismissal.

(cf. 4117.4 - Dismissal)
(cf. 4118 - Suspension/Disciplinary Action)
(cf. 4218 - Dismissal/Suspension/Disciplinary Action)

The following position is designated as Coordinator for Nondiscrimination in Employment:

Assistant Superintendent, Human Resources
5340 Skylane Blvd.
Santa Rosa, CA  95403

Any employee or job applicant who believes that he/she has been or is being discriminated against or harassed in violation of County Office policy should, as appropriate, immediately contact his/her supervisor, the Coordinator, or the Superintendent who shall advise the employee or applicant about the County Office procedures for filing, investigating, and resolving any such complaint.

Complaints regarding employment discrimination or harassment shall immediately be investigated in accordance with AR 4031 - Complaints Concerning Discrimination in Employment.

(cf. 4031 - Complaints Concerning Discrimination in Employment)

Any supervisory or management employee who observes or has knowledge of an incident of prohibited discrimination or harassment shall report the incident to the Coordinator or Superintendent as soon as practical after the incident. All other employees are encouraged to report such incidents to their supervisor immediately.

Training and Notifications

The County Superintendent or designee shall provide training to employees about how to recognize harassment and discrimination, how to respond appropriately, and components of the County Office's policies and regulations regarding discrimination.

(cf. 4131- Staff Development)
(cf. 4231- Staff Development)
(cf. 4331- Staff Development)

The County Superintendent or designee shall regularly publicize, within County Office schools and programs and in the community, the County Office nondiscrimination policy and the availability of complaint procedures. Such publication shall be included in each announcement,
bulletin, or application form that is used in employee recruitment.  (34 CFR 100.6, 106.9)

The County Office nondiscrimination policy shall be posted in all County Office schools and offices including staff lounges and student government meeting rooms.  (5 CCR 4960)

Legal Reference:
EDUCATION CODE
200-262.4  Prohibition of discrimination
CIVIL CODE
51.7  Freedom from violence or intimidation
GOVERNMENT CODE
11135  Unlawful discrimination
12900-12996  Fair Employment and Housing Act
PENAL CODE
422.56  Definitions, hate crimes
CODE OF REGULATIONS, TITLE 2
7287.6 Terms, conditions and privileges of employment
CODE OF REGULATIONS, TITLE 5
4900-4965  Nondiscrimination in elementary and secondary education programs
UNITED STATES CODE, TITLE 20
1681-1688  Title IX of the Education Amendments of 1972
UNITED STATES CODE, TITLE 29
621-634  Age Discrimination in Employment Act
794  Section 504 of the Rehabilitation Act of 1973
UNITED STATES CODE, TITLE 42
2000d-2000d-7  Title VI, Civil Rights Act of 1964, as amended
2000e-2000e-17  Title VII, Civil Rights Act of 1964, as amended
2000h-2-2000h-6  Title IX of the Civil Rights Act of 1964
6101-6107  Age discrimination in federally assisted programs
12101-12213  Americans with Disabilities Act
CODE OF FEDERAL REGULATIONS, TITLE 28
35.101-35.190  Americans with Disabilities Act
CODE OF FEDERAL REGULATIONS, TITLE 34
100.6  Compliance information
104.7  Designation of responsible employee for Section 504
104.8  Notice
106.8  Designation of responsible employee and adoption of grievance procedures
106.9  Dissemination of policy
110.1-110.39  Nondiscrimination on the basis of age
COURT DECISIONS
Management Resources:
U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS PUBLICATIONS
Notice of Non-Discrimination, August 2010
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PUBLICATIONS
Questions and Answers: Religious Discrimination in the Workplace, 2008
Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans
with Disabilities Act, October 2002
Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors,
June 1999
OPERATIONAL PROCEDURES
SCOE Operational Procedures Manual (staff use)
WEB SITES
California Department of Fair Employment and Housing: http://www.dfeh.ca.gov
U.S. Department of Education, Office for Civil Rights: http://www.ed.gov/about/offices/list/ocr

Superintendent Policy SONOMA COUNTY OFFICE OF EDUCATION
approved: September 16, 2013 Santa Rosa, California
TITLE VII: SEXUAL HARASSMENT
Title VII: Sexual Harassment

What is Title VII?

Federal Title VII of the Civil Rights Act of 1964 (20 U.S.C. §§ 2000e et seq.) applies to employers. It prohibits employment discrimination based on race, color, religion, sex, or national origin.

The statute protects employees from employment discrimination based on sex, which includes sexual harassment, and from retaliation for reporting perceived discrimination and cooperating with investigations and litigation.

It generally applies to employers with 15 or more employees, including federal, state, and local governments. Title VII also applies to private and public colleges and universities, employment agencies, and labor organizations.

Title VII is enforced like Title IX violations: An employee files a complaint with the EEOC, who either brings charges against the employer, or issues a “Right to Sue” letter so that the employer may sue the employer in court.

How Does Title VII Define Sexual Harassment?

Under Title VII it is illegal to harass an employee because of race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.

It is also illegal to harass someone because they have complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Harassment can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. Sexual harassment (including unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature) is also unlawful. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal if it is so frequent or severe that it creates a hostile or offensive work environment or if 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.

Harassment outside of the workplace may also be illegal if there is a link with the workplace. For example, if a supervisor harasses an employee while driving the employee to a meeting, that is sexual harassment in violation of Title VII.

[A summary from the EEOC website]
Text of Title VII Regulations Defining Sexual Harassment:

29 CFR § 1604.11 - Sexual harassment.

(a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
   (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
   (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
   (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) [Reserved]

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or

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1 Appendix A to § 1604.11—background information. The commission has rescinded § 1604.11(c) of the guidelines on sexual harassment, which set forth the standard of employer liability for harassment by supervisors. That section is no longer valid, in light of the supreme court decisions in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Faragher v. City of Boca Raton, 524 u.s. 775 (1998). The commission has issued a policy document that examines the Faragher and Ellerth decisions and provides detailed guidance on the issue of vicarious liability for harassment by supervisors. EEOC enforcement guidance: vicarious employer liability for unlawful harassment by supervisors (6/18/99), EEOC compliance manual (BNA), n:4075 [binder 3]; also available through EEOC's web site, at www.eeoc.gov., or by calling the EEOC publications distribution center, at 1-800-669-3362 (voice), 1-800-800-3302 (tty).
requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.


Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser’s conduct must be unwelcome.

Gender-Based Discrimination Includes Discrimination Based on Transgender and Transition Status

A U.S. Court of Appeals for the Sixth Circuit ruled that Title VII’s sex discrimination protections apply to transgender employees. The panel concluded discrimination against an employee on the basis his/her transgender status constitutes a form of gender stereotyping, which is prohibited under Title VII. As a result, it held that the former employee had stated a valid claim under Title VII for sex discrimination based on her status as a transgender individual because being transgender is a form of failing to conform to gender stereotypes.

The Court ruled that RG & GR Harris Funeral Homes unlawfully discriminated against Aimee Stephens when it fired her after she told her employer that she would begin presenting as a woman because she is transgender. The ruling affirms that transgender individuals are protected by federal sex discrimination laws, and that religious belief does not give employers the right to discriminate against them.

The panel also found sex discrimination based on “transgender and transitioning status violates Title VII.” It agreed with EEOC and Stephens’ argument on two grounds. “First, it is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex.” It emphasized that “discrimination ‘because of sex’ inherently includes discrimination against employees because of a change in their sex.”

_EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., No. 16-2424 (6th Cir. Mar. 7, 2018)_
Employer Liability

Harassment by Supervisors: In Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles:

1) an employer is responsible for the acts of its supervisors, and
2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment.

The Supreme Court held that an employer is liable for:

- a supervisor’s harassment if it culminates in a tangible employment action
- the employer did not exercise reasonable care to prevent and correct promptly any harassing behavior
- the employer failed to make available to employees reasonable preventive or corrective opportunities to avoid harm

Negligent Failure to Prevent Harassment: An employer is also liable for hostile work environment harassment by employees who are not supervisors if the employer was negligent in failing to prevent harassment from taking place. In assessing such negligence, the Court explained, the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent. Also relevant is evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed.

Vance v. Ball State University, 133 S. Ct. 2434 (2013)

Failure to Promptly Correct Harassment: Employer has a duty to exercise reasonable care to prevent and promptly correct harassment. To establish an affirmative defense against employer liability for sexual harassment, the employer must show that it undertook reasonable care to prevent and promptly correct harassment. Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. The steps described below are not mandatory requirements: whether or not an employer can prove that it exercised reasonable care depends on the particular factual circumstances and, in some cases, the nature of the employer’s workforce. Small employers may be able to effectively prevent and correct harassment through informal means, while larger employers may have to institute more formal mechanisms. (EEOC Guidance)
Policy and Complaints: It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. As the Supreme Court stated, “Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.” Ellerth, 118 S. Ct. at 2270. While the Court noted that this “is not necessary in every instance as a matter of law,” failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment. Ellerth, 118 S. Ct. at 2270. A union grievance and arbitration system does not fulfill this obligation. The employer cannot discharge its responsibility to investigate complaints of harassment and undertake corrective measures by providing employees with a dispute resolution process.

An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

• A clear explanation of prohibited conduct;
• Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
• A clearly described complaint process that provides accessible avenues of complaint;
• Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
• A complaint process that provides a prompt, thorough, and impartial investigation; and
• Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

Employer Must Take Harassment Seriously: An employer’s policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity (i.e., opposition to prohibited discrimination or participation in the statutory complaint process). This prohibition should cover harassment by anyone in the workplace – supervisors, co-workers or non-employees. Management should convey the seriousness of the prohibition. One way to do that is for the mandate to “come from the top,” i.e., from upper management.

An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints.

Employers should also think about the tone of the workplace. All workplace dynamics are unique, but employers should encourage employees — men and women alike — to stand up against harassment and speak up about harassment concerns. Management can accomplish this through frequent and frank
discussions with employees about company policies and reporting procedures. Employees should also be reminded that, ultimately, regardless of their relationship with their co-workers, they are still in a workplace. Inappropriate jokes, touching and the like should be consistently discouraged.

**Employer Liability for Inadequate Investigations:** The employer faces the most significant liability for not investigating the complaint properly or ignoring it altogether. An employer that swiftly, fully and fairly investigates each report or complaint of harassment can avoid or significantly reduce liability, even if its investigation does not substantiate the claim.

Poorly investigated complaints have led to some huge verdicts in the past few years. Most notable was the $168 million verdict, later reduced, against Catholic Healthcare West for failing to adequately investigate and address a nurse’s multiple complaints of sexual harassment by the physicians she worked with. (Chopourian v. Catholic Healthcare West, E.D. Cal., No. CIV S-09-2972).

To avoid defamation claims, employers should avoid making public statements about harassment cases, keep their investigations confidential and take disciplinary action only after the investigation is complete and the harassment has been substantiated.

**Investigation Requirements**

**Fact-finding:** An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

**Timeliness of Investigation - Examples:**

*Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 715 (2d Cir. 1996) (employer’s response prompt where it began investigation on the day that complaint was made, conducted interviews within two days, and fired the harasser within ten days)
Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (employer’s response to complaints inadequate despite eventual discharge of harasser where it did not seriously investigate or strongly reprimand supervisor until after plaintiff filed charge with state FEP agency), cert. denied, 513 U.S. 1082 (1995)

Saxton v. AT&T, 10 F.3d 526, 535 (7th Cir 1993) (investigation prompt where it was begun one day after complaint and a detailed report was completed two weeks later) Nash v. Electrospace Systems, Inc. 9 F.3d 401, 404 (5th Cir. 1993) (prompt investigation completed within one week)

Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 319 (7th Cir. 1992) (adequate investigation completed within four days).

Intermediate Measures: It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

Investigation Process:

- Complainant: Ask the complainant who, what, where, when and how. How was employee affected by the harassment? Any witnesses? Any notes, physical evidence or documentation of the incident? How would complainant like to see it resolved?
- Alleged harasser: Ask the harasser for a response. Are there any witnesses or other persons with relevant information? Any documentation regarding incident?
- Third parties: Ask third parties if they saw or heard anything. How was alleged harasser’s behavior towards complainant and others?
- Credibility determinations: Is the testimony believable and make sense? What is witness demeanor? Any motive to falsify? Is there corroboration by witness testimony or physical evidence/ documentation? Does the alleged harasser have a history of similar behavior?
- Determination: Reach a determination whether harassment occurred.
- Assurance of immediate and appropriate corrective action.
- Remedial measures designed to stop harassment.
- Appropriate discipline if there is a determination that the harassment occurred.
Examples of Measures to Stop the Harassment and Ensure that it Does Not Recur:

- Oral or written warning or reprimand
- Transfer or reassignment
- Demotion
- Reduction of wages
- Suspension
- Discharge
- Training or counseling of harasser to ensure that s/he understands why his or her conduct violated the employer’s anti-harassment policy
- Monitoring of harasser to ensure that harassment stops

Examples of Measures to Correct the Effects of the Harassment:

- Restoration of leave taken because of the harassment
- Expungement of negative evaluation(s) in employee’s personnel file that arose from the harassment
- Reinstatement
- Apology by the harasser
- Monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the workplace because of the complaint
- Correction of any other harm caused by the harassment (e.g., compensation for losses)

Penalties for Violating Title VII

- Back pay
- Front pay
- Compensatory damages: An employer may be ordered to pay compensatory damages for future economic loss, emotional distress, pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life of the employee.
- Punitive damages (generally not available against public entities)
- Attorney’s fees
- Injunctive relief: When intentional discrimination has occurred in the workplace, the employee may be reinstated at his or her old position. The employer may be required to take corrective or preventive actions to cure the source of the identified discrimination and minimize the chance of its recurrence, as well as discontinue the specific discriminatory practices involved in the case.
EEOC FACTS ABOUT SEXUAL HARASSMENT
Facts About Sexual Harassment

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and must stop. The victim should use any employer complaint mechanism or grievance system available.

When investigating allegations of sexual harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an
effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.
EEOC GUIDANCE ON INVESTIGATIONS OF COMPLAINTS
Effective Investigative Process

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are making scheduling changes so as to avoid contact between the parties; transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

Questions to Ask Parties and Witnesses

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.
Questions to Ask the Complainant:

- Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?
- How did you react? What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you? Has your job been affected in any way?
- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
- Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

Questions to Ask the Alleged Harasser:

- What is your response to the allegations?
- If the harasser claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

Questions to Ask Third Parties:

- What did you see or hear? When did this occur? Describe the alleged harasser’s behavior toward the complainant and toward others in the workplace.
- What did the complainant tell you? When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

Credibility Determinations

If there are conflicting versions of relevant events, the employer will have to weigh each party’s credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:
• **Inherent plausibility**: Is the testimony believable on its face? Does it make sense?

• **Demeanor**: Did the person seem to be telling the truth or lying?

• **Motive to falsify**: Did the person have a reason to lie?

• **Corroboration**: Is there **witness testimony** (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or **physical evidence** (such as written documentation) that corroborates the party’s testimony?

• **Past record**: Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant’s credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

**Reaching a Determination**

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator’s report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.
TOP 10 INVESTIGATION MISTAKES
The Top Ten Employer Mistakes When Investigating Employee Harassment and Discrimination Complaints

1. **Not conducting an investigation unless the complainant submits a signed written complaint or demanding that all witnesses provide their statements in writing.** This remains one of the most common employer mistakes that typically flow from misguided company complaint procedures. However, the employer is obligated to conduct an investigation when it knows or has reason to know that an employee is being subjected to discrimination, harassment or other unlawful conduct in the workplace, even if the complainant never submits a formal written complaint and no witnesses provide written statements.

2. **Not starting or concluding an investigation promptly.** Waiting too long to kick off an investigation or postponing the conclusion of investigation could lead to a claim that the company ignored the complaint or failed to take the concerns seriously.

3. **Not proceeding with the investigation when the complainant or the employee accused of harassment refuses to participate.** Although an employer may avoid liability under Title VII of the 1964 Civil Rights Act for failure to investigate a harassment complaint, this may not be true under various state anti-discrimination laws. For example, the Ninth Circuit in Hardage v. CBS, 436 F.3d 1050 (9th cir.2006) affirmed the dismissal of a plaintiff’s sexual harassment and retaliation claims under Title VII where the employer did not fully investigate his claims or take any corrective action at the request of the complainant. However, the California Supreme Court in Department of Health Services v. McGinnis, 31 Cal. 4th 1026 (2003) rejected the applicability of such an affirmative defense to claims brought under the CA Fair Employment & Housing Act, holding that under CA state law, an employer can only limit its damages but not avoid liability altogether.

4. **Not conducting an investigation in good faith without the appearance of bias or subjectivity.** Cross examining witnesses even those whom you suspect to be withholding information, could result in a claim that the investigator was biased and therefore the investigation was not objective. Even where the investigator suspects the complainant, witness or employee accused of misconduct is lying or hiding information, the investigator should ask the witness to explain contradictory statements or evidence that refutes their statements in a respectful manner that allows them a full opportunity to respond to questions without feeling like they are being subjected to cross examination.

5. **Failing to keep the investigation and all information gathered during the course of the investigation confidential.** Failing to safeguard witness identities or the confidentiality of the information could result in a claim of retaliation by any witnesses who later suffer any adverse consequences following the investigation.
6. **Allowing/inviting other third parties (complainant’s friend or lawyer) to participate in the investigative interview in a non-union context.** In *IBM Corp.*, 341 NLRB No. 148 (2004) the NLRB ruled that a non-union employee does *not* have the right to have a co-worker present at an investigatory interview that the employee reasonably believes might result in disciplinary action. It stands to reason that the complainant (who is not under investigation) should not be accompanied by his/her attorney or a friend, who could impede the investigator’s effort to obtain candid responses to questions aimed at uncovering the basis for his or her complaint.

7. **Not assuring the complainant and witnesses, and reminding the employee accused of misconduct that the company has a policy against retaliation.** The EEOC reports that retaliation claims have more than doubled since 1992 and now account for nearly a third of all claims filed with the agency. With this staggering rise in retaliation claims that typically follow a complaint of harassment or discrimination and result in punitive damages, employers should ensure all individuals who are interviewed as part of an investigation that the company has a no retaliation policy, which means that it will not tolerate any adverse action taken against anyone who makes a complaint in good faith or participates in an investigation of such a complaint and it will take disciplinary action against anyone who violates this policy.

8. **Not interviewing witnesses all witnesses with knowledge of the relevant events, even if they did not directly witness the incident that gave rise to the investigation.** Witnesses to whom the complainant contemporaneously complained when she was allegedly being subjected to harassment, should be interviewed to see whether what the complainant disclosed to them is consistent with what she shares with the investigator in the course of the investigation. If these accounts are consistent, it can help bolster a credibility determination.

9. **Not reviewing all relevant records and tangible evidence.** Too often, company investigators overlook documents that lie at the heart of an investigation (e.g., cell phone and telephone records of the complainant and the alleged harasser that can confirm the time and date of harassing phone calls).

10. **Making inconclusive findings when faced with the classic “he said, she said” scenario.** Not making findings after conducting an investigation is equivalent to not conducting an investigation at all. Even when the evidence is disputed by both sides, the investigator must nonetheless make findings of fact based on a preponderance of the evidence. The investigator must make credibility determinations in the absence of direct evidence of wrongdoing (e.g. consider whether the alleged harasser has ever made the same comments to other women in the workplace, ever uses such expressions to address women, etc.).
ANSWERS TO PRE-TEST
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1. **False.** Nothing in the law requires an alleged victim to confront the alleged perpetrator of sexual harassment.

2. **False.** While there may be several appropriate ways to address reported sexual harassment, corrective actions should not penalize the victim.

3. **True.** California Government Code section 12940, which outlines unlawful employment practices, including sexual harassment, provides in part: “An employee of an entity subject to this subdivision is **personally liable** for any harassment prohibited by this section that is perpetrated by the employee. . . .”

4. **True.** Supervisors are responsible for ensuring that the working/academic environment is free from discrimination, including sexual harassment, even if a supervisor doesn’t know to a certainty that sexual harassment has occurred.

5. **False.** The effect of the conduct on the victim, not the intent of the harasser, determines whether behavior is sexual harassment. An expectation that employees will conduct themselves as professionals within the workplace will help ensure that harassment does not occur. Employees might consider what legitimate business or academic purpose is served by their conduct.

6. **True.** Harassment of an individual based on sexual orientation or identity is prohibited.

7. **False.** A supervisor should not discourage an employee or a student from filing a police report. Sexual harassment can also be criminal assault.

8. **SCOE can take various steps to prevent sexual harassment, including adopting and distributing a policy that prohibits such conduct, training employees regarding preventing such harassment, providing effective processes for filing and investigating complaints, taking all complaints seriously, and assuring employees that retaliation for filing valid complaint will not be tolerated.**

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### Any questions about the process or responsibilities of SCOE staff should be directed to human resources, the Superintendent or John Laughlin, Title IX Coordinator.