

# **Sexual Harassment Prevention Training 1-Hour Non-Supervisory Personnel SB 1343**



This course is intended for non-supervisory personnel and is one hour in length per Senate Bill 1343 requiring all nonsupervisory employees to have at least one hour of sexual harassment training by January 1, 2020, and every two years thereafter. The information has been designed to be fairly generic in nature, and complex legal descriptions and concepts have been framed to ease readability. This course should not be taken as, nor is it intended to be, legal advice. Specific questions regarding legal issues of sexual harassment should be referred to the district's legal counsel.

Supervisory staff are required to receive specific training regarding sexual harassment. This course is not intended to meet the regulatory requirements pertaining to supervisors. If you are a supervisor, contact your Human Resources administrator to ensure you receive the appropriate training.

In addition, this course is designed to address the issue of sexual harassment in the workplace—it is not directed at employee-to-student (child molestation) or student-to-student conduct. It includes information on abusive conduct, harassment based on gender identity, gender expression, and sexual orientation harassment prevention.

# Introduction



Sexual harassment is illegal and can cause emotional damage, ruin personal lives, and end careers. It can also cost a lot of money. However, the cost of sexual harassment on the personal, professional, and legal levels is incalculable.

School districts are not immune: sexual harassment occurs in school districts across the state. It is committed by teachers, principals, administrators, supervisors, co-workers, contractors/outside vendors, parents, and even students.

While Title VII of the Civil Rights Act (federal law) permits an employer defense to liability for sexual harassment committed by a supervisor, the Fair Employment and Housing Act (FEHA), the state law, does not. Under FEHA strict liability is imposed.

This course is designed to provide you with the basics to help you keep your school site or workplace free of sexual harassment for non-supervisory employees.

# What Is Sexual Harassment?



Sexual harassment in the workplace includes unwelcome advances or other verbal, nonverbal, or physical conduct of a sexual nature if:

- submission is an implicit or explicit condition of employment;
- affects employment decisions;
- interferes with the employee's work performance; and/or
- creates an intimidating, hostile, or offensive environment.

This same definition applies to sexual harassment in a school environment. Education Code §212.5 defines sexual harassment as unwelcome sexual advances; requests for sexual favors; and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

- submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress;
- submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual;
- the conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment; and/or
- submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.

Sexual harassment can be male to female, female to male, across the same gender, or involving nonbinary gendered people or transgender people; however, to be

legally actionable, it must be because of sex. The motivation for the conduct must be either sexual desire or general hostility based on the victim's gender or other protected class. Rude or obnoxious behavior alone is not necessarily considered sexual harassment.

## Why Is This Training Important?

As a workplace subject, sexual harassment has existed as long as people have worked together. As a training issue, sexual harassment is one of the most significant and important topics you'll encounter as an employee. Along with workers' compensation cases and injuries or deaths due to safety problems, sexual harassment is often connected to lawsuits, litigation, and multimillion-dollar jury awards.



As such, it's critically important to understand what employees at every level in the organization should and should not do when interacting with each other, parents, or vendors. To be compliant with Title VII of the Civil Rights Act (and subsequent court rulings in 1972 and 1986), you need to know how sexual harassment is defined, what constitutes sexual harassment, and what you can do to avoid being disciplined, terminated, or sued.

- The bottom line is that sexual harassment prevention is about treating everyone fairly, decently, and with maturity. It is necessary to understand and comply with the workplace rules surrounding this complex issue.
- The law (and our behavior-based policies) entitles every employee, applicants, and vendors to a harassment-free work environment.
- You have a duty to know your organization's policies and procedures regarding sexual harassment.
- As an employee, you can be individually liable for sexual harassment. This means you can be disciplined, terminated, or even sued as a result of this conduct.
- Sexual harassment is considered outside the course and scope of your employment, meaning your organization does not allow it, under any circumstances, as part of your job or work duties.

As we previously discussed, there are both federal and state laws that govern sexual harassment. In the next few chapters, we will look at how both federal and state laws define sexual harassment.

## Defining the Workplace



It's becoming increasingly more difficult to define what is considered the workplace. Recent court cases have created a very wide definition of where we perform our work. The building where we work is certainly considered our "workplace," but depending upon the circumstances and the context of an employee's duties, the workplace can also be defined as

- business trips to conferences, seminars, or meetings;
- the car or truck you use as part of your work;
- lunches or other meals;
- official company-sanctioned parties or gatherings;
- anywhere you function as an employee of the district; and
- use of off-site electronic communications, including internet, email, texting, and a virtual environment.

This means that all employees must consider their "at-work" conduct to include these nontraditional work locations. Sexual harassment prevention is about respect for other employees' boundaries. Harassment can occur over a lunchtime meal just as well as it can occur in an office setting.

# Sexual Harassment Law



Sexual harassment in employment or education is illegal. All employees, students, and visitors (parents, vendors, etc.) are covered and protected in one way or another by varying sexual harassment laws.

Laws governing sexual harassment are derived from the following sources:

1. Federal Title VII: prohibits discrimination and harassment in employment.
2. California Fair Employment and Housing Act: prohibits discrimination and harassment in employment.
3. California Unruh Civil Rights Act: prohibits discrimination and harassment by a business toward its customers. In this context, school districts are considered businesses, and students, parents, and vendors are considered customers.
4. California Education Code section 200 et seq.: prohibits discrimination and harassment, including sexual harassment, by school districts and their employees and by students.
5. Federal Title IX: prohibits discrimination and harassment by school districts that receive certain federal funding.

There are other sources of potential liability and bases for prohibiting discrimination and harassment. However, most litigation arises under the preceding five areas of law.

## **The EEOC's Definition of Sexual Harassment**

According to the EEOC, or the Equal Employment Opportunity Commission, a federal agency, "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 a 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 C.F.R. § 1604.11.))



## **FEHA's Definition of Sexual Harassment**

California's definition of sexual harassment is provided by the Fair Employment and Housing Act (FEHA). According to FEHA, harassment because of sex includes sexual harassment; gender harassment; or harassment based on pregnancy, childbirth, or related medical conditions.

The Fair Employment and Housing Commission regulations define sexual harassment as unwanted sexual advances or visual, verbal, or physical conduct of a sexual nature. This definition includes many forms of offensive behavior including harassment between employees of the same gender.

FEHA's definition of sexual harassment is much broader than federal law, providing protection for the following classes of individuals:

- age (over 40),
- ancestry,
- color,
- denial of FMLA,
- marital status,
- medical condition,
- national origin,
- race,
- religious creed,



- sex,
- pregnancy,
- sexual orientation,
- gender identity, and
- genetic information.

Therefore, harassment or discrimination involving any of the categories listed above could be the basis of an allegation of sexual harassment.

# Gender Identity, Gender Expression, and Sexual Orientation

**What do these terms mean?**



Harassment based upon an individual's gender identity, gender expression, or sexual orientation may constitute sexual harassment. The definition of sex in the Department of Fair Employment and Housing, or DFEH, regulations and now includes gender expression, gender identity, sex, sex stereotype, and transgender.

These terms are defined by law as discussed below.

- "Sex" has the same definition as provided in Government Code section 12926, which includes, but is not limited to, pregnancy; childbirth; medical conditions related to pregnancy, childbirth, or breast feeding; gender; gender identity; and gender expression, or perception by a third party of any of the aforementioned. (Cal. Code Regs., tit. 2, § 11030.)
- Gender expression means a person's gender-related appearance or behavior, or the perception of such appearance or behavior, whether or not stereotypically associated with the person's sex assigned at birth. (Cal. Code Regs., tit. 2, § 11030.)



- Gender identity is one's internal understanding of one's gender or the perception of a person's gender, including a gender nonbinary that could be a combination of male or female or neither male nor female. Gender identity may or may not be different from a person's sex assigned at birth. (Cal. Code Regs., tit. 2, § 11030.)
- Transitioning means "a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. The process may include, but is not limited to, changes in name and pronoun usage, facility usage, participation in employer-sponsored activities (e.g. sports teams, team building projects, or volunteering), or undergoing hormone therapy, surgeries, or other medical procedures." (Cal. Code Regs., tit. 2, § 11030.)

Repeated misuse of pronouns strikes at the core of a transgender person's identity. Singling out employees and treating them differently based upon these categories can constitute discrimination, but also sexual harassment.

## What is "Unwelcome?"



As defined, sexual harassment is "unwelcome...verbal or physical conduct of a sexual nature." Because sexual attraction may often play a role in the day-to-day social exchange between employees, the distinctions between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected sexual advances may well be difficult to discern.

**However, this distinction is essential because sexual conduct becomes unlawful only when it is unwelcome.**

Generally speaking, conduct is unwelcome in the sense that an individual does not solicit or incite it, and in the sense that the individual regards the conduct as undesirable or offensive. When confronted with conflicting evidence as to whether the conduct was welcome, the record as a whole and the totality of the

circumstances should be evaluated. This is a case-by-case evaluation.

The office romance is of particular difficulty here. An individual may at first willingly participate in conduct of a sexual nature but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment. In this situation the individual will have a tougher burden of showing that the conduct is or was unwelcome. In addition, every aspect of the relationship may become public as the investigation or trial proceeds. For clandestine relationships, the toll the family pays when these acts become public is incalculable. Whether clandestine or not, after the relationship ends, the individual must clearly set forth to the alleged harasser that the conduct is no longer welcome. The safe route is to disclose consensual relationships to the Human Resources department. At the point the relationship ends or is no longer consensual, that too should be reported. The employer then has an opportunity to intervene before harassment occurs.

It is important for you to know and understand your district's policy with respect to office romances and relationships with co-workers.

## Preventing Unwelcome Conduct

As discussed above, identifying actions/comments that may be considered unwelcome is critical to preventing sexual harassment. To help prevent and avoid participating in unwelcome conduct, you should consider the following strategies:



- Don't tell questionable jokes.
- Think twice before making comments.
- Consider other people's thoughts and feelings.
- Be respectful to and of your coworkers.
- Ask yourself questions, such as
  - Would I want this published in a newspaper?
  -

How would I feel if my spouse knew I did this?

Would my mother/father approve of my actions?

- How would I feel if my kids heard or saw me do this?
- Do I feel like I need to hide my actions or keep them a secret?
- Am I looking over my shoulder before making these comments?

## Academic Freedom vs. Sexual Harassment



Academic freedom can often become a competing interest as it relates to sexual harassment. In certain educational courses, such as history and health education, the topics discussed may make some students uncomfortable. While instructors have the academic freedom to choose materials that best provide educational information, they should be mindful that classrooms are not public forums for discrimination and certainly not a place for sexual harassment.

In one case, a female instructor drew criticism from parents because, during a health education course, she showed images of male and female genitalia infected by sexually transmitted diseases. While the images were deemed to be educationally relevant and were not considered sexual harassment, instructors should evaluate their materials carefully to ensure that they will not be viewed as gratuitous displays that can then be interpreted as harassment. In California, teachers/instructors should also provide a disclaimer statement prior to showing graphic materials and allow students the opportunity to excuse themselves from that portion of the educational class if they find the material offensive.

# Forms of Sexual Harassment

The two main forms of sexual harassment are quid pro quo harassment and hostile work environment harassment. Let's take a look at these forms of harassment in more detail.



## Quid Pro Quo Harassment Translates to "This for That"

Quid pro quo harassment used to be considered less common, however, in the era of #metoo, it is clear that this type of harassment is much more common than previously thought. It includes, situations when submission to sexual advances is made a term or condition of employment by an employer. It may also include when employment is substantially affected by an employee's refusal to acquiesce to such advances. In addition, if employment decisions differ between employees of the opposite sex or employees who were not subjected to advances, then quid pro quo harassment may be found.

It is important for you to know and understand your district's policy with respect to office romances and relationships with co-workers.

This form of harassment is typically committed by an employee's supervisor or some other employee with the power to affect the employee's terms of employment.

## Hostile Environment Harassment



Hostile work environment harassment may be found when an employee is subjected to verbal or physical conduct that is unwanted or unwelcome. The conduct must be sufficiently severe or pervasive to alter the conditions of the victim's employment, thereby creating a hostile work environment.

The standard of whether conduct is sexual harassment is that of a "reasonable person," i.e., from the objective perspective of a reasonable person with the same fundamental characteristics as the employee/victim.

There is no "bright line" rule to determine when a hostile work environment exists. The identical conduct may be sexual harassment in one context under certain circumstances and not perceived as sexual harassment in another context under different circumstances. In addition, conduct should be evaluated on the basis of whether it is severe and/or pervasive.

In assessing the work environment, the factors to consider (with no single factor being required) include

- frequency of the conduct,
- severity of the conduct,
- whether it is physically threatening or humiliating or merely an offensive utterance,
- whether it unreasonably interferes with the employee's job performance, and
- whether it affects the employee's/victim's psychological well-being (although an employee/victim need not establish a psychological injury in order to prevail).

Generally, conduct that is more severe need not be as frequent, just as conduct that is more frequent need not be as severe.

## **Abusive Conduct**

On September 9, 2014, Governor Brown signed Assembly Bill 2053 ("AB 2053") into law, requiring employers to provide training on the "prevention of abusive conduct" in the workplace as a component of their mandated training for supervisors on sexual harassment. Abusive conduct is not sexual harassment but could be construed as unprofessional behavior and subject employees to discipline.

## **Quid Pro Quo**

Quid pro quo is a Latin term meaning this for that or an exchange of something for something. When discussing sexual harassment, quid pro quo typically occurs between supervisors and their subordinates, whereby the subordinate is asked to provide sexual favors in exchange for pay, promotions, favorable job assignments, or similar benefits.

Other examples of quid pro quo sexual harassment include the following:

- Receiving job benefits based on sexual favors: A supervisor forcing his or her employee to provide sexual favors in order to get or keep a job, get a promotion, a pay raise, preferred work shift, easier work duties, etc.
- People often compare this type of sexual harassment to the old Hollywood "casting couch" scenario, where actors and actresses could only get work if they had sex with a casting director. It typically involves some implicit or explicit term or condition of employment between someone who holds a position of power over another, who is usually the employee.

The gender or gender identity of either party makes no difference. It can involve a female supervisor and a male employee, or even a boss and employee of the same gender.

# Scenario – Let's Trade



Jane is very excited, because she and her husband are going to purchase a new home if she receives the promotion that she believes her supervisor has been promising. Today while on her way to lunch, Jane runs into her supervisor at the elevator. Jane asks her supervisor, Tom, if his boss approved the 17% raise. Tom informs Jane that his boss didn't want to give a 17% increase, but he mentions to Jane that he can help her get that raise if she just goes on a date with him. Tom is pretty straightforward and tells Jane to wear a red dress and be ready to give him a little "something, something." Jane finds her boss attractive and, with a smile, agrees to meet him for the date.



# Hostile Work Environment



Hostile work environment harassment differs from quid pro quo harassment in that an exchange of something for something does not take place. A hostile work environment is created when intimidating or offensive behaviors disrupt work and/or learning.

A hostile work environment is defined as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when 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 C.F.R. § 1604.11.)

Not every encounter between employees is sexual harassment. Hostile environment sexual harassment occurs when an employer creates, or allows others to create, a pattern of unwelcome sexual conduct that results in an intolerable work environment as measured by the standards of a reasonable person under the circumstances. In addition, the conduct involved must be subjectively perceived by the victim as offensive.

We can define a hostile environment in general terms, as typically involving sexually oriented or sexually provocative

- jokes, posters, photos, or comments displaying sexually based items;
- emails, letters, phone calls, or messages of a sexual nature;

- touching, hugging, rubbing, or blocking the way of an employee;
- looks (leering or ogling) and nonverbal gestures;
- favoritism toward an employee based on his or her gender, style of provocative dress, or flirtatious behavior; and/or
- sharing of inappropriate personal sexual information with another employee, i.e. "weekend tales."

## Scenario — Mary



Mary works as the only female bus driver for a school district. She knows she is in a “male dominated” shop, but likes the job and therefore “puts up with” the foul language, anti-female language, sexual jokes, and bikini-clad calendar pin-ups. Finally, after three years she says she has had enough. She files a claim for hostile work environment. The district claims that she never protested, and voluntarily worked in that department knowing she would be the only female. Mary admits that she knew it might be difficult as the only woman, but chose to work there anyway.

# Liability Issues

The Supreme Court issued two major decisions in June of 1998 that explained when employers will be held legally responsible for unlawful harassment by supervisors. The cases established two standards of liability for harassment. One standard of liability is for harassment committed by the victim's supervisor; the other standard of liability is for non-supervisor harassment.



Keep in mind that in California, under FEHA, employers are strictly liable for sexual harassment committed by supervisors, regardless if the harassment is quid pro quo or hostile work environment. The district is liable for co-worker, student, and third-party harassment if the district knew, or should have known, of the harassment and failed to take effective measures to stop it.

Damages, however, may be limited or reduced if the employer has a sexual harassment policy, the policy is disseminated to its employees, employees know how to report sexual harassment, there is a history of the employer taking effective action in response to complaints, and the employee unreasonably fails to report the conduct.

What is a tangible employment action? It means a significant change in employment status. Examples include hiring, firing, promotion, failure to promote, demotion, undesirable reassignment, a decision causing a significant change in benefits, compensation decisions, and work assignment. Any employment action qualifies as tangible if it results in a significant change in employment status, regardless of whether the individual retains the same salary and benefits.

Although we are outlining the instances when the school district will be held liable, it is important to note that both the district and the harasser will have to answer for themselves to the allegations. If the supervisor or co-worker is found guilty of illegal sexual harassment, the damages will not be covered by the district's liability insurance and the harasser will be directly responsible for paying any damages (money) to the victim. Under state law individuals can be directly sued for sexual harassment.

Under Labor Code §2802, the employee who is legally found to have engaged in intentional discrimination may also be ordered to pay the expenses, including attorney's fees, of the employer for having to defend the claim as a result of the employee's misconduct.

## Scenarios — Sue

### Director Sue



Sue is the Director of the Special Education department. She recruits and hires Sally as her new administrative secretary. Sue finds Sally very attractive. Sue begins to make remarks to Sally about how attractive she is and, how much Sue likes the way Sally's hair accentuates her features. She also makes comments about how Sally's attire flatters her nice figure. After two months of this type of behavior, Sally is very uncomfortable and resigns from her position. She files a lawsuit for sexual harassment, stating that she felt she had no choice because Sue was her supervisor.

# Scenario — Foul Language



Justine was hired into a school district's bus driver position. Justine is a transgender woman who transitioned from male to female prior to beginning her job with the district. She performed her duties well and received a positive performance evaluation; she completed her probationary period and became a permanent classified employee.

Shortly thereafter, Justine's coworkers learned about her gender identity via social media after she added a coworker as a friend on Snapchat.

From then on, her supervisor and two other coworkers repeatedly referred to her as Justin/he/him and would then apologize, stating that it was a mistake because Justine and Justin are such similar names.

This went on for 9 months before Justine quit and filed a complaint with the DFEH.

# Abusive Conduct—Bullying



Government Code section 12950.1 defines abusive conduct as "conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests." (Gov. Code, § 12950.1.) Abusive conduct can include "repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." (Gov. Code, § 12950.1.) The law states that a single act does not constitute abusive conduct, unless it is "especially severe and egregious." (Gov. Code, § 12950.1.)

According to the Workplace Bullying Institute, 27% of American workers are currently being bullied or have been bullied. In addition, nearly half of all American workers have either witnessed workplace bullying or been bullied themselves.

(Workplace Bullying Institute, United States Workplace Bullying Survey.)

Abusive conduct is defined by the law and should constitute a basis for disciplinary action if established by an investigation, but it does not necessarily constitute sexual harassment. Sexual harassment is focused on the protected classes defined previously, whereas generalized abusive conduct is "equal opportunity."

Abusive conduct should be taken seriously and prevented in the workplace.

# Scenario — Hostile or Abusive?



Jane is a young professional who recently graduated from a prestigious college and has taken a principal's position at a school. Jane is eager to change the world and make a difference in young students' minds. During a staff meeting with the school's teachers, Jane starts yelling that the old teachers are slowing down progress and that if they don't get up to speed, she will replace them with a younger staff.

Jane's comments may be considered both a form of hostile work environment and abusive conduct. Her comments about older teachers may be a form of age discrimination/harassment, which creates an intimidating environment for those teachers. While we don't know if Jane has yelled at her staff previously, her threats to replace her staff may be severe enough to constitute abusive conduct in this single instance.



# Methods of Harassment

As previously discussed, there are two major forms of harassment: quid pro quo and hostile work environment. Both of these types of harassment can occur in the form of verbal, nonverbal, physical, or visual conduct.



## Verbal

Verbal methods of harassment include making comments about a person's body or clothing; referring to someone as honey, dear, or sweetheart; telling stories about sexual exploits; making animal noises; telling off-color, vulgar, or sexual jokes; asking for sexual favors; and/or whistling, catcalling, hooting, or making other obscene noises of a sexual nature. Verbal harassment can occur in person, via phone calls, or even during video conference calls.

## Nonverbal

Nonverbal methods of harassment include making hand or body gestures; giving suggestive looks or "elevator eyes" (i.e., looking someone up and down); winking; and/or licking lips. In sexual harassment, nonverbal gestures are often combined with verbal comments, but the presence of both is not required to prove that harassment occurred.

## Case Example: Unequal Treatment

### **Birschtein v. New United Motor Mfg., Inc. (2001) 92 Cal.App.4th 994**

Plaintiff Michelle Birschtein worked on an assembly line. A coworker drove a forklift to deliver materials to the assembly line. The coworker asked Birschtein for a date three or four times; she declined each time. The coworker then approached Birschtein and made vulgar, sexual comments; Birschtein yelled at him to leave. Two or three days later, the coworker approached Birschtein and told her he was having sexual fantasies about her. Birschtein again yelled at the coworker to leave her alone. Birschtein then complained to supervisors about the coworker's conduct. The coworker stopped speaking to Birschtein. Instead, he began a campaign driving by her work station, and staring directly at her for several seconds each time. This continued for months.

The coworker's behavior progressed from a couple of requests for dates to four unwanted requests and as soon as the behavior was clearly unwelcome, it could be

considered sexual harassment. The vulgar, sexual comments and repeated and prolonged staring added to the list of harassing behaviors.

The court explained that sexual harassment can result from conduct other than explicit sexual advances. Given the coworker's prior conduct, repeated acts of staring at Birschtein could qualify as actionable sexual harassment, because any harassment or other unequal treatment of an employee that would not occur but for the sex of the employee may, if sufficiently pervasive, constitute an illegal condition of employment.



## Physical

Nonverbal methods of harassment are often confused with physical methods of harassment, but they differ in that physical methods typically extend to touching another person. Physical methods include touching a person, massaging someone's neck or shoulders, grabbing or pinching someone, kissing or hugging someone, exposing your body to someone, and/or physically blocking someone's movement (to or from rooms, buildings, etc.). In addition, physical methods of harassment can include following someone, standing too close to someone, leaning over someone, and the like. In some cases, a physical action may constitute a violent sexual act or crime such as rape, assault, or other sexual violence.

In the era of the #metoo movement, it is important to distinguish between sexual harassment and sexual assault. We have discussed sexual harassment as quid pro quo harassment and hostile work environment harassment. Sexual assault can be a number of different crimes, including sexual battery and rape.

Some sexual harassment could be sexual assault, but it would need to meet the Penal Code definitions to be both sexual harassment and sexual assault. It is important to keep in mind the differences between workplace sexual harassment and criminal sexual assault.

## Visual



Visual methods of harassment include the use of calendars, posters, desk art, objects, email jokes, and/or clothing with sexually expressive prints or clothing that reveals or highlights certain parts of a person's body.

With respect to the previous three methods of harassment (verbal, nonverbal, and physical), the perpetrator is typically present when the harassment occurs. Visual methods of harassment are one form of harassment where the perpetrator does not have to be physically present for harassment to occur.

For example, Bob is a custodian at the elementary school site. Bob has an office work area located in the back of the school, which is only occupied by him. He has taken the liberty of hanging various sexually explicit and denigrating posters in his work area, knowing that no one will ever see them. During Bob's vacation, the principal and the school's insurer perform a walk-through safety inspection of the school and see Bob's posters.

In this example, even though Bob is on vacation, his posters are on display for anyone entering the room. The fact that Bob normally does not share his office work area does not permit the display of inappropriate materials. If Bob were to continue to display his posters after being told to remove them, he would be creating a hostile work environment using visual methods.

# Scenario — Blocked



Jane is making copies in the small copy room located at the back of the office. Tony, her coworker, walks in to make some copies and then proceeds to strike up a conversation with Jane. When Jane responds, Tony starts to read more into the conversation than there is. Tony thinks he has a good chance at getting Jane to go on a date and pops the question. When Jane rejects his offer, Tony gets desperate and stands in the doorway and proceeds to ask Jane again. Jane finishes making copies and tries to leave, but Tony will not move out of the doorway. Jane asks Tony to move, but Tony remains in the doorway and asks Jane, “Are you sure you don’t want to go out on a date?”.

# Who Can Be a Sexual Harasser?

**Anyone can be a sexual harasser. Anyone.**



Sexual harassment is not as much about gender as it is about power, control, or the desire for one or more people to make a person feel ashamed or embarrassed about his or her sexuality. The usual scenario involving a male boss sexually harassing his female secretary has grown to include female supervisors harassing male employees; coworkers at all levels harassing each other; a group of female employees sexually harassing their male boss; males sexually harassing other males; or gay or lesbian employees harassing or being harassed by others in their place of employment. It could be any employee, vendor, or applicant, regardless of gender or gender identity.

Further, the nature of the relationship is not as significant as the conduct of the person doing the harassing. Third parties can be just as guilty of sexual harassment as a coworker. As such, you could be sexually harassed by a student, parent, vendor, consultant, volunteer, part-time employee, or temporary employee.

# Sexual Harassment by a Subordinate



You may be surprised to learn that a subordinate can harass a supervisor, just as a supervisor can harass a subordinate. While most subordinates won't be able to exert power in quid pro quo harassment, subordinates can create hostile work environments (e.g., our example of Bob the custodian and his posters) and may participate in abusive conduct toward their supervisor. While it is rare for subordinates to harass their supervisors, it is important to remember that anyone can be a harasser.

## Same-Sex Harassment



Department of Fair Employment and Housing v. Jarvis (2001) FEHC Dec. No. 01-02 (Cal.F.E.H.C.), 2001 WL 273486

The majority of sexual harassment cases and complaints filed with the EEOC and DFEH involved male-on-female or female-on-male harassment. Traditionally speaking, many people didn't believe that same-sex harassment could occur. In

2001, the California Fair Employment and Housing Commission ruled in Jarvis that a male cocktail waiter in a gay club was subjected to unwelcome verbal and physical harassment by both the club's owner and manager, who were also male. The DFEH Commission awarded \$30,000 in damages to be paid to the male waiter for emotional distress.

This case proved that same-sex harassment could occur in the workplace and that anyone can be a harasser.

## Third Party Harassment



As discussed, anyone can be a harasser, and this extends to many of the people that you may come into contact with as part of your work day, even though they may not work directly for you or your organization/district.

Third parties include guest speakers, visiting athletic coaches, volunteers, parcel service/delivery service personnel, parents, interns, and other vendors.

You are strongly encouraged to report any sexually harassing behavior to your supervisor and/or to Human Resources, even if the person harassing you is not an employee.



# Be on the Lookout



A school district's activities are so broad that concerns of sexual harassment can arise virtually anywhere. One defense attorney's experience in the Central Valley has caused him to become acquainted with the following real-life examples of misconduct:

1. A gag gift mug with breasts displayed on a supervisor's bookshelf.
2. An obscene object left on a bread deliveryman's truck seat.
3. "Pin-up" photos posted to the inside lid of a repairman's toolbox.
4. An off-campus affair between a supervisor and a secretary wherein each party was cheating on a spouse with subsequent bragging, litigation, and marital turmoil.
5. A hot tub party after a retirement dinner.
6. Offensive cartoons posted on a notice board.
7. A theater department's "custom" of girl students raiding the boys' dressing room and flashing their underclothing.
8. Excessive hugging.
9. Brushing up against females in a break room.

You have now been warned. Be on the lookout for offensive conduct. Do not participate in or ignore it.

# Employee Responsibilities



Employees have a responsibility to report incidents of harassment to the district. The employee must also take reasonable steps to avoid harm. Failure to report or failure to give the district a chance to correct the problem may result in a finding that a lawsuit by the victim may not go forward. In addition, even if the victim establishes that the harassment actually occurred, if the district is able to prove that it exercised reasonable care to prevent and promptly correct any harassing behavior and the victim unreasonably failed to take advantage of preventive or corrective opportunities provided by the district or to avoid harm, then the district may prevail in any subsequent legal action, particularly where the harassment is by someone other than a supervisor. Again, keep in mind the point mentioned earlier; if the harassing behavior is committed by a supervisor, whether or not tangible employment action is taken, the district will always be liable under FEHA.

Under Labor Code §2802, the employee who is legally found to have engaged in intentional discrimination may also be ordered to pay the expenses, including attorney's fees, of the employer for having to defend the claim as a result of the employee's misconduct.

The district will be held liable for the sexual harassment of its employees if it knew or should have known of the misconduct, unless it can show that it took immediate and appropriate corrective action. Supervisors need to also follow up and take seriously any employee complaints of harassment by individuals outside the school district, e.g., parents, vendors, etc. Our duty is to protect our employees, no matter who is harassing them.

# Differences in the Reasonable Person



The definition of a reasonable person indicates that some individuals, such as doctors, may be held to a higher standard than an ordinary person. This could be said about teachers and individuals working in educational agencies as well. The reasonable person standard is a fluid standard, meaning that the reasonable person test will be applied from the victim's point of view or from the point of view of a similar person in the same or a similar environment.

When considering the reasonable person standard, you must be careful not to apply it too narrowly, as your perception of reasonable may be subject to normalcy bias. In other words, just because everyone in your organization finds the behavior acceptable, doesn't mean that a reasonable person in another organization would not find it to be harassment. To illustrate, think about the types of language, jokes, and nonverbal actions that typically occur in a comedy club. While most people find the comedy humorous, how would you view that same routine in your workplace?

# Pervasiveness



One of the key components to determining whether an alleged perpetrator is guilty of sexual harassment is to determine if the actions were severe and/or pervasive. Merriam-Webster defines pervasive as "existing in every part of something: spreading to all parts of something."

In terms of sexual harassment, pervasive conduct is conduct that is repeated more than once or has become a pattern of conduct by an individual or group of individuals. When a victim tells the perpetrator to stop a behavior or that it makes him or her uncomfortable and the perpetrator continues to do it, the behavior is becoming pervasive.

Pervasiveness can also mean a pattern of behavior. For example, Tom is a single man and generally enjoys dating many different women. Tom has a habit of asking every woman he meets for a date. When Tom asks Jane for a date, she declines, and Tom doesn't ask her again. Later in the week, Tom asks Jane's coworker for a date, and she also declines. The next day, Tom asks another coworker on a date. While Tom may not be asking the same person on a date, his actions of asking every woman in the office on a date could create a hostile work environment in the eyes of a reasonable person.

# Severity



In most instances, a reasonable person will not find a single event, comment, or action to be sexual harassment unless it is severe in nature. In most cases, a person must voice or show his or her objection to the comment or action before someone is found liable for harassment. However, certain acts, such as rape, assault, grabbing or fondling someone's genitals, forcibly kissing someone, or other acts of violence, are considered severe and would immediately be grounds for a finding that sexual harassment occurred; they also would be considered criminal. When acts such as these occur, it is not necessary for a victim to voice or object to the behavior and/or action.

## Scenario — M&Ms

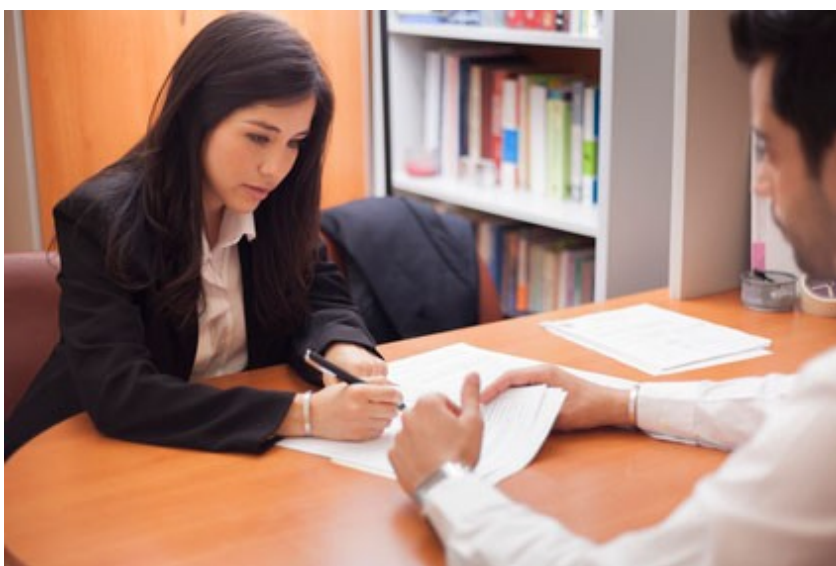


Jane is sitting in the break room with some of her female coworkers. Jane and her coworkers are talking and discussing their favorite candy bars. Tony walks into the break room and overhears the conversation. Tony has dated the other female coworkers, but would really like to date Jane. When Tony overhears that Jane likes M&Ms, he purchases a package from the vending machine. Tony then opens the M&Ms, walks behind Jane, and pours them down her shirt. He tries to reach into her shirt with his hand and asks if he can get a few out. Jane and her coworkers get up immediately and leave the room.

# Stopping Harassment – Report It Early

Reporting harassment early is a key factor in stopping harassment in the workplace. Early reporting provides the best opportunity for the organization and investigators to gather statements from witnesses before their memories of the event(s) have faded. In addition, early reporting of harassment sends a clear message to harassers that their actions will be looked into and no form of harassment will be tolerated. It can effectively stop bad behaviors from becoming more severe and pervasive behaviors.

## Making a Complaint



It is important to keep in mind that if you believe you are a "victim of sexual harassment, you must report it to the Human Resources administrator in your district. Failure to report the behavior deprives the district of the opportunity to respond and intervene to correct the behavior.

In addition to reporting the alleged harassment to your district's Human Resources administrator, you can also get more information regarding your rights and recourse through the Department of Fair Employment and Housing (DFEH), which administers state law, or through the Equal Employment Opportunity Commission (EEOC), which administers federal law. Check your local phone book under government listings for contacts in your area.

Many districts do not have the benefit of a Human Resources department; however, under most district complaint processes, a Compliance Officer is identified (which may be the Superintendent or designee). In addition to DFEH and EEOC, employees may file a complaint with the California Department of Education (CDE), though CDE will generally defer to DFEH.

# The EEOC vs. DFEH

In California, victims of sexual harassment may file complaints with either the federal government agency, Equal Employment Opportunity Commission (EEOC), or the California agency, Department of Fair Employment and Housing (DFEH). The EEOC enforces federal law. The DFEH enforces state law, including the Fair Employment and Housing Act, or FEHA. This can be confusing to many employees and supervisors; however, the nuances of each agency's complaint process are important. Let's take a look at some of the reasons why an employee may wish to file a complaint with one agency over the other:

- The EEOC and DFEH have different employee thresholds that companies must meet to be subject to the laws.
- The EEOC does not investigate claims of sexual harassment based on sexual orientation, whereas the DFEH does.
- The DFEH does not enforce the Equal Pay Act, whereas the EEOC does.
- The DFEH allows up to 365 days to file a claim, whereas the EEOC only allows 180 days or 300 days for state/local agencies.



# Wrap Up



A district's responsibility to exercise reasonable care to prevent and correct harassment is not limited to implementing an anti-harassment policy and complaint procedure.

A district's duty to exercise due care includes instructing all of its supervisors and managers to address complaints of harassment or report them to appropriate officials, regardless of whether they are officially designated to take complaints and regardless of whether a complaint was framed in a way that conforms to the district's particular complaint procedures.

In addition, every employee has the responsibility to act in a professional, respectful way toward co-workers. In the end, you will be held responsible for your conduct. Remember, everything you have said or done may be evaluated by a jury and may potentially make headlines. Be mindful of the situations you put yourself in.

**Especially in a school district**, our work environments should model those behaviors that are appropriate examples for our students.

























