Sexual Harassment and Misconduct in the Workplace

Women Lawyers Association
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Presenter: Lisa Boutelle Lazzara
Law Office of Lisa Boutelle Lazzara
1212 Marsh Street, Suite 3
San Luis Obispo, CA 93401
lisalazzara@sloemploymentlaw.com

I.

Two Types of Sexual Harassment Recognized Under California Law: Quid Pro Quo and Hostile Work Environment

"California case law recognizes two theories upon which sexual harassment may be alleged. The first is **quid pro quo harassment**, where a term of employment is conditioned upon submission to unwelcome sexual advances. The second is **hostile work environment**, where the harassment is **sufficiently pervasive** so as to alter the conditions of employment and create an abusive work environment." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1408, 1414, citing *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 607, emphasis added; *see also* CACI 2524, the text of which is found at the end of these materials and which explains the "severe and pervasive" element of a hostile work environment.)

II.

Statutory Protections for California Employees

A.

CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT ("FEHA") Government Code Section 12940, *et seq.*

It is an unlawful employment practice, unless based upon a bona fide

occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

* * *

(h) For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

(j) (1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, to **harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.** An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. **An entity shall take all reasonable steps to prevent harassment from occurring.** Loss of tangible job benefits shall not be necessary in order to establish harassment.

* * *

(3) **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, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

(4)(C) For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth or related condicionts. **Sexually harassing conduct need not be motivated by sexual desire.** (Emphasis added; the statute was amended to add this language in 2013.)

***State Dept. of Health Services v. Superior Court* (2003) 31 Cal. 4th 1026**

"The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. (§ 12940, subd. (j)(1).) This is a negligence standard. * * * Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor'(§ 12940, subd. (j)(1)), by implication the FEHA makes the employer strictly liable for harassment by a supervisor. * * * **We conclude that under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor."**

"The FEHA makes it a separate unlawful employment practice for an employer to 'fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.'"

Government Code Section 12926(t)

"Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Same Sex Harassment is actionable under the FEHA

The California 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 and includes gender-based harassment of a person of the same sex as the harasser." Additionally, the courts have recognized that male employees pinching and slapping another male employee on the buttocks goes far beyond "horseplay" and creates a hostile work environment. (See *Smith v. Rock-Tenn Services, Inc.*,813 F.3d 298 (6th Cir. 2016); the jury in that case awarded the plaintiff in excess of $300,000.00.)

As indicated above, the FEHA was amended in 2013 to specify that sexually harassing conduct need not be motivated by sexual desire. The statute was amended by the Legislature (in SB 292) in direct response to the Court's holding in *Kelly v. Conco Companies* (2011)196 Cal.App.4th 191. In *Kelly*, the Court held that held that in order to constitute sexual harassment under the FEHA, an expression of actual sexual desire or intent by the defendant was required, or that the defendant's conduct must have resulted from the defendant's actual or perceived sexual orientation. Note: *Kelly* was a case in which the plaintiff and alleged harasser were both males.

Government Code Section 12950.1

Section 12950.1(a) imposes an obligation on employers of 50 or more employees to provide at least two hours of classroom or other interactive training and education regarding sexual harassment to all supervisory employees within six months of their assumption of a supervisory position and further requires additional sexual harassment training to such supervisory employees once every two years. **The statute, as of 2015, includes the following language: "An employer shall also include prevention of abusive conduct as a component of the training and education specified in subdivision (a).**

"Abusive conduct" is defined at subsection (g)(2), 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. Abusive conduct may 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. A single

act shall not constitute abusive conduct, unless especially severe and egregious."

In light of Section 12950.1, does "abusive Conduct" or bullying, when <u>not</u> based on harassment because of the Plaintiff's inclusion in a protected class under the FEHA, give rise to a cause of action?

Answer: Not at this time.

B.

California Civil Code Section 1708.5; Sexual Battery

California *Civil Code* Section 1708.5 defines "sexual battery" to include acting "(1)...with the intent to cause a harmful or offensive contact with another by use of his or her intimate part, and a sexually offensive contact with that person directly or indirectly results; (2) ... with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results; and (3)...to cause an imminent apprehension of the conduct described in paragraph (1) or (2), and a sexually offensive contact with that person directly or indirectly results. The definition of "intimate body part" includes the sexual organ, anus, groin and buttocks of any person, or the breast of a female. Pursuant to Section 1708.5(b), a person who commits a sexual battery is liable for general damages, special damages and punitive damages. Note that the sexual battery statute refers to the sexual organ, anus, groin or buttocks "...of **any person**." *The gender of the victim and perpetrator are not relevant* except that only female breasts are included in the definition of intimate body parts under the statute.

Fair Employment and Housing Act CACI 2524

"Severe or Pervasive" Explained

"Severe or pervasive" means conduct that alters the conditions of employment and creates a hostile or abusive work environment.
In determining whether the conduct was severe or pervasive, you should consider all the circumstances. You may consider any or all of the following:
(a) The nature of the conduct;
(b) How often, and over what period of time, the conduct occurred;
(c) The circumstances under which the conduct occurred;
(d) Whether the conduct was physically threatening or humiliating;
(e) The extent to which the conduct unreasonably interfered with an employee's work performance.

New September 2003; Revised December 2007

Directions for Use
Read this instruction with any of the Hostile Work Environment Harassment instructions (CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, and 2522C). Read also CACI No. 2523, "Harassing Conduct" Explained.

Sources and Authority

• "We have agreed with the United States Supreme Court that, to prevail, an employee claiming harassment based upon a hostile work environment must demonstrate that the conduct complained of was severe enough or sufficiently pervasive to alter the conditions of employment and create a work environment that quali?es as hostile or abusive to employees because of their sex. The working environment must be evaluated in light of the totality of the circumstances: '[W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " (Miller v. Dept. of Corrections (2005) 36 Cal.4th 446, 462 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

• "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' . . . [¶] 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would ?nd hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (Aguilar v. Avis Rent A Car System, Inc. (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

• "Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances. The plaintiff must prove that the defendant's conduct would have interfered with a reasonable employee's work performance . . . and that she was actually offended . . . . The factors that can be considered in evaluating the totality of the circumstances are: (1) the nature of the unwelcome sexual acts or works (generally, physical touching is more offensive than unwelcome verbal abuse); (2) the frequency of the offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4) the context in which the sexually harassing conduct occurred." (Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 609–610 [262 Cal.Rptr. 842], internal citation omitted.)

• "In determining what constitutes 'sufficiently pervasive' harassment, the courts have held that acts of harassment cannot be occasional, isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of harassment of a repeated, routine or a generalized nature." (Fisher,supra, 214 Cal.App.3d at p. 610.)

• "The United States Supreme Court . . . has clarified that conduct need not seriously affect an employee's psychological well-being to be actionable as abusive work environment harassment. So long as the environment reasonably would be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." (Kelly-Zurian v. Wohl Shoe Co., Inc. (1994) 22 Cal.App.4th 397, 412 [27 Cal.Rptr.2d 457], internal citations omitted.)

• "As the Supreme Court recently reiterated, in order to be actionable, '. . . a sexually objectionable environment must be both objectively and subjectively

offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' The work environment must be viewed from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' This determination requires judges and juries to exercise '[c]ommon sense, and an appropriate sensitivity to social context' in order to evaluate whether a reasonable person in the plaintiff's position would find the conduct severely hostile or abusive." (Beyda v. City of Los Angeles (1998) 65 Cal.App.4th 511, 518–519 [76 Cal.Rptr.2d 547], internal citations omitted.)

• "The requirement that the conduct be sufficiently severe or pervasive to create a working environment a reasonable person would find hostile or abusive is a crucial limitation that prevents sexual harassment law from being expanded into a 'general civility code.' The conduct must be extreme: ' "simple teasing," . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment." ' " (Jones v. Department of Corrections (2007) 152 Cal. App. 4th 1367, 1377 [62 Cal.Rptr. 3d 200], internal citations omitted.)

• "[E]mployment law acknowledges that an isolated incident of harassing conduct may qualify as 'severe' when it consists of 'a physical assault or the threat thereof.' " (Hughes v. Pair (2009) 46 Cal.4th 1035, 1049 [95 Cal.Rptr.3d 636, 209 P.3d 963], original italics.)

• "In the present case, the jury was instructed as follows: 'In order to find in favor of Plaintiff on his claim of race harassment, you must find that Plaintiff has proved by a preponderance of the evidence that the racial conduct complained of was sufficiently severe or pervasive to alter the conditions of employment. In order to ?nd that racial harassment is "sufficiently severe or pervasive," the acts of racial harassment cannot be occasional, isolated, sporadic, or trivial.' . . . [W]e find no error in the jury instruction given here . . . . [T]he law requires the plaintiff to meet a threshold standard of severity or pervasiveness. We hold that the statement within the instruction that severe or pervasive conduct requires more than 'occasional, isolated, sporadic, or trivial'

acts was an accurate statement of that threshold standard." (Etter v. Veri?o Corp. (1998) 67 Cal.App.4th 457, 465–467 [79 Cal.Rptr.2d 33].)

Confidential Settlement Agreements

Code of Civil Procedure Section 1002 (effective January 1, 2017). (a) Notwithstanding any other provision of law, a confidential settlement agreement is prohibited in any civil action the factual foundation for which establishes a cause of action for civil damages for an act that may be prosecuted as a felony sex offense.

(b) Subdivision (a) does not preclude an agreement preventing the defendant or any person acting on his or her behalf from disclosing any medical information or personal identifying information, as defined in subdivision (b) of Section 530.5 of the Penal Code, regarding the victim of the felony sex offense or of any information revealing the nature of the relationship between the victim and the defendant. This subdivision shall not be construed to limit the right of a crime victim to disclose this information.

(c) Subdivision (a) does not apply to or affect the ability of the parties to enter into a settlement agreement or stipulated agreement that requires the nondisclosure of the amount of any money paid in a settlement of a claim.

Legislation has been introduced in both the California Assembly (AB 1682) and Senate (SB 820), motivated by the many allegations of sexual harassment against Harvey Weinstein and others, that would further restrict the ability of defendants to enforce confidentiality provisions in sexual harassment settlement agreements, as follows:

"Existing law prohibits a provision in a settlement agreement that prevents the disclosure of factual information related to the action in a civil action with a factual foundation establishing a cause of action for civil damages for certain enumerated sexual offenses. Existing law prohibits a court from entering an order in any of these types of civil actions that restricts disclosure of this information, as specified, and **it makes a provision in a settlement agreement that prevents the disclosure of factual information related to the action, entered into on or after January 1, 2017, void as a matter of law and against public policy.**

This bill would similarly provide that, a provision in a settlement agreement that prevents the disclosure of factual information relating to the action is prohibited, unless a claimant requests the inclusion of such a provision, if the pleadings state a cause of action relating to specified claims of sexual assault, sexual harassment, or harassment or discrimination based on sex. The bill would make a provision in a settlement agreement that prevents the disclosure of factual information related to the action, as described in the bill, entered into on or after January 1, 2019, void as a matter of law and against public policy. The bill would also provide that a court may consider the pleadings and other papers in the record or any other findings of the court in determining the factual foundation of the causes of action specified in these provisions." (Emphasis added.)

SEXUAL HARASSMENT INCLUDES MANY FORMS OF OFFENSIVE BEHAVIORS

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.

THE MISSION OF THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING IS TO PROTECT THE PEOPLE OF CALIFORNIA FROM UNLAWFUL DISCRIMINATION IN EMPLOYMENT, HOUSING AND PUBLIC ACCOMMODATIONS, AND FROM THE PERPETRATION OF ACTS OF HATE VIOLENCE AND HUMAN TRAFFICKING.

FOR MORE INFORMATION

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

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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.

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*

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 brochure or an alternative writing that complies with Government Code 12950. This pamphlet 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 DFEH and the United States Equal Employment Opportunity Commission as additional avenues for employees to lodge complaints.
- 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).
- 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.
- Make clear that employees shall not be retaliated against as a result of making a complaint or participating in an investigation.

④ 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.

⑤ 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.

⑥ 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.