“I AM A PROFESSIONAL AND HAVE TRIED TO BE PROFESSIONAL. I AM NOT TREATED THAT WAY HOWEVER. I AM SEXUALIZED AND DIMINISHED.”

LAUREN O'CONNOR

“IT'S SO UNBELIEVABLE THAT IN 2017, ALMOST EVERY SINGLE WOMAN HAS A STORY ABOUT SEXUAL HARASSMENT.”

GRETCHEN CARLSON

“IT WOULD HAVE BEEN MORE COMFORTABLE TO REMAIN SILENT.”

ANITA HILL
13,891 Allegations of Harassment, Discrimination + Retaliation Were Filed in California in 2016

70% of Women Do Not Report Sexual Harassment
"I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star, they let you do it. You can do anything."

Donald Trump

"The whole experience of pleading guilty to a felony was incredibly devastating. I did not think I was guilty of many of the accusations."

Bob Filner

"I did not have sexual relations with that woman."

Bill Clinton


75% of Americans call harassment a problem.
43,000 RAPES AND ASSAULTS OCCUR ANNUALLY IN THE WORKPLACE

Tony Mendoza

“IF I’VE COMMUNICATED OR MISCOMMUNICATED ANYTHING THAT HAS EVER MADE A FEMALE EMPLOYEE FEEL UNCOMFORTABLE, THEN I AM DEEPLY EMBARRASSED AND I WILL IMMEDIATELY APOLOGIZE.”

Harvey Weinstein

“I APPRECIATE THE WAY I’VE BEHAVED WITH COLLEAGUES IN THE PAST HAS CAUSED A LOT OF PAIN, AND I SINCERELY APOLOGIZE FOR IT.”

Al Franken

“ I RESPECT WOMEN. I DON’T RESPECT MEN WHO DON’T. AND THE FACT THAT MY OWN ACTIONS HAVE GIVEN PEOPLE A GOOD REASON TO DOUBT THAT MAKES ME FEEL ASHAMED.”
18% of all sexual harassment charges filed with the EEOC are filed by men.

33 million American women have been harassed at work.
“HOPEFULLY, ME COMING FORWARD WITH MY STORY WILL DETER A PREDATOR AND ENCOURAGE SOMEONE WHO FEELS HOPELESS.”

TERRY CREWS

“EACH OF US HAS ENDURED, OR WITNESSED OR WORKED WITH WOMEN WHO HAVE EXPERIENCED SOME FORM OF DEHUMANIZING BEHAVIOR BY MEN WITH POWER IN OUR WORKPLACES.”

OCTOBER 2017 LETTER BY 140+ WOMEN IN CALIFORNIA STATE POLITICS

RUTH BADER GINSBURG

“FOR SO LONG WOMEN WERE SILENT, THINKING THERE WAS NOTHING YOU COULD DO ABOUT IT, BUT NOW THE LAW IS ON THE SIDE OF WOMEN, OR MEN, WHO ENCOUNTER HARASSMENT AND THAT’S A GOOD THING.”

RUTH BADER GINSBURG

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SERIOUSLY, WHY AM I HERE?

**LEGISLATION**
- California's Fair Employment and Housing Act (FEHA) makes sexual harassment illegal in the workplace. Requires employers take reasonable steps to prevent harassment from occurring.

**Mandatory Training**
- As of January 1, 2015, AB 2053 requires all California employers subject to the mandatory training law to include a component on preventing "abusive conduct."
- AB 1825 requires public agencies to provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees.

**Officials**
- As of January 1, 2018, SB 396 requires that AB 1825 training also include information regarding gender identity, gender expression and sexual orientation.
- As of January 1, 2017, AB 1661 requires that local government officials receive sexual harassment prevention training to all agency officials, if any agency official receives any form of compensation, salary or stipend.

**Case Law**
- AB 1825 requires public agencies to provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees.

**Abusive Conduct**
- As of January 1, 2017, AB 1661 requires that local government officials receive sexual harassment prevention training to all agency officials, if any agency official receives any form of compensation, salary or stipend.

**Gender Identity**
- As of January 1, 2018, SB 396 requires that AB 1825 training also include information regarding gender identity, gender expression and sexual orientation.
THERE ARE OTHER IMPORTANT BENEFITS

- Educates officials, supervisors, and employees on their obligations and best practices
- Encourage a healthy and respectful workplace
- Increase employee retention and organizational productivity
- Avoid/limit legal liability

LEGAL FOUNDATION

FEDERAL LAWS

- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act ("ADA")
- Age Discrimination in Employment Act ("ADEA")
- Genetic Information Non-Discrimination Act ("GINA")
- Administered by the Equal Employment Opportunity Commission ("EEOC") [www.eeoc.gov]

CALIFORNIA LAW

- Fair Employment and Housing Act ("FEHA")
- Administered by the Department of Fair Employment and Housing ("DFEH") [www.dfeh.ca.gov]
WHAT IS WORKPLACE HARASSMENT?

ACCORDING TO THE DICTIONARY...

HA-RASS (HUH-RAS, HAR-uh S)

VERB (USED WITH OBJECT)

1. to disturb persistently; torment, as with troubles or cares; bother continually; pester; persecute.
2. to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid.

—SYNONYMS

1. badger, vex, plague, hector, torture.
2. molest.

WWW.BWSLAW.COM
ACCORDING TO THE LAW + CITY POLICY...

BECAUSE OF LEGALLY PROTECTED CHARACTERISTICS

- Sex
- Gender
- Sexual Orientation
- Age (Over 40)
- Race
- National Origin
- Religious Creed
- Ancestry
- Color
- Mental Disability
- Physical Disability
- Genetic Information
- Medical Condition
- Military or Veteran's Status
- Pregnancy
- Gender Identity
- Gender Expression
- Marital Status

LEGAL UPDATE

SB 396 - GENDER IDENTITY, GENDER EXPRESSION + SEXUAL ORIENTATION

• Gender Identity - a person’s identification as male, female, a gender different from the person’s sex at birth, or transgender
• Gender Expression - a person’s gender-related appearance or behavior, whether or not stereotypically associated with the person’s sex at birth
• Sexual Orientation - heterosexuality, homosexuality, and bisexuality
• Sex - includes, but is not limited to:
  • A person’s biological sex (male or female)
  • A person’s gender, including gender identity and expression
  • Pregnancy, childbirth, breastfeeding or related medical conditions
• Transgender - generally refers to a person whose gender identity differs from their sex at birth
FEHA PROTECTS...

BECAUSE OF LEGALLY PROTECTED CHARACTERISTICS

- A person who is a member of one or more of the protected categories;
- A person who is perceived to be a member of one or more of the protected categories; and
- A person who is associated with a person who is in, or is perceived to be in one or more of the protected categories

TO WHOM DOES THE LAW APPLY?

THE LAW PROTECTS:
- Employees
- Unpaid interns and volunteers
- Applicants

THE LAW PROHIBITS HARASSMENT FROM:
- Employees (of any rank)
- Third parties
- Elected and appointed officials
WHAT IS SEXUAL HARASSMENT?

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.
IS THIS ABOUT SEXUAL DESIRE?

Sexually harassing conduct need not be motivated by sexual desire

A person's sexual orientation is irrelevant to sexual harassment

The City and individual employees are at risk for liability when the conduct is simply sexual in nature

QUID PRO QUO SEXUAL HARASSMENT

Offering employment benefits or giving preferential treatment in exchange for sexual favors; and/or retaliating against or getting back at someone who turns down sexual advances
HOSTILE WORK ENVIRONMENT HARASSMENT

Hostile work environment harassment occurs when offensive conduct that is based on a protected characteristic is severe or pervasive enough to alter the conditions of an employee's job and create an abusive working environment.

EXAMPLES OF HOSTILE WORK ENVIRONMENT

**Verbal Conduct:** Jokes or comments about a protected characteristic ■ Public accusations or comments about protected characteristics ■ Talking about sexual conquests, preferences, experiences, and values ■ Spreading rumors or gossip about a person's personal or sex life ■ Verbal abuse

**Physical Conduct:** Hugging, kissing, pinching, massaging, rubbing ■ Brushing up against someone ■ Leering at someone or "checking them out" ■ Interfering with movement ■ Invading someone's space ■ Staring at a person ■ Physical or sexual assault

**Visual Conduct:** Posters ■ Calendars ■ Pictures ■ Screensavers ■ Electronic Images

**Correspondence:** Email ■ Text messages ■ Instant messages ■ Handwritten communications ■ Blogging ■ Social networking and social media

**Sexual advances or propositions:** Repeatedly asking someone on a date ■ Romantic relationships ■ Former romantic relationships
AN EMPLOYEE JUST COMPLAINED AT WORK ABOUT SOME COMMENTS ANOTHER EMPLOYEE POSTED ON HER FACEBOOK WALL. IS IT OKAY FOR THE CITY TO BE INVESTIGATING THIS?

A. Absolutely not – everything on Facebook is protected by the First Amendment
B. It depends on the comments

BUT WHAT ABOUT ME? I'M AN OFFICIAL. SO I CAN SAY ANYTHING I WANT, RIGHT? AND I CAN BLOCK THOSE IRRITATING RESIDENTS THAT ARE SO CRITICAL OF ME, TOO, RIGHT?

A. Of course. Laws don't apply to local government officials.
B. Not so fast – there are limitations on everyone's online conduct.
How does an employee establish harassment?

A hostile work environment must be subjectively perceived as abusive to alter the conditions of the plaintiff's employment.

“Sexual harassment is complex, subtle, and highly subjective”

Factors to consider:

- Was the conduct unwelcome?
- Did the employee complain about the conduct?
- Did the employee suffer psychological harm?
- Did the employee participate in the conduct, i.e., engage in “horseplay” with the offender?
HARASSMENT IN LITIGATION

OBJECTIVE STANDARD

Was the plaintiff’s subjective belief reasonable?

“WHETHER AN ENVIRONMENT IS ‘HOSTILE’ OR ‘ABUSIVE’ CAN BE DETERMINED ONLY BY LOOKING AT ALL THE CIRCUMSTANCES”

FACTORS TO CONSIDER

• Frequency and severity of the conduct
• Threatening or humiliating vs. a minor offensive utterance
• Did it unreasonably interfere with an employee’s work performance?
• Psychological harm

HARASSMENT IN DISCIPLINE

DISCIPLINARY ACTION

• Did the employee violate City policy?
• Is the City required to act to prevent unlawful harassment?
• An employee can be disciplined for conduct that does not meet the legal/litigation standard
What about behavior that is not motivated by a protected characteristic?

Joel is a great boss, but sometimes he gets angry and yells, pounds on the desk, kicks the desk, and uses vulgarity. Is that a hostile work environment?

A. Clearly it is a hostile work environment
B. There is insufficient evidence that this is a hostile work environment
Abusive conduct (or bullying) is not a form of harassment

Abusive conduct is not motivated by a protected characteristic

Abusive conduct does not violate the FEHA

It Might Be “Abusive Conduct”

• 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;
  • The gratuitous sabotage or undermining of a person’s work performance
  • A single act shall not constitute abusive conduct, unless especially severe and egregious

So, What Is Abusive Conduct?
CONDUCT THAT CAN* BE WORKPLACE BULLYING

*NOT THAT ALWAYS IS WORKPLACE BULLYING

- Creating Undue Pressure
- Insults and Put-Downs
- Intimidation
- Demeaning Work Abilities

- Hostile Glares
- Malicious Teasing
- Withholding Information
- Spreading Malicious Rumors
- Yelling

- Silent Treatment
- Personal Attacks
- Aggressive Behavior
- Unwarranted Criticism

- Not Giving Credit
- Constant Reminding of Old Mistakes
- Exclusion
- Undermining Employees

- Overworking Employees
- Isolation
- Giving Impossible Deadlines
- Threats

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BASICS OF CIVIL WORKPLACE BEHAVIOR

JUST LIKE KINDERGARTEN...

- Play fair
- Be nice to the other kids
- Keep your hands and feet to yourself
- Clean up your own mess
- Say you're sorry when you hurt somebody
- Put things back where you found them
- Don't take things that aren't yours
- Follow the “Golden Rule”
HOW TO ADDRESS ABUSIVE CONDUCT

• Civility and professionalism matter
• Bullying can frequently lead to harassment or workplace violence
• Bullying by officials can lead to attrition
• Employees should report concerns about abusive conduct to HR or to the General Manager
• Any official who is aware of potential abusive conduct in the workplace should report that to the General Manager

DISCRIMINATION AND RETALIATION
**WHAT IS DISCRIMINATION?**

Employees have a right to the opportunity to seek, obtain, and hold employment without discrimination.

An employer may not discriminate against any job applicant or employee in hiring, promotions, assignments, termination, or any term, condition, or privilege of employment based on a person’s actual or perceived protected characteristic(s).

**WHAT IS RETALIATION?**

<table>
<thead>
<tr>
<th>ADVERSE ACTION TAKEN BECAUSE OF PROTECTED ACTIVITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Termination                                    • Filing a good faith complaint</td>
</tr>
<tr>
<td>• Demotion                                       • Testify, assist or participate in proceedings or hearings</td>
</tr>
<tr>
<td>• Failure to promote                             • Opposing an act the employee reasonably believes is unlawful</td>
</tr>
<tr>
<td>• Refusal to hire                                 • Defending yourself against a charge</td>
</tr>
<tr>
<td>• Poor evaluation                                • Reasonably refusing to follow a discriminatory order (if City is aware of belief)</td>
</tr>
<tr>
<td>• Unwarranted criticism or ostracism</td>
</tr>
<tr>
<td>• Denial of privileges, such as overtime</td>
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</tbody>
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ESTABLISHING “TAKEN BECAUSE OF”

DIRECT EVIDENCE

• Statements by the supervisor taking discipline
  • Caution: City still liable if supervisor not aware of protected activity but relied upon a subordinate manager

CIRCUMSTANTIAL EVIDENCE

• City’s knowledge of protected activity
• Proximity of time between protected activity and adverse employment action

DEFENSE TO RETALIATION

• Action was justified by a legitimate, non-retaliatory reason
  • Employee can defeat by showing the stated reason was a pretext
    • Reason was false or unpersuasive
    • Similarly situated employees were treated differently
  • Effective documentation is key to defense
    • Documentation should be consistent
    • Documentation should be fair and unbiased
Creating Effective Documentation

Did You Provide Sufficient Factual Information and Context?
- Will the employee know what you are talking about?
- Would the comments make sense to an outside person?
- Will you remember what you meant years in the future?

The Basics

- Create Believable
- Accurate Factual
- Unbiased
- Professional
- Proofread
- Spell Check

- Identify, Quote and Attach Policies
- Date
- Author (Legible)
- Meeting Attendees
- Provide Context Outline Consequences
WHAT DO I DO IF I AM ACCUSED?

HOW CAN I BE ACCUSED?

- Three ways:
  - Internal complaint
  - Charge filed with the EEOC/DFEH
  - Named in litigation

- City must investigate upon first receipt of complaint or knowledge
WHAT SHOULD I DO IF I AM ACCUSED?

• Fully participate in the investigation
  • Be patient
  • Be cooperative
  • Be honest
  • Maintain confidentiality
  • Do not retaliate

WHAT SHOULD AN EMPLOYEE DO IF THEY THINK THEY ARE THE VICTIM?
COMPLAINT PROCEDURES

• Non-employees should report any concerns to General Manager
• Employees should report any concerns to Human Resources or any City supervisor
• Complaints should be made as soon as possible after the alleged incident(s)
• Complaints should be as specific and detailed as possible
• Written or verbal is acceptable
• Potential adverse consequences in litigation if the employee does not follow internal procedures
INVESTIGATION OF COMPLAINTS

- The City will conduct (or oversee) a prompt and impartial investigation of all complaints
- The City must take steps to protect employees from retaliation
- The City must take steps to protect confidentiality to the extent practical
  - Limited disclosure
  - Ability to impose a confidentiality requirement

AVAILABLE REMEDIES

- The City will take appropriate corrective action if internal policies were violated
- Remedies can include, but are not limited to:
  - Termination
  - Lesser discipline
  - Transfer/reassignment
  - No contact orders
  - Training and education
A manager comes to work to find a typed, unsigned letter alleging harassment in the workplace. Does the city have to investigate this?

A. No – you cannot investigate of an anonymous complaint
B. Yes – but it’s not the best way to complain about harassment
CITY LIABILITY FOR HARASSMENT

SUPervisors
• City is vicariously liable

Non-supervisory Employees or Third Parties:
• If City knows or has reason to know that the sexual harassing conduct occurred

Officials
• If the harassment arose from and was directly related to the official's performance of his/her official duties

REPORTING OBLIGATION

• Any supervisory employee who receives a complaint OR who has reason to believe that harassment, discrimination, or retaliation may have occurred MUST notify Human Resources/General Manager immediately

• Officials are strongly encouraged to report any potential harassment, discrimination, or retaliation to the General Manager immediately
EMPLOYEE’S LIABILITY FOR HARASSMENT

Employees are not personally liable for acts of discrimination or retaliation.

Employees can be personally liable for acts of harassment.

OFFICIAL’S LIABILITY FOR HARASSMENT

An elected official can be personally liable for harassment (as an intentional tort).

Plaintiff must recover against the official first before recovering against the City (but the City can sue the official for reimbursement).
INDIVIDUAL & CITY LIABILITY FOR HARASSMENT

- Compensatory Damages
  - Emotional distress
  - Lost wages
- Punitive Damages (individuals only)
  - Unlimited under FEHA if the defendant is shown by clear and convincing evidence to have acted with oppression, fraud or malice
  - Limited under Title VII if the defendant acted with malice or reckless indifference
- Attorney’s Fees

ANY QUESTIONS?