



CITYOFBENDIA

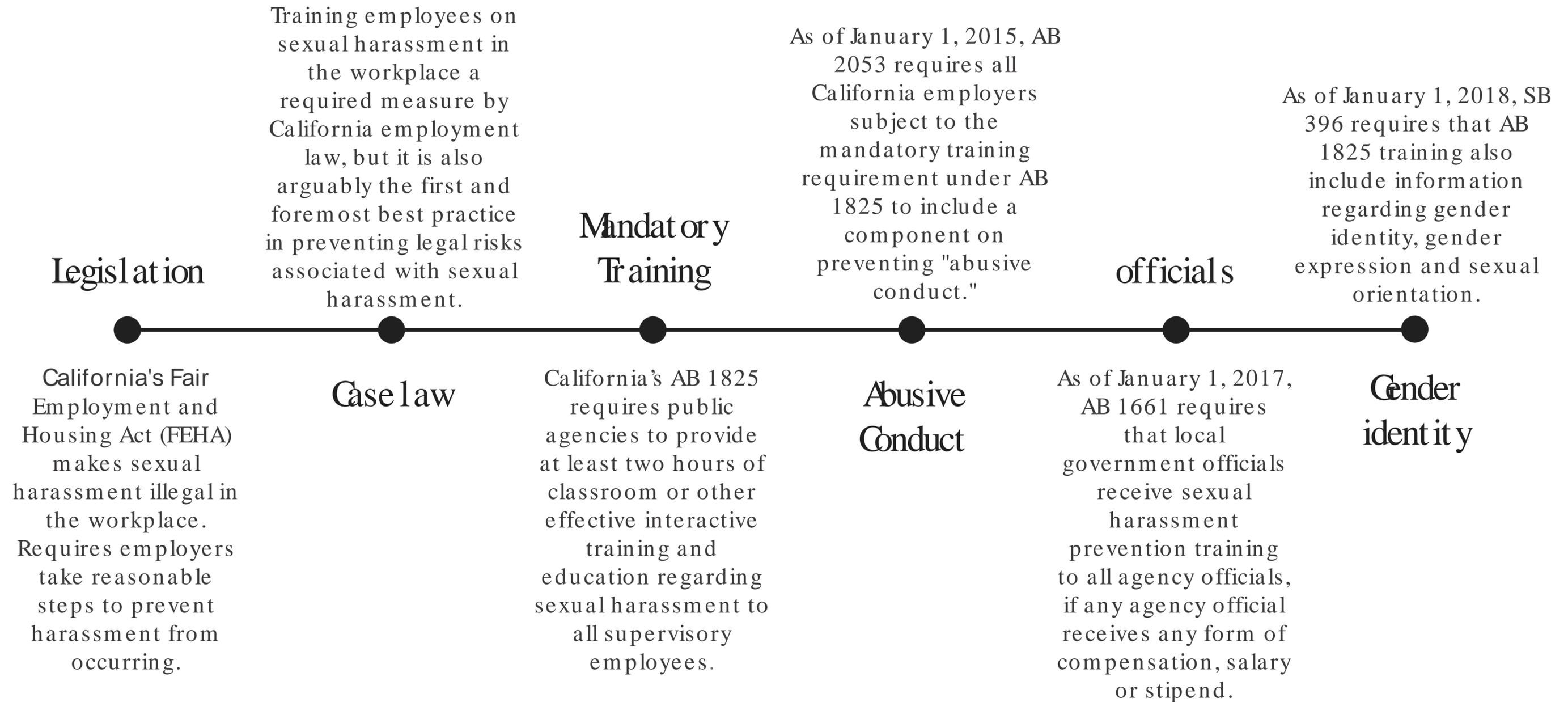
Harassment Prevention Training for supervisors + local Government Officials

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Why am I here?

SERIOUSLY, WHY AM I HERE?



There Are Other Important Benefits

- Educates supervisors and officials on their obligations and best practices
- Encourage a healthy and respectful workplace
- Increase employee retention and organizational productivity



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”)

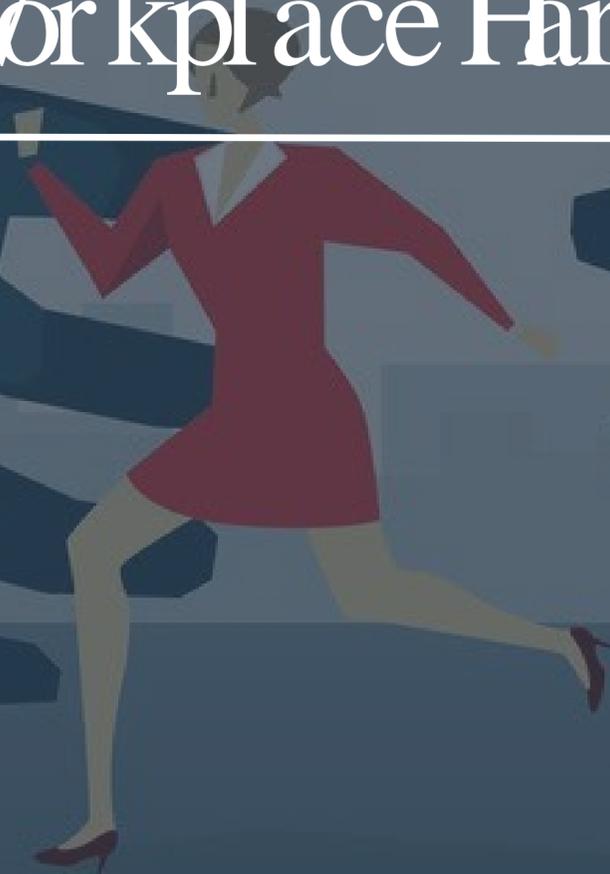
- Administered by the Equal Employment Opportunity Commission (“EEOC”) [www.eeoc.gov]

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

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.

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

2

—Synonyms

According to the law + City policy...

BECAUSE OF LEGALLY PROTECTED CHARACTERISTICS



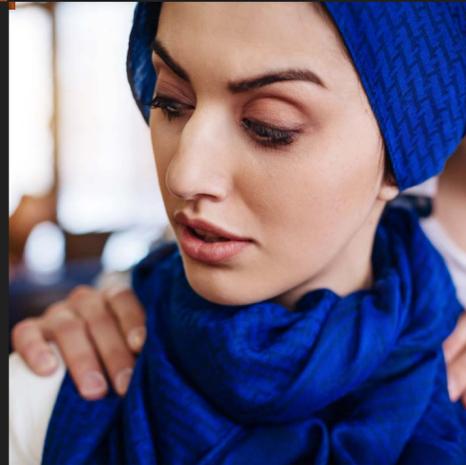
- Sex
- Gender
- Sexual Orientation
- Age (Over 40)



- Mental Disability
- Physical Disability
- Genetic Information



- Race
- National Origin
- Religious Creed
- Ancestry
- Color



- Medical Condition
- Military or Veteran's Status
- Pregnancy



- Gender Identity
- Gender Expression
- Marital Status

Legal Update

SB396- Gender Identity, Gender expression and 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 identify differs from their sex at birth

FEAR of acts...

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?



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,

submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

2

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: Derogatory comments about a protected characteristic ■ Sexual, racist or similar jokes ■ 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



One of my co-workers just complained at work about some comments I posted on my Facebook wall. Is it okay for the City to be investigating me for this?

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



How does one
establish harassment?

Harassment in Litigation

Subjective Standard

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



An illustration of a man and a woman in a heated conversation. The man, on the left, has a distressed expression with sweat drops on his forehead and is looking away. The woman, on the right, has a stern, angry expression and is pointing her finger at the man. The background is a solid dark teal color.

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

It Might Be “Abusive Conduct”

Abusive conduct (or bullying) is not a form of harassment

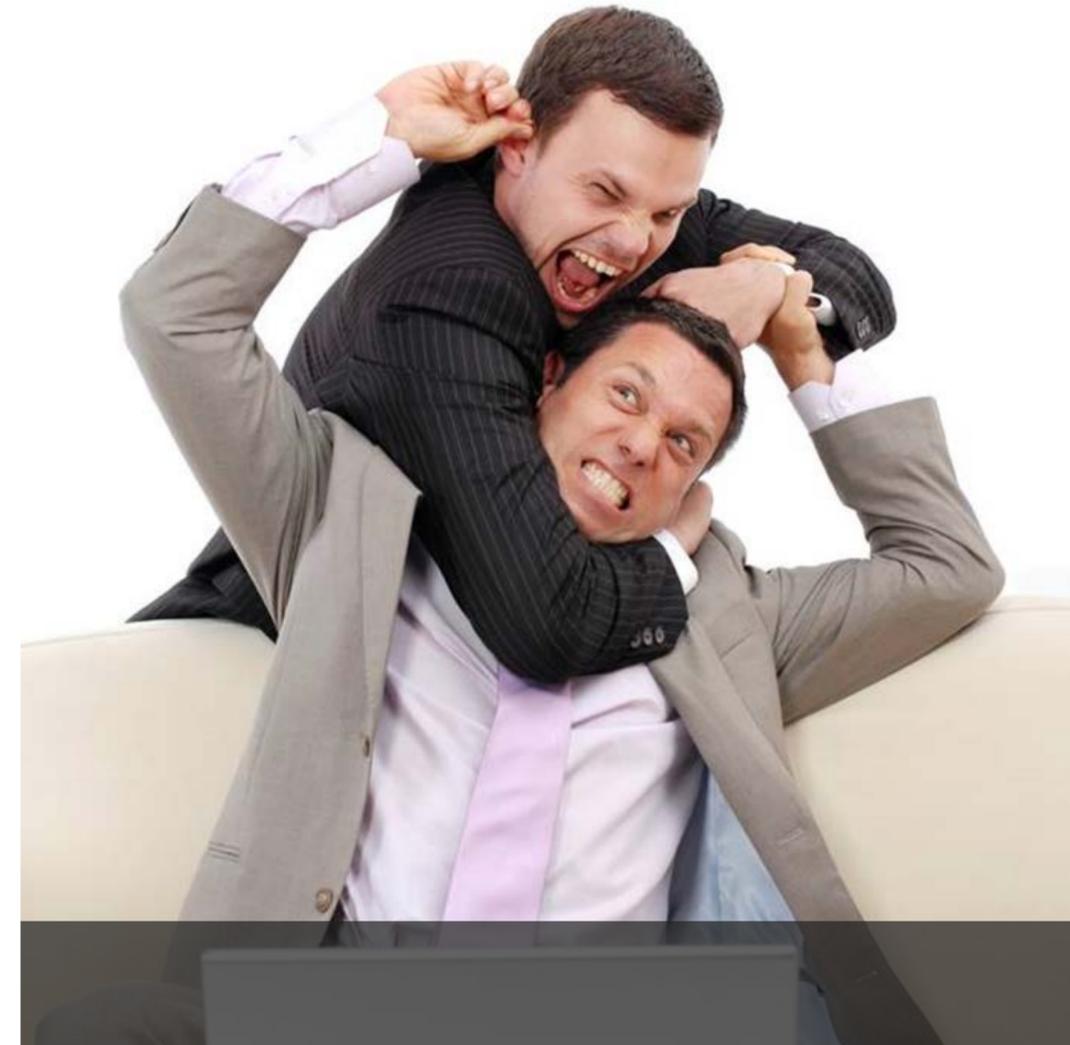
Abusive conduct is not motivated by a protected characteristic

Abusive conduct is not unlawful



So, What is 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



Conduct that CAN be Workplace Bullying

	<ul style="list-style-type: none">• Creating Undue Pressure• Insults and Put-Downs• Intimidation• Demeaning Work Abilities		<ul style="list-style-type: none">• Silent Treatment• Personal Attacks• Aggressive Behavior• Unwarranted Criticism	
<ul style="list-style-type: none">• Hostile Glares• Malicious Teasing• Withholding Information• Spreading Malicious Rumors• Yelling		<ul style="list-style-type: none">• Not Giving Credit• Constant Reminding of Old Mistakes• Exclusion• Undermining Employees		<ul style="list-style-type: none">• Overworking Employees• Isolation• Giving Impossible Deadlines• Threats

Basics of civil workplace behavior

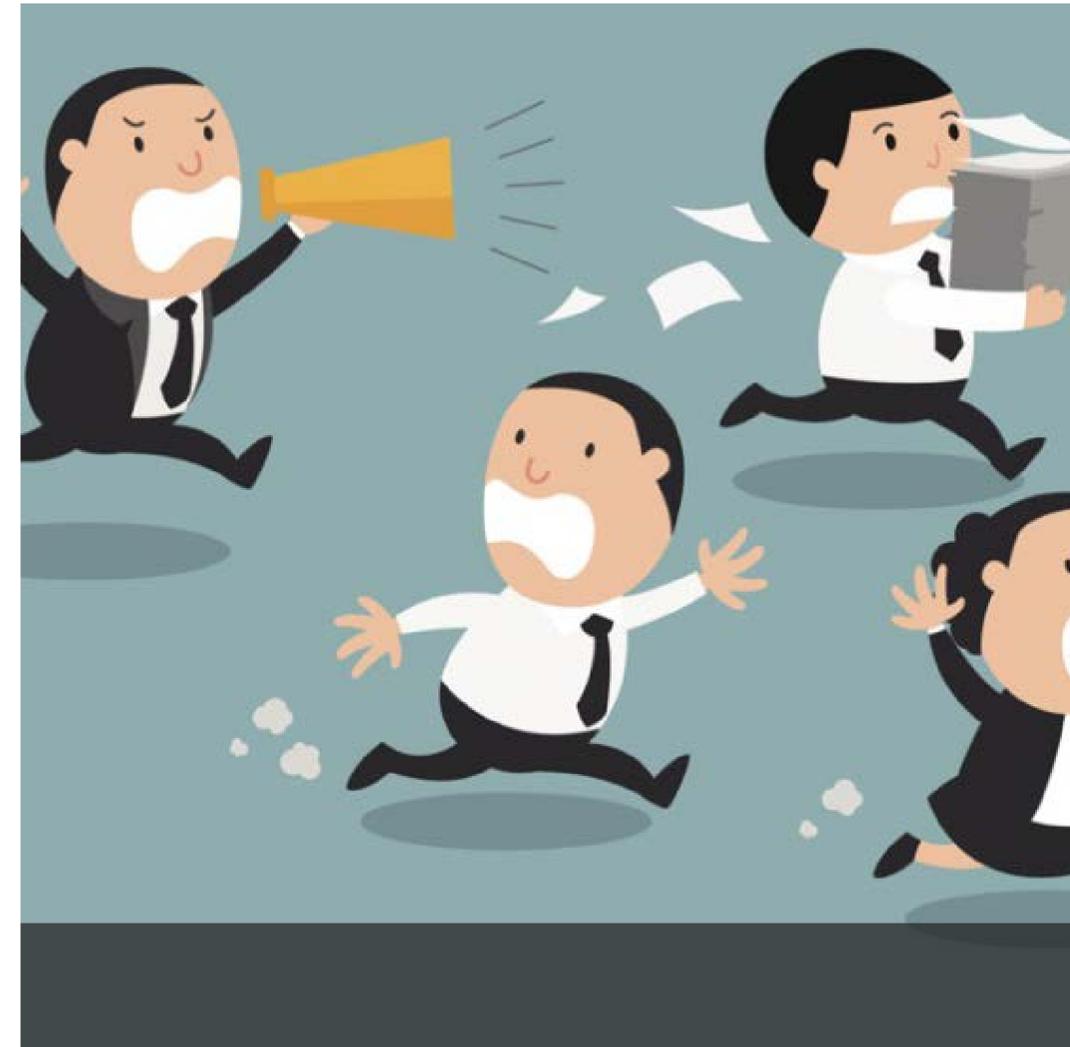
Just like kindergarten...

- 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
- Any employee who believes that he/she is being subjected to abusive conduct should report that to a supervisor or to Human Resources
- Any supervisor who is aware of potential abusive conduct in the workplace should report that to Human Resources



A hand on the left holds a blue string. On the right, a small white rabbit figurine wearing a dark suit and tie stands on a yellow pencil. The background is a solid light blue color.

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?

Adverse action



Taken Because of



Protected Activity

- Termination
- Demotion
- Failure to promote
- Refusal to hire
- Poor evaluation
- Unwarranted criticism or ostracism
- Denial of privileges, such as overtime

- Filing a good faith complaint
- Testify, assist or participate in proceedings or hearings
- Opposing an act the employee reasonably believes is unlawful
- Defending yourself against a charge
- Reasonably refusing to follow a discriminatory order (if City is aware of belief)

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



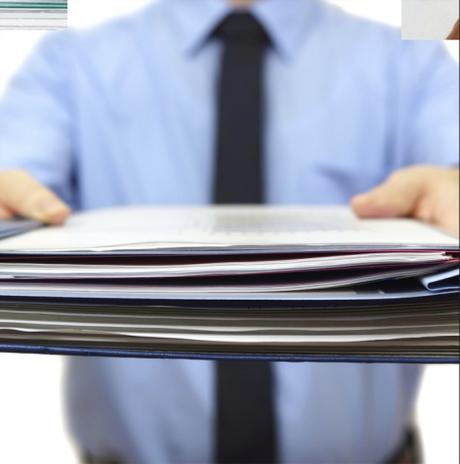
Creating Effective Documentation

- 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?



Creating effective documentation

The basics

	<ul style="list-style-type: none">• Unbiased• Professional• Proofread• Spell Check		<ul style="list-style-type: none">• Identify and Quote Policies• Provide Context	
<ul style="list-style-type: none">• Simultaneously Created• Believable• Accurate• Factual		<ul style="list-style-type: none">• Date• Author (Legible)• Meeting Attendees		<ul style="list-style-type: none">• Outline Consequences



LEGAL CONSEQUENCES
of 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



Supervisor's 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 immediately
- This obligation is not dependent on
 - The supervisor supervising of the complaining party or alleged target of harassment
 - The supervisor directly learning of it from the complaining party or alleged target of harassment



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



A young man with short brown hair, wearing a grey suit jacket, a white shirt, and a pink tie, looks upwards and to the right with a confused expression. On the right side of the image, four hands are visible, each pointing its index finger towards the man. The background is a plain, light grey color.

What Do I Do
if I am Accused?

How Can I Be Accused?

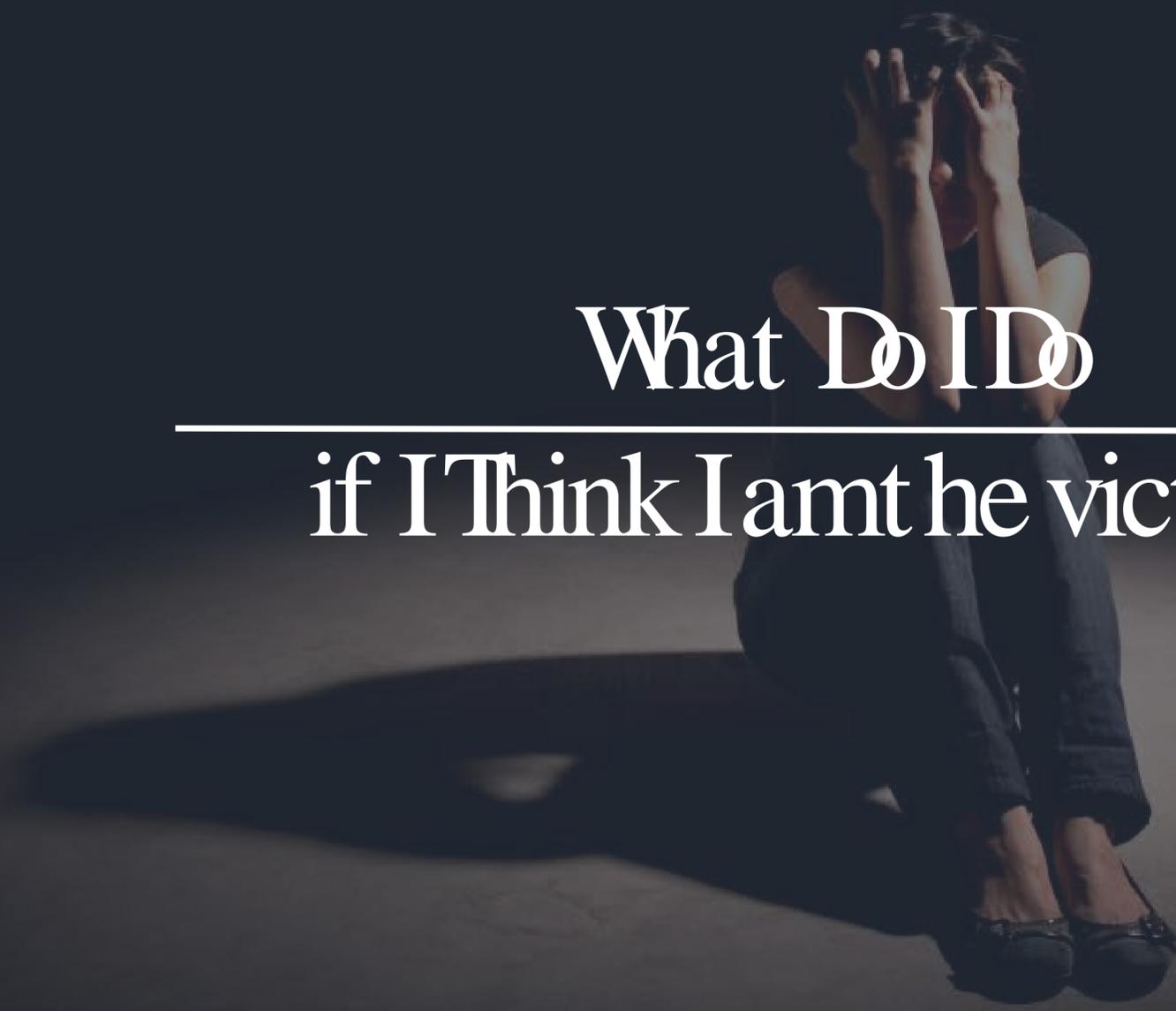
- Three ways:
 - Internal complaint
 - Charge filed with the EEOC/DFEH
 - Named in litigation
- City must investigate upon first receipt of complaint or knowledge



What Should I Do If I am Accused?

- Fully participate in the investigation
 - Be patient
 - Be cooperative
 - Be honest
 - Maintain confidentiality
 - Do not retaliate
- Address questions about the process to Human Resources





What Do I Do

if I Think I am the victim?

Employee Complaint Procedures

- Report concerns about harassment to Human Resources or to any 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





If I feel like my co-worker is making inappropriate comments about sex in the workplace. Do I need to tell her that I am offended by what she is saying?

- A. Absolutely - how can she know she is offending you if you stay quiet?
- B. Only if you want to do so and feel comfortable having that conversation.



What Happens After a
Complaint is Filed?

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

A hand in a dark blue sleeve holds a red diamond-shaped sign with a sad face emoji (☹️) on top of an open cardboard box. The background is a plain, light-colored wall.

How do I receive a complaint?

Receiving a complaint

Let the employee tell their story

1

- Listen actively
- Takes notes if necessary, but remember they may be evidence one day

- Do not guarantee confidentiality or make other promises

2

~~Do Not~~ Make Promises

Provide Reassurance



- Reassure the employee that he/she has done the right thing in bringing the complaint forward
- But do not express an opinion on the merits of the complaint

- Do not discourage the employee from making the complaint
- Do not suggest that it is trivial, a waste of your time, or could have been handled another way



Keep Your Opinion to Yourself

Understand the procedure



- Do not attempt to mediate the problem yourself
- Keep the parties separate
- Supervisors are not authorized to investigate without HR

- Advise the employee that you will be reporting their concerns to HR
- Okay to encourage the employee to come with you

6

Explain process to employee

Call for reinforcements

7

- Immediately report the matter to Human Resources



ANY QUESTIONS?