SEXUAL HARASSMENT IN THE WORKPLACE

GUIDELINES AND CURRICULUM

1994

THE COMMISSION
ON PEACE OFFICER STANDARDS AND TRAINING

STATE OF CALIFORNIA

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FOREWORD

Penal Code Section 13519.7 requires the Commission on Peace Officer Standards and Training to establish complaint guidelines and training for sexual harassment in the workplace. The law provides that the guidelines are to be followed by city police departments, county sheriffs' departments, districts, and state university departments, for peace officers who are victims of sexual harassment in the workplace.

Even though these guidelines follow the law in focusing on peace officers as victims of sexual harassment, they may equally apply to all employees of law enforcement agencies. All peace officers who have received their basic training before January 1, 1995, are required to receive supplementary training on sexual harassment in the workplace by January 1, 1997. The POST Telecourse *Sexual Harassment* broadcast on September 1, 1994 will meet this training requirement.

Sexual harassment in the workplace is of increasing concern in California and throughout the nation. When it occurs, sexual harassment is the cause of personal and organizational distress and discord. People and organizations should not have to endure or tolerate these behaviors. This manual is to help organizations assure a workplace free of sexual harassment.

Sexual harassment refers to behavior that is not welcome, is personally offensive, and creates an intimidating, hostile, or offensive work environment. Complicating the issue is the fact that what makes certain conduct sexual harassment is the complainant's interpretation of it, regardless of the harasser's intent. What one recipient considers humorous, for example, could be sexual harassment if another recipient finds it offensive.

The Commission appreciates the POST Sexual Harassment Advisory Committee, whose members developed and reviewed the guidelines and curriculum. Special thanks are also extended to the Los Angeles County Sheriff's Department for contributing materials for this publication.

Questions concerning these guidelines and curriculum should be directed to the Training Program Services Bureau at (916) 227-4889.

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SEXUAL HARASSMENT GUIDELINES

I. REQUIREMENTS FOR AND COMPONENTS OF A SEXUAL HARASSMENT POLICY AND COMPLAINT PROCEDURE

Guideline #1

Each law enforcement agency, as described in Penal Code Section 13519.7(a), shall develop a formal written procedure for the acceptance of complaints from peace officers who are the victims of sexual harassment in the work place. Agency policies shall begin with a preamble articulating concerns regarding the significance of sexual harassment and the importance of addressing such behavior.

Comment: Agencies should consider extending their individual complaint procedures and these guidelines to cover all categories of employees.

Agencies may also wish to consider addressing how a sexual harassment complaint should be filed if an employee is harassed by an employee from another organization (e.g. participant in a training course, booking at an allied agency jail, outside contractors, etc.).

Guideline #2

Each law enforcement agency, as described in Penal Code Section 13519.7(a), shall provide a written copy of their complaint procedure to every peace officer employee.

Guideline #3

Agency sexual harassment policies, while not required, may include a recommendation that the complainant of the perceived harassment notify the offending party that their behavior is offensive and/or unwanted.

COMMENT: Procedures should recognize that in some cases of harassment (e.g. where the complainant fears retaliation) this recommendation may be undesirable or impractical.

Guideline #4

Agency sexual harassment complaint procedures shall include the definitions and examples of sexual harassment as contained in the Code of Federal Regulations (29 CFR 1604.11) and California Government Code Section 12950.

COMMENT: Examples should include, but are not necessarily limited to physical, verbal, visual, written, and other kinds of conduct which may constitute sexual harassment.

Guideline #5

Agency sexual harassment complaint procedures shall identify the specific steps complainants should follow for initiating a complaint.

Guideline #6

Agency sexual harassment complaint procedures shall address supervisory/management responsibilities to intervene and/or initiate an investigation when possible sexual harassment is observed in the work place, whether or not an involved party elects to pursue a complaint. If it is determined that sexual harassment has occurred, appropriate administrative action shall be taken in accordance with state, federal, and case law.

COMMENT: Investigators of sexual harassment complaints should be sensitive to and trained in sexual harassment issues.

Guideline #7

Agency sexual harassment complaint procedures should identify that, when possible, the complainant will be accorded an appropriate level of confidentiality.

COMMENT: The complainant shall be advised that their identity may be disclosed when the investigation reveals the potential for formal disciplinary action or criminal procedures.

Guideline #8

Sexual harassment complaint procedures shall state that agencies must attempt to prevent retaliation, and, under the law, sanctions can be imposed if complainants and/or witnesses are subjected to retaliation.

Guideline #9

When identifying the specific steps a complainant should follow to report an incident of sexual harassment, the agency procedure:

a. Shall identify parties to whom the incident should/may be reported (e.g. any supervisor, manager, department head, Human Resources Department, Personnel Department)

b. Shall allow the complainant to circumvent their normal chain of command in order to report a sexual harassment incident.

c. Shall include a specific statement that the complainant is always entitled to go directly to the California Department of Fair Employment and Housing (DFEH) and/or the Federal Equal Employment Opportunity Commission (EEOC) to file a complaint.

Guideline #10

Agency sexual harassment complaint procedure shall require that all complaints shall be fully documented by the person receiving the complaint.

GUIDELINE #11

All sexual harassment prevention training shall be documented for each participant and maintained in an appropriate file.

II. INSTRUCTION

GUIDELINE #12

All instructors should have training expertise regarding sexual harassment issues.

SEXUAL HARASSMENT CURRICULUM

I. Learning Goal: To provide the student with the knowledge of state and federal laws which define sexual harassment.

A. Title VII and Government Code Section 12950 et seq

1. Unwelcome sexual conduct

a. Physical, verbal, written, visual, etc.

2. Quid Pro Quo

a. Submission or rejection of sexual conduct which explicitly or implicitly made a term or condition of hire or continued employment or an employment decision (assignment, promotion, etc.)

3. Hostile Work Environment

a. Sexually harassing conduct, within the complainants immediate work environment, which is so pervasive as to interfere with his or her work performance. Such conduct may or may not be directed at the complainant

4. Retaliation

a. Adverse action against the complainant and/or witnesses

B. Case Law Examples

1. Meritor Savings Bank v. Vinson 477 U.S. 57 (1986)

2. Ellison v Brady 924 F. 2d 872 (1991)

3. Harris v Forklift Systems Inc. 1114 S. Ct. 367 (1993)

II. Learning Goal: To provide the student with understanding of behaviors which constitute sexual harassment.

A. Causes of Sexual Harassment

1. Gender Issues

a. Male messages

1. Compete to win at any cost

2. Decision maker

3. Protector/provider

b. Female messages

1. Cooperate to avoid conflict

2. Nurturance & responsibility for emotional care of family, pregnancy, and child care

c. Extension to police culture

1. Changing role expectations

2. Fear that women are competing for men's jobs

3. Conduct differs in work setting, social setting, cultural considerations, confusion about boundaries of proper conduct

4. Sexual jokes, touching or other inappropriate behavior meant to show acceptance

B. Power Issues

1. Using position to request date or sex, excluding employee from work activities, subservient status, patronize, insensitive interruptions, failure to remove harasser from situation after reported

C. Examples of Sexual Harassment

1. Verbal Harassment

   a. Repeated, unsolicited, derogatory comments or slurs

2. Continued requests for social or sexual contact after being advised such is unwelcome, (i.e., repeated phone calls)

3. Discussing sexual exploits

4. Sexually patronizing comments; (i.e., "honey, "babe", and "doll")

5. Commenting on body parts

6. Telling of vulgar sexist jokes

7. Making obscene or suggestive sounds or gestures

8. Questions about a persons' sexual practices

9. Requesting employees wear sexually suggestive or demeaning clothing

D. Physical Harassment

1. Physical interference or contact which impedes normal movement when directed at an individual

2. Unwelcome touching (i.e., back rubs, brushing up against an individual, hugging, patting, kissing, and grabbing body parts)

E. Visual Harassment

1. Sexually offensive computer software, posters, cartoons, pictures, drawings, magazines, or objects

2. Staring or leering

3. Sexual gestures

F. Writings

1. Unwelcome notes, greeting cards, love letters, or invitations

G. Sexual Favors

1. Quid Pro Quo

a. Actual or perceived requests for sexual favors in exchange for employment benefits. Such may include but not be limited to: Offers of job assignments or promotions

2. Request for sexual favors without threat to employment benefits.

H. Hostile Work Environment

1. Any of the above examples which is directed toward the complainant and is ongoing and pervasive.

2. Any of the above examples which is not directed toward the complainant but which the complainant is subjected to in his or her immediate work environment

I. Threats

1. failure/refusal to provide timely backup, loss of assignment or job status, etc.

J. Force

1. Physical assault

III. Learning Goal: Provide the student with understanding of how to respond to sexually offensive or unwanted behavior in the workplace, and if necessary, how to initiate a sexual harassment complaint.

A. Recipients of perceived sexual harassment, when appropriate, should inform the harasser that the conduct is unwelcome, offensive, and should cease

B. Where the complainant is uncomfortable with a personal confrontation, he/she should contact any supervisor, manager, department head, or their equivalent

C. Where the complainant perceives that the department's internal environment is not conducive to making an internal complaint, they have the option of reporting the incident to an entity external to the department (i.e., City, County, DFEH, EEOC, etc.)

IV. Learning Goal: To provide the student with an understanding of the state mandated sexual harassment complaint process, legal remedies available, and protection from retaliation against complainants of sexual harassment.

A. Complaint Process

1. To whom does the complaint process apply per PC 13519.7

Comment: Agencies which are not covered by PC 13519.7 may choose to follow guidelines.

2. Supervisor/management responsibilities

a. Listen to complaint

b. Counsel on options

c. Document complaint

Comment: What is documentation

d. Appropriate investigative actions

Comment: Example of typical investigation process

B. Ramifications for offender

1. Verbal reprimand through termination

2. Civil suit

3. Criminal penalties

4. Fines imposed by EEOC and/or DFEH

5. Negative impact on career, family, credibility, reputation, etc.

C. Protection from retaliation

1. Illegality of retaliation under the law

SEXUAL HARASSMENT OVERVIEW

This material was adapted from "Risk Management For The 1990's: Sexual Harassment". Published by the Los Angeles County Sheriff's Department, Sherman Block, copyright 1994.

GENERAL OVERVIEW

Harassment on the basis of sex is a violation of Sec. 703 of Title VII (of the US Civil Rights Act). Unwelcome 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 the 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 work environment.

Complaints about sexual harassment can be divided into two general categories, those which result from quid pro quo harassment and those which result from a hostile or offensive work environment. Preventing and resolving these two different types of complaints represent two different types of challenges to organizations. Quid pro quo harassment is relatively easy to define. In dealing with quid pro quo harassment, the organizational task becomes one of stating a policy and enforcing that policy. By contrast, it is not always as easy to determine what constitutes a hostile or offensive work environment. The task of understanding what constitutes a hostile or

offensive work environment is even more difficult because the law is concerned with the perception of the person alleging the harassment rather than the intent of the organization or individual responsible for the action. In dealing with hostile and offensive work environment harassment, the organizational task broadens to include providing personnel with the tools to avoid inappropriate action as well as to alter potentially problematic behavior at the earliest point possible.

The bulk of the training program outlined here is primarily designed to deal with the issue of a hostile or offensive work environment. In this day and age, individuals who consider it acceptable to trade jobs, promotions, or privileges for sexual favors are unlikely to have their attitude changed by training. However, especially because we can not climb into another person's head, learning what sorts of behaviors might be experienced as hostile or offensive can be of great value. Similarly, while we each have our own understanding of what constitutes hostile or offensive behavior, there are undoubtedly differences between peoples' understandings. Just as with ethics, the process of developing a fuller understanding of the "gray areas" and how to handle them will be an important part of developing and implementing a successful program on sexual harassment.

Another important factor in dealing with the issue of hostile or offensive work environment complaints is timing. Situations and conduct which may be initially only mildly offensive or hostile can become damaging when they persist over time. Dealing with problematic situations and conduct before individuals have suffered serious or even lasting ill effects greatly reduces the level of financial cost. Increasing the organizational consensus and awareness about what specific behaviors are generally acceptable or unacceptable has significant positive effects. Training supervisors and managers to be proactive rather than simply reactive can also make tremendous changes. Finally, training supervisors in the proper handling of complaints when they do occur has an overwhelmingly positive effect. Relatively few complaints will result in legal or outside agency actions if handled properly by supervisors in the early stages.

Over and over, organizations have discovered that the MOST CRITICAL

factor in the success of a program to reduce sexual harassment is the initial involvement of the top levels of management. By participating in defining and developing a consensus around the "gray areas," top management gives a clear signal to all levels of the organization in language which can be understood.

LEGAL ISSUES: AN OVERVIEW

The following discussion summarizes some of the major issues and misconceptions concerning what is typically referred to as sexual harassment. It is intended to be a layperson's guide to understanding sexual harassment, not a legal brief. However, appropriate legal citations are noted.

SEX HARASSMENT OR SEXUAL HARASSMENT?

Harassment on the basis of an individual's sex is illegal. The US Supreme Court has stated that, "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult"[1] based on sex, race, religion, or national origin. Violations of that right because of an individual's sex have been referred to in common usage as "sexual harassment." That is, in some ways, unfortunate because it has created the misperception that only conduct or content which is explicitly sexual in nature is a violation of the law. In fact, what we are talking about as "sexual harassment" includes a whole range of "discriminatory intimidation, ridicule, and insult" based on or arising out of an individual's sex. The legal category of sexual harassment (as defined by the Equal Employment Opportunity Commission (EEOC) Guidelines of 1980), is only one form of unlawful harassment on the basis of sex, or sex harassment. The categories of gender harassment and pregnancy harassment have been suggested as terms to describe the other major forms of sex harassment.

POWER NOT SEX

Sex harassment is about power. The key to dealing effectively with sex harassment in the work place is replacing the misperception that sex harassment is about sex with the recognition that sex harassment is about power, or more specifically, about the misuse and abuse of power. That misuse or abuse of power can be intentional or unintentional, it can be physical or verbal, it can be malicious or benign, but sex harassment always involves the misuse or abuse of power.

Sex harassment involves the abuse or misuse of power because, in order to be harassment, the behavior or environmental characteristic must be unwelcome or unwanted. When people agree to do what they do not want to do, it is because they perceive the consequences of refusing as being undesirable or the rewards of acquiescing to be highly desirable. When people tolerate an environment which they find hostile or offensive, it is because either they perceive themselves as being unable to change it, or they perceive the negative consequences of attempting to change it to be greater than the benefits they expect to receive. Conversely, when people persist in doing something which they know another person finds upsetting or offensive or has asked them to stop, it is because they are not concerned about the consequences of continuing to do what they are doing.

From this perspective, there can be no harassment without a power differential. However, that power differential is not always easy to see. Within any organization or structure, there is both formal and informal power. One type of informal power is the result of friendship networks, the "who you know" issue. Another type of informal power which can be very important in some situations is physical power; capability of one person to use physical force on another person. Additionally, the informal power within an organization may reflect either formal or informal power conferred by some other (frequently super-ordinate) organization or social structure. One such type of informal power is the power granted by virtue of possessing characteristics which have superior status within a society or organizational culture. Race, ethnicity, gender, and religion are all examples of characteristics which can and do (in some settings) confer informal social power to those who possess the preferred characteristic. Thus, in assessing whether or not a power differential exists, it does not suffice to simply look at the relative formal power status of the two individuals. All the various types and sources of informal power must also be considered. (See Appendix for Power Examples.)

Once one recognizes that sex harassment is about power, the effective strategies for prevention and intervention become clearer. Obviously, to be effective an organization must create mechanisms to both empower the individuals who are being harassed and to provide consequences for those

who persist in harassment. That dual concern is, in fact, reflected in the legal requirements for dealing with sex harassment in the work place. Furthermore, an organization which can show that it has created effective mechanisms on both of those fronts is likely to be protected from any significant legal consequences.

SEXUAL HARASSMENT: A TIME PERSPECTIVE

HISTORY

In the first applications of Title VII (US Civil Rights Act), dealing with the issue of sex in the workplace, the law was used to overturn organizational polices and procedures which directly excluded women as a group (and in some cases men) from various occupations. Additionally, the law was seen as preventing employers and their agents from disparaging and discriminatory categorizations of women, or any group which has protected status. The result was that various occupations which had been open only to one sex or the other were now open to persons regardless of sex.

During the 1970's, women and their attorneys began pursuing legal actions alleging that certain types of sexual behaviors in the workplace also had the effect of excluding women or discriminating against female workers. This conduct, they argued, was also a form of sex discrimination. One significant argument for including this issue under the umbrella of Title VII protection was the argument that employers or supervisors (usually men) who demanded sex from an employee of one sex (usually women) in exchange for employment benefits did not generally make the same demands upon employees of the other sex (usually men). Another issue raised was the argument that sexual behavior could create an environment in which women were uncomfortable, and thus less able to work. By the late 1970's, the courts were beginning to issue rulings which concurred with these arguments.

In 1980, the Equal Employment Opportunity Commission (EEOC) of the United States Government issued guidelines which provided some definition

of what constitutes sexual harassment. These guidelines also clearly stated that, as interpreted by the EEOC, sexual harassment is an illegal form of sex discrimination. Although there has been some expansion and interpretation, generally the EEOC guidelines of 1980 are used as the basis of legal decision making in the area of sexual harassment.

LEGAL DEFINITION OF SEXUAL HARASSMENT (EEOC, 1980)

The guidelines issued by the EEOC provide a basic definition of sexual harassment. EEOC states:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII (of the US Civil Rights Act). Unwelcome 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 the 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 work environment. (EEOC, 1980)

In the legal discourse on sexual harassment, two basic categories or causes of action have developed. The first is usually referred to as "quid pro quo" harassment. The second is called "hostile environment harassment."

In general terms, the distinction is that in "quid pro quo" harassment, the submission to or rejection of the harassing behavior is used as the basis for employment decisions. Just as employers are not allowed to make employment decisions (i.e. decisions about hiring, firing, promoting, etc.) based on such characteristics as race, ethnicity, or gender (unless the employer can demonstrate a bona fide job requirement in the case of gender); employers are also not allowed to make employment decisions on the basis of whether or not an employee grants or withholds "sexual favors." With "hostile environment" harassment, the effect of the harassment is either to interfere with an individual's job performance or to create a work environment which is hostile or offensive to the individual.[2] The issue of "hostile environment" harassment is quite complex and can be confusing. A great deal of the discussion which follows will deal with issues arising out of "hostile environment" harassment.

Anecdotal evidence makes it clear that the problem of people (usually women) being required to engage in sexual conduct as a condition of employment is centuries old (at least). However, it was not until the mid 1970's that such behavior was held by the courts to be unlawful. The first round of education on sexual harassment involved getting the word out that employers, or their representatives, were no longer allowed to require sexual conduct from their employees and were no longer allowed to reward or punish employees for submitting to or refusing to submit to sexual advances or propositions. In the early 1980's, even here in California, enforcement agencies frequently found that employers didn't deny that women had been required to submit to sexual advances as a condition of employment, they simply didn't believe it to be illegal.[3]

Today employers generally understand that employees, especially the organization's executives, managers, and supervisors, are not allowed to exploit their positions within the organization to advance their sexual desires. Even though anybody in the US who was employed before 1976 started to work at a time when the "rules" were that the ability to require or reward sex from subordinates was an "executive perk," there is a general understanding in the US today that such behavior is not lawful. The confusion today concerning requiring sexual behavior as a condition of

employment is more frequently on the issues of what exactly constitutes rewards and punishments and of what constitutes mutual as opposed to unwanted or unwelcome sexual advances or behaviors.

GENDER HARASSMENT AND PREGNANCY HARASSMENT

Harassment on the basis of sex which is not sexual is still illegal harassment which constitutes sex discrimination under both Title VII of the US Civil Rights Act and the California Department of Fair Employment and Housing Act (DFEH). In dealing with the forms of harassment on the basis of sex which are not sexual, different legal strategies have developed. California DFEH simply states that such behavior constitutes sexual harassment when it is linked, overtly or otherwise, to the victim's sex and creates a hostile or offensive work environment. EEOC distinguishes "non-sexual, sex-based harassment" as a separate form of harassment which "may also give rise to Title VII liability." Additionally, both agencies and the courts include such "non-sexual sex harassment" as part of the total picture which they evaluate in a sexual harassment case (i.e. when determining if a hostile or offensive work environment exists). A third strategy is simply codifying three specific categories of sex harassment into law.

It is important for employers to understand that non-sexual forms of sex harassment can also be grounds for legal liability under both state and federal law.[4] In the effort to deal with sexual harassment, employers need to be careful that they do not allow, condone, or ignore other forms of actionable harassment. It may be of use to review policies, procedures, and training to ensure the message concerning non-sexual sex harassment is clear. Intimidation, ridicule, and insult based on gender or pregnancy are not acceptable in the work environment. Because non-sexual sex harassment is, almost by definition, of the "hostile work environment" type, it will be included under the discussions of hostile work environment.

KEY TERMS AND CONCEPTS

In the discussion of sexual harassment, there are several key terms and concepts which need to be defined and discussed.

UNWELCOME

For conduct to be harassment, it must be unwelcome or unwanted. The purpose of the law is not to prevent people from entering into romantic/sexual relationships with people they meet in the work place as long as those relationships are mutual. The purpose is to prevent individuals from being harassed.

The issue of what constitutes "unwelcome" conduct becomes critical. Obviously, the clearest case is when somebody says, "no," or "don't do that," or some other clear physical or verbal indication that they are rejecting or discouraging the conduct. However, the courts have ruled that this is not the test of whether or not conduct was unwelcome. The courts have said that unwelcome conduct is unsolicited and regarded by the employee as undesirable or offensive. A person may "voluntarily" submit to or participate in conduct which they considered "unwelcome" without giving up the legal right to object to the conduct.

The conduct of the complaining party is one factor used in determining whether or not the complaint is about conduct which was unwelcome. If a person actively participated in telling sexual jokes or stories and actively participated in sexual banter, he or she would have a more difficult time establishing that such behavior was unwelcome. That does not mean that just because a person engages in one behavior that could be considered sexual harassment, he or she gives up the right to object to other behaviors.

Being an active participant in verbal banter or joke telling does not mean the individual welcomed other potentially harassing behaviors. This is particularly true of more extreme or abusive verbal behavior, physical touching, or "quid pro quo" harassment. Just because Mary jokes around with the guys does not mean they can grab her or make verbally threatening sexual remarks.

A person may set a new standard for him or herself by putting others on notice. For example, if a person clearly states that, up until now he or she has engaged in this conduct, but no longer wishes to and now finds it offensive, that notice would likely be viewed as establishing the unwelcome nature of any future conduct. This principle also applies to situations where two people have been engaging in a mutually desired sexual relationship. If one person ends the relationship, he or she may put the other on notice that they no longer welcome the other's sexual advances. At that point, continued advances become harassment.

To be relevant to the issue of "welcomeness," the behavior of the complaining party must be with the person about whom he or she is complaining. A person may engage in welcomed joking, teasing, or touching with one person without giving up the right to not welcome similar behavior from others. Thus, Mary may agree to let John give her a hug or rub her neck, but this does not give Jim the right to hug her or rub her neck.

HOSTILE OR OFFENSIVE WORK ENVIRONMENT:

The basic concept involved in the issue of hostile or offensive work environment is that a person need not actually be fired or denied a promotion (or some other obvious loss of tangible benefit) in order to suffer an injury. The courts have ruled that being forced to work in an environment which is hostile or which is offensive can also be damaging. Further, such an environment seen as eventually causing tangible losses because an individual may become ill or may quit. Other tangible losses may result because an individual is unable to perform up to her (or his) full abilities, thus being less likely to receive raises or promotions.

Insults, offensive sexual material or language, unwanted comments on ones' anatomy, unwanted pressures for dates or for sex, and unwanted touching are all items which can contribute to a hostile or offensive work environment. Both the statement, "Women belong at home fixing dinner, not here in a patrol car," and the statement, "You look so hot I'd rather see you in bed than in uniform," can contribute to a hostile environment. In the first case it would be an issue of gender harassment. In the second, the sexual connotation may contribute to the environment being offensive or it could also feel hostile to a person who wants to be viewed and evaluated as a co-worker, not a sex object.

PERVASIVE OR SEVERE:

The legal discussion of hostile work environment harassment generally requires that, to be considered harassment, the conduct must have been sufficiently pervasive or severe to "alter the work environment."[4] This means that a single act can constitute harassment if it is sufficiently severe.[4] However, less severe conduct or situations may require a pervasive or sustained pattern before they constitute harassment. Generally, the courts and regulatory agencies have found a single incident of explicit "quid pro quo" harassment may easily be sufficient to "alter the work environment." Similarly, a single sexual assault has been relatively consistently viewed as sufficient to constitute sexual harassment.

While it would be nice if there were a scale that defined absolutely how many of what actions in what combinations would be required to "alter the work environment," there isn't one. However, common sense is quite useful. The idea to keep in mind is that the conduct should be sufficient to significantly diminish a person's desire to go to work. "Quid pro quo" demands are generally actionable, even on a single occurrence. Physical conduct is generally viewed as more serious than verbal conduct. Sexual battery is more serious than non-sexual touching. Verbal behavior that includes threats is more serious than non-threatening comments. In determining whether or not sexual harassment has occurred, the totality of the situation must be considered.

REASONABLE PERSON/REASONABLE WOMAN VERSUS THE EYE OF THE RECIPIENT:

Perhaps the most important question in determining whether or not a hostile or offensive work environment exists is the question "according to whom." This is another area where California law and federal law currently differ. Additionally, it is an area where the Federal 9th Circuit Court differs from some other federal appellate courts, an obvious sign that the Supreme Court will be settling this issue for federal cases at some point.

California state law has taken the position that the criterion by which to determine whether or not a hostile or offensive work environment existed is the viewpoint of the complaining party. Was the complaining party intimidated or offended? Under California law, even if the person complaining is more sensitive than the "average person," the employer is expected to stop the offensive or hostile conduct or actions as long as it falls within the purview of what could be considered "sexual in nature or linked, overtly or otherwise, to the victims sex." While this may appear, at first glance, to be a totally subjective standard, it is not. California law defines a set of behaviors ("sexual in nature....") which could constitute sexual harassment and then says that it is the recipient who gets to draw the line determining when such potentially hostile or offensive behaviors have become hostile or offensive.

The challenge presented by the state standard is that it makes it very difficult to define in advance all of the things which might be experienced as sexual harassment. Generally, however, the legal decisions in California make it clear that employers are not being required to read people's minds. What California law does appear to require is: 1) that employers take all employee complaints seriously, and 2) that the intent of the actor is irrelevant in determining whether or not harassment has occurred.

The federal courts have historically used the "reasonable man" or "reasonable person" standard rather than the perception of the complaining party standard. The reasonable person standard is the same standard used for issues like self defense. Essentially, the court asks how would the

average, reasonable person see things? Recently, the 9th Circuit Court of Appeals ruled that the criterion should be how would a reasonable person of the same gender as the complaining party see things? Where the complaining party is a woman that means would a "reasonable woman" find such a situation to be hostile or offensive. This has been called the "reasonable woman standard." [5] The basis for this requirement is that, in general, men and women differ in terms of their interpretation of and reaction to the issues and behaviors involved in complaints of sexual harassment.

This federal standard has a complex impact, especially for work environments which have been primarily male occupations. On the one hand, this rule tends to suggest that if one person is unusually sensitive to profanity or sexual comments, there may be limits to the protection provided that person by the law. On the other hand, the comparison group for determining "unusual sensitivity" must be the average person of the same gender as the individual making the complaint. In some situations, this average individual has been the "average person on the street," not the average policeman or policewoman. Thus, even if most women deputies are not offended by a particular comment, if the "average woman" would be, it may well be considered harassing.

LEGAL AND FINANCIAL LIABILITY

One of the critical questions for employers is the issue of legal and financial liability for sexual harassment. There are a number of issues in this area which need to be considered. Some are general issues concerning legal and financial liability and some are more specific to the topic of sexual harassment.

COMPENSATORY AND PUNITIVE DAMAGES:

Generally speaking, compensatory damages are compensation to the complaining party for losses suffered or damages which have occurred. Compensatory damages may be awarded for lost wages and benefits, or even lifetime earnings loss in the case of people who are fired or who are constructively discharged. Compensatory damages may also be awarded for physical or emotional injuries sustained.

Punitive damages are awarded in sex harassment cases to "punish" the employer, and in some cases also the individuals responsible for the harassment or the failure to deal with the harassment, for cases which were either particularly egregious and/or where the employer was callous or negligent. An effective program for dealing with sex harassment issues should virtually eliminate awards in which the employer is required to pay punitive damages. Similarly, the failure to implement an effective program may be part of the basis for being required to pay punitive damages.

LIABILITY UNDER WHAT LAWS AND WHAT LEGAL SYSTEMS

There are several different legal arenas in which departmental liability for sexual harassment may occur. Sexual harassment in the workplace is a violation of federal civil rights law. Sexual harassment in the workplace is a violation of California state law. Sexual harassment in the workplace may result in physical or emotional injury and come under the jurisdiction of the Worker's Compensation system. In addition, issues arising out of sexual harassment concerns may also be a factor in civil service proceedings and

may give rise to law suits under general tort provisions (although this is currently unlikely).

Federal Civil Rights Law: Sexual harassment is a violation of Title VII of the 1964 Civil Rights Act. It is also effected by certain provisions of the 1991 Civil Rights Act. Complaints filed under federal civil rights law are filed with the Equal Employment Opportunity Commission. The EEOC is charged with investigating job discrimination claims, including sexual harassment. The agency may investigate the complaint and make an award to the complaining party. Where the agency does not find a cause of action, they will still issue the complaining party a "right to sue" letter. The right to sue letter allows an individual to pursue action in federal court using their own attorney. An individual may also request a right to sue letter immediately upon filing with EEOC.

California Fair Employment and Housing Law: Sexual harassment in the workplace is a violation of California's Fair Employment and Housing Act (FEHA). Violations are investigated by the Department of Fair Employment and Housing (DFEH). Individuals who wish to sue for violations of California FEHA must first file a complaint with DFEH. However, they do not need to wait for DFEH to conduct an investigation before initiating a law suit. Recent court decisions have given women who do not want to file their sexual harassment complaint as a violation of FEHA the right to sue (under general tort principles) for emotional distress or assault and battery without first filing a DFEH claim.

California Worker's Compensation Law: Currently the law in California gives workers the right to file under Worker's Compensation statutes for claims arising for emotional injury. Sexually harassing behaviors, especially where the complaining party is alleging emotional distress or emotional harm could result in Worker's Compensation claims and stress retirement claims.

Each of the laws varies slightly in terms of time limits for filing complaints, the precise definition of for what the employer is or isn't legally liable, and the amounts of monetary damages which can be imposed by the agencies and/or (in some cases) by juries in law suits. For employers, perhaps the most important thing to remember is that it is the complaining party (and her or his lawyer) who gets to decide which laws and agency or judicial arenas to use. Thus, employers are best advised to assess and take steps to prevent liability arising out of all of the potential violations.

It is also important to realize that the area of sexual harassment law and legal relief is still a relatively young and evolving field of law. In general, the trend has been towards increasingly broad definitions of what is actionable and increasingly greater damage awards. Additionally, the trend has been for the legislative bodies to restore rights to receive monetary damages where courts have eliminated them. For example, at one point California courts ruled that DFEH could not award damages. This was reversed by AB311. Similarly, one major function of the 1991 Civil Rights Act was to re-establish the rights to monetary damages for several types of discrimination which the Supreme Court had ruled were not covered by the 1964 Act.

Currently federal law limits damages for Title VII violations to $300,000. However, it is possible for plaintiff's to allege other causes of action, in addition to Title VII (for example, assault and battery or sexual battery where their has been any physical contact), with the damage settlements for those other causes being in addition to the Title VII damages. In such instances, the damages can be much higher. Of course, the damage awards are in addition to court costs of the complaining party which are recoverable (the defendant can be required to pay if they lose) and the legal costs to the organization of defending against the suit.

California law does not limit damage awards which can be granted by the courts. However, the penalties which the DFEH can assess through its agency proceedings (as opposed to court) are limited to $50,000 per complaining party per named respondent. It is easily possible for these awards to reach $100,000 per complaining party if both the agency and the

individual harasser or supervisor is named. It may be possible for the DFEH damages to get even higher if multiple individuals within the chain of command are named.

SUPERVISOR HARASSMENT
VERSUS HARASSMENT BY CO-WORKERS OR OTHERS:

Employers have a greater liability for the conduct of people to whom the employer has given the authority and responsibility to supervise others. State and federal law differ slightly on this issue of supervisor liability. The US Supreme Court[6] has rejected the standard of "automatic liability" for the employer concerning all actions by supervisors. At the same time, the Court made it clear that employers do have greater liability for the actions of their supervisors because supervisors are the agents of the employer. The law in California is clearer. Under the Fair Employment and Housing Act in California, employers have strict liability for the actions of those persons to whom the employer gives supervisorial authority.[7]

In an action brought under California law (FEHA), employers can expect to be held liable for compensatory damages because of the actions of the employer's supervisors regardless of whether or not the employer condoned the conduct. In fact, even if the supervisor was doing something that they employer has specifically said not to do, the employer is still liable under California law. However, there are actions by which an employer can reduce or increase the probability of incurring punitive damages because of the actions of supervisors. These will be addressed in the RISK MANAGEMENT SECTION.

Employers can also be held responsible for the actions of non-supervisory employees and even for the actions of persons who are not employed by the organization. The issues here are not the same as for the conduct of supervisors. To be liable for conduct by persons who are not supervisors, one or both of two conditions must exist.

One condition is that the employer or its agent (i.e. a supervisor) must have encouraged, condoned, or failed to take adequate steps to prevent the

conduct. Under such conditions, an employer may be held liable for sex harassment by persons who are not supervisors or even employees. For departments, sex harassment that takes place as part of patrol training hazing might be an example of harassment which the employer could be considered to have condoned or encouraged if there is not an active program to prevent such hazing from occurring.

The second condition which could result in employer liability for the behavior of non-supervisors is that the employer or its agent (i.e. a supervisor) knew or should have known about the conduct or situation and did not take adequate steps to put an end to the conduct. Cartoons, signs, or posters on bulletin boards, in locker rooms, or in workout rooms are good examples of items about which supervisors should know. If individuals are offended by such material, the fact that no supervisor knows who put it up does not prevent the employer from having a responsibility for taking it down. There may even be a responsibility to prevent future occurrences, if possible. Similarly, an employer may be held liable for behavior which a supervisor has observed but done nothing about ending or preventing.

Because employers can discipline or terminate employees, the employer is assumed to be able to exercise control over the conduct of employees. Liability for **non-employees** generally requires that the employer be able to exercise some control over those persons. For law enforcement, prisoners, persons visiting prisoners, and employees of contractors and sub-contractors are all persons over whom the department could be seen as having some control. It is unlikely that the department could be viewed as having control over harassing behavior of the general public unless that behavior reached the level of criminal behavior (i.e. sexual battery, interference with an officer in the performance of duties, etc.).

Summary

1. In California the employer is strictly liable for the behavior of its supervisors.

2. The employer can be liable for the behavior of non-supervisory employees when a member of management knew or should have known about the conduct or situation.

3. The employer can be liable for the behavior of non-supervisory employees if the employer could have taken and failed to take adequate steps to prevent the behavior or situation from occurring.

4. The employer can be liable for the behavior of non-employees if the employer can exercise any control over those persons and if the employer knew or should have known about the behavior or situation.

WORKPLACE VERSUS WORK RELATED CONDUCT

Employer liability for what occurs in the work place proper is covered under the guidelines (above) concerning supervisors, employees, and non-employees. The same liability applies during work time, even if the employees are working away from employer owned property (i.e. deputies out on patrol, employees attending a training, etc). Additionally, employers may be liable for harassment which occurs away from the work place and not on work time, if there is "sufficient job nexus." The issue of "job nexus" is the question of what connection exists between the job and the situation in which the harassment occurred?

Although the issue of "job nexus" is, again, not a totally defined standard, issues which are important include whether or not the activity was employer sanctioned, employer advertised or advertised by department personnel at work locations, and related to employment. Thus, conduct at things like peace officers organizations, promotion and transfer parties, or department sponsored or supported athletic events might create liability for the

organization. This would be especially true if any department members were attending on department time or if the participation in such events is ever considered in promotions, commendations, or other job related decisions.

Another category of job related conduct involves harassment over which the employer could exercise control which occurs off duty. Bothering a co-worker at home, stalking, and similar behaviors could create liability for the employer. This is particularly possible if the harasser is a supervisor, the harasser used work resources (i.e. Alpha rosters or computer networks) to obtain the harassed individual's phone number or address.

Summary

1. Employers may be liable for conduct occurring off site if it occurs during work hours or during the performance of work duties.

2. Employers may be liable for conduct occurring off site and not during work hours if there is significant connection between the job and the event where the harassment took place.

PREVENTATIVE AND REMEDIAL ACTION

Both State and Federal law establish requirements for preventative and remedial action by employers. Put very simply, the employer's liability may increase if the employer fails to take reasonable and necessary steps to prevent sexual harassment from occurring and/or if the employer learns of harassment and fails to take prompt remedial action to end the harassment and rehabilitate the victim. While this issue will be discussed further under "Risk Management," the steps to prevent harassment generally include publishing and enforcing a clear policy, creating an effective complaint procedure, and providing training on the policy and procedure for all employees.

The requirement to take prompt remedial action does not end when an employee files a complaint with an outside agency. In fact, filing a complaint with an outside agency is one of the legally recognized ways to inform an employer that a problem exists. An employer who fails to activate it's internal procedures to investigate a complaint and take steps to protect a victim who has filed with an outside agency is opening the door to additional liability.

There is also a responsibility for the employer to determine that the action taken was sufficient to end the harassment. This is the basis of the requirement that employers discipline perpetrators of harassment. Continuing to counsel an individual who has previously been counseled to stop harassment was viewed by the courts as insufficient. The reasoning being that if the employer had previously used that level of intervention or discipline without it being effective, the employer has no reason to believe it will be effective in the future. Similarly, courts and agencies have reasoned that if perpetrators do not expect any significant discipline, there is little motivation to avoid engaging in harassing behaviors.

Finally, there is a responsibility for the employer to determine that retaliation did not occur or is not occurring. Retaliation can become an additional cause of action. It is a particularly difficult problem for any organization where issues of group and co-worker loyalty are strong. This issue will also be addressed further under risk management.

Summary

1. Employers, especially in California, are required to make reasonable efforts to prevent sexual harassment from occurring.

2. Employers are required to stop harassment which is occurring once they (or their agents) are aware of it.

3. Employers are required to prevent and/or stop retaliation.

RISK MANAGEMENT

One difficulty for managers dealing with the issue of sexual harassment complaints is that there is a difference between the occurrence of actions and behaviors which contribute to a hostile or offensive work environment and the existence of a hostile or offensive work environment. Thus, the manager needs to curb the occurrence of the individual actions without trivializing the issue of sexual harassment. It is, to a very real extent, a question of tone and attitude.

No court is likely to find that a single joke, a single utterance of a sexually explicit term, or a single comment about a person's anatomy taken totally by itself, created a hostile or offensive work environment. On the other hand, if a work site has 120 employees, and if half of them make one comment EACH to a particular co-worker every day, that one worker will be hearing 60 comments a day. It is quite possible that a court would find that a daily diet of 60 sexually explicit terms or jokes or comments about one's anatomy could create a hostile or offensive work environment.

The above example illustrates another important point about "hostile or offensive work environment" sexual harassment. It is possible for one person to experience a hostile or offensive work environment without there being any identifiable individual specifically responsible for the creation or existence of that environment. The lack of an identifiable "perpetrator" does not mean that there is not a hostile or offensive work environment for the complaining party. Similarly, the lack of an identifiable perpetrator does not relieve an employer from the responsibility to end the harassment and to make the victim whole for losses suffered.

This issue of separating the organizational response to and responsibility for the complaining party from the organizational response to and responsibility for the alleged harasser (if there is one) is an important issue, especially for a law enforcement organization. In general, law enforcement's mission and training focus attention on identifying the "crime," identifying the perpetrator, and building a case against the perpetrator. Case law and

agency interpretations of the issues involved in sex harassment cases do require that employers take sufficient action against harassers to ensure that the harassment stops. However, the focus is on protecting and "making whole" the victims of the discriminatory harassment. Even the requirement that harassers be disciplined stems from the expectation that employers will take effective and sufficient steps to end harassment, not from a "punish the perpetrator" perspective.

What that means for an employer is that, even if all harassers are severely sanctioned whenever they are identified, the organization may still find itself with serious liability in sexual harassment cases. The liability in sexual harassment cases is generally measured in terms of preventable harm to the victim.

Returning for a moment to the example of the hypothetical employee who is hearing 60 sexually explicit remarks a day. If that employee was then touched or grabbed by another employee, the courts may conclude that the employer who condoned all of the sexual banter created or encouraged an environment in which the problematic escalation was likely to occur. Even if the employer has a policy which prohibits sexual harassment (and sexual assault), the tone set by appearing to condone the sexual banter may create or increase the employers liability for the sexual assault.

Risk management should focus on those two issues. First, how to set a tone which makes it clear that management actively discourages sexual harassment. Second, how to take care of those individuals who do experience harassment despite management's sincere efforts to prevent it from occurring.

SETTING THE TONE: SHAPING THE CULTURE

In the long run, nothing reduces liability in sexual harassment cases more than an organizational culture which does not condone sexual harassment. Minor harassment is dealt with early, before it has sufficiently poisoned the environment to constitute grounds for legal action. Serious harassment is unlikely to occur because more serious conduct usually occurs at the end of an escalating series of behaviors. That escalation does not occur when minor harassment gets dealt with promptly.

Part of shaping any culture is the behavior of its leaders. A comment which might be of minor concern if coming from a officer (i.e., "did you see the legs on that waitress?"), may have a totally different effect if it is made by a Chief, Commander, or Captain. If there is a copy of "Playboy" on the Captain's desk, it may say something stronger than the same magazine in a officer's locker.

A major part of risk management involves taking steps to end harassment before complaints occur. Active monitoring of the items posted on bulletin boards and walls can ensure that material with a high probability of being offensive is not displayed. Intervention by supervisors to put a stop to teasing or "kidding around" which appears to be harassing or in danger of "getting out of control," makes it clear that the department doesn't condone the behavior. Furthermore, such intervention greatly reduces the chance that "fun" will result in creating a hostile or offensive work environment. This protects not only the targets of the harassment but also the employees who may get swept up in an escalating "game" which could cost them their jobs.

Summary:

1. At every level, leaders set the tone for their subordinates.

2. It is important to stop potentially harassing behavior before it results in a complaint.

MODEL RISK MANAGEMENT PROGRAM

The following steps illustrate various aspects of a full Risk Management Program. It is based on the various legal issues discussed previously. Periodic review of existing policies and practices to evaluate how effectively they conform to these guidelines is an effective means for keeping liability for sexual harassment low.

1. Establish a clear policy, illustrated with examples from the organization's normal functioning.

    a. Educate all employees on the policy.

    b. Have upper management set the tone and example concerning the importance of taking the issue seriously.

    c. As part of the policy, require that supervisors be proactive on the issue.

    d. Use compliance with the policy as part of the promotion process. That includes evaluating efforts to be proactive in preventing sexual harassment as part of the appraisal of supervisors seeking to promote to higher positions.

2. Establish a user friendly complaint procedure.

    a. Make the complaint procedure easy to use.

    b. Have an informal as well as a formal procedure.

    c. Follow up complaints to ensure that the harassment has stopped.

    d. Monitor to ensure that there is no retaliation against persons making a complaint.

e. Document use of complaint procedure, follow up, and prevention of retaliation.

3. Train all personnel on the policy and the complaint procedure.

   a. Ensure that all employees know what the rules are.

   b. Ensure that all supervisors are aware of both their proactive duty and the importance of dealing with complainants or victims in an appropriate manner. Monitor compliance and use rewards, training, and discipline where appropriate.

   c. Provide regular reminders of the policy, emphasizing that the organization expects full compliance.

4. Perform periodic assessments concerning harassment and hostile work environment factors. Provide additional interventions where necessary to reduce or eliminate harassment.

5. When victims of harassment are identified (either by making a complaint or by supervisors), take steps to reduce or eliminate further harm and provide opportunities for recovery from any damages.

Any organization which follows all of these steps will reduce serious sexual harassment complaints and will dramatically reduce liability. It is important to realize however, that initially, implementing a program to deal with sexual harassment may increase complaints. In an effective program, it may even be that the number of complaints will remain high. However, serious (i.e. expensive) complaints will be reduced. Documentation which shows a frequently used and effective complaint procedure is a powerful defense against any "constructive discharge" claim. Documentation which demonstrates an effective, proactive program by management is a powerful defense against any claim for punitive damages.

Conversely, the courts have indicated that failure to enforce a policy, failure to act on harassment complaints in a timely manner, and failure to protect victims from further harm once management "knows or should have known" about a problem may all increase the liability of the organization. It is still, however, probably worse to not have a policy than to have one which is not given adequate attention. Failure to implement the provisions of policy, however has been viewed as creating an "*estoppel*," effectively putting employees on notice that no policy exists.

REFERENCES

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[5] EEOC Policy Guidance on Current Issues of Sexual Harassment. N-915-050, 3/19/90.

[6] Ellsion v. Brady (9th Cir., 1991) 924 F.2d 872.

[7] Meritor Savings Bank v. Vinson, 106 S. Ct., at 2406, 40 EPD 36,159 (1986). See also, EEOC Policy Guidance on Current Issues of Sexual Harassment. N-915-050, 3/19/90.

[8] Fisher v. San Pedro Peninsula Hospital (1990) 214 Cal.App.3d 590, 608, fn 7. See also: Poppink, P. P. (1992). "Sexual harassment in the workplace: Litigating under the California Fair Employment and Housing Act." In handbook for training presented by California Women's Law Center, Berkeley California, November, 1992.

ROLES AND RESPONSIBILITIES IN PREVENTING SEXUAL HARASSMENT

This material was adapted from "Implementing Zero Tolerance And Creating Defensibility" published by V.T. and Associates, copyright 1993.

GUIDELINES FOR ALL EMPLOYEES

Role

In the law enforcement profession, there are many opportunities for interaction, power and affiliation - one advantage of working in a people-oriented service organization. Ironically, it is this opportunity for interaction, power and affiliation that may be the root of the difficulties faced by law enforcement regarding sexual harassment. It breeds a familiarity that may be misinterpreted.

As an employee of an organization which is committed to ensuring a sexually hostile free work environment, you have as much of a responsibility as does the Chief of Police in making sure your agency's policy on sexual harassment is followed. You cannot change the personal beliefs and attitudes of others. However, by not taking part in discriminatory or harassing behaviors, you can begin to make a difference; to make a change. If you do not allow a fellow employee to say something or act in such a way that causes discomfort to another - and he or she does the same for you - then soon we are all helping each other. Eventually, sexual harassment behavior will be a thing of the past; either through positive behavior modification or from suffering the consequences of continuing past practices.

As a recipient of unwelcome sexual harassment behavior you have a level of responsibility to tell the offender to stop or to tell a supervisor about the behavior. You do not have to passively accept unwelcome and offensive sexual behavior in the workplace. You have many available alternatives in stopping the behavior.

Responsibilities

- **TRUST YOUR INSTINCTS.**

  When you suspect a fellow employee's intentions are of a sexual nature and it is unwelcome, take action immediately to discourage that behavior.

- **KNOW YOUR WORKING ENVIRONMENT.**

  Refrain from taking part in sexual jokes or conversations. Report violations of agency policyregarding hostile environment.

- **KNOW THE RULES.**

  Know your department's sexual harassment policy. Don't violate it.

- **KNOW YOUR OWN COMFORT LEVEL AND KNOW THE COMFORT LEVEL OF OTHERS.**

  If you firmly establish yourself as a concerned human being, your working relationships will be comfortable and productive.

- **KNOW YOUR PRIORITIES.**

  Work comes first in the workplace.

- **ESTABLISH CLEAR BOUNDARIES.**

  If you won't date fellow workers, let them know. If you will, know the rules and follow them.

- **LEARN TO LET OTHERS KNOW HOW YOU FEEL.**

If you or someone you know is being sexually harassed on the job, follow your policy. Seek help and by all means, when appropriate, let the person who is harassing you know how you feel about it.

- **SET A POSITIVE EXAMPLE.**

This section originally adapted from
***Corporate Attractions: An Inside Account of Sexual Harassment.** Kathleen Neville.*

FIRST LINE SUPERVISOR

Role

As a first line supervisor, you represent the best offense and strongest defense for your organization. You represent the Chief of Police, management, city personnel department, and every other policy making body in preventing sexual harassment.

As part of the chain of command, you most likely will be named in civil suits against your agency. You must be tuned in to the rumor mill and know what is taking place within your working unit. You, as does every department supervisor and manager, must take immediate action in dealing with any sexually offensive or hostile environment behaviors. You must be willing to immediately confront the issues or stop activities. If you cannot or will not be assertive, then you should not be involved in police supervision in the 1990's. This is true for all ranks. There simply is no place for inaction when dealing with sexual harassment issues.

Inaction will cause continued illegal behavior and expose you and your department to potentially great financial liability.

YOU COULD LOSE YOUR HOUSE, YOUR CAR,
YOUR PENSION AND YOUR CAREER.
BE ASSERTIVE AND PROACTIVE.

Responsibilities

- Present and sell to your work unit the department's sexual harassment policy. Be positive and supportive.

- Know what constitutes sexual harassment, hostile work environment, gender discrimination, etc.

- Know how to direct employees in the proper procedures for reporting incidents.

- Confront any violators of department policy. Advise your supervisor.

- Encourage employees to present complaints without fear.

- Remember there is no informal interaction when dealing with sexual harassment issues. Everything gets documented. You may still counsel employees, resolve differences and restore a sexual harassment-free workplace; however, now it gets documented.

- Recognize early warning signs of dysfunctional employees indicating possible harassment activity. Advise your supervisor and document.

- Set a positive example.

COMMAND/MIDDLE MANAGEMENT

Role

As managers in a police organization, your exposure to punitive damages and general agency liability is tremendous. Many plaintiffs will name you personally in civil lawsuits due to negligence on your part for not correcting offensive behavior. You will be identified as being part of the chain of command who knew or should have known about the harassment or discrimination. Your inactions may be listed in the lawsuit as condoning the behavior.

YOU HAVE MUCH TO LOSE
THEREFORE YOUR RESPONSIBILITIES ARE GREAT

Responsibilities

- Distribute and personally give to each employee within your division a copy of the department's policy on sexual harassment and discrimination. Read or have them read the entire policy. Clarify any areas of confusion. Have the employee sign an acknowledgement form. (See end of this section)

- Quiz every employee on the sexual harassment policy to ensure they have a clear understanding of their responsibilities and obligations if they are a recipient of or witness to possible harassment behavior. This should be a written quiz requiring 100% accuracy -- Place in employee's personnel file.

- Require all new employees to attend a sexual harassment and discrimination seminar.

- Complete workplace inspections at least twice yearly. This is to include all office areas, maintenance rooms, garages, lockers and locker rooms, fitness centers, etc.

- Ensure that any and all allegations of sexual harassment, hostile work environment or discrimination is thoroughly investigated, documented and resolved.

- Take *immediate* action if you observe any offensive or hostile type behavior. Stop the action in progress. Investigate, counsel, discipline, train and document.

- Set a positive example.

CHIEF'S OF POLICE/SHERIFF'S

Role

The concept of zero tolerance regarding issues of sexual harassment in the workplace is recommended. The Chief/Sheriff is ultimately responsible for the actions of all his/her employees. Zero tolerance philosophies and examples through conduct must start at the top of any organization if they are to permeate throughout all ranks and be taken seriously. If the Chief/Sheriff only gives lip service to this subject matter, then likewise so will his management and supervisory teams. Consequently, no matter how much training, investigations, discipline or documentation of conduct takes place the organization will never rid itself of discrimination and harassment.

The Chief/Sheriff and top management have the absolute responsibility and obligation to adopt, implement and enforce a zero tolerance sexual harassment and discrimination policy.

IN ADDITION, the Chief/Sheriff must be responsible for keeping this matter in the forefront of all his employees through constant awareness and training. Through an extremely proactive approach by all levels of the management team, your organization may never have to face a future harassment claim or a lawsuit.

The Chief/Sheriff will most likely be named in all sexual harassment civil suits as the person in charge who allowed the harassment or hostile environment to exist. Consequently, the Chief/Sheriff has the most to lose if he/she does not adopt and enforce a zero tolerance philosophy and policy.

This section suggests actual methodologies to effectively implement your sexual harassment policy. It details the responsibilities of all management, supervisory, and line level positions.

IF these guidelines are implemented, the chances of someone successfully claiming sexual harassment, hostile work environment, gender discrimination or even quid pro quo will be nearly impossible. As Chief/Sheriff, you have practically guaranteed a sexual harassment free workplace.

Responsibilities

- Ensure that all employees have received and read the organization's policy on sexual harassment and discrimination - This includes a signed acknowledgement form. (see end of this section)

- Require that all employees receive initial in-depth training on sexual harassment prevention and mitigation measures including reporting procedures.

- Require all employees to be interviewed at least once per year (preferably during an annual performance review process) questioning if they have been the recipient of unwanted or unwelcome sexual harassment or other types of discriminations. Additionally, question them if they have witnessed any of the above. Develop a standardized interview form for all department sections/divisions.

- Ensure that a workplace inspection is conducted at least twice per year. This is to include all office areas, maintenance rooms, lockers and locker rooms, fitness centers, etc.

- Conduct spot check policy compliance inspections with employees from throughout the organization both sworn and non-sworn. This should be both unannounced and conducted personally. Make sure DFEH posters are conspicuously posted.

- Hold twice yearly (minimum) staff meetings to debrief any concerns raised through employee interviews, investigations, rumor mill, etc.

- Distribute to all appropriate personnel any legal updates, recent court cases, etc. regarding sexual harassment.

- Maintain a system for monitoring the rumor mill and responding to inaccurate "grapevine" information immediately.

- Personally review all sexual harassment allegations and investigations.

- Directly question employees during exit interviews regarding any possible sexual harassment or discrimination issues.

- Set a positive example.

REMEMBER - BE PROACTIVE
WHERE WE ARE TODAY IS DUE TO
REACTING INSTEAD OF PREVENTING

SEXUAL HARASSMENT POLICY
EMPLOYEE ACKNOWLEDGEMENT

I (employee's name) have been issued a copy of the (agency's name) policy dealing with sexual harassment and discrimination issues. I understand that the (name of agency) is committed to the fair and equal treatment of all employees. Achievement of this goal depends on all employees in all ranks including myself to deliberately sustain efforts to identify and eliminate any barriers to fair employment, advancement, and maintaining a hostile free workplace.

I have been instructed by (Supervisor's name) on (date) as to what constitutes illegal or offensive behavior as it relates to this policy. I have been advised of the potential for discipline including up to termination if I violate this policy. I have also been informed and understand the procedures and my responsibilities for immediate reporting if I feel I am the victim of discrimination or sexual harassment.

I understand that this acknowledgement form will be placed in my personnel file.

_____ _____

Employee's signature Date

_____

Witness

(SAMPLE ONLY - MUST BE REVIEWED BY AGENCY'S LEGAL COUNSEL)

SEXUAL HARASSMENT CASE SYNOPSES

Prepared by Martin J. Mayer, Attorney at Law

MERITOR SAVINGS BANK V. VINSON
(1986) 477 U.S. 57.

COURT RULE:

A claim of "hostile environment" sexual harassment is a form of sex discrimination even if there are no economic injuries to the individual. The language of Title VII is not limited to economic or tangible discrimination.

FACTS:

Ms. Vinson, a former employee of Meritor Savings Bank, brought an action against the bank and her supervisor claiming that during her employment she had been subjected to sexual harassment by her superior and was required to engage in a sexual relationship with him. He made repeated demands for sexual favors both during and after business hours and they had sexual intercourse some 40 or 50 times over several years.

ELLISON V. BRADY
(1991) 924 Fed.2d 872.

COURT RULE:

A female employee can establish a prima facie case of hostile environment, sexual harassment when the conduct she alleges occurred would be considered sufficiently severe or pervasive in the mind of a "reasonable woman" as to alter the conditions of employment and create an abusive working environment. "A complete understanding of the victims view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may

offend many women."

FACTS:

Ellison worked for the Internal Revenue Service in San Mateo. A fellow employer began to ask her out continuously for dates and wrote "love letters" to her making repeated references to sex. He was counseled, admonished and subsequently transferred to another office. Later he was allowed to return to the San Mateo office and upon learning of that, Ellison became "frantic", filed a complaint alleging sexual harassment with the IRS and transferred to another office. The IRS rejected Ellison's complaint stating it did not describe a pattern or practice of sexual harassment and that they took appropriate action. Ellison filed a complaint in the federal court.

HARRIS V. FORKLIFT SYSTEMS, INC.
(1993) 114 S. Ct. 367.

COURT RULE:

An employee's psychological well being need not be affected in order for an individual to have an action for abusive work environment, under Title VII of the Civil Rights Act of 1964, as a result of harassing conduct in the workplace. The court stated that "mere utterance of an ... epithet which engenders offensive feelings in an employee ... does not sufficiently affect the conditions of employment to implicate Title VII." However, " ... Title VII comes into play before the harassing conduct leads to a nervous breakdown." If the work environment was or could reasonably be perceived as hostile of abusive there is no need for it to also be psychologically injurious.

FACTS:

The president of Forklift Systems, Inc. subjected Harris to insults because of her gender and also subjected her to unwanted sexual comments. He apologized to Harris after she complained to him about his conduct. The improper conduct started again resulting in her filing an action under Title VII claiming that his behavior created an abusive work environment and continued as an employee of the company.

MOGILEFSKY V. SUPERIOR COURT (SILVER PICTURES)
(1993) __ Cal. App. 2d ___, 93 DAR 15679

COURT RULE:

Sexual harassment between people of the same gender provide the basis for a cause of action under the Fair Employment and Housing Act specifically Government Code § 12940. An employee alleging harassment need not allege loss of tangible job benefits but only needs to show a "hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment." There is no evidence to indicate that the legislature intended to limit protection from sexual harassment to only male/female harassment.

FACTS:

Plaintiff worked as an editor for Silver Pictures and was sexually harassed by the president of the company, Michael Levy, on two separate occasions. When Mogilefsky refused to participate in the homosexual conduct, Levy alleged implied falsely to others that Mogilefsky had engaged in homosexual sex with him.

FISHER V. SAN PEDRO PENINSULA HOSPITAL
(1989) 214 Cal. App. 3d 590.

COURT RULE:

A claim that a plaintiff was exposed to sexual harassment directed not at her but at her co-workers in her immediate work environment constitutes "environmental" sexual harassment. The plaintiff must be able to articulate when, where and how the alleged acts occurred and how they constituted "a pattern of continuous, pervasive harassment."

FACTS:

Julie Fisher was employed at a hospital where she was initially harassed sexually by her supervisor, a doctor. After complaining the doctor apologized in writing, but no disciplinary action was taken. The doctor, however, "continued to engage in sexual harassment against other women employees in the presence of Ms. Fisher." As a result she was forced to see and hear the doctor's behavior.

GANTT V. SENTRY INSURANCE
(1992) 1 Cal. 4th 1083.

COURT RULE:

Constructive discharge of an employee in retaliation for the employee's testifying truthfully with regard to another employee's sexual harassment claim is a violation of Government Code § 12975. That section forbids any person from attempting to induce or coerce an employee to lie to a government investigator. A cause of action for tortious discharge of an employee in violation of public policy is an exception to the "at will" employment status.

FACTS:

Gantt was the sales manager at the Sacramento office of Sentry Insurance when a female employee complained to him that she had been sexually harassed. Gantt reported that conversation to two senior company officials and eventually the female employee was terminated. Following her filing a complaint with the Department of Fair Employment and Housing, Gantt

secretly cooperated with the department investigator while expressing fear of retaliation. Gantt was subsequently demoted and left the insurance company thereafter.

INTLEKOFER V. TURNAGE
(1992) 973 Fed.2d 773.

COURT RULE:

An employer's responses to an employee's complaints of sexual harassment by a co-worker are insufficient if they are not reasonably calculated to stop the harassment. If harassment continues after attempts by the employer to intervene then more harsh disciplinary measures must be imposed in order to meet the requirements of Title VII.

FACTS:

After the end of a consensual, intimate relationship between Joyce Intlekofer and Norman Cortez, Intlekofer complained to their employer, the Veteran's Administration, that Cortez was harassing her. The VA admonished Cortez, counselled him, and threatened him with discipline if he continued his behavior. The harassment continued and VA took no further action.

SAMPLE POLICY

Prepared by Martin J. Mayer, Attorney at Law

Sexual harassment will not be tolerated in this agency and in an effort to prevent such behavior and/or address acts of misconduct in this area, the following procedure has been established.

A. ***Definition:***

Unwelcome sexual advances, request for sexual favors, and or 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 of 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. Submission to such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

B. ***Sexual Harassment Includes:***

1. ***Verbal Harassment:*** Repeated, unsolicited, derogatory comments or slurs, or continued request for social or sexual contact after being advised such is unwelcome.

2. ***Physical Harassment:*** Physical interference or contact which impedes normal work movement when directed at an individual.

3. ***Visual Harassment:*** Derogatory posters, cartoons, or drawings,

staring or leering.

4. ***Sexual Favors:*** Sexual advances which condition an employment benefit in exchange for sexual favors, or which may be perceived as such.

C. ***Employee's Role:***

There is no intent by this department to regulate or control any relationship or social interactions of employees which are freely entered into by both parties.

The following are suggestions for all employees to help establish and maintain a professional and healthy working environment, while at the same time preventing sexual harassment from occurring.

1. It is this department's philosophy that employees must set an example of acceptable conduct by not participating in or provoking behavior that is offensive.

2. Make it absolutely clear that you are not interested in, or flattered by, uninvited sexual advances.

3. Warn the harasser that the particular behavior is offensive and unwelcome. Be specific in advising that person about what conduct is offensive and unwelcome. Make it clear that you will take official action if it continues. If you foresee a problem, document the incident thoroughly.

4. If the harassing behavior continues, notify your immediate supervisor or any supervisor, including the Chief's office, documenting the notification. It is the employee's responsibility to bring sexual harassment behavior to the attention of a supervisor to ensure proper follow-up action.

   Note: ***You need not follow the chain of command.***

5. This department will take all steps to prevent any retaliation against the complaining party or witnesses supporting that individual and appropriate sanctions will be imposed on any individual subjecting any party involved in this process to retaliation.

D. ***Supervisor's Role:***

1. Individual supervisors are responsible to report and/or handle sexual harassment incidents where the supervisor **knows** or **should have known** of the incident by nature of his or her supervisorial position.

2. Whether the complaining party requests formal or informal action, the supervisor **must follow through**, either by the formal complaint process or by verbally warning the harasser and documenting the admonishment.

3. The supervisor, as well as the department, may be held civilly liable if swift corrective action is not taken. Any supervisor who fails to take corrective action can and will be disciplined by this department.

4. It is the responsibility of all supervisors to establish and maintain a working environment which is free from discriminatory intimidation, ridicule and insult.

E. ***Investigation:***

As indicated above, it is the supervisor's obligation to document all incidents, and action taken thereafter, involving allegations of sexual harassment. All such incidents must be reported to the Chief of Police by the supervisor at which time the Chief will determine whether an internal affairs investigation is required. An investigation may be conducted whether or not an involved party elects to pursue a complaint.

If, based upon the facts and circumstances presented, a decision is made to proceed a full and complete investigation will be conducted by an individual selected by the Chief of Police. The investigation will be conducted as quickly as possible and, based

upon that report, a decision will be made regarding whether disciplinary action is necessary.

Any and all rights which exist regarding confidentially and/or privacy in these matters will be fully protected. The complainants identity, however, will be disclosed if the investigation reveals the potential for formal disciplinary action or criminal prosecution.

Discipline up to and including termination may result from behavior found to constitute a violation of this directive.

F. Although it is the goal of this policy to identify and prevent sexually harassing behavior, if problems and/or concerns arise, the affected employee is urged to make use of the process set forth above. However, any employee has an absolute right to go directly to the California Department of Fair Employment and Housing or the Federal Equal Employment Opportunity Commission for assistance.

Reference Section

Appendix A

C.P.O.A. Sexual Harassment Article

Sexual harassment

Sending a message by taking it seriously

By Mervin Feinstein
and Perri Portales

The city of San Jose pays a former police officer $350,000 to settle a lawsuit that claimed the police department failed to protect her from harassment after she accused a sergeant of sexually assaulting her.

A U.S. District Court jury awards $2.7 million to three sheriff's deputies that claimed a male officer demanded sex in exchange for favorable work reviews. The court also rules that the department and several officials did not do enough to discourage the ongoing harassment.

The city of San Diego settles a claim for $100,000 with a former city planner who claimed she was harassed into having sex with the city planning director.

These examples, less than 18 months old, illustrate the conduct—now being interpreted by the courts as creating a "hostile, offensive or intimidating" work environment—that continues to plague agencies large and small.

Figures from the State Department of Fair Employment and Housing show that sexual harassment complaints in California increased 74 percent from 1984 to 1990.

Let us revisit the basics and explore the latest legal requirements in an effort to aid, assist and clarify sexual harassment (CRA of 1964, Section 703, Title VII); what it is or may be; how, when a complaint presents itself, the actions, words, deeds, etc., of the accused are to be viewed; and, if thought to be lingering in the organization, what can be done to mitigate personal as well as organizational liability exposure.

In the simplest of terms, sexual harassment is defined as unwelcome and unwanted sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:

- 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 a basis for employment decisions affecting each individual
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile offensive working environment

Conduct that constitutes sexual harassment includes:

- Verbal harassment: Repeated, unsolicited, derogatory comments or slurs, or continued request for social or sexual contact after being advised such is unwelcome
- Physical harassment: Physical interference or contact that impedes normal work movement when directed at an individual
- Visual harassment: Derogatory posters, cartoons, drawings, staring or leering
- Sexual favors: Sexual advances that condition an employment benefit in exchange for sexual favors or that may be perceived as such

Employers may be liable not only for the conduct of employees, but also for the conduct of non-employees if the employer knew or should have known of the harassment, failed to take corrective action and had some control or legal responsibility for the conduct of the offending non-employee (*EEOC* v. *Sage Realty Co.*, 25 FEP 529, SDNY 1981).

Additionally, there may be a valid cause of action against a supervisor who becomes a participant in a pattern of discriminatory activity, against other supervisory personnel who fail to act when confronted with evidence of other supervisors' discriminatory activity and against the employer (*Woerner* v. *Brzeczek*, 519 FSupp. 517, WD Ill. 1981).

Environmental harassment

Holding that a claim of hostile environment sexual discrimination is actionable under Title VII of the Civil Rights Act, the United States Supreme Court stated that a Title VII violation is established when "discriminati[on] based on sex created a hostile or abusive environment." (*Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 106)

Whether the individual participated voluntarily, the Court added, is not the issue. The focus, rather, is on whether the alleged sexual advances were "unwelcome." In addition, the Court reaffirmed that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult (*Meritor*, quoting 45 Federal Regulation 74676, 1980; *Rogers* v. *EEOC*, 454 F2d 234, Fifth Circuit, 1971, cert. denied 406 U.S. 957, 1972. See also California Government Code Section 12940.).

Addressing the issue of provocation, the Supreme Court held that evidence of sexually provocative speech or dress is relevant as a matter of law in determining whether the complaint found particular sexual advances unwelcome.

The Court stated that employers are not always automatically liable for sexual harassment by their supervisors and

indicated that it would review individual cases to determine whether the employer knew or should have known of the harassment.

Last, the Supreme Court has taken the view that the mere existence of a grievance procedure and a policy against discrimination does not in and of itself insulate the employer from liability. At a minimum:

- There must be a policy.
- The policy must address sexual harassment.
- There must be a procedure whereby the employee can circumvent the chain of command. (This ensures that the employee is not forced to complain to the harasser.)

Personality differences between employees or between employees and management may not be actionable. A mere clash of personalities may be insufficient proof of the existence of a hostile or abusive work environment for the purposes of a sexual discrimination and retaliation claim under Title VII (*Jordan* v. *Clar*, 847 F.2d 1368, Ninth Circuit, 1988).

In order to prevail in a sexual discrimination and retaliation action under Title VII, a sexually harassed plaintiff does not have to show that her harassment resulted in tangible loss of an economic character. It is sufficient for the plaintiff to show that "discrimination based on sex has created a hostile or abusive work environment" (*Jordan*). To make this showing, a plaintiff must demonstrate that he or she was subjected to "sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature" (*Jordan*).

Non-harassed employee

In a case of first impression, a California appellate court held that a complaint of environmental sexual harassment, which failed to plead specific facts as to how the litigant personally witnessed the harassment in his or her immediate work environment, could be amended (*Fisher* v. *San Pedro Peninsula Hospital*, 214 Cal. App. 3d 590, 1989).

In reversing to allow amendment of the complaint, the appellate court noted that the U.S. Supreme Court held that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex had created a hostile or abusive work environment regardless of whether the plaintiff suffered tangible or economic loss (*Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 58, 66). "Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive." (*Vinson* v. *Taylor*, 753 F.2d 141, DCC 1985, affirmed in part and reversed in part, sub. nom. *Meritor*, supra.)

The Court stated that one who is not personally subjected to such remarks or touching must establish that he or she personally witnessed the harassing conduct, and that it was in his or her immediate work environment.

A plaintiff who is not a direct victim must also allege exactly what occurred in her presence in her immediate work environment and describe that work environment.

Analyzing the complaint

The United States Court of Appeals for the Ninth District was presented two important issues (*Ellison* v. *Brady*, Ninth Circuit 1991, __ F.2d __; 91DAR958.):

- What test should be applied to determine whether conduct is sufficiently pervasive to alter the conditions of employment and create a hostile working environment
- What remedial actions can shield employers from liability for sexual harassment by coworkers

"[A] hostile environment exists when an employee can show: (1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

The court added that "it is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions of employment. Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation."

Thoroughly investigate each complaint

Reasonable standard

"[W]e believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim," the court said.

"In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hypersensitive employee, we hold that a female plaintiff states a *prima facie* case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."

Employer shield

Employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known (*EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, Ninth Circuit, 1989).

Remedies should be "reasonably calculated to end the harassment. An employer's remedy should persuade individual harassers to discontinue unlawful conduct. We do not think that all harassment warrants dismissal, rather remedies should be assessed proportionately to the seriousness of the offense. Employers should impose sufficient penalties to assure a work place free from sexual harassment." (*Ellison*, supra)

In evaluating the adequacy of the remedy, the court may also "take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct." (*Ellison*, supra) To

avoid liability under Title VII for failing to remedy a hostile environment, "employers may even have to remove employees from the work place if their mere presence would render the working environment hostile." (*Ellison*, supra)

The escalating trend of complaints can only be turned around by (1) exposing all personnel to updated training regularly; (2) taking all complaints seriously; (3) assuring that all supervisors, managers and administrators take immediate and affirmative action; (4) thoroughly investigate each complaint; and (5) take the appropriate disciplinary action, which will not only highlight the seriousness of the offense, but also send a message to all employees that this type of conduct will not be tolerated.

Mervin D. Feinstein is the retired deputy police chief of Riverside. He now serves as a consultant to the city attorney, county counsel and private law firms specializing in the defense of law enforcement.

Perri E. Portales is a deputy sheriff with the Riverside County Sheriff's Department.

Reference Section

Appendix B

Equal Employment Opportunity Commission (EEOC) Information

EEOC COMPLAINT INFORMATION

Title VII of the Civil Rights Act was enacted in 1964 and provides broad protections against employment termination, as well as other types of adverse employment actions, on the basis of race, color, national origin, religion, or sex. The mission of the Equal Employment Opportunity Commission (EEOC) is to ensure equality of opportunity by vigorously enforcing federal laws prohibiting employment discrimination through investigation, conciliation, litigation, coordination, education and technical assistance.

An administrative charge of discrimination under the Civil Rights Act must be filed with the EEOC, within strict time limits, to obtain a remedy for violation of Title VII. The aggrieved employee must file their EEOC claim within 300 days of the alleged discriminatory incident. The EEOC will then investigate the matter and determine whether there is reasonable cause to believe the charge is true. If, as a result of the EEOC's investigation, they determine that there is reasonable cause, the EEOC will then attempt to resolve the problem through conciliation. If conciliation fails and the EEOC does not bring civil action in Federal Court, a right-to-sue letter will be issued. A right-to-sue letter may also be issued when "no cause" is found or if the employee so elects. After the employee receives the right-to-sue letter, the employee may then file a civil lawsuit.

Relief under Title VII includes back pay, front pay, injunctive relief, and attorney fees. Punitive and compensatory damages are not available for violations of Title VII.

Employees may contact their local Equal Employment Opportunity Commission office in order to make an EEOC claim.

EEOC OFFICES

NATIONAL TOLL-FREE NUMBER	1-800-669-EEOC

REGIONAL OFFICES

Fresno Local Office
1265 West Shaw Avenue, Suite 103
Fresno, California 93711
(Hours - 11:00 a.m. - 7:30 p.m. EST)
(Hours - 8:00 a.m. - 4:30 p.m. PST)

(San Francisco District)
Commercial - (209) 487-5793
FTS - (209) 487-5793
FAX - (209) 487-5053
TDD - (209) 487-5837

Los Angeles District Office
255 E. Temple, 4th floor
Los Angeles, California 90012
(Hours - 11:30 a.m. - 8:00 p.m. EST)
(Hours - 8:30 a.m. - 4:00 p.m. PST)

Commercial - (213) 894-1000
FTS - (213) 894-1000
FAX - (213) 894-1118
TDD - (213) 894-1121

Oakland Local Office
1301 Clay Street, Suite 1170-N
Oakland, California 94612-5217
(Hours - 11:00 a.m. - 7:30 p.m. EST)
(Hours - 8:00 a.m. - 4:30 p.m. PST)

(San Francisco District)
Commercial - (510) 637-3230
FTS - (510) 637-3230
FAX - (510) 637-3235
TDD - (510) 637-3234

San Diego Area Office
401 B Street, Suite 1550
San Diego, California 92101
(Hours - 11:00 a.m. - 7:30 p.m. EST)
(Hours - 8:30 a.m. - 5:00 p.m. PST)

(Los Angeles District)
Commercial - (619) 557-7235
FTS - (619) 557-7235
FAX - (619) 557-7274
TDD - (619) 557-7232

San Francisco District Office
901 Market Street, Suite 500
San Francisco, California 94103
(Hours - 11:00 a.m. - 7:30 p.m. EST)
(Hours - 8:00 a.m. - 4:30 p.m. PST)

Commercial - (415) 744-6500
FTS - (415) 744-6500
FAX - (415) 744-7423
TDD - (415) 744-7392

San Jose Local Office
96 North 3rd Street, Suite 200
San Jose, California 95112
(Hours - 11:00 a.m. - 7:30 p.m. EST)
(Hours - 8:00 a.m. - 4:30 p.m. PST)

(San Francisco District)
Commercial - (408) 291-7352
FTS - (408) 291-7352
FAX - (408) 291-4539
TDD - (408) 291-7374

Reference Section

Appendix C

Department of Fair Employment and Housing Information

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

A GUIDE FOR COMPLAINANTS

The Department of Fair Employment and Housing investigates complaints of harassment or discrimination in employment, housing, public accommodations and services based on race, color, ancestry, religious creed, sex, marital status, mental or physical disability (including AIDS and HIV diagnosis) or national origin. In employment, harassment or discrimination are also prohibited on the basis of age (40 and over), medical condition (cancer-related only), and pregnancy. In housing, discrimination or harassment against persons based on their age, or because there are children in the family, or for arbitrary reasons such as sexual orientation, is also prohibited.

People who believe they have experienced harassment or discrimination may file a complaint with the Department of Fair Employment and Housing. the employer or individual filed against becomes the respondent. The person filing is the complainant. The complaint is a written document that states what happened (complainant was fired, laid off, harassed, unable to rent, etc.), and why the complainant believes the action or incident was illegal.

It is essential for complainants to cooperate fully with the Department. They should provide accurate information such as names, addresses, telephone numbers, dates and places. They will be asked to identify witnesses and to supply documents (payroll slips, rent receipts) to substantiate the charges listed in the complaint.

Complainants who have been fired should continue to look for work and record each contact with an employer by noting the:

- company's name and address
- position applied for
- date of application
- individual contacted

The Department should be notified in writing if complainants:

- decide to withdraw the complaint
- desire to file a lawsuit
- change their address or telephone
- cannot be reached as previously indicated

When complainants fail to respond to Department contacts, their cases are closed.

The law prohibits respondents from taking any retaliatory action against complainants or any person who provides information to the Department. If retaliatory action occurs, the Department should be contacted immediately.

COMPLAINT PROCESS

To determine if a problem is covered by law, contact the nearest office of the Department of Fair Employment and Housing to obtain an appointment for an interview. Bring any written documents that support the allegations and allow several hours for the interview.

If a case is accepted, the Department will help the complainant draft the complaint. Complainants must declare under penalty or perjury that statements in the complaint are true.

When filed, the complaint is given an identifying number. This number should be used when contacting the Department. A copy of the complaint is mailed to the respondent.

INVESTIGATION

Under the normal complaint process, it may be several months before the Department can actively investigate a complaint.

If complainants wish to add new information to their file, they should submit it in writing identifying it by complaint number.

As the investigation proceeds, a Department staff member may contact the complainant for more facts or for clarification of the information obtained from the respondent.

Many practices are unfair but not illegal. The Department can proceed only if evidence demonstrates that the law has been violated. Once this is established, the Department will seek a suitable remedy.

SETTLEMENT

A case can be settled at any point after filing the complaint. Settlement can occur in several ways. For example, the respondent may contact the Department with an offer, or may approach a complainant directly. If this occurs, the complainant should contact the Department for assistance. Settlement may also result from negotiations initiated by the Department.

The Department will discuss all settlement offers with the complainant, who is free to accept or reject them. The Department determines what constitutes appropriate conditions of settlement for those agreements it signs. If an appropriate settlement is rejected by the complainant, the case will usually be closed.

Once the settlement conditions are agreed on, they are put in writing for signature by the complainant, the respondent, and the Department. A settlement signed by the Department is enforceable in a court of law.

PROSECUTION

If the Department determines that the law has been violated and is unable to resolve the issues through conciliation, the Director may issue an accusation of discrimination. The accusation must be issued within one year of the time the case is filed. The respondent will be given the option of either having the issues heard by the Fair Employment and Housing Commission, or of removing the matter to court.

- **Fair Employment and Housing Commission**

  If the respondent elects to have the matter heard by the Commission, the Commission will hear testimony under oath, render a decision, and issue a legally enforceable order. The Commission may order remedies for out-of-pocket losses, hiring or reinstatement, changes in an employer's policies or practices, additional damages for emotional distress and an administrative fine, which together may total up to $50,000 per complainant per respondent.

  In cases where hate violence is demonstrated, in violation of Civil Code Section 51.7, the Commission may order remedies for out-of-pocket losses and additional emotional distress damages of up to $150,000, as well as a civil penalty of up to $25,000, which also go to the complainant.

  The Commission's order may be appealed to, or enforced by, a superior court.

- **Court**

  If the respondent elects to have the matter removed to court, the Department will represent the complainant, and the damages which may be awarded will be unlimited.

RIGHT-TO-SUE

Complainants have the right to sue on their own behalf in a California court.

If employment discrimination complainants choose to sue under the Fair Employment and Housing Act, the Department will cease investigation and close the case. Those who have filed a suit will need to give the court a notice of right to sue from the Department. Individuals have one year from the date they receive the notice to file suit. The complainant may request a notice at any time during an investigation.

If a complaint has not been resolved within 150 days of filing, the Department will advise the complaining party that he or she may request a right-to-sue notice. Issuance of this notice does not result in closure of the complaint. If not requested earlier, a right-to-sue notice will be automatically issued when the complaint is closed, or after one year has passed from the date on which a complaint was filed.

Individuals who wish to file suit under the Unruh Civil Rights act are not required to file with the Department and do not need a right-to-sue notice.

STATE OF CALIFORNIA
The Department of Fair Employment and Housing

For more information, contact your nearest Fair Employment and Housing office.

BAKERSFIELD
1001 Tower Way, #250
Bakersfield, CA 93309-1586
(805) 395-2728

FRESNO
1900 Mariposa Mall, Suite 130
Fresno, CA 93721-2504

LOS ANGELES
322 West First Street, #2126
Los Angeles, CA 90012-3112
(213) 897-1997

OAKLAND
1330 Broadway, #1326
Oakland, CA 94612-2512
(510) 286-4095

SACRAMENTO
2000 "O" Street, #120
Sacramento, CA 95814-5212
(916) 445-9918

SAN BERNARDINO
1845 S. Business Center Dr., #127
San Bernardino, CA 92408-3426
(909) 383-4711

SAN DIEGO
110 West "C" Street, #1702
San Diego, CA 92101-3901
(619) 237-7405

SAN FRANCISCO
30 Van Ness Avenue, Suite 3000
San Francisco, CA 94102-6073
(415) 557-2005

SAN JOSE
111 North Market Street, #810
San Jose, CA 95113-1102
(408) 277-1264

SANTA ANA
28 Civic Center Plaza, #538
Santa Ana, CA 92701-4010
(714) 558-4159

VENTURA
5720 Ralston Street, #302
Ventura, CA 93003-6081
(805) 654-4513

TDD NUMBERS
LOS ANGELES (213) 897-2740
SACRAMENTO (916) 324-1678

Reference Section

Appendix D

SB459

Senate Bill No. 459

CHAPTER 126

An act to add Section 13519.7 to the Penal Code, relating to sexual harassment.

[Approved by Governor July 19, 1993. Filed with Secretary of State July 19, 1993.]

LEGISLATIVE COUNSEL'S DIGEST

SB 459, Boatwright. Sexual harassment: peace officer victims.

Existing law prohibits any person from touching an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, which is sexual battery and punishable by a fine not exceeding $2,000, by imprisonment in a county jail, or both. Existing law provides for increased punishment of a fine not exceeding $3,000, imprisonment in a county jail, or both if the defendant was an employer and the victim was an employee of the defendant with the amount in excess of $2,000 to be distributed to the Department of Fair Employment and Housing for the purpose of enforcing the California Fair Employment and Housing Act, including, but not limited to, laws that proscribe sexual harassment in places of employment.

This bill would require the Commission on Peace Officer Standards and Training to develop, on or before August 1, 1994, complaint guidelines for specified entities that employ peace officers for peace officers who are victims of sexual harassment in the workplace.

Existing law requires the Commission on Peace Officer Standards and Training to adopt rules establishing minimum standards for training of peace officers, and to establish a certification program for peace officers.

This bill, additionally, would require the course of basic training for law enforcement officers, no later than January 1, 1995, to include instruction on sexual harassment in the workplace, as specified. This bill also would require all peace officers who have received their basic training before January 1, 1995, to receive supplementary training on sexual harassment in the workplace by January 1, 1997, thereby imposing a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates which do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that this bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to those statutory procedures and, if the statewide cost does not exceed $1,000,000, shall be made from the State Mandates Claims Fund.

The people of the State of California do enact as follows:

SECTION 1. Section 13519.7 is added to the Penal Code, to read:

13519.7. (a) On or before August 1, 1994, the commission shall develop complaint guidelines to be followed by city police departments, county sheriffs' departments, districts, and state university departments, for peace officers who are victims of sexual harassment in the workplace. In developing the complaint guidelines, the commission shall consult with appropriate groups and individuals having an expertise in the area of sexual harassment.

(b) The course of basic training for law enforcement officers shall, no later than January 1, 1995, include instruction on sexual harassment in the workplace. The training shall include, but not be limited to, the following:

(1) The definition of sexual harassment.

(2) A description of sexual harassment, utilizing examples.

(3) The illegality of sexual harassment.

(4) The complaint process, legal remedies, and protection from retaliation available to victims of sexual harassment.

In developing this training, the commission shall consult with appropriate groups and individuals having an interest and expertise in the area of sexual harassment.

(c) All peace officers who have received their basic training before January 1, 1995, shall receive supplementary training on sexual harassment in the workplace by January 1, 1997.

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

O

Reference Section

Appendix E

Title VII & EEOC Regulations

TITLE VII OF CIVIL RIGHTS ACT OF 1964 (Section 708)

EMPLOYER PRACTICES

(a) It shall be an unlawful employment practice for an employer --

(1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

EEOC REGULATIONS REGARDING SEXUAL HARASSMENT

Sec. 1604.11. Sexual Harassment

(a) Harassment on the basis of sex is a violation of Sec. 708 of Title VII. "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is make either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

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

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

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

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

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

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit. (Se. 1604.11. reads as amended by 45 FR 74676, eff. Nov. 10, 1980)

Reference Section

Appendix F

Government Code 12940

CHAPTER 6. DISCRIMINATION PROHIBITED

ARTICLE 1. UNLAWFUL PRACTICES, GENERALLY

Section

§ 12940. Employers, labor organizations, employment agencies and other persons; unlawful employment practice; exceptions

It shall be 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:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of any person, to refuse to hire or to refuse to select the person for a training program leading to employment, or to bar or discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

(1) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of * * * an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health and safety of others even with reasonable accommodations.

(2) Nothing in this part shall prohibit an employer from refusing to hire or discharging an employee who, because of the employee's medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner which would not endanger the employee's health or safety or the health or safety of others even with reasonable accommodations. Nothing in this part shall subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee who, because of the employee's medical condition, is unable to perform his or her essential duties, or cannot perform those duties in a manner which would not endanger the employee's health or

safety or the health or safety of others even with reasonable accommodations.

(3) Nothing in this part relating to discrimination on account of marital status shall do either * * * of the following:

(A) Affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, of facility, consistent with the rules and regulations adopted by the commission.

(B) Prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.

(4) Nothing in this part relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam era veterans.

(b) For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, mental condition, marital status, or sex of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

(c) For any person to discriminate against any person in the selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex of the person discriminated against.

(d) For any employer or employment agency, unless specifically acting in accordance with federal equal opportunity guidelines and regulations approved by the commission, to print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through the use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical * * * disability, mental disability, medical condition, marital status, or sex, or any intent to make any such limitation, specification or discrimination. Except as provided in the Americans with Disabilities Act of 1990 (Public Law 101-336) and the regulations adopted pursuant thereto, nothing in this subdivision shall prohibit any employer

from making, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if that inquiry or request for information is directly related and pertinent to the position the applicant is applying for or directly related to a determination of whether the applicant would endanger his or her health or safety or the health or safety of others.

(e) For any employer, labor organization, or employment agency to harass, discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to Section 11161.8 of the Penal Code which prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities.

(f) 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.

(g) For any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so.

(h) (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, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant 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 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.

* * * (2) This subdivision is declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

(3) (A) For purposes of this subdivision only, "employer" means any person regularly employing one or more persons, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities.

* * * (B) Notwithstanding subparagraph (A), for purposes of this subdivision, "employer" does not include a religious association or corporation not organized for private profit.

(4) For other types of discrimination as enumerated in subdivision (a), an employer remains as defined in subdivision (c) of Section 12926.

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(5) Nothing contained in this subdivision shall be construed to apply the definition of employer found in this subdivision to subdivision (a).

(i) For any employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

(j) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties which conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance such as a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.

(k) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other entity to produce undue hardship to its operation.

(l) Initial application of this section with discrimination by employers on the basis of mental disability shall be in accordance with the following schedule:

(1) Commencing January 1, 1993, for employers with 25 or more employees, the state, and its municipalities and political subdivisions.

(2) Commencing July 26, 1994, for all other employers specified in paragraph (2) of the subdivision of Section 12926 which defines "employer."

(Amended by Stats.1992, c. 912 (A.B.1286), § 5; Stats.1992, c. 913 (A.B.1077), § 23.1.)

Historical and Statutory Notes

1992 Legislation

The 1992 amendment , throughout the section, substituted "physical disability, mental disability" for "physical handicap, mental condition"; in subd. (a)(1) in two places, substituted "an employee with a physical or mental disability" for "physically handicapped employee"; in subds. (a)(1) and (2) substituted "essential duties even with reasonable accommodations" for "duties" in five places; in subd. (a)(3), redesignated (i) and (ii) as paragraphs (A) and (B) respectively; in subd. (d) inserted a reference to the Americans with Disabilities Act of 1990; in subd. (h), designated paragraphs (1) to (5) respectively; in paragraph (h)(3), designated subparagraphs (A) and (B); in subparagraph (B), added "Notwithstanding subparagraph (A) , for purposes of this subdivision"; added subd. (k); and made nonsubstantive changes throughout.

Legislative intent of Stats.1992, c.913 (A.B.1077), see Historical and Statutory Notes under Business and Provisions Code 125.6.

Under the provisions of 45 of Stats.1992, c.913, the 1992 amendments of this section by c.912 and c.913 were given effect and incorporated in the form set forth in 23.1 of Stats.1992, c.913. Amendment of this section by 23, 23.2, 23.3 of Stats.1992, c.913, failed to become operative under the provisions of 45 of that Act.

Amendment of this section by 5.1, 5.2, and 5.3 of Stats.1992, c.912, failed to become operative under the provisions of 14 of that Act.

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Appendix G

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