LOS RIOS COMMUNITY COLLEGE DISTRICT

Title IX: Sexual Harassment, Sexual Violence, and Discrimination

A More Detailed Legal Explanation

What is Sexual Harassment?

Sexual harassment is generally defined to include unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone in the work or educational setting. These acts constitute sexual harassment when (1) submission to such conduct is made a term or condition of employment, or (2) submission to or rejection of such conduct is used as a basis for employment decisions affecting the individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating hostile or offensive working environment.

What are the Two Basic Forms of Sexual Harassment?

1. Quid Pro Quo (literally means "this for that"): When a supervisor, manager, or other superior employee conditions an employment benefit or continuing employment on another employee's acquiescence to the unwelcome sexual behavior.
2. Hostile Environment: No specific employment benefit(s) need be lost or gained. Hostile work environment sexual harassment exists if conduct of an offensive sexual nature has the purpose or effect of unreasonably interfering with an employee's work or educational performance or creating an intimidating, hostile, or offensive environment. The conduct must be "unwelcome"; "pervasive" or "severe"; and "offensive" to a reasonable person of the same gender.

Examples of behaviors which may create a hostile environment include: unwanted sexual advances; verbal sexual advances or propositions; offering employment benefits in exchange for sexual favors; verbal abuse of a sexual nature; graphic verbal commentary about an individual's body; use of sexually degrading words to describe an individual; suggestive or obscene letters, notes, or invitations; verbal conduct such as making or using derogatory comments, epithets, slurs, or telling sexually explicit jokes; comments about a person's body or dress; making or threatening retaliation after a negative response to sexual advances; and visual conduct such as leering, making sexual gestures, and/or displaying sexually suggestive objects or pictures, cartoons, calendars, or posters.

Was the Conduct Welcome?

This is a fact-based inquiry and requires the answers to some or all of the following questions:

- Who initiated the sexual conduct?
- How did the complainant respond to or regard the conduct?
- Did the complainant tell the harasser or another person of his/her discomfort and that the conduct was unwelcome? Did the complainant write a letter, or write in a diary or journal about the incident?
- Did the complainant engage in conduct which suggested that the "harasser's" conduct was welcome?
- Was submission to the conduct explicitly or implicitly made a term or condition of the complainant's employment, academic status, or progress?
- Was the submission to, or rejection of, the conduct by the complainant used as a basis of employment or academic decisions affecting the complainant?

Was the Conduct Severe or Pervasive?

In order to establish a claim for hostile environment, the complainant must allege conduct that a reasonable person of the same gender as complainant considers sufficiently severe or pervasive. The required showing of severity or

seriousness of conduct varies inversely with the pervasiveness or frequency of the conduct. [Ellison v. Brady 9243 F.2d 872 (9th Cir. 1991)]

Where is Sexual Harassment Found in the Law?

Sexual harassment violates both state and federal law.

1. State Law:
    - Sexual harassment in the educational and/or work environment is prohibited by California Education Code, sections 221.5, 72011, and 66271.7, as well as Government Code Section 12940 et. seq.
    - The California Education Code prohibits the sexual harassment of all persons in the educational setting, including students. Specifically, Education Code, sections 221.5, 66271.7, and 72011 prohibit sex discrimination in community college districts and sections 231.5 and 66281.5 prohibit sexual harassment in the educational environment.
    - The California Fair Employment and Housing Act (FEHA) and Government Code, section 12940 prohibits the following conduct: 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, 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 knows or should have known of this conduct and fails to take immediate 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. Federal Law:
    - Sexual harassment violates Title VII of the Civil Rights Act of 1964 and Title IX of the Education amendment of 1972.
    - Title VII of the Federal Civil Rights Act of 1964—Title VII governs harassment in the work place. Sexual harassment is regarded as a form of unequal treatment based on one's sex and is prohibited.
    - Title IX—Title IX prohibits the sexual harassment of students. Title IX of the Education Amendment of 1972 is a federal statute prohibiting discrimination on the basis of sex, including sexual harassment in all education programs that receive federal funding. Title IX states: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

When May the District be Found Liable?

1. <u>Student to Student Harassment:</u>

    Schools and colleges are liable under Title IX if its students sexually harass other students when the following factors are present: (1) the school knows or should have known of the harassment; and (2) the school fails to take immediate and appropriate corrective action. Oona R.S. v. McCaffrey, 118 S.Ct. 1989 (1998)

2. <u>Employee to Student Harassment:</u>

    A school district or community college district will be liable for sexual harassment of a student by an employee if (1) an appropriate official had actual knowledge of the harassment; (2) the official had authority to take corrective action to remedy the discrimination; and (3) the official acted with deliberate indifference in his or her failure to respond to the discrimination. Gebser v. Lago Vista, 118 S.Ct. 1989(1998)

3. <u>Supervisor to Employee:</u>

    Under state law, an employer is generally strictly liable for the harassing conduct of its agents and supervisors. Strict liability has until recently been applied in quid pro quo cases and not hostile work environment cases. In 1998, strict liability was extended to hostile work environment claims involving supervisors.

Under Federal law, an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee or quid pro quo harassment.

Under circumstances where there is no tangible employment action or significant change in employment status, the employer may still be vicariously liable, but has an affirmative defense available. The affirmative defense is based on two elements: (1)the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities or to avoid harm otherwise. Faragher v. City of Boca Raton, 118 S.Ct.2275 (1998).

4. Employee to Employee/Liability for the Acts of Wo-workers:

   The Equal Employment Opportunity Commission (EEOC), and most courts, hold that an employer will be liable for co-worker harassment if the employer knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

5. Liability for Acts of Third Parties:

   The EEOC and federal case law make it clear that an employer may be held liable for the acts of its customers, clients, or personnel of other businesses with which the employer has an official relationship. Third party harassment involves hostile work environment claims. The employer can be held liable when the employer (1) knew or should have known of the harassment and (2) failed to take immediate and appropriate corrective action. The most important factor in determining employer liability is the degree of control the employer has over the third party.

   For example, in Rodriguez-Hernandez v. Miranda-Velez, 132 F.3d 848 (1st Circ.1998), the court held that where the employer encourages its account manager employee to respond as a "woman" to a high level executive customer who was sexually harassing her, the employer had acquiesced in the harassment and therefore was liable for third party sexual harassment. An example of a limited control situation is where a corporate client's employee harasses a package delivery person.

How Does a Plaintiff Prove Sexual Harassment?

The plaintiff must establish:

- He/she belongs to a protected group;
- He/she was subject to unwelcome sexual harassment;
- The harassment complained of was based upon gender;
- The harassment complained of affected a term, condition, or privilege of employment/education; and
- Employer responsibility.

What is the Duty to Investigate?

The Federal Equal Employment Opportunity Commission requires that an employer investigate allegations of sexual harassment...

- When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly.

The Fair Employment and Housing Department requires that:

- The Employer's policy should include provisions to fully and effectively investigate. It must be immediate, thorough, objective and complete. All those with information on the matter should be interviewed.

What is the Duty to Remediate and Prevent?

Once an employer knows or should have known of harassment, the remedial obligation begins. Steiner v. Showboat Operating Company, 25 F.3d 1459 (9th Cir. 1994). The obligation does not necessarily end when the harasser's conduct stops. Not only must the remedy utilized by reasonably calculated to end the harassment and be disciplinary in nature, but it must also offer more than a short-term solution or result. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). The Courts have devised a two prong test: (1) the reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment; and (2) the remedy must discourage other employees from unlawful conduct.

1. What is an effective prevention program?
    a. The employer has an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented;
    b. There is regular in-servicing and training of all staff;
    c. A procedure is in place for resolving sexual harassment complaints;
    d. The procedure protects confidentiality to the degree feasible; and
    e. An anti-retaliation policy is in place.
2. Education institutions are required to have a written sexual harassment policy. Education Code, section 231.5 and 66281.5