The Law of Illegal Harassment

The following is reprinted from the State of California Department of Fair Employment and Housing pamphlet (DFEH-185) on Sexual Harassment.

Sexual Harassment

The Facts About Sexual Harassment

The Fair Employment and Housing Act (FEHA) defines sexual harassment as harassment based on sex or of a sexual nature; gender harassment; and harassment based on pregnancy, childbirth, or related medical conditions. The definition of sexual harassment includes many forms of offensive behavior, including harassment of a person of the same gender as the harasser. The following is a partial list of types of sexual harassment:

- *Unwanted sexual advances*
- *Offering employment benefits in exchange for sexual favors*
- *Actual or threatened retaliation*
- *Leering; making sexual gestures; or displaying sexually suggestive objects, pictures, cartoons, or posters*
- *Making or using derogatory comments, epithets, slurs, or jokes*
- *Sexual comments including graphic comments about an individual's body; sexually degrading words used to describe an individual; or suggestive or obscene letters, notes, or invitations*
- *Physical touching or assault, as well as impeding or blocking movements*

Employers' Obligations

All employers must take the following actions against harassment:

- *Take all reasonable steps to prevent discrimination and harassment from occurring. If harassment does occur, take effective action to stop any further harassment and to correct any effects of the harassment.*
- *Develop and implement a sexual harassment prevention policy with a procedure for employees to make complaints and for the employer to investigate complaints. Policies should include provisions to:*
    - *Fully inform the complainant of his/her rights and any obligations to secure those rights.*
    - *Fully and effectively investigate. The investigation must be thorough, objective, and complete. Anyone with information regarding the matter should be interviewed. A determination must*

be made and the results communicated to the complainant, to the alleged harasser and, as appropriate, to all others directly concerned.

- *Take prompt and effective corrective action if the harassment allegations are proven. The employer must take appropriate action to stop the harassment and ensure it will not continue The employer must also communicate to the complainant that action has been taken to stop the harassment from recurring. Finally, appropriate steps must be taken to remedy the complainant's damages, if any.*

- *Post the Department of Fair Employment and Housing (DFEH) employment poster (DFEH-162) in the workplace (available through the DFEH publication line [916] 478-7201 or web site).*
- *Distribute an information sheet on sexual harassment to all employees. An employer may either distribute this pamphlet (DFEH 185) or develop an equivalent document that meets the requirements of Government Code section 12950(b). This pamphlet may be duplicated in any quantity. However, this pamphlet is not to be used in place of a sexual harassment prevention policy, which all employers are required to have.*
- *All employees should be made aware of the seriousness of violations of the sexual harassment policy. Supervisory personnel should be educated about their specific responsibilities. All employees must be cautioned against using peer pressure to discourage harassment victims from complaining.*
- *Employers who do business in California and employ 50 or more part-time or full-time employees must provide at least two hours of sexual harassment training every two years to each supervisory employee and to all new supervisory employees within six months of their assumption of a supervisory position.*
- *A program to eliminate sexual harassment from the workplace is not only required by law, but is the most practical way for an employer to avoid or limit liability if harassment should occur despite preventive efforts.*

Employer Liability

All employers, regardless of the number of employees, are covered by the harassment section of the FEHA. Employers are generally liable for harassment by their supervisors or agents. Harassers, including both supervisory and nonsupervisory personnel, may be held personally liable for harassing an employee or coworker or for aiding and abetting harassment.

Additionally, the law requires employers to take "all reasonable steps to prevent harassment from occurring." If an employer has failed to take such preventive measures, that employer can be held liable for the harassment. A victim may be entitled to damages, even though no employment opportunity has been denied and there is no actual loss of pay or benefits.

In addition, if an employer knows or should have known that a nonemployee (e.g. client or customer) has sexually harassed an employee, applicant, or person providing services for the employer and fails to take immediate and appropriate corrective action, the employer may be held liable for the actions of the nonemployee.

An employer might avoid liability if

- *the harasser is not in a position of authority, such as a lead, supervisor, manager or agent;*
- *the employer had no knowledge of the harassment;*
- *there was a program to prevent harassment; and*
- *once aware of any harassment, the employer took immediate and appropriate corrective action to stop the harassment.*

Filing a Complaint

Employees or job applicants who believe that they have been sexually harassed may file a complaint of discrimination with DFEH within one year of the harassment.

DFEH serves as a neutral fact-finder and attempts to help the parties voluntarily resolve disputes. If DFEH finds sufficient evidence to establish discrimination occurred and settlement efforts fail, the Department may file a formal accusation. The accusation will lead to either a public hearing before the Fair Employment and Housing Commission or a lawsuit filed by DFEH on behalf of the complaining party.

If the Commission finds that discrimination has occurred, it can order remedies including:

- *Fines or damages for emotional distress from each employer or person found to have violated the law*
- *Hiring or reinstatement*
- *Back pay or promotion*

• Changes in the policies or practices of the involved employer

Employees can also pursue the matter through a private lawsuit in civil court after a complaint has been filed with DFEH and a Right-to-Sue Notice has been issued.

For more information, see publication DFEH-159 "Guide for Complainants and Respondents."

For more information, contact DFEH toll free at (800) 884-1684 Sacramento area & out-of-state at (916) 478-7200 TTY number at (800) 700-2320 or visit our web site at www.dfeh.ca.gov.
In accordance with the California Government Code and ADA requirements, this publication can be made available in Braille, large print, computer disk, or tape cassette as a disability-related reasonable accommodation for an individual with a disability. To discuss how to receive a copy of this publication in an alternative format, please contact DFEH at the numbers above.
State of California Department of Fair Employment & Housing.

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Sample Anti-Harassment Policy

All employees have the right to work in an environment free of illegal harassment. Illegal harassment is unwelcome behavior directed against an individual because of race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, disability, citizenship, military or veteran status, family medical leave status, or other characteristic protected by federal, state or local laws ("protected characteristic"). Such behavior is prohibited whether it is from managers, co-workers, subordinates, consultants, temporary employees, vendors, suppliers, customers or others doing business here. Any person who engages in illegal harassment or retaliation will be disciplined, up to and including termination.

Harassment Defined

Unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal, visual or physical conduct because of protected characteristic are illegal harassment when

1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,

2) Submission to or rejection of such conduct by an individual is used as the basis for taking tangible employment actions 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.

Retaliation Prohibited

Supervisors are prohibited by law from taking, recommending, or threatening to take or recommend employment actions against an employee because of any protected characteristic.

Employee Duty to Complain of Harassment

Any employee who feels harassed must take all steps necessary to stop the behavior and avoid harm. Speaking up to the harasser is encouraged but not required. The employee is required to provide a complaint to one of the following people in order to report harassment: the employee's manager, any senior manager, any manager or representative in the Human Resources Department, or the President of the company. This complaint should be filed as soon as possible.

Employer Duty to Respond to Complaints

It is the responsibility of the person receiving the complaint to immediately report it to the Vice President of Human Resources or to the President of the company. Whether or not an employee files a complaint, management must correct harassment if management knows it is occurring. Once a written complaint is received, it will be evaluated. If an investigation is necessary, it will be impartial. The information will be kept as confidential as possible. It is a violation of this policy and of the law to retaliate against any person who in good faith has filed a complaint, testified or assisted in any proceeding under this policy.

Employee Right to File Claim

If after filing a complaint the employee is not satisfied, the employee should first complain to the Vice President of Human Resources. Whether or not the employee complains to the Vice President of Human Resources, the employee has the right to file with the U. S. Equal Employment Opportunity Commission (EEOC) and with the California Department of Fair Employment and Housing (DFEH). The time to file with the EEOC may be as little as 180 days after the last incident of illegal harassment. The time to file with the DFEH is within one year of the illegal behavior. Information about how to contact these agencies is posted on the bulletin board, or is available at www.eeoc.gov and www.dfeh.ca.gov.

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Harassment is a form of discrimination. It is illegal under federal and/or state laws to harass any employee on the basis of the protected classifications: sex or gender, age 40 and over, sexual orientation, race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition or genetic characteristic, martial status, pregnancy, childbirth and related medical conditions, family leave, status as domestic violence victim, medical leave, citizenship, and veteran/military status.

Sometimes employees claim that being criticized or disciplined at all is harassment. Unless the discipline is explicitly related to a protected classification, it is not illegal under these laws.

However, behavior that is not illegal harassment may still violate other laws. Unwanted touching may not be harassment but it is a battery. Calling someone names may not be harassment, but could be intentional infliction of emotional distress. Exposing oneself may not be illegal harassment but it may be indecent exposure, a criminal offense. And if employees become stressed by unpleasant behavior at work, they may be able to get workers' compensation benefits.

While reading the following discussion, remember that the law sets a floor for behavior, not a ceiling. As you will see, the courts have set a very low standard for what is acceptable behavior.

Employers have the right to set, and should set, a higher standard by policy. The employer may set the standard as high as it wants. The employer could require all employees to treat each other with the utmost respect and dignity. As long as the policy is enforced consistently, you can terminate for disrespect, even though the behavior is not illegal.

Intent Is Irrelevant

The intent of the harasser is irrelevant. Often harassers do not intend to harass. But it doesn't matter. All that matters is what the impact of the behavior is on the reasonable person.

Four Factors Prove Harassment

Four factors are necessary to prove illegal harassment. All four must be present for a person to have a valid claim.

Four Factors Prove Illegal Harassment

1. **It's sexual or discriminatory.**
2. **It's unwelcome by the victim.**
3. **It's so severe it interferes with work.**
4. **The employer knew or should have known about it, and did nothing.**

(1) Illegal harassment is sexual or discriminatory.

Because harassment is a form of discrimination, it must be related to one of the protected classifications. If a manager harasses everyone equally, that is not good management, and may violate company values or policy, but it is not illegal.

But don't count on the "equal opportunity harasser" defense. It didn't work in a 2005 federal appeals case, where the manager screamed and yelled at both male and female employees, and acted in a physically intimidating fashion to both. The appeals court left it up to a jury to decide whether the abusive treatment was worse for the women, who cried, felt panicked, avoided contact with the manager and failed to submit overtime hours for fear of angering him, called the police, and ultimately resigned. None of the men did any of those things.

Racial slurs can be racial or national origin harassment. Making degrading comments about another's religion may be religious harassment. Refusing to work with someone with AIDS could be disability harassment. In all these cases, the conduct is explicitly related to the protected classification.

Here's an example of disability harassment. In 1994, an employee who had hurt his back at work was repeatedly told to do tasks that violated his medical restrictions. When he refused, his supervisor cursed him and said, "I don't need any of you handicapped m----- f-----s. As far as I am concerned you can go the h--- home." At weekly safety meetings, he referred to disabled workers as "handicapped people," "hospital people" and "handicapped m----- f-----s." He told other employees not to talk to the disabled employees, and as a result, they were ostracized and treated "like they had a disease."

Finally, the disabled employee requested a meeting with management to complain about these incidents. During the meeting, his supervisor said, “How in the f--- do you take a s--- with these restrictions?" Then some of the other officials at the meeting began making fun of disabled workers. The federal Court of Appeals held this was illegal disability harassment.

It is not a defense that the harasser is in the same group as the victim. For example, in 1997, a black male corrections officer was supervised by another black male who continually called him “nigger” and “black boy,” and occasionally referred to his wife, who was white, as “whitey.” The employee protested and asked that he be addressed like the other employees, as “Officer.” He finally filed a complaint of discrimination.

After he filed the complaint, his supervisor permanently transferred him to the worst job in the facility. The employee sued for harassment. The employer defended by saying that a black person can’t possibly be guilty of racial harassment against another black. The federal Court of Appeals disagreed, and the employee won his case.

A worker of Arabic heritage won a 2005 federal appeals case because his supervisor refused to call him by his given name of Mamdouh. Over the worker’s strenuous and repeated objections, the boss insisted on calling him “Manny”, saying that a “Western” name would be more acceptable to the company’s clients. The jury awarded the employee compensatory and punitive damages, and the court tacked on attorneys’ fees, as well.

There are two types of sex harassment. The first is gender harassment, where discriminatory comments are made. For example, it was held to be illegal harassment where:

--a supervising male doctor consistently refused to call women "Doctor," even in front of patients;
--a sales manager frequently said, "Women were the worst thing to happen to sales;"
--a manufacturing supervisor repeatedly said, "Women are taking men's jobs."

These gender statements may seem less severe than sexual ones, but they clearly are discriminatory.

The second type of sex harassment is harassment that is explicitly related to sexuality. In these cases, the behavior must be considered sexual by a reasonable person. You may have heard of the "reasonable woman" standard, but it was disapproved by the U. S. Supreme Court in 1993. The standard today is that any reasonable person, male or female, would consider the behavior sexual. At least two federal appeals courts have held that assuming women are more insulted and demeaned by sexual banter about heterosexual acts is "paternalistic" and an "outdated stereotype".

This is an objective standard, not subjective. Just because someone feels harassed doesn't necessarily mean it's illegal. One still hears today that harassment is "in the eye of the beholder." That's true only if the beholder is reasonable.

Sometimes it seems that an employee complaining of harassment is supersensitive. Everyone else laughs at your little insults. Other people don't complain when you playfully pat them on the rear. Anybody else would be thrilled to be propositioned by you. Everyone knows that's just the way you are, except for this one troublemaker.

Even though you all think the victim is supersensitive, that does not excuse you from the reasonable person standard. Maybe everyone else is being unreasonable. In fact, if the victim can prove you knew he or she was sensitive, you could be held liable for intentionally inflicting emotional distress as well as illegal harassment.

On the other hand, even if an employee unreasonably feels harassed, that's a management issue you still have to deal with. But the way you handle it may be very different if it's not illegal harassment.

Examples of Illegal Sexual Behavior

--frequently calling a woman a whore, slut, or worse
--grabbing breasts or crotch
--constantly calling a man a bitch because he wore an earring
--repeated unwelcome propositions to have sex
--job promises or job threats in exchange for sex

(2) Illegal harassment is unwelcome by the victim.

Some behavior is presumed unwelcome. Racial slurs are presumed unwelcome. Hitting people, or threatening to hurt them, is presumed

unwelcome. In one case, a group of men grabbed a woman's arm and slammed it in a car door. Their defense was that she welcomed it because she didn't say anything. The court held that no one welcomes physical abuse.

Slander is presumed unwelcome. Slander is an untrue comment that the victim has a lack of chastity. For example, in a U. S. Supreme Court case, the president of the company slandered a saleswoman twice in front of other employees, once by offering her a raise in exchange for sex, and another time by saying she got a sale by having sex with the customer.

Humiliating comments that degrade the victim are also presumed unwelcome. There are many, many cases where a manager constantly asks an employee questions about her sex life. Truth is not a defense in humiliation cases. Presumably, many of the employees asked about their sex lives do have sex, but it is still highly personal and private information.

According to the U.S. Supreme Court, what victims wear and talk about is evidence of whether they welcomed sexual behavior. For example, talking dirty indicates the person welcomes dirty talk. A court may say that people who wear provocative clothes are welcoming comments or stares, but not grabbing.

Practical pointer: Assume it's unwelcome unless it's clearly invited.

Harassment hardly ever turns deadly, but in 2005 a black man in Pennsylvania shot and killed a white former co-worker, telling investigators he had done it because he had heard the murder victim telling a racist joke at work. The shooter also told investigators he had been thinking about killing the former co-worker ever since he had overheard the racist joke seven years earlier.

Context Allows Some Conduct

There are some situations where employees expect to be exposed to sexual activity at work and can't claim sexual harassment. By accepting their jobs, they welcomed it.

People who work in topless bars expect to see nudity. Prison guards review all magazines and letters that come for inmates to make sure they don't receive contraband. As a result, deputies often are forced to look at

pornographic material. They can't complain of sexual harassment in that situation.

But there still is an issue about what type of sexual behavior was welcome. For example, Robert Guccione, the publisher of *Penthouse* magazine, was sued for harassment by one of his employees because she was forced to have sex with his business associates. He was not allowed to argue that, because she worked in an environment where pornography was rampant, she welcomed rape.

Delayed Complaints

Sometimes people who are harassed at work don't speak up for many years, because they are afraid of losing their jobs. For example, in 1992, a new police chief made it clear to his employees that he was a born-again Christian, and that he had been sent by God to save as many people from damnation as he could.

In his conversations with one employee, the chief constantly told her that to be a good employee, she had to be saved, that the police station was "God's house," and that if she were unwilling to play by God's rules he would "trade" her. He frequently reminded her that she was an at-will employee who could be dismissed at any time.

Although she did not welcome these lectures, the employee was afraid to tell him to stop, and at times even tried to appear interested and to ask questions about his faith in order to placate him. She believed he would fire her if she objected.

One day, after two years of this, the chief called her in to his office and told her that she obviously had been abused as a child and accused her of making animal sacrifices to Satan. At that point, she told him that he had "crossed the line," and that if he did not maintain a professional attitude toward her in all future conversations, she would file a harassment claim. He then replied that no one's job performance is perfect, and that he would get the proof to fire her.

Even though the employee did not object for two years, a court might find that the chief's comments were presumed unwelcome. But once the employee told the chief clearly that she did not welcome his comments, this second factor is met.

The Victim's Duty to File a Complaint

Most behavior that occurs in the workplace is not as gross as the above examples. Many more cases allege unwelcome, repeated requests for dates, compliments on appearance, or a few unwelcome comments. In these cases, the victim must prove the behavior was unwelcome. The best way to do that is to file a complaint with the employer.

Victims are not required by law to speak up directly to harassers, although it is recommended as a first step. But the U. S. Supreme Court has emphasized that a company usually will not be held liable for harassment if it had no reason to know that behavior was unwelcome.

Victims are required to file complaints as long as:

the employer has a written harassment policy that's been publicized to the victim,

the employer has a grievance procedure for harassment complaints, and

the grievance procedure is not futile.

A grievance procedure is futile if harassment complaints have been ignored in the past, if victims have been retaliated against after filing complaints, or if the only person the victim can complain to is the harasser.

Even if the employer doesn't have a written policy, if the people complaining have participated in the behavior, they must file internal complaints before suing. For example, if an affair between co-workers ends and one begins harassing the other, the target must let the employer know the relationship is over and the sexual attention unwanted.

In one case, a woman chemist filed suit complaining about her co-workers' vulgar language, frequent discussions about sex, and sexual teasing. The court found she had participated in and appeared to enjoy this activity. She asked them once to stop the crude language, but she herself used it after that, so they didn't stop. The court held she couldn't sue for harassment. Since she had participated, she had a duty to make it very clear it was no longer welcomed. She should have become a

model of virtue first, next asked her co-workers for cooperation, and then made an internal complaint, before ever filing suit.

As a practical matter, few attorneys will represent victims who haven't complained internally first. It's too easy for a harasser to convince a judge and jury the harassment would have stopped if only the victim complained. But even though an attorney won't take a case if the victim didn't complain, a government agency will. The EEOC will investigate almost any claim of wrongdoing.

A 2003 California Supreme Court sexual harassment case has major implications not only for California employers, but also for employers throughout the US, where courts may very well follow this important decision.

The case involved a woman who worked for the State for about five years. After several years she transferred to a new supervisor. He made inappropriate remarks and touched her, for example, on one occasion grabbing her crotch. The woman complained to a co-worker about the harassment at one time, but did not file a complaint with the employer until one year later. During that year, she suffered continued harassment.

Once the woman filed a complaint, the employer conducted an investigation, found that she had been harassed, and implemented disciplinary procedures against the harasser. Nonetheless, the woman filed suit for damages as a result of the harassment.

The employer's defense was that it should not be held liable for damages under the "avoidable consequences doctrine." This doctrine, which has never been applied by any court in a harassment case, provides that a plaintiff has a duty to prevent future damages. The court held in this case that the woman thought she was being harassed a year before she filed a complaint; if she had filed a complaint at that time, she would not have experienced the emotional distress that she did; therefore, the employer could not be held liable for damages accruing after the time she reasonably should have filed a complaint.

The Court said, "In this particular context, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered."

"In other words, to take advantage of the avoidable consequences defense, the employer ordinarily should be prepared to show that it has adopted appropriate antiharassment policies and has communicated essential information about the policies and the implementing procedures to its employees. In a particular case, the trier of fact may appropriately consider whether the employer prohibited retaliation for reporting violations, whether the employer's reporting and enforcement procedures protect employee confidentiality to the extent practical, and whether the employer consistently and firmly enforced the policy. Evidence potentially relevant to the avoidable consequences defense includes anything tending to show that the employer took effective steps "to encourage victims to come forward with complaints of unwelcome sexual conduct and to respond effectively to their complaints."

What You Should Do: If you are an employer, make sure your anti-harassment policies include all of the points listed above. Insure that the policy is distributed, and make sure that employees are aware of the policy by instituting anti-harassment training.

(3) Illegal harassment is so severe it interferes with the employee's work.

The U. S. Supreme Court has said it decides if illegal harassment occurred based on "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Frequency and severity are balanced by the courts. The more severe the behavior, the less frequent it must be. The less severe, the more frequent, and the more important to show that the behavior unreasonably interfered with the victim's work.

An example is the Paula Jones case against former President Bill Clinton. She claimed he exposed himself. Although this is severe conduct, it only happened once, and it did not interfere with her work at any time after that. Therefore, the court held he was not liable for sexual harassment. The result would have been different if he had been her direct supervisor. In that case, it probably would have interfered with her work.

Severe harassment includes grabbing a breast or crotch, physical threats, hitting, and rape. One instance of these could be considered sufficiently severe to meet this factor.

Can verbal comments alone be considered illegal harassment? Strong arguments have been made by free speech advocates that it is a violation of the First Amendment for the government to make speech illegal under the harassment law. However, the courts generally have not accepted this argument. The only free speech exceptions sometimes recognized are for university and government employees.

So when are verbal comments alone sufficiently severe to meet this third factor?

When they are:
--job promises or job threats in exchange for sex,
--physical threats,
--slander (implying lack of chastity)
--humiliation (making demeaning comments about a particular person to or in front of others)
--discriminatory (propositions, explicitly racial or ethnic slurs)

Other types of verbal comments like requests for dates, compliments on appearance, or mildly personal questions must be made frequently (perhaps a few times a week for months or even years) before a court will consider them sufficiently severe to interfere with the employee's work.

Here's an example of one comment being sufficiently severe to be illegal harassment. In 1997, Ms. Taylor, an African American, had been a sheriff's officer for 20 years. One day she passed by the Sheriff and Undersheriff and said hello. The Sheriff turned to the Undersheriff and said: "There's the jungle bunny." The Undersheriff laughed.

Ms. Taylor was shocked by this demeaning and derogatory racial slur. At the time she was too upset to say anything, but a few days later, she demanded a written apology. The Sheriff claimed he did not know it was a racial slur and badgered her for interpreting it that way. He said he needed to think before deciding whether to apologize. The next day, he gave her a written apology in which he admitted calling her a "jungle bunny," but which also claimed she had been wearing camouflage fatigues at the time of the comment. She refused to accept the apology because at the time she had been wearing jeans.

The New Jersey Supreme Court held, "The circumstances -- that the insult was clearly a racist slur, that it was directed against plaintiff, that it was uttered by the chief ranking supervisor of her employ, the Sheriff of Burlington County, and that it was made in the presence of another supervising officer -- were sufficient to establish the severity of the harassment and alter the conditions of plaintiff's work environment."

Harassment doesn't need to be repeated by the same person in order to be considered frequent. If one coworker calls the victim dirty names, another makes lewd propositions, and a third shoves the victim, those actions are taken together to show the victim was working in a hostile and offensive environment.

A gay man was able to prove harassment had been severe in a 2005 California appellate case and was awarded $1.9 million dollars in damages, including $1 million in punitive damages. The employee's immediate supervisor called him a "m**f** faggot or "homo" every day. A security officer hurled the same insults—and worse ones—at least 150 times, and repeatedly threw trash on the floor the employee had just cleaned, forcing him to clean it again. The employee was promoted, but the promotion was revoked 4 days later, and he was denied a merit increase because of his complaints. The employee developed a bleeding blister in his right eye as a result of the anxiety caused by five years of mistreatment and abuse, leading to a permanent loss of vision, and he had to go on disability.

Examples of Comments Held Not to be Harassment

Some verbal comments, even if repeated daily, are not considered severe by the courts and are not illegal harassment, no matter how unwelcome they are. For example:

--constant use of the "f-word"
--daily calling a woman a "pretty girl"
--frequently calling a woman a "bitch"

These comments were held to be "merely offensive" but not severe or humiliating. However, comments like these will offend some people, may violate a company's policy, and can be grounds for discipline, up to and including termination.

> ***Practical pointer:*** It is in a company's best interest to set its own standards for behavior higher than the law. You want to discipline,

and if necessary terminate, an offending employee before the legal line is crossed.

(4) The employer knew or should have known about the harassment, and did not take appropriate action.

When an employer finds out that an employee feels harassed, it must investigate. If it finds harassment has occurred, it must take immediate and appropriate corrective action. If it does so, it is protected from suit in almost every situation.

No matter how severe, frequent, unwelcome and discriminatory the behavior, if the employer takes action, generally it is not liable for harassment under federal law. However, some states hold employers strictly liable for harassment by supervisors, meaning that this fourth factor is automatically met.

In a 2007 federal Court of Appeals case, the employer won because it took prompt steps to end the harassment.

Ms. Baldwin was a sales rep for Blue Cross in Huntsville, Alabama. She alleged her boss sexually harassed her by propositioning her repeatedly one evening. Once he cornered her in his office and propositioned her by saying, "Hey babe, blow me." He approached her on more than one occasion and said "Hey babe" while playing with his zipper. And he came up behind her two or three times, said "Hey babe" and breathed down her neck.

More than three months after the last incident, Ms. Baldwin filed a complaint with HR. The HR rep met with her for over an hour, then called the Vice President of HR. He and another HR rep came to the office a few days later and interviewed the accused and several other employees in the office. They did not re-interview Ms. Baldwin.

As a result of the investigation, HR concluded that it was a "he said, she said" situation. The boss was told if he did do it, not to do it again, and if it was found that he did, he would be disciplined up to and including termination. Ms. Baldwin was told the result. She informed the company that she could no longer work for that boss. Since he was the only manager of sales reps in that office, the company offered her two choices: she could stay in that office and the company would hire a psychologist to work with the two of them to resolve their relationship, or she could transfer to the Birmingham office. Ms. Baldwin refused both

options, and refused to report to work for the boss, so the company terminated her employment. She sued for harassment and retaliation.

The court noted that an employer is not liable if: (1) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior"; and (2) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities [it] provided." As a result, the court ruled against her and in favor of the company. The court found the employer's investigation was reasonable, its conclusion was reasonable, and its offer of counseling or transfer was reasonable under the circumstances. The court ruled her refusal to accept one of these options was unreasonable. Furthermore, the court held she waited too long to complain. "Her complaint came three months and two weeks after the first proposition incident and three months and one week after the second one. That is anything but prompt, early, or soon."

In 1990, a manager harassed a professional employee of Iranian origin by frequently calling him "the local terrorist," a "camel jockey" and "the ayatollah." The manager encouraged others to do the same. He also embarrassed the employee in front of other employees by saying the employee did not know what he was talking about.

The employee complained to Human Resources. The HR person said he would investigate and get back to him. The HR person then spoke only to the employee's managers, who said they were unaware of any harassment.

After six months, the employee had not heard back from the HR person about the results of his "investigation." The employee then complained to a Vice President of the company. The Vice President told him he would investigate and get back to him. The next day, the employee was called into a meeting, told that no discrimination had occurred, and that he could not discuss the subject any more. The employee felt his situation was hopeless, and resigned.

The court held the employee had been harassed, that the employer's investigation was inadequate, and therefore the employee could sue.

What if the employer does not find out an employee feels harassed? When is it liable because it "should have known"?

According to the U. S. Supreme Court, if an employer does not have a written harassment policy, it can be held strictly liable for harassment by

supervisors, even if the employer did not know that the harassment occurred.

That's why all good companies have comprehensive anti-harassment policies.

An employer also can be liable when it should have known of harassment, whether or not it has a written policy. Whenever supervisors or managers harass subordinates, employers may be held liable if the managers were given managerial responsibility without close supervision and training to prevent abuses.

The employer also will be held liable for harassment between coworkers if a manager is told about, overhears or sees the harassment and does nothing. If employees harassed others in the past, the employer should strictly supervise them in the future. Otherwise the employer could be liable for negligent retention.

If an employee harasses a peer-level coworker in complete privacy, the harasser has no history of harassment, and the victim doesn't file an internal complaint, the employer should not be held responsible. In California and some states, the harasser can still be sued personally.

The employer also is responsible for harassment by outsiders. If a temporary agency worker, consultant, customer, vendor or contractor does business with your company and harasses your employees, the company is liable if you knew about it and didn't do anything to stop it.

If talking to harassing outsiders doesn't work, and other options such as meeting off-site aren't available, the only way to protect the company is to ban them from the premises, even if that means you lose customers.

The employer also may be liable for off-site behavior, if there is a connection with the job. Company sponsored off-sites are held to on-site standards. If a supervisor or manager harasses a subordinate, no matter where or when it is, there is a strong presumption the subordinate's work will be affected. When a coworker harasses a peer away from work, effect on work must be proven.

“Subtle” Illegal Harassment

Taking these four factors and putting them together, here are some examples of the most subtle cases of the 1990’s where the federal Courts of Appeals found that illegal harassment occurred.

--Women field sales reps frequently were required to attend sales meetings and parties that were closed to wives so the male reps could bring dates or "road whores." At these parties, managers engaged in constant sex banter and jokes, once showed a video of three sales women showing off their breasts, and once brought in a stripper for a manager’s birthday.

--A woman hospital employee was diagnosed as HIV positive. Her supervisor, who had been a close friend, stopped going to lunch with her, began intercepting her telephone calls, eavesdropping on her conversations, and hovering around her desk. The hospital president, who also had been friendly with her, now refused to shake her hand and would go to great pains to circumvent her office to get to other parts of the hospital.

--A manager told his executive secretary that he had a dream about her. Over the next two years, he showered her with gifts including roses, perfume and a teddy bear. He frequently invited her to sit in his lap, ordered her to go out to lunch with him, asked her out to dinner because "I'm a bachelor tonight," asked personal questions, invited her to Atlantic City, constantly complimented her on appearance and generally expressed his interest in her, despite her frequent requests to leave her alone.

--A woman going through menopause was harassed by her female manager almost daily about her appearance and mental capacity. When the employee told her manager that she would understand how it felt when she went through menopause, the manager responded that she “would never go through it and become an old lady like you." She said the employee was "too sensitive" and would "just have to get used to it" since she was, after all, "an old lady."

--A supervisor required a woman to attend numerous, non-work-related, closed-door meetings with him. As a result, her co-workers began spreading false rumors that they were having an affair. She was ostracized by co-workers and management, lost a promotion, and received a poor evaluation for "poor interpersonal relations with co-

workers." The supervisor refused to deny the rumors and continued the meetings despite her protests.

Our Values Set a Higher Standard

Most people would not consider the above examples very subtle. Good employers would have fired the offending employees above long before their behavior rose to the level of illegal harassment.

In addition, most people want to get along with their co-workers. They don't want to offend, even if what they do is not illegal and does not violate their employer's policy.

With that in mind, here are some guidelines to avoid offending others.

Touching

To understand touching, divide the body into two zones.

The "strike zone" is just like in baseball: from the chest to the knees is off limits. Any touching in the strike zone could be considered offensive.

In contrast is the neutral zone: hands, arms, top of the back and shoulders. This is the area where we touch in our society. We shake hands, nudge one another on the arm to get attention, pat someone on the shoulder for a job well done. This is accepted in our society and for the most part would not be considered offensive.

However, stroking the arm, fondling the hand or rubbing the shoulders, if unwelcome and frequent, could be over the line into sexual harassment. The courts consistently have held that unwelcome back rubs are illegal harassment.

Even if a touch is in the neutral zone, it's important to recognize that many people may be uncomfortable about being touched anywhere at all. Many people have been abused as children, raped, or battered as spouses. They may feel threatened by any touching. Other people are from cultures or religions where being touched by a stranger is taboo. Be sensitive to that, and don't touch them.

People also may be offended by seeing touchy-feely behavior in the workplace. They may feel uncomfortable if co-workers hug, or rub each

other's shoulders. That doesn't mean you can't do it. Just be aware of the impact of your behavior on other people.

> ***practical pointers:*** what if you sometimes hug people at work and now are wondering if it's welcome? Next time you see them, don't hug them. Wait for them to hug you first, or for them to ask, "Where's my hug?" If they continue to hug you, the hugging is welcome. If they don't, it's probably been unwelcome all along.

Pin-Ups

Pin-ups, calendars, or computer screens may be considered sexual harassment if they are nude or sexually explicit. Pictures of women or of men are included.

How explicit does a picture have to be before it is sexual harassment? All of the reported cases deal with "pornographic" or "obscene" pictures. Although it is very unlikely that a swimsuit calendar would be considered part of a hostile and offensive working environment, it certainly could be evidence in a discrimination case if, for example, a man with such a calendar in his office refused to give a promotion to a qualified woman. It also is likely to offend many people, both men and women.

A boudoir portrait of your spouse also may be offensive to others. To you it's your spouse. To someone else it's just another body.

Employees sometimes claim they have the right to post what they want in their private offices, lockers and desk drawers. But these aren't private property. They're employer property. Employer property shouldn't be used for sexual purposes, because it could be seen by others at any time.

Jokes

Dirty and ethnic jokes legally are a gray area. Some courts have held that jokes alone are not illegal harassment. However, in one case, a woman who claimed sexual harassment from her supervisor was allowed to show that he sent dirty jokes to other managers by e-mail, as evidence of his general character.

If jokes are told or distributed by a manager, they also may be used as evidence of the manager's intent to discriminate. For example, a manager who sends ethnic jokes to friends and then fires an employee of

that ethnicity, may be vulnerable to a charge of national origin discrimination.

Because of these dangers, and because such jokes will offend some people, many employers have policies prohibiting telling or sending any jokes.

practical pointers: Don't tell jokes, dirty, ethnic or otherwise related to one of the protected classifications. A good sense of humor can bring people together, when it comes from our shared experience of a ridiculous situation. But jokes can tear people apart, because they almost always are based on stereotypes. The only jokes you can tell safely are lawyer jokes, engineer jokes, and jokes about other professions.

Overheard Conversations

If what you say would be objectionable to the reasonable person when said directly, it is just as objectionable if it's overheard. Be sure your conversation is acceptable to everyone within earshot, whether you're in the cafeteria, your cubicle, or on the telephone.

Endearments

No court has said that calling women (or men) "honey," "sweetie" or "babe" is considered sexual harassment. Endearments are presumed to be innocuous to the reasonable victim. But the U.S. Supreme Court has said if you use words to refer to women that you don't use in referring to men, that's evidence of your intent to discriminate. If a woman is denied a promotion, she could point to being called "honey" as evidence of discrimination.

The one thing some men do that make many women mad is calling them "girls," even when the women themselves use the word to describe their friends.

practical pointers: If they're old enough to work, they're old enough to be called women. Young women are just that - young women. Men are men or young men.

Requests for Dates

A request for a date should be distinguished from an outright proposition. A request for a date is nice. “Would you like to go out sometime?”

One request for a date between coworkers is not harassment. If the person asked says anything other than "no," the asker is allowed to ask again. Repeated unwelcome requests for dates between coworkers are sexual harassment, if they are so frequent that they interfere with the victim’s work, and the employer knew, or should have known, and did nothing.

If coworkers do date, have relationships, live together or marry, it's important to ensure that their work is not affected.

Manager Affairs

A manager or supervisor should *never* date a subordinate. The dangers of such affairs were dramatized in a U.S. Supreme Court decision.

In that case, Mechelle Vinson was hired at a bank as a teller-trainee. At the end of her first three months, the branch manager asked her out to dinner. Over dinner, he said he was attracted to her and wanted to have an affair. At first she said no, but later that evening she said yes.

For the next four years, they had sex while she was steadily promoted through the ranks to assistant branch manager. After four years she quit her job and sued for sexual harassment. She said she had been forced to have an affair because she was afraid to say no to the boss.

Some people might wonder how anyone could be forced to do anything for four years. Not the Supreme Court. In a unanimous decision, the Court held that if Ms. Vinson did not welcome the first proposition, she could sue for sexual harassment. Some people argue she had a choice to leave the employer. But she had a good job. She shouldn’t be forced to leave just because her boss was sexually harassing her.

The Court said that Ms. Vinson was sexually harassed even if she had a voluntary affair with the boss. The Court said her eventual agreement to have sex was not important in deciding whether she had been sexually harassed. What was important was whether she welcomed his advances in the first place. In other words, was she giving out signals she was

interested? If so, she welcomed his advances and there was no sexual harassment.

This case illustrates the dangers of supervisor-subordinate affairs. Even if you think it's completely voluntary, you could lose later if your ex-lover says it wasn't.

The breakup of an affair leads to other problems. A former lover who's not picked for promotion could claim retaliation. And if the affair continues, other employees may be able to sue for sexual favoritism.

Sexual Favoritism

Lawsuits by other employees sometimes can be filed while the relationship is going on. According to EEOC regulations, it's not illegal for a supervisor to promote a lover instead of another employee who is better qualified. It's not illegal because it doesn't discriminate on the basis of sex: both men and women are excluded from the promotion.

But if the subordinate was forced into the relationship by sexual harassment from the manager, then other employees can claim they are victims of illegal sexual favoritism. Furthermore if consensual sexual relations are so pervasive that virtually the only people promoted and rewarded are sleeping with the boss, that creates a hostile or offensive working environment.

In 2005, the California Supreme Court found that a manager's affairs created an illegal hostile environment for other women. Although not binding outside California, this case may well be cited by courts in other states when faced with the same issue.

The case involved a prison warden who for seven years had affairs with 3 of his subordinates at the same time. Throughout this time, he gave them unfair advantages. He gave them opportunities to train that were denied to other women. He promoted them into supervisory positions over other women who were more qualified. He also allowed his lovers to abuse women who complained about the affairs. After the other women complained, they were retaliated against by both the lovers and the warden. One of the lovers physically assaulted a woman who complained.

The Court said:

"Certainly, the presence of mere office gossip is insufficient to establish the existence of widespread sexual favoritism, but the evidence of such favoritism in the present case includes admissions by the participants concerning the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications, and [the warden]'s admission he could not control [one of his girlfriends] because of his sexual relationship with her - a matter confirmed by the Department's internal affairs report."

The Court echoed the guidelines from the EEOC that one relationship by a supervisor is not enough to create illegal sexual favoritism. Even multiple relationships may not create liability if they are kept private. It is when the behavior spills over into the workplace that a potential hostile environment is created.

What this means to you: In this case, the warden's supervisors knew about the affairs. If you are a manager and are aware of this type of behavior (whether by a subordinate or by your management), report it immediately to your company's Human Resources Department.

Your state may have a broader interpretation of sexual favoritism. Certainly, employee morale will suffer if the boss is perceived as giving favorable treatment to a lover.

Affairs between managers and employees who do not have direct reporting relationships also are dangerous. The victim still can claim the affair was not voluntary because managers have power to influence each other.

For these reasons, some companies have policies that prohibit supervisor-subordinate relationships. United Parcel Service (UPS) had a policy that prohibits social relationships between any manager and any non-manager. UPS fired a manager who had worked for the company for 25 years because he was living with a subordinate. He sued for wrongful termination and lost. The Court said the employer had the right to enforce this policy to prevent sexual harassment.

> ***Practical pointers:*** Consider a policy prohibiting dating between supervisors and their direct reports. Discourage top management from any involvements at work.

If a relationship is ongoing, what can the employer do to protect itself? This is a situation that needs to be handled carefully to avoid a claim for invasion of privacy. At the same time, the employer has a legitimate business concern here. Some employers require the two people involved to decide who will transfer or leave. However, if the subordinate leaves, he or she could claim coercion later. Other options: the reporting relationship could be changed if neither person is disadvantaged as a result. If one person must be disadvantaged, it should be the supervisor, since the supervisor is held to a higher standard than the employee.

If separating the two is not possible, at a minimum you could talk to the subordinate privately to determine if the affair was welcomed. If the subordinate says it is, document it. It may help you defend a lawsuit if one is filed in the future. Then audit decisions made about everyone in the work group to make sure there's no sexual favoritism or retaliation against the subordinate after the relationship ends.

Retaliation

Retaliation against a person who complains about illegal harassment or who rebuffs sexual attention is illegal. Retaliation comes in many forms. It includes giving poor performance appraisals, assigning demeaning tasks, demoting, taking pay away, and other adverse employment actions, as well as physical retaliation such as threats or violence.

You can't retaliate against a person who complains, even if the complaint is not substantiated. A person who files an honest but mistaken complaint is protected by the law. There are many cases where the employee was not able to prove the underlying allegations of discrimination or harassment, but <u>can</u> prove retaliation for his complaints. For example, in 2003, one federal appeals court affirmed a $1 million+ jury verdict for retaliation, even though he had lost his sexual harassment claim.

A person who intentionally files a false complaint with the EEOC can NOT be given a disciplinary warning or terminated. This is considered illegal retaliation. Filing a false complaint is defamatory and just as illegal as harassment. However, the courts say the only remedy is for the person who was falsely accused to sue the accuser for defamation.

A regional sales manager won an important retaliation case in the California Supreme Court in 2005. She had worked for 18 years for a

cosmetics company, had been named regional sales manager of the year, and was then promoted. Shortly after that, a new director was named over her, and she and the director went together on a routine tour of one of the company's cosmetic counters at a local department store.

After the tour, the director told the manager to fire a dark-skinned female sales associate because he did not find the woman to be attractive. He said he preferred fair-skinned blondes and directed the manager to "[g]et me somebody hot." On a return trip to the store, the director discovered the sales associate had not been fired. He complained to the manager that she was still there, then passed "a young attractive blonde girl, very sexy," on his way out, and told the manager, "God damn it, get me one that looks like that."

The manager asked the director for an adequate justification before she could terminate the associate. On several subsequent occasions, the director asked the manager whether the associate had been dismissed, and each time the manager asked the director to provide adequate justification for dismissing the associate, who, it turned out, was among the top sellers in the western region. Ultimately, the manager refused to carry out the director's order and did not terminate the sales associate. She never complained to her immediate supervisor or to the human resources department that he was pressuring her, nor did she explicitly tell him that she believed his order was discriminatory.

After that, the director began soliciting negative information about the manager from her subordinates. He and another director began looking for any excuse to reprimand her. They audited her travel expenses, screamed at her in front of her staff, and wrote a disciplinary memo demanding she respond in writing and come to a meeting within a few days. She wrote a response, came to the meeting, but they refused to read the response and questioned her in an aggressive manner.

The manager, who was by now being treated for nervous anxiety allegedly brought on by the situation at work, broke down in tears. Two days after the meeting, she departed on disability leave due to stress. She did not return, and the company replaced her four months later.

One of the important issues in this case was whether the manager could claim retaliation for refusing to fire the associate, even though she never said that she believed the order was discriminatory. The Supreme Court said she did not have to explicitly say, "this is discriminatory" or "this is illegal." The fact that she repeatedly asked for "adequate justification" was

sufficient to establish that the employer knew that the refusal to comply with the order was based on the employee's reasonable belief that the order was discriminatory.

What you should do: This case could have been avoided if HR or top management had been paying better attention. How could the manager go from sales manager of the year to incompetent in less than a year? Whenever new management comes in and former top employees begin receiving negative evaluations, it may be because past management has been lax - or it may be that there is discrimination, harassment or retaliation involved. Investigate! or get sued and lose!

Employer's Responsibility for Preventing Harassment

According to EEOC regulations, an employer must take *all steps necessary* to prevent harassment. That's a very high standard. It means you have to be proactive.

The EEOC says there are six minimum requirements for preventing harassment:

1. Have a written harassment policy.
2. Affirmatively raise the issue.
3. Express strong disapproval of harassment.
4. Develop appropriate penalties for harassers.
5. Inform employees of their right to raise and how to raise the issue.
6. Develop methods to sensitize all employees.

The best way to meet these objectives is to have a formal training program for all managers, supervisors and employees. In that training program, the issue will be raised. Strong disapproval will be communicated. The penalties for harassment will be expressed. Employees will be informed that harassment is illegal and that they have a right to file complaints. And the training will sensitize employees to the gray areas and fine lines.

Once training has been conducted, don't wait for a complaint. If you see harassment, you have a duty to stop it. As a manager, you are the employer.

Listen to what people are talking about. Look at what's on the walls. Rumors and graffiti can put the employer on notice that harassment has occurred. Investigate all leads. Stop all inappropriate behavior.

Why Targets Don't Complain

According to a federal government study, most targets of harassment do not file complaints about harassment. They endure it, go along, or quit. Indeed, if a particular manager has a high turnover of employees, it may be evidence that harassment is occurring.

Why don't targets file internal complaints? Many times, they don't know how. Often companies don't have harassment policies, or the Human Resources department is seen as part of the problem.

Recipients of harassment often blame themselves. They think if only they acted differently, this wouldn't have happened.

Targets of harassment often are too embarrassed to talk about what happened to them. They are afraid others will laugh at them. When the harassment is from a higher-ranking employee, they're afraid the other person will be believed instead.

Employees don't file complaints because they're afraid of retaliation. They fear they'll lose their jobs, or at least be excluded and isolated by others. In these violent times, many targets fear that complaining will cause the accused to physically attack them. As reported in Forbes magazine in 2004, a study from the American Psychological Association states that a mere 1% of harassment claims are bogus, a statistic attributed to the large career risks involved in making a harassment allegation, even if completely justified.

Finally, victims sometimes don't complain because they don't want to get the accused into trouble. They realize a charge of harassment could hurt the other person's career. They often recognize the many good qualities the individual has. They don't want to be responsible for injuring another person's reputation, especially if they think they can handle it.

If a court finds that an employee's lawsuit is frivolous or unreasonable, the court can award the employer legal fees and other sanctions. That's what happened in a 2005 federal appeals case, where the court ordered the seven employees who had brought a baseless discrimination case to pay their employer nearly $30,000 in attorneys' fees and costs, and ordered the workers' lawyer to pay an additional $10,000 out of his own pocket.

Handling Complaints

If employees come to you complaining of harassment, they are trusting you to treat them seriously. Listen. Listen, but don't agree. The worst thing you can do is exclaim, "That's illegal harassment!" That's an admission in court.

Don't sympathize, empathize. "It sounds like you are really upset." At the same time, you don't want to be cold. You want the person to feel relieved they came to you.

Once you've listened to the complaint, find out how serious the victim is. If the victim says, "I just want it to stop," you are going to have a different reaction than if the victim says, "I want this person fired now." If the victim wants the harasser fired, you need to counsel that immediate termination is rarely justified. Harassers almost always should receive at least one warning.

Sometimes victims will say, "I don't want you to do anything about this. I wanted to let you know, just in case." If victims describe something that's not illegal harassment, they can be allowed to resolve it themselves. But if it is illegal harassment, you can't ignore it. You are the employer. If it happens again, the employee could complain, "I told my boss and nothing happened."

Your response might be, "The employee told me not to do anything." But at trial the attorney representing the employee will ask you, "Since when do you do what employees want? If an employee ran in and said someone was brandishing a gun in the lobby, wouldn't you do something?" As a manager, you have to use your own good judgment.

When receiving a complaint, don't bring up confidentiality. That's a negative. If asked, don't make a blanket promise of confidentiality. You will keep the situation confidential to the extent possible. Only people with a need to know will be informed. And you will attempt to keep the victim's name out of it as much as possible. Take confidentiality seriously. A company that did not, and publicly announced to its employees it had fired a supervisor for sexual harassment was held liable for $600,000 in emotional distress in a 2002 Ohio appellate case.

Don't promise you will fix the problem. Only promise to investigate and check back. End the session by setting a date and time to meet. Then have that meeting, even if all you can say is that you've done some

research and talked to some people, but you still need to do more. Then set another date. If you cancel a follow-up meeting, you will alienate the victim and increase the likelihood that he or she will seek legal action.

Evaluating Complaints

Once you receive a complaint, call an expert on harassment. Call your Human Resources department or employment lawyer immediately. This is a mine field.

It is critical that the complaint be evaluated before any investigation takes place. Assuming everything the complainant says is true, does the behavior appear to violate the law? Does it violate company policy? Is it a conflict of values? Or is the person complaining being completely unreasonable?

Whether and how the complaint will be investigated depends upon the answers to these questions. If the person complaining is being unreasonable, that person should be counseled, and no investigation is needed. If it is a conflict of values, an initial first step may be to coach the person who complained about how to handle it alone.

Only if a violation of policy or law is alleged should the investigation process begin.

Investigating Complaints

Once an expert gets involved, the complaint must be investigated. At least three parties must be questioned. The victim must be asked about specifics: the what, where, when and why. See sample questions in the box.

Questions to Ask

1) When did you and accused first meet? In what capacity? What was your relationship at first?

2) When and where did you first experience harassment?

3) What exactly did the harasser do and say? What was your response? What was harasser's response? (and so on for each incident)

4) Were there any witnesses to these incidents? Who? What exactly did they see or hear?

5) Have you told anyone about it? Who? How can I reach them?

6) Have you made any notes or kept a diary? May I see them?

7) Have you confronted harasser? What response?

Second, coworkers must be questioned. They may be victims themselves, or they may have witnessed the harassment.

Coworkers often can be questioned without bringing in the name of either the complaining victim or the accused harasser. A police chief told how he investigated a problem in his department. There was only one woman police officer. She complained about a male officer sexually harassing her. The chief knew if he confronted the man, it would be obvious who complained.

So he talked to all of the other women who worked with his officers — clerks, bailiffs, secretaries. He asked them, "Have you had any problems of sexual harassment from any of my officers?" The universal response was, "Most of your officers are great. But there's this one guy..."

This investigation was impartial and maintained confidentiality. Now the chief was able to question the officer about harassing ten women without identifying any of them.

The third party to be questioned is the accused harasser. Harassers have rights too, most importantly the right not to be wrongfully terminated. Their side of the story must be heard.

What if the accused asks, “Who told you?” If the harasser is like the police officer who harassed everyone, your response should be, “It doesn’t matter.” On the other hand, if one person is complaining about a specific incident, it is necessary for the harasser to know who complained in order to respond fully to the charges. Of course the harasser should be warned not to retaliate. The matter should not be discussed by the accused with the person who complained, until the complaint is resolved.

Whom Do You Believe?

In harassment cases it's common not to have any witnesses. It's one person’s word against another's. As a result, many managers fear that someone could file a false complaint and ruin another’s career. Although false complaints are filed, they're rare. Just because it's one person against another doesn't mean the complaint is inherently false. Complaints often are filed with the police and in the courts based on one person’s word. Robbery, assault and oral contracts often involve just two people’s stories.

It's often difficult for managers to take appropriate action when the evidence is one person’s word against the other’s. They're tempted to throw up their hands and say, “There's no evidence so I can’t do anything.” Even if you have only one person’s word, that's evidence. That's enough for a jury to decide that harassment occurred, so that's enough for you.

Many managers find themselves faced with the same situation as the senators in the confirmation hearing for U.S. Supreme Court Justice Clarence Thomas. Several senators said they voted for him because they weren't convinced beyond a reasonable doubt that harassment occurred. “Beyond a reasonable doubt” is not the correct standard of proof. That's the standard in criminal cases. In harassment cases, the standard of proof is “preponderance of the evidence.”

What's the difference between “beyond a reasonable doubt” and “preponderance of the evidence”? If you have the scales of justice before you, they need to tip only a little bit in favor of one person as opposed to the other in order for a court to decide, and for you to decide, whether harassment occurred.

In evaluating a complaint of harassment, look at whether the victim has a motive to lie. For example, if a complaint is filed after the victim has

been disciplined, fired or laid off there may be a motive to lie. Sometimes the motive for lying is outside the workplace.

In the course of conducting your investigation, you may discover the victim acted irrationally. That's what happened during the confirmation hearings for Clarence Thomas. Many of the senators at the time said they did not believe Professor Anita Hill's charges of sexual harassment. They said she acted irrationally. She said she had been harassed while working with Clarence Thomas at the Department of Education, yet she followed him to work at the EEOC. After she left the EEOC, she saw him twice and talked to him on the phone. And she recommended to the FBI that he be appointed to the Supreme Court.

The senators' reactions: if she had been harassed, she wouldn't have done those things. Therefore, they reasoned, she had not been harassed.

The fact is that victims often do things that appear irrational. They've been traumatized. Other options aren't always obvious to them. Victims of harassment try to do what is best for their health, their self-esteem and their careers. We've all been taught to go along to get along. That doesn't mean the harassment didn't occur.

Take Action

Once you've completed your investigation, if you conclude harassment occurred, you must take immediate and appropriate corrective action. If you take corrective action designed to stop the harassment, you can't be sued by the victim. But if you don't take corrective action and the victim quits, he or she can sue not only for harassment but also for constructive discharge (being forced to quit).

The discipline you take must be intended to be effective in stopping the harassment. A verbal warning may be appropriate as a first warning, but if harassment occurs again, a second verbal warning should not be given. The action you take must be reasonably related to the severity of the behavior, and can range from firing the harasser for gross misconduct, to writing a warning, to verbally counseling for low-level harassment. If what happened was in fact an honest misunderstanding, a meeting between the so-called harasser and the so-called victim may be appropriate.

It also may be appropriate to take action with the person who

complained. A victim who is unreasonably sensitive should receive counseling and training, too.

Transfers are appropriate in some circumstances. Harassers should be transferred if possible after a written warning. Although it may not send the best message to others, according to the courts, targets of harassment may be transferred against their will to remove them from the situation. However, this should only be done in exceptional situations after consulting with an attorney.

Follow Up

If disciplinary action is taken against an accused, the victim should be informed that "corrective action has been taken." To protect the confidentiality of the harasser, some companies don't reveal what level of discipline was given. Other companies find that the victim doesn't trust that answer, and to reassure the victim, will give specifics. This has been allowed by the courts. Whatever you say, require the complainant to keep the information confidential.

After a complaint of harassment has been resolved, you have a duty to follow up. Check back with the victim two weeks, four weeks and six weeks later. Do this privately.

After six weeks of follow-up, say to the victim, "Let me know if you have any more problems." Even if your Human Resources department has taken over the entire matter, you, as the manager, want to encourage your employees to come back to you if they're not happy.

A Success Story

No matter how good your anti-harassment policy and practice, harassment happens. But if your company responds to complaints with a good investigation and training, according to a 2007 federal appeals case, you will not have to pay punitive damages.

A company had a zero-tolerance sexual harassment policy. A male accountant complained about sexual horseplay from his female supervisor. The company conducted four separate investigations of his complaint, but none revealed evidence that would have justified firing the supervisor. In the interviews, coworkers were asked neutral questions which were open ended and not suggestive, for example, "Have you seen any inappropriate behavior in the department?"

The company instituted a harassment prevention training program and required all employees, including the supervisor and the accountant, to attend. The company also hired outside employment law specialists to look into whether its internal investigations had been proper and thorough and contracted with them to investigate the accountant's claims further. The outside specialists determined that the company's investigations had been thorough and confirmed the company's conclusions.

The accountant argued it was unreasonable for his boss to remain as his supervisor. The company responded that the small size of the plant and of the accounting department made it impossible to accommodate his request for another supervisor unless the supervisor was terminated. Firing her without more evidence would have exposed the company to legal action by her. Moreover, there were no further complaints by the accountant of any sexual harassment after the company took its actions in response to his initial complaint.

A jury found in favor of the employee and awarded him back pay, compensatory damages, attorney fees and $250,000 in punitive damages. The employer appealed just the issue of whether the award of the punitive damages was proper.

In overturning the lower court's decision and declaring punitive damages to be improper under the circumstances, the appeals court referred to a number of essential preventive and investigative actions taken by the employer, including:

- Having a zero-tolerance sexual harassment policy;
- Beginning an immediate investigation into the accountant's claims by meeting with him and getting his written statement and witness list;
- Creating a questionnaire with neutral questions for the witnesses;
- Limiting communications between the accountant and supervisor during the internal investigation;
- Calling in outside counsel to ensure that it was properly investigating the accountant's claims;
- Hiring independent outside counsel to investigate the accountant's claims after its own internal investigation;
- Counseling counseled the supervisor, providing her with a formal letter giving examples of unlawful retaliation and warning her that she would be fired if she retaliated against the accountant;

- Encouraging the accountant to report any further incidents of harassment and/or retaliation through a special direct procedure;
- Conducting anti-harassment training and requiring the supervisor to participate.

What this means to you: Whenever there is a complaint of harassment, make sure your company does everything right. It could save you some big money!

What Victims Can Do to Stop Harassment

Managers usually can't be victims of harassment from their subordinates, because they have the power to stop it by disciplining and firing them. If higher management prevents a manager from disciplining a subordinate for harassment, that could be grounds for the manager to sue the employer.

Since managers also may be victims of harassment from their managers or coworkers, it's appropriate to say a few words here about what you can do to stop harassment if you are the target. The EEOC and the courts highly encourage victims to file internal complaints. But as a practical matter, the more you do informally, before talking to the Human Resources department, the better results you probably will have.

If you are uncomfortable about behavior, be direct. One approach is to use non-judgmental phrases to ask people to stop:

"I know you don't mean to be offensive, but comments like that make me feel uncomfortable."
"I'm sure you don't realize it, but I find that kind of language offensive."
"I'm not the kind of person who likes dirty jokes."
"I always cringe when I hear people say that."

If these phrases don't work, you can write a request letter. Request letters are written by attorneys for their clients, but they're just as effective coming from you.

The letter is addressed to the harasser. It has three paragraphs:

(1.) In the first paragraph, list the behavior you find harassing. Give times, dates, places, and details. At the end of this paragraph, write the sentence, "I consider these actions to be harassment."

(2.) In the second paragraph, list the effects of the harassment. You can't concentrate on your work. You worry when you get home. You can't sleep. You're depressed. You have an eating disorder, migraine headaches, ulcers. All the physical and emotional effects of the harassment should be listed, but don't exaggerate.

(3.) In the last paragraph, make your request. In most cases, you want the harassment to stop. "I request that you stop this and any other harassment. If you don't stop, I will show a copy of this letter to the Human Resources department. If you do stop, this matter will not go beyond us. I look forward to developing a good working relationship with you."

Give the letter to the harasser. In most cases, seeing their actions on paper causes harassers to stop. If they don't, you can take the letter to the Human Resources department, where the matter should be taken very seriously since you've documented the problem and given the harasser an opportunity to improve.

Victim's Remedies Under California Law

If you write a letter and it is not effective, you should first file a complaint internally with the company. This puts the company on notice and gives it a chance to resolve the issue. If, after a reasonable time, the company does not take appropriate action, then you may file a complaint with either the California Department of Fair Employment and Housing (DFEH) or with the Equal Employment Opportunity Commission (EEOC).

Both the DFEH and EEOC have websites, as well as phone numbers in the larger metropolitan areas.

Both agencies have similar procedures. Once they receive complaints, they send a notice to the employer with a request for the employer to respond to each allegation. Once the employer response is received, it is queued for processing. Processing can take from six months to a year. Eventually, the agency processes the complaint, and may conduct an investigation. As a result of the investigation, the agency may find the employer violated the law, and then attempt to get a settlement with the employer, or sue if no settlement is reached. Or the agency can find the employer did not violate the law. In that case, the agency issues what is called a Right to Sue letter, and the employee can then sue in court.

If the case is settled or won, victims may receive remedies including damages for emotional distress, hiring or reinstatement, back pay or promotion, or changes in the policies of the employer. In California, there is no limit on emotional distress damages, and most employers also can be liable for punitive damages if they acted with malice or reckless indifference to the rights of the employee.

If the employee files suit and loses, and the court finds the suit was frivolous, the employee can be required to pay the employer's attorneys fees and costs. A few courts have ordered employees to do this.

Harassment is serious, and illegal, and claims of harassment should only be brought if they are valid.

Guidelines for Preventing Harassment

The best guideline for preventing harassment is the Platinum Rule: "Treat others as they want to be treated." In any large workplace, you will find people with a wide range of tolerance for behavior. Observe. Listen. Be perceptive. Treat people the way they are telling you they want to be treated.

When in doubt, don't. Especially as a manager, you need to be aware of what you're saying and how you're saying it, so there is no question about your behavior.

Ask people for feedback. Communicate your boundaries. Listen when others state theirs. By communicating our feelings to each other, we create a feedback loop for continuous learning, so that we can create a workplace of mutual respect.