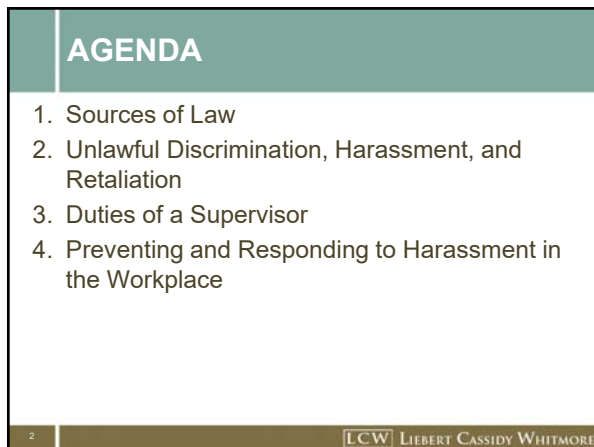


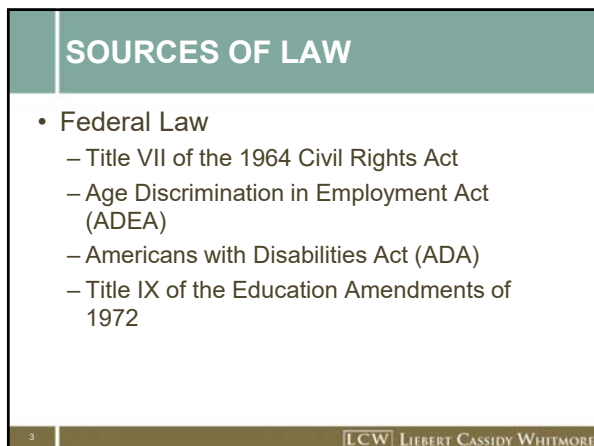
Preventing Harassment, Discrimination and Retaliation in the Academic Workplace

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SOURCES OF LAW

- California Law
 - Fair Employment and Housing Act (FEHA)
 - Education Code
 - Labor Code
- Your District's Policies

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ADMINISTRATIVE AGENCIES

- Title VII and ADA - U.S. Equal Employment Opportunity Commission
- FEHA - California Department of Fair Employment & Housing
- OCR – Office for Civil Rights (Students)

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SUPERVISOR

- Anyone who has any responsibility or discretion to lead others
- Those with purely clerical or record-keeping responsibility are excluded

Government Code section 12926(r)

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DISCRIMINATION

- Treating individuals differently **because of:**
 - A protected classification
 - A perception that an individual is a member of a protected classification
 - An association with an individual of a protected classification or perceived protected classification

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**RETALIATION:
A FORM OF DISCRIMINATION**

- Imposing an adverse employment action **because of**
- An individual's exercise of a protected right

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**HARASSMENT:
A FORM OF DISCRIMINATION**

- Conduct that is:
 - Physical
 - Verbal
 - Visual
- Taken **because of** an individual's protected classification
- Two types:
 - Quid Pro Quo
 - Hostile Work/Education Environment

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“ABUSIVE CONDUCT” v. ILLEGAL HARASSMENT

- Harassing conduct is directed at someone’s membership in a protected classification
 - Harassment is illegal
- “Abusive Conduct” is NOT directed at someone’s membership in a protected classification
 - NOT illegal, but should be addressed

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EXAMPLES “ABUSIVE CONDUCT”

- Repeated verbal abuse
- Threatening, intimidating, or humiliating verbal or physical conduct
- Gratuitous sabotage or undermining of person’s work

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PROTECTED CLASSIFICATIONS

- Religious creed
- Marital status
- Race/national origin/ancestry/color
- Disability/medical condition
- Military and veteran status
- Genetic information
- Sex (gender, pregnancy, gender expression, gender identity, etc.)
- Sexual orientation
- Age
- Opposition to harassment
- Association/perception

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**PROTECTED CLASSIFICATIONS:
NEW DFEH REGULATIONS**

Protections for Transgender Employees

- New definitions, effective 7/1/2017:
 - “Gender identity” includes male, female, combination of male and female, or neither
 - Defines transition process for transgender people

[2 C.C.R. sec. 11030]

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**PROTECTED CLASSIFICATIONS:
NEW DFEH REGULATIONS**

Protections for Transgender Employees

- New protections, effective 7/1/2017:
 - Employer may not condition job benefits on sex, gender identity or expression
 - Employer may not designate a job exclusively for one sex, or maintain separate seniority lists based on sex (with a few permissible exceptions)
 - Employees use the restroom and locker room facility corresponding to their own gender identity or expression
 - Employer provides privacy options in facilities

[2 C.C.R. sec. 11034(b), (c), (e)]

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**PROTECTED CLASSIFICATIONS:
NEW DFEH REGULATIONS**

Protections for Transgender Employees

- New protections, effective 7/1/2017:
 - May not impose appearance, dress, or grooming standards inconsistent with gender identity or expression (with limited exception)
 - May not inquire or identify employees on the basis of gender (with limited exception).
 - May not require applicant to designate gender.
 - Employer must use employee’s stated preferred gender designation and pronouns.
 - Prohibits discrimination based on transition.

[2 C.C.R. sec. 11034(g)-(i)]
[2 C.C.R. sec. 11034]

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**PROTECTED CLASSIFICATIONS:
NEW DFEH REGULATIONS**

Employers may defend a claim of sex discrimination by establishing a Bona Fide Occupational Qualification:

- Personal privacy considerations – job requires employee to observe other people in state of nudity or perform body searches
- Offensive to prevailing social standards for individual of different sex to be present
- Detrimental to mental or physical welfare of those observed to have individual of different sex present

[2 C.C.R. sec. 11031(b)]
[2 C.C.R. sec. 11034]

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**Case Study:
Protected Classification**

Mandy is Tammy's supervisor. Every morning Tammy must send Mandy an email explaining what tasks she is going to perform that day. At the end of every day, Tammy must email Mandy what she accomplished that day and provide an updated status on each assigned task. Mandy doesn't require any other employee to do this. Tammy is the only person of Asian descent working in the office.

Question: Is Mandy's conduct unlawful?

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**Case Study:
Protected Classification**

Barb and Don are both maintenance workers for ABC-CCD. Barb unsuccessfully applies for a supervisor position. Don overhears the Facilities Director say Barb didn't get the job because the District didn't want to hire a supervisor so close to retirement. Don tells Barb what he heard. Barb files a complaint and discloses that Don told her what he heard. Shortly thereafter, Don starts getting undesirable assignments and receives two reprimands for being 5-10 minutes late. Other employees who were similarly late didn't receive reprimands.

Question: Can Don state a claim of unlawful discrimination? Retaliation? Harassment?

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ADVERSE ACTION

- Any action with material effect on employment taken within course and scope of employment
- Includes actions which impact:
 - Job Performance
 - Grades or Student Status
 - Opportunity for Advancement

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“QUID PRO QUO” HARASSMENT

- Job/Education Benefits
- Promised
 - Explicitly or implicitly
 - In exchange for sexual favors
- or**
- Denied
 - If sexual favors not given

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“HOSTILE ENVIRONMENT” HARASSMENT

- Protected Classification
- Physical, Verbal or Visual Conduct
- Objectively and Subjectively Offensive (Unwelcome)
- Severe **or** Pervasive*
- Unreasonably interferes with work or learning opportunities

**But note legal update: one incident may be enough*

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Hostile Work Environment

New Legislative Declarations:

- Decline in productivity not required, sufficient that harassing conduct "so altered working conditions as to make it more difficult to do the job."
- A single incident of harassing conduct may be sufficient to create a hostile work environment
- Totality of the circumstances matter, including "stray remarks" by non-decisionmakers
- Standards do not vary by workplace
- Rarely determinable "on paper" alone

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VERBAL CONDUCT

- Sexual Comments
- Jokes
- Mocking Accent
- Teasing
- Slurs

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VISUAL CONDUCT

- Workplace displays
 - Posters
 - Photos
 - Calendars
 - Religious images
- Decorations
- Cartoons
- Gestures
- Staring/Leering
- Sexual conduct between others at work

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PHYSICAL CONDUCT

- Hugs
- Massages
- Physical intimidation
 - Slamming or hitting objects
 - Blocking entry/egress

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“GRAY” (BORDERLINE) AREAS

- “Private” and “consensual” relationships between supervisors and subordinates or educators/students? (**Warning:** Not for long!)
- Invitations to lunch, drinks or dinner
- References to appearance or dress
- “Casual” touching of non-intimate parts of the body

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**Case Study:
Sexual Harassment**

Tom is a star basketball player for ABC-CCD. However, he has told the Athletic Director, Vince Andrews, that he’s quitting the team due to rampant sexual harassment.

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**Case Study:
Sexual Harassment**

QUESTION: Which, if any, of the following allegations could subject the District to liability?

1. Coach puts his arm around Tom's shoulder when giving him directions; he often does this to other players too.
2. Coach pats the players' butts when sending them on court.
3. Wendy Vasquez, the women's athletic director, commented to Tom, "those are some fine muscles you've got there!"
4. The cheerleaders' uniforms are very tight and revealing.
5. Teammates teased Tom about his assumed sexual prowess. When Tom complained, Coach laughed, "well, what do you expect, looking the way you do?"
6. Visiting teams often shout sexually insulting epithets in an effort to break their concentration.
7. Sexually explicit graffiti covers the walls of the locker room at a college where the team played earlier in the season.

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**Case Study:
Workplace Harassment**

Jan is a tenured faculty member in ABC-CCD's Physics Department. She is also the grievance officer for the ABC Faculty Association. She has filed a harassment complaint with H.R.

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**Case Study:
Workplace Harassment**

QUESTION: Which, if any, of the following allegations could subject the District to liability?

1. Two students that received failing grades on the midterm have posted on Rate My Professor and other sites degrading, misogynist and homophobic comments. Jan has brought these to her deans attention.
2. Jan's department chair, Bob, keeps trying to engage her in discussions about women in STEM fields and his theories that women aren't more successful because they are better suited to nurturing fields like nursing or education.
3. The president of the FA insults and belittles her at meetings, while treating male colleagues like his best buddies.

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WHO IS LIABLE?

- **Any employee** can be held individually liable for harassment, discrimination, or retaliation, **depending on the statute at issue:**
 - California FEHA: Individuals may be liable for harassment only, not for discrimination or retaliation.
 - Federal laws: Individuals can be liable for harassment and discrimination and retaliation, depending on the statute.

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WHO IS LIABLE?

- **The employer** is liable for:
 - Discrimination
 - Retaliation
 - Harassment committed by a supervisor
 - Harassment not committed by a supervisor, but only if the employer knew or should have known about it and failed to take appropriate action.

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CONSEQUENCES DAMAGES LIABILITY

- Employers are liable for the conduct of **supervisors** who harass
- Employees can be liable for harassment
- Liability can include:
 - Back pay
 - Damages
 - Compensatory & Punitive

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TITLE 5 REQUIREMENTS

- Identify person responsible for coordinating investigation
- Establish option for informal resolution process
- Set forth investigation process, including report content requirements
- Provide notice of investigation results
- Provide for appeal to governing board and State Chancellor
- Provide required information to State Chancellor
- Establish timelines for completion of investigation

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SUPERVISOR RESPONSIBILITIES

- Report Observed/Overheard Conduct
- Forward Reports to Human Resources, including:
 - Third-party complaints
 - Verbal complaints
 - Rumors

Remember: The word “Harassment” need not be used to trigger duty to follow procedure

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SUPERVISOR RESPONSIBILITIES

- Cooperate in the investigation
- Prevent further harassment
- Assure no retaliation

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APPROPRIATE CORRECTIVE ACTION

- Conduct neutral, prompt, thorough investigation

Remember: Failure to investigate now constitutes a separate cause of action, even if employer can show that if an investigation had been conducted, the allegations would not have been sustained.

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APPROPRIATE CORRECTIVE ACTION

If allegations sustained:

- Impose appropriate discipline
- Take steps to remediate the hostile environment for the complainant(s), such as:
 - Counseling/EAP
 - Leave
 - Relocation of accused (if not terminated)
 - Relocation of complainant (if requested after other remedial measures offered)
- Take steps to prevent future violations, such as:
 - Training
 - Republish/update District's Policy

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WHAT IF YOU ARE ACCUSED?

- Refer the accuser to a superior, Human Resources, legal advisor
- Report the accusation to your supervisor and to Human Resources
- Refrain from any action that could be interpreted as retaliation
- Seek constructive counseling from Human Resources
- Cooperate in the investigation
- Follow your district's policy

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OPTIONS FOR RESOLUTION

- Use the District’s complaint procedure
- Report to the U.S. Equal Employment Opportunity Commission
- Report to the California Department of Fair Employment & Housing
- Lawsuits

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COMPLAINT RESOLUTION

Get past the buzz words:

- *My colleague, Dr. Green, is harassing me.... Dr. Green disagrees with everything I say.*
- *My professor Dr. Green created an unsafe environment and traumatized me ... when Dr. Green told me I don’t have what it takes to pass her course.*

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COMPLAINT RESOLUTION

Not All “Hostility” Constitutes a “Hostile Work/Educational Environment”

- Ask: *Is there objective information that the adverse treatment or “hostility is based on a protected status?*
 - If yes: Treat as a harassment complaint.
 - If no: Don’t ignore it; just redirect to informal dispute resolution.

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COMPLAINT RESOLUTION

Not All Unwelcome Behavior is “Unsafe”

- Ask: *Is there objective information that the adverse treatment or “hostility” is putting someone in physical danger?*
 - If yes: Call the police.
 - If no: Restate the nature of the conflict, and address it.

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PREVENTION

- Never play favorites
- Report all complaints immediately
- Take all complaints seriously
- Monitor the workplace
- Follow District procedure
- Be a good role model
- Make respect a core value

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