

CALIFORNIA STATE PERSONNEL BOARD

Date of Issue: October 20, 1988

MEMO TO: ALL STATE AGENCIES AND EMPLOYEE ORGANIZATIONS

SUBJECT: Sexual Harassment Policy

Since the issuance of the State Personnel Board's Sexual Harassment Policy in 1981 there have been a number of cases litigated in the courts and the decisions that have resulted have further defined employer responsibility and liability. This memorandum provides a summary of the latest developments on this subject and is intended to assist departments in revising their policies to conform with recent rulings.

The most significant clarifications as a result of court rulings include:

- Legal action can be justified when sexual harassment is sufficiently severe (for a one-time offense) or pervasive (for less severe actions) "to alter the conditions of employment and create an abusive working environment. (Henson v. Dundee (1982)682 F2d 897,904)
- Hiring authorities are responsible for the acts of managers and supervisors with respect to sexual harassment, regardless of whether they had knowledge of or issued policy statements forbidding such behavior (29 CFR 1604.11(c)1985). Potential liability may be minimized by demonstrating that all reasonable steps have been taken by a department to prevent sexual harassment/discrimination in the work place. (Recommended steps are listed on pg. 3 and 4.)
- Hiring authorities are responsible for acts of sexual harassment committed by fellow employees (co-workers) in the work place if the employer (or its managers and supervisors) knew or should have known of the conduct, unless it can be shown that immediate and appropriate corrective action was taken. (29 CFR 1604.11(d)1985)

Departments are requested to review their current policies, and if they are outdated, revise, reissue and prominently post their updated sexual harassment Policies by December 1, 1988. Copies of your policy should be distributed to all employees by December 31, 1988. All departments are requested to send a copy of their current policy statement, noting date that the policy was distributed to all employees, to the State Women's Program at 801 Capitol Mall, MS 55 Sacramento, CA 95814, by December 31, 1988.

LEGAL MANDATES FOR THE STATE'S SEXUAL HARASSMENT POLICY

It is legally mandated by State and Federal laws that employees have a right to work in an environment that is free from all forms of discrimination, including sexual harassment. Sexual harassment is a form of discrimination that is prohibited by Title VII of the Civil Rights Act of 1964 and California Government Code Section 12940. It is the policy of the State of California that sexual harassment is unacceptable and will not be tolerated. State agency secretaries, executive officers, department directors and other appointing authorities are expected to take proactive steps to vigorously and visibly demonstrate their support for a harassment-free work place and their strong disapproval of sexually harassing conduct/behavior by their employees.

Sexual harassment is generally defined as unsolicited and unwelcomed sexual advances of a severe and/or pervasive nature, be they written, verbal, physical and/or visual, that usually occur when:

1. Submission to that conduct or communication is made either explicitly or implicitly a term or condition of employment;
2. Submission to or rejection of that conduct or communication by an employee is used as a basis for employment decisions affecting the employee; or
3. Such conduct or communication has the potential to affect an employee's work performance negatively and/or create an intimidating, hostile or otherwise offensive work environment.

Sexual harassment manifests itself in many forms. The following are a few examples of sexual harassment:

Written: Sexually suggestive or obscene letters, notes or invitations.

Verbal: Sexually derogatory comments, slurs, jokes, remarks or epithets.

Visual: Leering, making sexual gestures, or displaying sexually suggestive objects, pictures, cartoons, or posters.

Physical: Assault, attempted rape, impeding or blocking movement, or touching.

Other: Sexual advances which are unwanted (this may include situations which began as reciprocal attractions, but later ceased to be reciprocal).

Women in nontraditional work environments who are subjected to hazing (this may include being dared or asked to perform unsafe work practices, having tools and equipment stolen, etc.) if requests for sexual favors are not met.

Employment benefits affected in exchange for sexual favors (may include situations where an individual is treated less favorably because others have acquiesced to sexual advances).

Implying or actually withholding support for appointment, promotion, transfer or change of assignment; or initiating a rejection on probation or adverse action; or suggesting that a poor performance report will be prepared if requests for sexual favors are not met.

Reprisals or threats after negative response to sexual advances.

The law requires employers to take all reasonable steps to prevent discrimination and harassment from occurring (Gov. Code 12940(i)). The Fair Employment and Housing Commission has set forth specific requirements that are "intended to establish the parameters for an appropriate response by an employer" where sexual harassment is alleged. These requirements include:

1. establishing a written sexual harassment policy which clearly states that sexual harassment will not be tolerated;
2. establishing a complaint process for the prompt, objective, and thorough handling of sexual harassment complaints;
3. ensuring that all employees are informed of the department's discrimination complaint process and sexual harassment policy prior to the need to know, and again when a complaint is brought forth;
4. taking appropriate action to remedy the victim's loss, if any, resulting from the harassment - the department must act to make the employee whole, (e.g. reinstatement, back pay, promotion);
5. taking appropriate action against the harasser where sexual harassment is found - whatever punishment is meted out to the harasser must be made known (within the guidelines of the Information Practices Act) at least to the victim to give them a sense of redress;

6. taking action to remedy the situation in a manner which protects potential future victims; and
7. protecting the employee(s) complaining of harassment from any form of reprisal/retaliation.

To satisfy the intent of the law, employers must make their sexual harassment policy and complaint procedure readily available to all their employees and members of the general public utilizing their facilities/services. The mere existence of these documents in administrative manuals does not satisfy this intent. The complaint procedure must allow more than one avenue for complainants to raise concerns, e.g., it cannot require all complaints to be directed to the immediate supervisor since they may be the alleged harasser.

EMPLOYER'S LEGAL OBLIGATIONS AND/OR RESPONSIBILITY

Employers have a legal obligation to ensure that the work environment is free from all forms of discrimination-- including sexual harassment. Employers are responsible for the actions of supervisors, and are responsible for acts of other employees if they know or should have known of such acts and fail to take timely and appropriate action. Each department, agency, board and commission is responsible for investigating complaints of sexual harassment in a timely, thorough and confidential manner, and taking appropriate action to end any sexual harassment. **This responsibility applies even if the complaint is withdrawn or the complainant requests that no action be taken. Once a sexual harassment complaint has been filed (formally or informally) the hiring authority is legally obligated to ensure that the work environment is free of discrimination.** Prompt, appropriate action will help to avoid or minimize the incidence of sexual harassment and potential employer liability.

If your department, agency, board, or commission has not established a written policy statement on sexual harassment, you should do so immediately. Your policy statement must clearly define sexual harassment as prohibited conduct/behavior that violates both State and Federal law and guidelines published by the Equal Employment Opportunity Commission and the Fair Employment and Housing Act. The policy must also indicate that such conduct/behavior is subject to immediate disciplinary action, up to and including discharge from employment. Departmental affirmative action plans should contain language stating the department's commitment to the prevention and prohibition of sexual harassment.

Training is strongly recommended as a preventive measure for departments to undertake for all supervisors managers and employees, to sensitize them to conduct/behavior that constitutes

sexual harassment and the consequences of such actions, and to communicate departmental procedures for remedying complaints.

Supervisor/management training programs and employee orientation programs should contain a comprehensive section on sexual harassment, on employee rights and options when harassment is encountered and on supervisory responsibilities and obligations when harassment is complained of or suspected.

Each hiring authority should provide counseling, support and/or referral services to employees who are sexual harassment victims. Employees shall be advised of their right to seek informal and formal remedies through their department's discrimination complaint process. Typically, employees may file an appeal with the State Personnel Board only after they have completed their departmental complaint procedure. Employees shall also be informed of their right to file complaints directly with the Department of Fair Employment and Housing (State level) or with the Equal Employment Opportunity Commission (Federal level) regardless of the status of their departmental complaint.

All employees should be made aware of the following facts:

1. Sexual harassment is a costly form of discrimination that can result in expensive litigation that has resulted in back pay or punitive damage awards, withdrawal of Federal support funds and other adverse actions.

Examples of back pay and punitive damage awards:

DFEH v. Hart and Starkey, Inc., supra, FEHC Doc. No.84- 23(1984-85 CEB9). Awarded back pay in excess of \$21,000 punitive damages of \$40,000, and compensatory damages of \$135,000.

Brooms vs. Regal Tube Co., (1987)44 EPD,37,484. An employer's ineffective response to the sexual harassment of a female employee that continued after corrective action had been taken resulted in back pay award of \$43,319.00 to the employee.

State of California, 188 Cal. App 2nd 320. An employee had been subjected to continuous acts of sexual harassment including derogatory comments, sexually offensive pictures and offensive materials placed in her work site mail box and had been denied job assignments and given limited promotional opportunities on the basis of her gender. Monetary relief was awarded at \$90,000 in compensatory damages for physical and emotional pain and suffering (less \$20,000 for settlement in a worker's compensation claim), \$50,000

in compensatory damages for the acts of precluding her from certain assignments on the basis of her gender, and back pay with interest for approximately one year (including all estimated mandatory and voluntary overtime complainant might have received if she would not have been subject to discrimination).

2. Supervisors who make sexual advances and base a promotion or the retention of a job on the acceptance of these advances, can be held personally and financially liable for their conduct/behavior.

Examples of personal financial liability:

State of California. 188 Cal. App 2nd 320. Supervisor was dismissed from employment for soliciting employees to have sexual intercourse with him in addition to committing other acts of incompetency and discourteous treatment.

DFEH v. La Victoria Tortilleria. Inc., supra FEHC Doc.No. 84-07(1984-85 CEB 13). Compensatory damages equalled \$40,000, of which the respondent, manager and corporate vice-president was solely liable for \$20,000. Punitive damages amounted to \$60,000 of which the respondent was solely liable for \$50,000.

3. The law clearly states that employers can be (and have been) held financially liable for their acts and the acts of their employees (managers, supervisors, administrators and co-workers) if the employer knows or should have known of the existence of sexual harassment and fails to take timely and appropriate action.

Examples of employer financial liability for supervisor and co-worker harassment:

DFEH v. Bee Hive Answering Service, (1984) FEHC Doc. No. 84-16, (1984-85 CEB 8). Compensatory and punitive damages amounted to \$85,000. The company was liable for payment for manager's harassment.

DFEH v. Fresno Hilton, FEHC Doc. No. 84-03 (1984-85 CEB 2). The hotel was held liable for payment for supervisor's harassment. The award was for \$15,000 for compensatory and \$20,000 for punitive damages.

4. Reprisal/retaliation against an employee who files a sexual harassment complaint is unlawful.

Examples of employer liability in harassment/reprisal situations:

DFEH v. Sigma Circuits, Inc. and Charles Dimick, FEP 85- 86 G3-0088se, N-27767,88-14. Complainant was subjected to sexual harassment and was unlawfully terminated by respondents. Even if complainant resigned her employment or left by mutual consent, the termination was involuntary in that the refusal to accept acts of sexual harassment made her working conditions so oppressive and intolerable that she was forced to quit. Complainant was awarded \$36,522 in back pay plus interest, \$560 for out-of-pocket expenses, and \$25,000 in compensatory damages.

State of California Case No. 3004-67. The State Personnel Board adopted a stipulated agreement in which the Department retroactively promoted the employee; restored 374 hours of sick leave; paid out-of-class and salary difference, medical care expenses, attorney's fees, and funded a two-year project and position to address the problem of sexual harassment on a statewide basis. The total settlement against the Department is estimated at over \$100,000.

PUNITIVE DAMAGE AWARDS

The DFEH has awarded punitive damages in past cases; however, the California Supreme Court has since determined that the Commission does not have the statutory authority to award punitive damages. This does not mean that employers cannot be held liable for punitive damages. Complainants can continue to seek punitive damage awards through civil court action.

If you have questions or wish to obtain more information, please contact the State Women's Program at the Personnel Board at (916) 324-5596, ATSS 454-5596.

/s/

LAURA AGUILERA, Chief
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