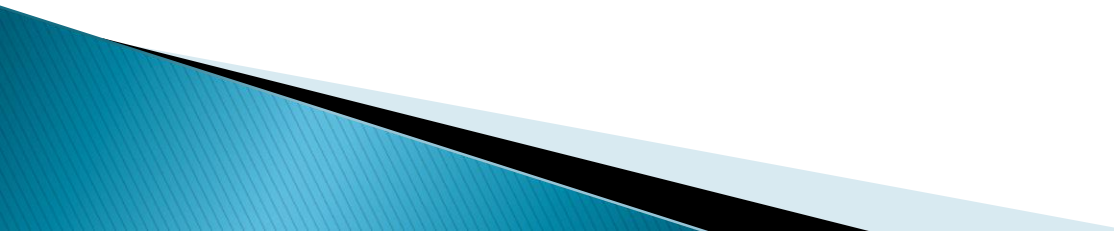


# IS YOUR SEXUAL HARASSMENT TRAINING TRULY EFFECTIVE?

By  
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Attorney-at-Law

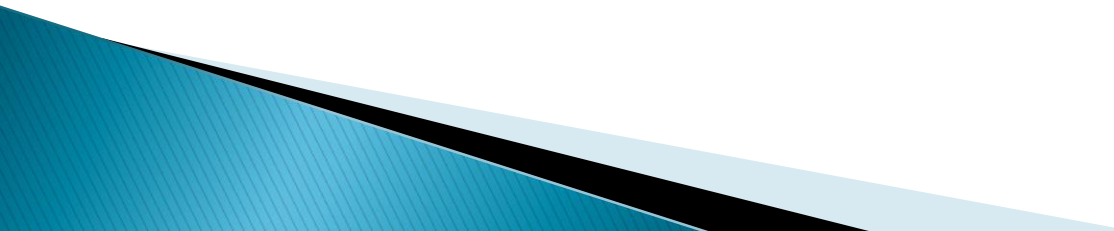
# GRAB AND KEEP THEIR INTEREST TO BE EFFECTIVE

Repeat training every other year is challenging

- ▶ Start with something new, interesting, shocking
  - ▶ Keep the training fresh—change it up every time with a different approach
  - ▶ Update with the latest information
  - ▶ Tailor to your industry; something your managers will understand and identify with
- 

# NEW LAW FOR 2015 ABUSIVE CONDUCT

California legislature defines Abusive Conduct:

- ▶ **Conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive and unrelated to an employer's legitimate business interests.**
  - ▶ Think bullying
  - ▶ Spend some time on the definition
- 

# ABUSIVE CONDUCT

## FURTHER EXPLANATION IN THE LAW

Abusive conduct may include

- ▶ repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or
- ▶ the gratuitous sabotage or undermining of a person's work performance.
- ▶ A single act shall not constitute abusive conduct, unless especially severe or egregious.

# CALIFORNIA LAW EFFECTIVE 1-1-15

- ▶ Defines abusive conduct
- ▶ Requires that sexual harassment training include discussion of abusive conduct
- ▶ **But does not make abusive conduct illegal**
- ▶ Some insurers recommend anti-bullying policy

**Why is abusive conduct a workplace issue?**

1.

2.



# *ROBY V. McKESSON*

Roby was a 25 year employee, a customer service liaison in a distribution center. She received good performance reviews

She started experiencing panic attacks, which caused shortness of breath, heart palpitations, dizziness and excessive sweating. Her medication caused her body to produce an unpleasant odor and she developed a nervous disorder which caused her to dig her fingernails into her arms, producing open sores.

# ROBY CASE CONTINUES

- ▶ Her boss made negative comments in front of other workers about her body odor
- ▶ She called Roby “disgusting”
- ▶ She refused to respond to Roby’s greetings and turned away when she asked questions
- ▶ Her boss ignored Roby in staff meetings
- ▶ She excluded Roby from office parties
- ▶ She spoke to Roby in a demeaning manner and openly belittled her, calling her job a “no brainer”

# MORE ROBY

Roby was written up and ultimately terminated for absences due to her disability. Roby was devastated emotionally and financially, losing her savings and medical insurance, having to forgo treatment. She developed agoraphobia and became suicidal. She was judged completely disabled by the Social Security Administration.

Was her boss abusive to Roby?

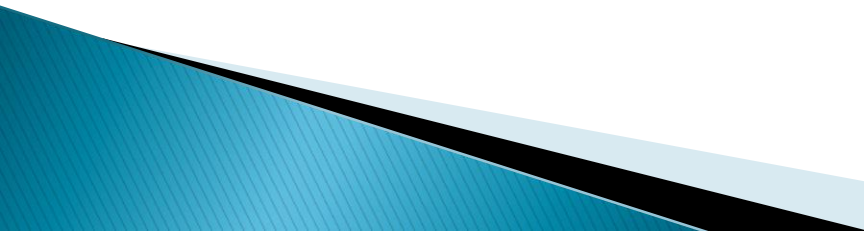


# ILLEGAL HARASSMENT CATEGORIES

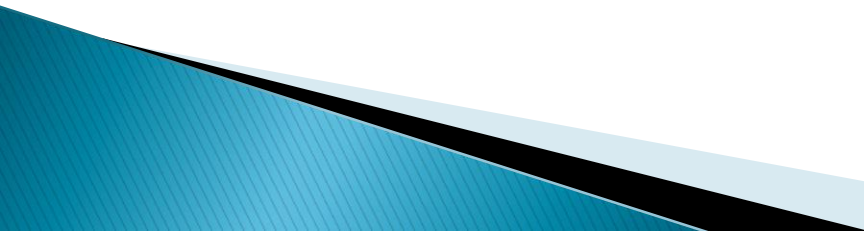
- ▶ Race, color, national origin, ethnicity
- ▶ Age, religion
- ▶ Sex, sexual orientation, gender, marital status
- ▶ Physical disability, mental disability, medical condition (cancer or genetic characteristics)
- ▶ Military or veteran status (added 1-1-14)

**Every supervisor's job -- prevent, report, and stop any of type of illegal harassment**

# YOUR ANTI-HARASSMENT POLICY

- ▶ Read now
  - ▶ Sign now
  - ▶ Remember – it's important --  
**Employer's duty is to provide safe place to work.**
  - ▶ Enforce –If not you, who?
- 

# MAKE IT REAL TO YOUR MANAGERS

- ▶ Explain how they are involved in the process
  - ▶ Give examples—there are plenty of real life cases to use; stories bring the law alive; good trainers are good story-tellers
  - ▶ Fulfill the requirements of the regulations on sexual harassment training
  - ▶ Interactive is a requirement – require your supervisors to have to think and analyze
- 

# GROUP EXERCISE #1

Rudolpho, a widower, was new on the job at the Las Vegas airport. His co-worker Sylvia asked him out repeatedly and gave him flirtatious notes saying that she was “turned on” by him. He was not interested and went to his boss Patrick for help. Patrick told Rudolpho to tell Sylvia that he was not interested and if she “kept it up”, he should notify management so they could “take care of it.”

Rudolpho followed Patrick’s advice, but Sylvia increased her romantic overtures, handing him a revealing picture of herself and telling him about her “crazy dreams about us in the bathtub.”

# THE STORY'S END

Rudolpho complained to another manager who did nothing. He complained to a third manager who said that he did not want to get involved in “personal matters”.

Maybe because Sylvia was pretty, Rudolpho's co-workers suggested he was gay. His performance declined and he is terminated for performance and negative attitude. Rudolpho sues the company for sexual harassment.

# WITH YOUR GROUP DISCUSS

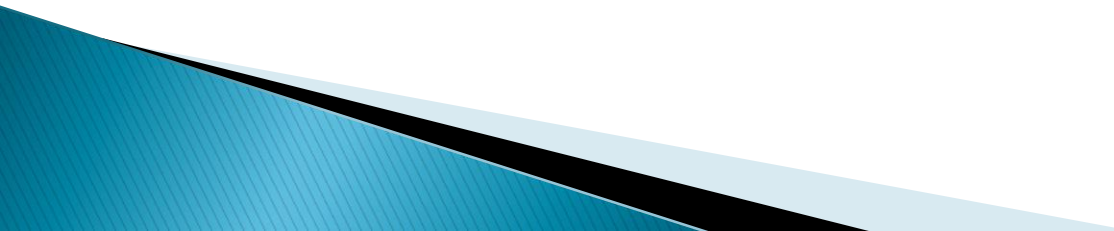
1. Is this sexual harassment? Why?
2. What should the managers have done?
3. When does the employer (company) become liable for sexual harassment by a co-worker (not a supervisor)?
4. How could this have been prevented?

(Interactive group discussions, followed by discussion altogether with legal emphasis)

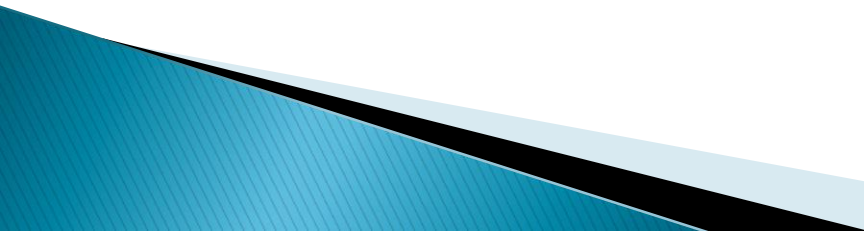
(Female harasser – why is this important?)



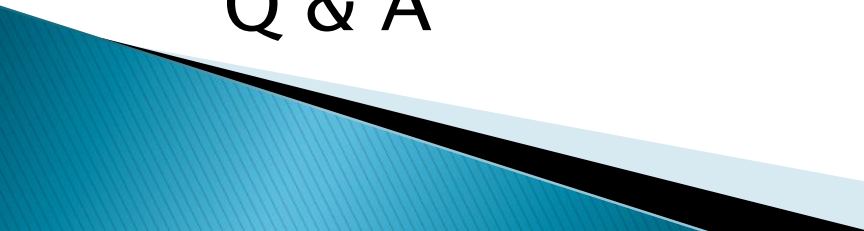
# LET THEM FIND THE ANSWERS

- ▶ Many have been through training several more times (requirement of training every 2 years)
  - ▶ Providing company's sexual harassment policy reminds them of the subject matter
  - ▶ Managers are experienced problem-solvers
  - ▶ Empower them to work through problems, not just defer to Human Resources
- 

# WHY TRAINING SHOULD BE AS EFFECTIVE AS POSSIBLE

- ▶ Legally mandated
  - ▶ Prevent harassment – advise of the personal liability of harasser
  - ▶ Educate supervisors and managers about their duty to report any potential harassment, otherwise can be disciplined if don't report
  - ▶ Explain how all management can be hurt by liability of company -- the \$\$\$ factor
- 

# DIFFERENT METHODS OF TRAINING

1. Live in-person group training
  2. Computer training (know who was trained?)
    - a. Individual training
    - b. Webinar
  3. Any other method that is interactive and allows legal answers to questions within 48 hours
  4. Video or other one-way communication not allowed without more—discussion, Q & A
- 


# QUALIFICATIONS TO PROVIDE THE TRAINING

Trainer must be one of the following:

1. **Attorney** with at least 2 years experience in employment law;
2. **Human Resource professional** or harassment prevention consultant with at least 2 years experience in sexual harassment prevention training, responding to sexual harassment complaints, conducting harassment complaint investigations, and advising employers or employees about discrimination, retaliation or sexual harassment; or
3. **Professor** of law school or college .

# ADDITIONAL TRAINER QUALIFICATIONS

Knowledge of the following:

- ▶ What constitutes unlawful harassment, discrimination and retaliation under the law
  - ▶ What steps to take when harassing behavior occurs in the workplace
  - ▶ How to report harassment complaints
  - ▶ How to respond to a harassment complaint
  - ▶ Obligation to conduct a workplace investigation
  - ▶ What constitutes retaliation and how to prevent
  - ▶ Essential components of an anti-harassment policy
  - ▶ The effect of harassment on harassed employees, co-workers, harassers and employers
- 

# GROUP EXERCISE #2

*(EEOC v. restaurant)*

Waitresses at restaurant were continuously harassed by manager including being touched with a sexual devise and unwanted hugging and kissing. They were forced by the manager to attend karaoke bars after work.

# WITH YOUR GROUP DISCUSS

1. Is this case worse than the prior case? Why?
2. When does the employer become liable for sexual harassment of a manager?
3. What are the damages for sexual harassment?

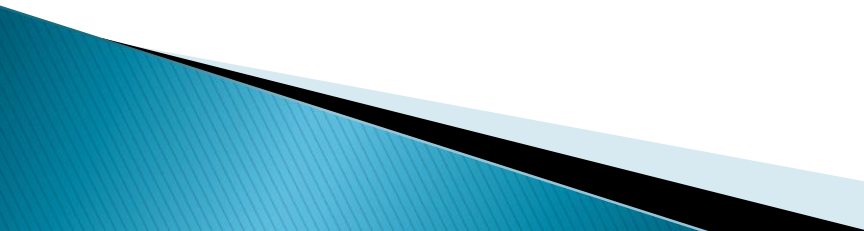
(Discuss compensatory and punitive damages and what insurance pays)



# THE BASICS

## WHO MUST BE TRAINED

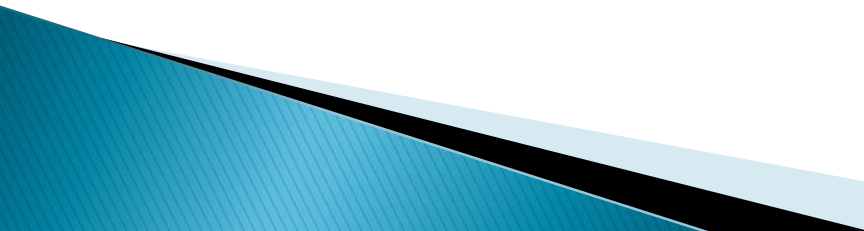
All employees of employers of 50 or more employees with “**supervisory authority**”, meaning those who exercise **independent judgment** as to:

- ▶ Hiring, transferring, disciplining and terminating other employees,
  - ▶ Direct other employees’ work or adjust their grievances, or
  - ▶ Effectively recommend any of these actions
- 

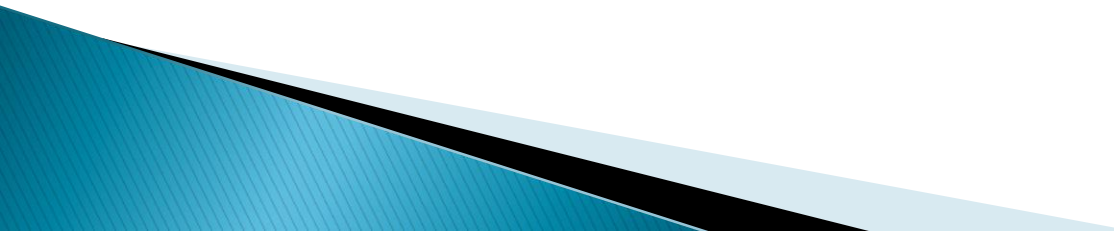
# WHEN IS TRAINING REQUIRED

- ▶ **Within 6 months of the hiring or promotion of a new supervisor, manager or executive, unless can prove was trained elsewhere within 2 years—requires individual tracking**
- ▶ **Every two years for all supervisors, managers and executives. Tracking options:**
  - Individual – within 2 years of prior training
  - Company-wide—every 2 calendar years, regardless of exact dates


# WHAT MUST BE INCLUDED IN THE TRAINING

- ▶ Definitions of sexual harassment under FEHA and Title VII
  - ▶ Definition, training and discussions of other forms of harassment under FEHA
  - ▶ Discussion of several forms of sexual harassment
  - ▶ Explanation of FEHA, Title VII and case law principles about prohibiting and preventing sexual harassment, discrimination and retaliation
- 

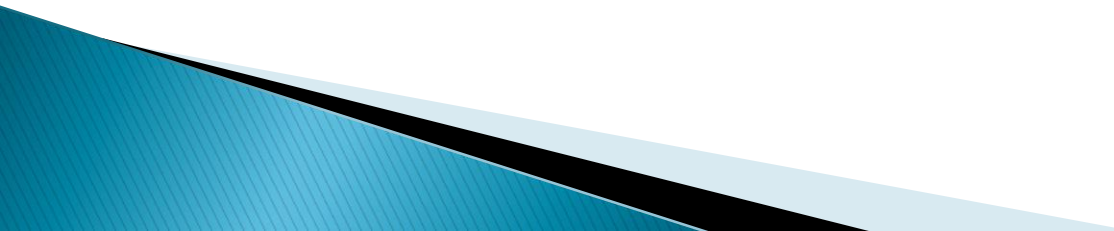
# MORE TRAINING REQUIREMENTS

- ▶ Examples of conduct that constitutes sexual harassment, including practical examples that show true-to-life scenarios that illustrate sexual harassment, discrimination and retaliation through use of role playing, case studies and group discussions
  - ▶ Information on the remedies available to employees for sexual harassment
  - ▶ Strategies to prevent sexual harassment in the workplace
- 

# AND MORE

- ▶ Explanation of limited confidentiality of the complaint process
  - ▶ Listing of resources for victims and steps they should take to report sexual harassment
  - ▶ Explanation of obligation to conduct effective workplace investigation of complaint
  - ▶ What to do if a supervisor is personally accused of harassment
- 

# AND

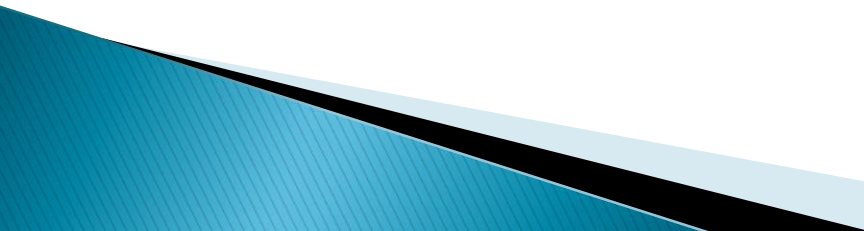
- ▶ Discussion of the essential elements of an anti-harassment policy and how to use it if a complaint is filed
  - ▶ Discussion on the prevention of abusive conduct, as defined by law
  - ▶ A sample anti-harassment policy
- 

# GROUP EXERCISE #3

## (*EEOC V. WINFIELD RUBBER*)

Mark Holmes was the plant manager. He was responsible for investigating complaints of sexual harassment at the factory. He received a complaint from a female subordinate that a male co-worker was sexually harassing her. He investigated the claim and had a rare “Perry Mason moment” when the harasser confessed. Mark terminated the harasser. However, the company overruled his decision, reinstated the harasser and terminated Mark.

# DISCUSS WITH YOUR GROUP

1. What type of claim does Mark have against the company?
  2. How does he prove it? What type of evidence does he need?
  3. What if the company had terminated Mark six months after this incident? Would that matter?
  4. What are Mark's damages?
- 

# WHAT IF YOU ARE ACCUSED OF HARASSMENT?

What should you do? What should you not do?

1.

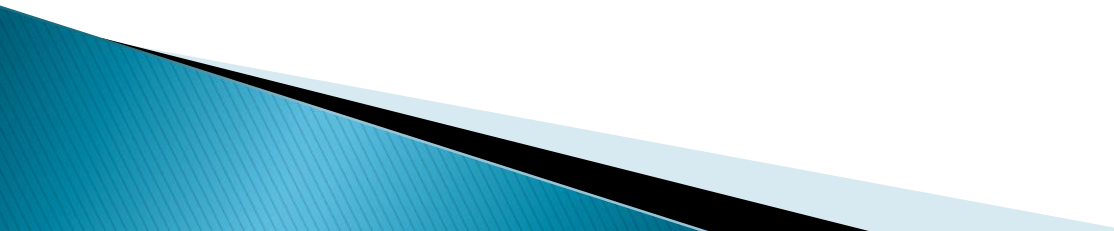
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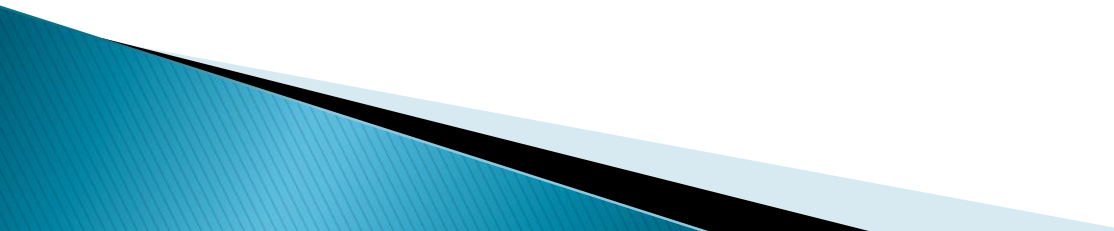
4.

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6.



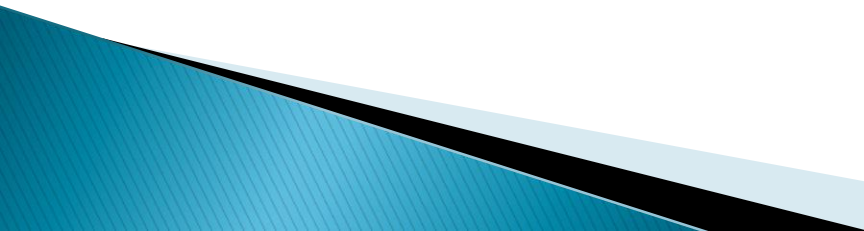
# QUIZ TO SEE WHAT YOU LEARNED

- ▶ Goes into the manager's personnel file, along with the signed and dated harassment policy to prove that the manager was trained
  - ▶ Also impresses the manager of the importance of the training (serious business)
- 

# SEXUAL HARASSMENT TRAINING FOR OTHERS

- ▶ **Employers of less than 50 employees** – still excellent idea as the goal is prevention
- ▶ **Non-supervisory employees**
  - Suggest different approach that emphasizes treating co-workers with respect and to speak up if offended. However, if ineffectual or uncomfortable, talk with your supervisor for help
  - Goal to educate but not increase claims
  - Remember poster and DFEH pamphlet DFEH-158

# CAREFULLY DOCUMENT TRAINING

1. Who was trained
    - a. Suggest sign-in form for easy reference
    - b. Signed and dated policy and quiz in each supervisor's file
  2. Content of training
    - a. Keep copy of presentation, e.g. power point
    - b. Keep copy of any handouts
  3. Qualifications of trainer
- Keep documentation for at least 2 years
- 

# DOES TRAINING HELP, OR LACK OF TRAINING HURT, EMPLOYER?

CA Govt Code section 12940(k) requires an employer to take “all reasonable steps to prevent harassment from occurring.”

1. Training shows compliance with the law
2. Employer’s effort to prevent sexual harassment by training and having the required policy
3. Failure to train shows non-compliance with the law and failure to attempt to prevent

# DO YOU KNOW YOU ARE A TARGET?

**“Recognizing & Increasing the Value of a Sexual Harassment Case”** article at [sexualharassment.com](http://sexualharassment.com)

- ▶ **Demonstrate the existence of a weak Human Resources Department**
  - In most cases, the **HR dept. is on trial**
  - If the company has an adequate sexual harassment policy and employees know how to report sexual harassment to human resources and the department performs an adequate investigation, then plaintiff will probably lose any sexual harassment case other than a strict liability case against a supervisor.

# READING LIST

## The laws

- ▶ California Government Code section 12940(j),(k)
- ▶ <http://www.eeoc.gov/laws/statutes/titlevii.cfm>

## Government publications

- ▶ [http://www.dfeh.ca.gov/Publications\\_StatLaws\\_SexHarrass.htm](http://www.dfeh.ca.gov/Publications_StatLaws_SexHarrass.htm)
- ▶ <http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2015/DFEH-185.pdf>
- ▶ <http://www.eeoc.gov/facts/fs-sex.html>

# HISTORICAL READING LIST

- ▶ <http://www.eeoc.gov/policy/docs/currentissues.html>
- ▶ Hill, Anita, Speaking Truth to Power, (1998), Anchor Books

# THANKS FOR YOUR ATTENTION

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