

727 Sansome Street
San Francisco
California
94111
(415) 835-9000

info@cdhks.com
www.cdhks.com

CURIALE
DELLAVERSON
HIRSCHFELD
& KRAEMER &
LLP

2425 Olympic Boulevard
Suite 550 East Tower
Santa Monica, CA
90404
(310) 255-0705

5450 Longley Lane
Reno, NV 89511
(775) 826-7100

Managing Within the Law

Google

Presented by
Richard J. Curiale

Curiale Dellaverson Hirschfeld & Kraemer, LLP

CURIALE DELLAVERSON HIRSCHFELD & KRAEMER, LLP advises and assists private and public employers of all sizes on issues and claims arising out of the employer-employee relationship and on union-related matters. Its attorneys regularly handle litigation involving wrongful termination, discrimination and sexual harassment, and counsel companies on discipline and discharge, workplace privacy, drug abuse and testing, safety, personnel policies, wage and hour matters, and other employment-related issues. As part of their "preventive" practice, the firm's attorneys present training seminars on how to manage within the law and avoid claims which can lead to potentially costly litigation.

RICHARD J. CURIALE is the firm's Managing Partner. He is resident in the San Francisco office. Mr. Curiale practices in the area of labor and employment law with an emphasis on supervisory training, defense of discrimination/sexual harassment charges, union organizing and decertification, collective bargaining and contract administration. He co-authored Conducting An Effective Internal Investigation and the book Stopping Sexual Harassment: An Employer's Guide. Mr. Curiale formerly served as president of an American Federation of Teachers and New York State United Teachers affiliate. He is a member of the Bar Association of San Francisco and the American Bar Association (Labor and Employment Law Section; Committee on Individual Rights and Responsibilities in the Workplace). He received his B.A. in 1969 from Marist College and his J.D. in 1979 from St. John's University School of Law.

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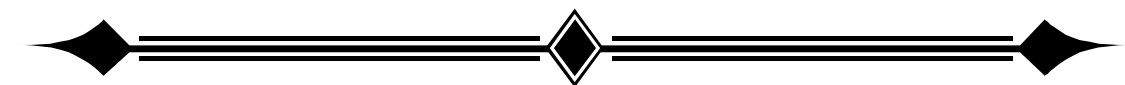
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WRONGFUL DISCHARGE



MANAGING WITHIN THE LAW

Wrongful Discharge

EMPLOYMENT-AT-WILL

“An employment, having no specified term, may be terminated at the will of either party on notice to the other.”

STATUTORY EXCEPTIONS

There are a number of federal and state laws which prohibit terminating even at-will employees for certain designated reasons, including:

- ◆ National Labor Relations Act
- ◆ Anti-discrimination laws (federal and state)
- ◆ Political activity/jury service
- ◆ Occupation Safety and Health Act
- ◆ Workers' compensation/wage-hour claims

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COMMON LAW (JUDICIALLY- CREATED) EXCEPTIONS

Courts have slowly been eroding the at-will doctrine through a series of significant decisions.

1. PUBLIC POLICY:

Peterman v. Teamsters Local 396 (1959);
Tameney v. Atlantic Richfield Corporation (1980);
Gantt v. Sentry Insurance (1992)

Prohibits termination for reasons which would violate “public policy” as defined by statute or state or federal constitutions.

EXAMPLES

- ◆ Retaliation or discharge for raising safety complaints.
- ◆ Termination for reporting violations to a law enforcement or other government agency, i.e. “whistle-blowing.”
- ◆ Termination of an employee for refusing to do something unlawful. For example, price fixing, improper disposal of hazardous wastes, overcharging on a government contract or falsification of reports to government agencies.
- ◆ Termination for asserting constitutional or statutory rights. For example, making a complaint of discrimination.
- ◆ Termination for fulfilling a duty imposed by law. For example, jury duty or testifying truthfully under oath.

MANAGING WITHIN THE LAW

Wrongful Discharge

HOW TO MINIMIZE THE RISK OF PUBLIC POLICY CLAIMS

- Ensure all Company safety policies and procedures are being followed.
- Audit your department to ensure legal obligations are being met.
- ***Listen*** to employee complaints; explore resistance to your instructions or job duties, especially when the issue raised may involve unsafe, illegal, unethical or discriminatory conduct.
- ***Investigate*** the issues raised, including seeking assistance from appropriate internal resources, such as the H.R., legal, safety, contract compliance, security, or facility departments.
- ***Respond*** by telling the employee the results of the investigation and correcting the problem.
- ***Document*** the responsive steps taken.
- Be careful not to retaliate or criticize the employee for raising the concern, even if the employee was wrong or over-reacted.

MANAGING WITHIN THE LAW

Wrongful Discharge

EXPRESS ORAL CONTRACT

2. Express Oral Contract:

Brawthen v. H&R Block (1972)

Express oral promises may modify an employer's right to terminate at-will, or change other terms of employment.

EXAMPLES

The following statements by a manager may alter the at-will employment relationship or add new contractual obligations:

- ◆ Employment will be terminated only for certain reasons;
- ◆ Employment will continue for a specified period;
- ◆ Certain procedures will be followed before termination;
- ◆ The employee will receive a raise, bonus or be promoted;
- ◆ The employee will be transferred not terminated if the department is downsized or “re-engineered.”

MANAGING WITHIN THE LAW

Wrongful Discharge

How should Company managers answer questions from prospective or current employees about job security or other terms of employment?

FOLLOW THESE SIMPLE RULES:

- ◆ Don't be careless.
- ◆ Be honest and candid with applicants and employees.
- ◆ Don't oversell.
- ◆ Be prepared - anticipate questions and be ready with answers that you and Company can live with.
- ◆ Remember the at-will nature of employment at Company.

Remember: Don't make promises you and Company can't keep!

MANAGING WITHIN THE LAW

Wrongful Discharge

IMPLIED CONTRACT – PERSONNEL POLICIES

3. *IMPLIED CONTRACT OF EMPLOYMENT BASED ON PERSONNEL POLICIES:*

Cleary v. American Airlines (1980)

Courts have ruled that under certain circumstances written personnel policies and procedures may give rise to an “implied” agreement specifying how an employee will be treated and under what circumstances employees may be terminated.

WHAT CAN COMPANY MANAGERS DO IN ORDER TO MINIMIZE A “CLEARY” CLAIM IN A WRONGFUL DISCHARGE LAWSUIT?

- ◆ Read and understand personnel policies and procedures.
- ◆ Follow the applicable policies and procedures.
- ◆ Conduct truthful performance reviews.
- ◆ Do not ignore performance issues – use corrective counseling in an effort to turn the problem around.

MANAGING WITHIN THE LAW

Wrongful Discharge

TERMINATION FOR CAUSE

4. *TERMINATION FOR CAUSE:*

Pugh v. See's Candies (1980)

Courts have found that the existence of certain factors, such as **long term service**, continual promotions and pay raises, a lack of criticism and other “**indicia of job security**” can create an **implied contract** requiring a reason or "cause" for termination.

The *two* factors which must be present in order for an employee to claim that he/she was terminated in violation of the rule established in *Pugh*:

- ◆ *Indicia* of job security
- ◆ Long-term employment

BASIC ELEMENTS OF CAUSE -- A DUE PROCESS STANDARD

- ◆ **NOTICE** - Give employees advance *notice* of performance standards and behavioral rules, *notice* that they are not meeting those standards or rules, and *notice* of the penalty for failing to improve or correct deficiencies.
- ◆ **INVESTIGATION** - Conduct a *fair and thorough investigation* into performance deficiencies or misconduct, including an opportunity for the employee to present his/her side of the story, before deciding on the proper discipline.
- ◆ **CONSISTENCY** - Apply company rules and standards *consistently* to similarly-situated employees.
- ◆ **CORRECTIVE COUNSELING/PROGRESSIVE DISCIPLINE** - Implement *corrective counseling and progressive discipline*, as appropriate, before resorting to termination.

MANAGING WITHIN THE LAW

Wrongful Discharge

ADDITIONAL CLAIMS WHICH MAY GIVE RISE TO EMPLOYER LIABILITY

1. *CONSTRUCTIVE DISCHARGE:*

Forcing an employee to “resign” will *not* protect against a claim of wrongful discharge. “Voluntary resignations” may give rise to a claim of constructive discharge.

Conduct which might permit an employee to quit and claim constructive discharge:

- ◆ Intentionally creating an abusive/hostile environment.
- ◆ Excessive overtime or other unreasonable expectations designed to force an employee to quit.
- ◆ Demotions/other substantial changes in duties designed to force an employee to quit.
- ◆ Being subjected to discriminatory behavior or racial/sexual harassment.

AVOIDING CLAIMS OF CONSTRUCTIVE DISCHARGE

Make sure all decisions about an employee are:

- ◆ Demonstrably related to business goals
- ◆ Consistent with decisions about similarly situated employees
- ◆ Non-discriminatory and non-retaliatory

MANAGING WITHIN THE LAW

Wrongful Discharge

ADDITIONAL CLAIMS WHICH MAY GIVE RISE TO EMPLOYER LIABILITY

2. *INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS:*

Employers and supervisors can be sued based on the treatment of an employee if their conduct toward the employee or the manner in which the employee was terminated was **“outrageous”** or **“shocks the conscience of a civilized society.”**

Example of conduct which may create liability:

- ◆ Subjecting an employee to intolerable working conditions to force a resignation
- ◆ Racial or sexual harassment

AVOIDING CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Treat employees with respect and professionalism at all times.

- ◆ Counsel and terminate all employees in private; and
- ◆ Don't make public examples of employees.

MANAGING WITHIN THE LAW

Wrongful Discharge

ADDITIONAL
CLAIMS WHICH
MAY GIVE RISE
TO EMPLOYER
LIABILITY

3. *NEGLIGENT PERFORMANCE EVALUATION:*

Negligence is a legal theory which holds a party liable for damages if it had a legal duty to act and failed to act as a reasonable person would act.

HOW CAN
COMPANY
MANAGERS
AVOID CLAIMS
BY EMPLOYEES
THAT THEY
WERE
NEGLIGENTLY
EVALUATED?

- ◆ Be honest and candid about performance problems.
- ◆ Don't over-inflate grading -- ratings should accurately reflect performance levels.
- ◆ Avoid surprises -- unless it is a very unusual situation, the word "termination" should be communicated to the employee well *before* the termination meeting.

MANAGING WITHIN THE LAW

Wrongful Discharge

TERMINATION CHECKLIST

FOR
PERFORMANCE-
RELATED
PROBLEMS

- ✓ Was the employee informed in advance of the performance standards that he or she was expected to meet?
- ✓ Was the employee given advance warning that he or she was not meeting those standards and sufficient time, opportunity and assistance in order to correct or improve his or her performance?
- ✓ Does the employee's last performance appraisal or counseling memo accurately reflect these performance problems, and did it notify the employee of the possible consequences for continued failure to correct these performance deficiencies?
- ✓ Are there any mitigating factors which would justify giving the employee additional time to turn his or her performance around?
- ✓ Have these performance standards been consistently applied to all similarly situated employees, and have other employees with similar performance records also been terminated?
- ✓ Have all applicable Company policies and procedures been followed?

MANAGING WITHIN THE LAW

Wrongful Discharge

FOR
MISCONDUCT,
ATTENDANCE
AND OTHER
DISCIPLINARY
PROBLEMS

- ✓ Have the Company's progressive disciplinary procedures been followed?
 - Have all steps within that procedure been utilized or, if not, is there proper justification for skipping a step in the procedure?
 - Has each step been properly documented, including the verbal steps?
 - Has a full investigation of the problem leading to the termination, including the employee's explanation, been conducted?
- ✓ Have all applicable Company policies and procedures been followed?
- ✓ Is the discharge in accord with past disciplinary practices with regard to other similarly situated employees?
- ✓ Can each of the following questions be answered "yes"?
 - Was the employee placed on notice that a continuation of the problem would result in termination?
 - Before administering discipline to the employee, was an effort made to discover whether the employee did in fact violate or disobey a rule or order of management?
 - Was the Company's investigation conducted fairly?

MANAGING WITHIN THE LAW

Wrongful Discharge

IN ALL TERMINATION SITUATIONS

- ✓ Has the Human Resources representative been consulted prior to the termination decision?
- ✓ Have the discharge documents been prepared and do they include the following information?
 - Nature and dates of all previous disciplinary actions or performance problems; and
 - An explanation, including dates, of the incidents, actions and/or problems which resulted in the employee's discharge.
- ✓ Have the necessary approvals been obtained?
- ✓ Has an exit interview been scheduled for the terminated employee?



EQUAL EMPLOYMENT OPPORTUNITY



MANAGING WITHIN THE LAW

Equal Employment Opportunity

WHAT IS PROTECTED?

Protected Classes

Race
Color
National Origin
Religion
Sex/Pregnancy
Age
Sexual
Orientation

Regulated Decisions/Conduct

Hire/Fire
Compensation/Promotions
Terms, Conditions & Privileges of
Employment
Limit, Segregate, Classify
Harass
Retaliate
(Some jurisdictions)

THE BONA FIDE OCCUPATIONAL QUALIFICATION (BFOQ) DEFENSE

Employers may take sex, national origin or religion into account in making employment decisions when these characteristics directly affect a person's ability to do the "essence" of the job. For example, a manufacturer of men's clothing can require that applicants for modeling jobs be male without violating the law.

RACE & COLOR

The law protects individuals from discrimination based on race and color. Color discrimination focuses on skin color, and recognizes that skin color may vary within a given race. For example, an Eastern European employee is the same race as a Latino employee (Caucasian) but may have a different skin color.

MANAGING WITHIN THE LAW

Equal Employment Opportunity

NATIONAL ORIGIN

Employment decisions may not be made based upon on where an employee was born or his/her ancestral roots.

- ◆ ***Citizenship:*** U.S. citizenship cannot be required by an employer. Employees, however, must have the legal right to work in the U.S.
- ◆ ***English-Only Rules:*** Must be justified by a significant business reason and not apply to non-work time.
- ◆ ***Accents/English Fluency:*** English proficiency can be required if it is necessary to do the job. For example, a customer service representative must be able to communicate with customers. Likewise, an applicant's pronounced accent may disqualify him/her from a customer service job because he/she cannot be understood over the telephone. However, the accent may not disqualify him/her from a job with little public contact or communication with co-workers.

RELIGION

The protection for religious beliefs and practices is extremely broad under the law. Essentially, any set of ethical or moral beliefs which are sincerely held with the strength of traditionally recognized religions are protected from discriminatory actions.

- ◆ ***Reasonable Accommodation:*** Employers must also accommodate religious beliefs, practices, dress and holidays, unless to do so would cause an undue hardship.

MANAGING WITHIN THE LAW

Equal Employment Opportunity

SEX & PREGNANCY

Employers may not make decisions on the basis of an employee's gender, male or female. The protection does not extend to sexual orientation, transvestites or transsexuals.¹ The law also protects women from discrimination based on pregnancy.

AGE

The law protects employees and applicants from discrimination on the basis of age once they reach 40. Additionally employers are prohibited from requiring retirement at a certain age, except under very limited circumstances.

PHYSICAL AND MENTAL DISABILITY

Federal and most state laws prohibit employers from discriminating against disabled persons regarding any term, condition or benefit of employment. Applicants and employees with disabilities who are qualified to perform the essential functions of a job with or without reasonable accommodation must be considered for openings, promotions and other employment benefits without regard to their disability. Employers must also provide accommodations to assist individuals with disabilities; so long as such accommodations are reasonable and do not cause the employer undue hardship. Employers must engage in a good faith and interactive process with employees to identify an effective, reasonable accommodation.

¹ Sexual orientation and gender identity may be separately classified as protected characteristics. Fourteen states and the District of Columbia include sexual orientation in their anti-discrimination statutes, and three states extend it further to include gender identity.

MANAGING WITHIN THE LAW

Equal Employment Opportunity

DISABILITY DISCRIMINATION

WHO IS PROTECTED?

The law protects qualified individuals (i.e., those with the requisite skills, knowledge and experience);

1. With significant physical or mental impairments;
2. With a record of an impairment, such as cancer which is in remission or a history of back ailments;
3. Who are regarded as having an impairment, for example those infected with HIV; and,
4. Who live with or have a relationship with a disabled person.

EXAMPLES OF PROTECTED DISABILITIES

Physical

- Hearing, Speech & Visual Impairments
- Paralysis
- Cancer
- Epilepsy
- Loss of Limb

Mental

- Severe Anxiety Disorders
- Paranoid Schizophrenia
- Post-Traumatic Stress Disorders
- Severe Depression

Physical characteristics, such as eye and hair color, height and left handedness are not protected impairments. Additionally, temporary impairments, such as broken limbs, concussions and the flu are not considered disabilities.

MANAGING WITHIN THE LAW

Equal Employment Opportunity

WHAT ARE ESSENTIAL JOB FUNCTIONS?

“Essential functions” means the fundamental job duties of the position. “Essential functions” does not include the marginal functions of the position. A job function may be considered essential for the following reasons:

- ◆ The function may be essential because the reason the position exists is to perform that function; and/or
- ◆ The function may be essential because of the limited number of employees available among whom that job function can be distributed.

Evidence of whether a particular function is essential can include:

- ◆ The amount of time spent on the job performing the function and,
- ◆ The consequences of the function not being performed.

MANAGING WITHIN THE LAW

Equal Employment Opportunity

WHAT IS “REASONABLE ACCOMMO- DATION?”

- ◆ Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
- ◆ Job restructuring
- ◆ Part-time or modified work schedules
- ◆ Reassignment to a vacant position
- ◆ Acquisition or modification of equipment or devices
- ◆ Appropriate adjustment or modifications of examinations
- ◆ The provision of qualified readers or interpreters
- ◆ Other similar accommodations for individuals

WHAT IS AN UNDUE HARDSHIP?

Undue hardship means an action requiring *significant* difficulty or expense, when considered in light of the following factors:

- ◆ the nature and cost of the accommodations needed;
- ◆ the financial resources of the facility;
- ◆ the number of persons employed;
- ◆ the effect on expenses and resources of the College as a whole; and/or
- ◆ the impact otherwise of such accommodation upon the operation of the facility.

MANAGING WITHIN THE LAW

Equal Employment Opportunity

Theories of Discrimination

DISPARATE IMPACT

Discrimination that results from employment policies or practices which appear to be neutral, but actually disadvantage employees or applicants in disproportionate numbers based on a protected characteristic. For example, height and weight requirements, while neutral on their face, would tend to impact women and certain minorities more harshly.

DISPARATE TREATMENT

Discrimination that results from intentionally treating employees or applicants differently because of a protected characteristic. For example, requiring female applicants to take pre-employment tests not required of male applicants.

How Are Discrimination Cases Won Or Lost?

DISPARATE IMPACT

1. Plaintiff's Prima Facie Case
2. Defendant's Showing of Business Necessity and "Least Intrusive Means."

DISPARATE TREATMENT

1. Plaintiff's Prima Facie Case
2. Defendant's Legitimate Non-Discriminatory Reason
3. Plaintiff's Showing of Pretext

PRETEXT - HOW IT'S PROVEN

1. Jokes/Slurs/Epithets/Derogatory Comments
2. Inconsistent Treatment
3. Statistics



FAMILY AND MEDICAL LEAVES



MANAGING WITHIN THE LAW

Family And Medical Leaves

FAMILY AND MEDICAL LEAVES

Under the Federal Family and Medical Leave Act

- ◆ Women and men are entitled to take unpaid leave to care for a newborn, adopted or recently placed foster child, or seriously ill child, parent or spouse, or for their own serious health condition. Child is defined as biological, adopted or foster child, stepchild, legal ward or adult dependent child.
- ◆ The leave may not exceed a total of **12 weeks within a 12-month period.**
- ◆ Eligible employees must have been employed for at least one year and have performed at least 1250 hours of work in the year preceding the request for leave.
- ◆ Employers must continue to provide group health benefits during the leave on the same basis as if actively at work.
- ◆ Right of reinstatement to same or equivalent position.

SPECIAL CALIFORNIA RULE

Women disabled due to pregnancy or childbirth are entitled to a leave of up to four months, and do not exhaust family leave benefits during that time. Once a women is no longer disabled she can take an additional 12 weeks of family (child bonding) leave.



SEXUAL HARASSMENT



MANAGING WITHIN THE LAW

Sexual Harassment: The Continuing Saga

HOW DOES THE LAW DEFINE SEXUAL HARASSMENT?

Sexual harassment is UNWELCOME conduct of a SEXUAL NATURE that occurs in the workplace and takes one of two forms:

- ◆ ***Quid Pro Quo Harassment:*** when submission to or rejection of sexual conduct is used as the basis for making employment decisions, such as promotions, pay increases, hiring and firing; or
- ◆ ***Hostile Environment Harassment:*** sexual conduct which has the *purpose or effect* of unreasonably interfering with an employee's work performance *or* creates an intimidating, hostile, or offensive working environment. A violation of the law occurs even if the individual suffers no economic loss or tangible job detriment.

DETERMINING WHEN SEXUAL CONDUCT IS UNWELCOME

- ◆ The inquiry will be whether the employee by his/her conduct indicated that the sexual advances or conduct were unwelcome, not whether any participation was voluntary.
- ◆ The “totality of the circumstances” will be evaluated such as:
 - Whether the employee contemporaneously complained about the conduct;
 - If no complaint was made, the reason the employee did not come forward, i.e., fear of retaliation;
 - Whether the employee's conduct was consistent or inconsistent with the claim that the sexual conduct was unwelcome; and,
 - Whether the individual initiated the conduct.

MANAGING WITHIN THE LAW

Sexual Harassment: The Continuing Saga

DETERMINING WHETHER A WORK ENVIRONMENT IS HOSTILE

- ◆ The conduct must be sufficiently severe or pervasive so as to alter the conditions of the employee's employment. Trivial or merely annoying conduct will not sufficiently alter an employee's working conditions. Hypersensitive employees will not automatically be entitled to relief.
- ◆ A pattern of offensive conduct is generally required. Unless severe, a single incident or isolated incidents of sexual conduct or remarks will not be sufficient to show environmental harassment.
- ◆ The conduct will be evaluated from the objective viewpoint of a *reasonable person* facing the same conditions. The victim's perspective and not community standards or stereotypes of acceptable behavior will be used.

For example, a workplace in which sexual slurs, displays of pinups and other offensive conduct are commonplace can still be a hostile environment even if many employees deem it to be harmless or insignificant.

MANAGING WITHIN THE LAW

Sexual Harassment: The Continuing Saga

THE EEOC HARASSMENT GUIDELINES

SEXUAL HARASSMENT GUIDELINES

- (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual 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 employment decisions 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.
- (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.
- (c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.
- (d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

MANAGING WITHIN THE LAW

Sexual Harassment: The Continuing Saga

THE EEOC HARASSMENT GUIDELINES

SEXUAL HARASSMENT GUIDELINES

- (e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.
- (f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.
- (g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied the employment opportunity or benefit.

MANAGING WITHIN THE LAW

Sexual Harassment: The Continuing Saga

CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

HOW STATE LAW DEFINES SEXUAL HARASSMENT

In its regulations, the California Fair Employment and Housing Commission defines sexual harassment as including, but not limited to:

State Definition

Verbal harassment: epithets, derogatory comments or slurs.

Physical harassment: assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual.

Visual forms of harassment: derogatory posters, cartoons or drawings.

Sexual favors: unwanted sexual advances which condition employment benefit upon an exchange of sexual favors.

Examples

Name-calling, belittling, sexually explicit or degrading words to describe an individual, sexually explicit jokes, comments about an employee's anatomy and/or dress, sexually oriented noises or remarks, questions about a person's sexual practices, use of patronizing terms or remarks, verbal abuse, graphic verbal commentaries about the body.

Touching, pinching, patting, grabbing, brushing against or poking another employee's body, hazing or initiation that involves a sexual component, requiring an employee to wear sexually suggestive clothing

Displaying sexual pictures, writings or objects, obscene letters or invitations, staring at an employee's anatomy, leering, sexually oriented gestures, mooning, unwanted love letters or notes.

Continued requests for dates, any threat of demotion, termination, etc., if requested sexual favors are not given, making or threatening reprisals after a negative response to sexual advances, propositioning an individual.

MANAGING WITHIN THE LAW

Sexual Harassment: The Continuing Saga

WHAT ARE THE OBLIGATIONS AND LIABILITIES OF EMPLOYERS AND SUPERVISORS?

Key Responsibility: Employers and supervisors must take steps to **prevent** sexual harassment, **and respond promptly** to stop harassment which is brought to their attention or which should have been known to them.

The nature of the legal obligations and potential liability depend upon whether the alleged harasser is exploiting a position of power to obtain sexual favors.

Supervisor	→	Employee
Employee	→	Employee
Customer/Vendor	→	Employee
Employee	→	Non-employees in a business, service or professional relationship.

MANAGING WITHIN THE LAW

Sexual Harassment: The Continuing Saga

SUPERVISOR →
EMPLOYEE
(POWER
RELATIONSHIP)

- ◆ Quid Pro Quo Harassment: the employer will *always* be liable where a supervisor has made or threatened to make an employment decision based on the refusal to participate in sexual conduct. The use of authority and position to obtain sexual favors may result in liability even when the sexual advances or conduct occurs during non-working hours or off company premises.

Supervisors may also be held personally liable for such conduct.

- ◆ Hostile Environment: The employer is automatically liable for environmental harassment created by the conduct of a supervisor. Under federal law, employers may have a defense if (1) there has been no tangible job loss or detriment; (2) the employer has an established and disseminated sexual harassment policy and complaint procedure; and (3) the complainant unreasonably failed to complain about the unwelcome conduct.

In California, employers are generally held to a strict liability standard regarding the conduct of supervisors and those in positions of power. Supervisors may be held personally liable for their own wrongful conduct.

MANAGING WITHIN THE LAW

Sexual Harassment: The Continuing Saga

EMPLOYEE →
EMPLOYEE
(NEUTRAL
POWER
RELATIONSHIP)

- ◆ An employer becomes liable for sexual harassment between employees when it **knew or should have known of the conduct and fails to take immediate and appropriate corrective action.**
- ◆ Employees have been held personally liable in California for their unlawful conduct.

MEMBERS OF THE
PUBLIC /
CUSTOMERS
AND
VENDORS →
EMPLOYEES

The same standard will be used as with harassment which occurs between two employees.

MANAGING WITHIN THE LAW

Sexual Harassment: The Continuing Saga

EMPLOYEE →
NON-EMPLOYEE
IN A
“PROFESSIONAL
RELATIONSHIP”

An employee (and potentially a person’s employer) is liable for sexual harassment committed by the employee to a non-employee if:

- ◆ a business, service or professional relationship exists – such as physician, psychotherapist, dentist-patient, attorney-client; banker; trust officer; real estate agent; accountant; loan officer; teacher-student; or other “substantially similar” relationship;
- ◆ the non-employee cannot easily end the relationship without tangible hardship;
- ◆ sexual advances, solicitations, sexual requests; or demands for sexual compliance have been made;
- ◆ the conduct was unwelcome and persistent or severe;
- ◆ the conduct continued after a direct request to stop; and
- ◆ the non-employee has suffered or will suffer economic loss or disadvantage or personal injury as a result.

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PREVENTING WORKPLACE SEXUAL HARASSMENT: WHAT NO ONE IS TELLING YOU

THE LITMUS TEST

If you have any question about whether your comments, compliments, jokes or conduct will be considered unwelcome, don't do it. If you need help drawing a line for workplace comments or conduct, use either of our three "litmus tests":

1. Would you say the same thing or allow such a comment to be said to a loved one to whom you feel especially protective, *e.g.*, a daughter, son, niece, nephew, sister or brother? If you wouldn't want such a comment said to that person, then don't say it and don't allow it to be said to others.
2. Would you make the same comment or act in the same manner if your spouse/partner **and** the other person's spouse/partner were present? If not, don't say it and don't allow it to occur.
3. Would you want to read about your comments or conduct on the front page of the morning newspaper? If that is a distasteful thought, then do not make the comment or engage in the conduct.

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ALCOHOL: MODERATION OR TEMPTATION?

A surprising number of sexual harassment issues arise when co-workers drink alcohol. Often this conduct occurs at company functions, such as holiday parties, and the excessive consumption of alcohol prompts embarrassing and regrettable conduct. Alcohol loosens inhibitions and causes you to look differently at that co-worker you have known for years. Suddenly, your co-worker is unbelievably more attractive and more witty than you ever thought he or she could be. A possible solution is to avoid drinking alcohol with co-workers unless: (1) it is just one drink; (2) you know the person well enough to avoid any misunderstandings in communication; or (3) both parties' spouses/partners are present. The presence of spouses/partners serves to dramatically counteract the effect of alcohol consumption.

WAIT FOR THE RETURN ARROW

The law does not prohibit you from asking a co-worker out on a date one time. However, if the person you ask declines without indicating that he or she is interested in going out another time, then don't ask again. Wait for the person to return Cupid's arrow by asking you out socially.

COMPLIMENTS DON'T INCLUDE BODY PARTS

It is perfectly acceptable to compliment co-workers if the remarks have no sexual component. "That is a nice tie" or "Those are nice earrings" are appropriate comments and do not constitute sexual harassment. However, by including body parts in the compliment, you introduce a sexual element in the comment. "You have great legs" objectifies the person's body and should be avoided.

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KNOW YOUR LIMITATIONS

If you have been involved in prior incidents in which co-workers misunderstood you regarding your intentions, then be especially cautious in how you interact with others. Be sensitive to how you are being perceived.

“I WAS JUST JOKING” IS NO EXCUSE

The law on sexual harassment clearly states that an individual's sexual conduct that has the *purpose or effect* of unreasonably interfering with an employee's work performance or creates a hostile environment can be found to be unlawful. Everyone understands that deliberately creating a hostile environment would be unlawful. However, many people don't understand that intent is irrelevant – merely creating the effect is sufficient. “I didn't mean to do anything. I was just joking around.” These are common excuses, but they are not ways to escape liability.

LISTEN AND PAY ATTENTION

Almost all sexual harassment complaints could be resolved without involving a supervisor or the human resources department, if everyone in the workplace paid more attention to the verbal and nonverbal cues of others. An employee usually gives some indication that the objectionable conduct from another employee is unwelcome. Pay attention and respect that individual's wishes.

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A CO-WORKER IS A CO- WORKER

Many employees make the mistake of believing co-workers are their friends based on “friendly” interaction in the workplace, and therefore often unwittingly step over the line of acceptable behavior. Unless you truly have a relationship outside of work, then a co-worker is a co-worker, not a friend.

CONFIDENTIALITY: NOT SECRECY

Anyone who complains to management about unwelcome and offensive conduct should expect the complaint to be handled in a confidential manner. However, you must understand that confidential does not mean secret. Rather, it means that the matter will only be addressed with those who have a legitimate business need to know the information.

DON'T FISH OFF YOUR OWN PIER

Numerous issues are raised when supervisors date subordinates. Under the best of circumstances you create morale, credibility and supervisory problems. The worst case scenario is exposure to sexual harassment complaints and possible liability. There are many fish in the sea, just don't fish off your own pier.