

*The Critical Role of the Human Resource Liaison in
Addressing and Preventing Workplace Harassment*



Mary Egan
Municipal Resource Group, LLC.
Contact us at www.municipalresourcegroup.com

THE LEGAL STANDARDS

Federal Title VII of Civil Rights Act of 1964*	California Fair Employment Housing Act	Local Rules
<p>Harassment is unwelcome conduct that is based on race, color, religion, sex pregnancy, national origin, age (40 +), disability or genetic information.</p> <p>Harassment is unlawful where</p> <ol style="list-style-type: none"> 1) Enduring the offensive conduct becomes a condition of continued employment, 2) Conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. 	<p>Adds “medical condition” “marital status” and “sexual orientation” to federal standards.</p> <p>Under the FEHA, an entity is required to take <u>all reasonable steps</u> to prevent harassment from occurring. Cal. Govt. Code ' 12940(j)(1).</p> <p>Mandatory training (AB 1825) impacts supervisors personally</p> <p>Does not require adverse employment action</p>	<p>Some agencies have a “zero tolerance” policy</p> <p>Some policies mention violence in the workplace or define harassment more broadly</p>

*NOTE: Also relevant the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA) and the Family and Medical Leave Act.

Bottom line under Law

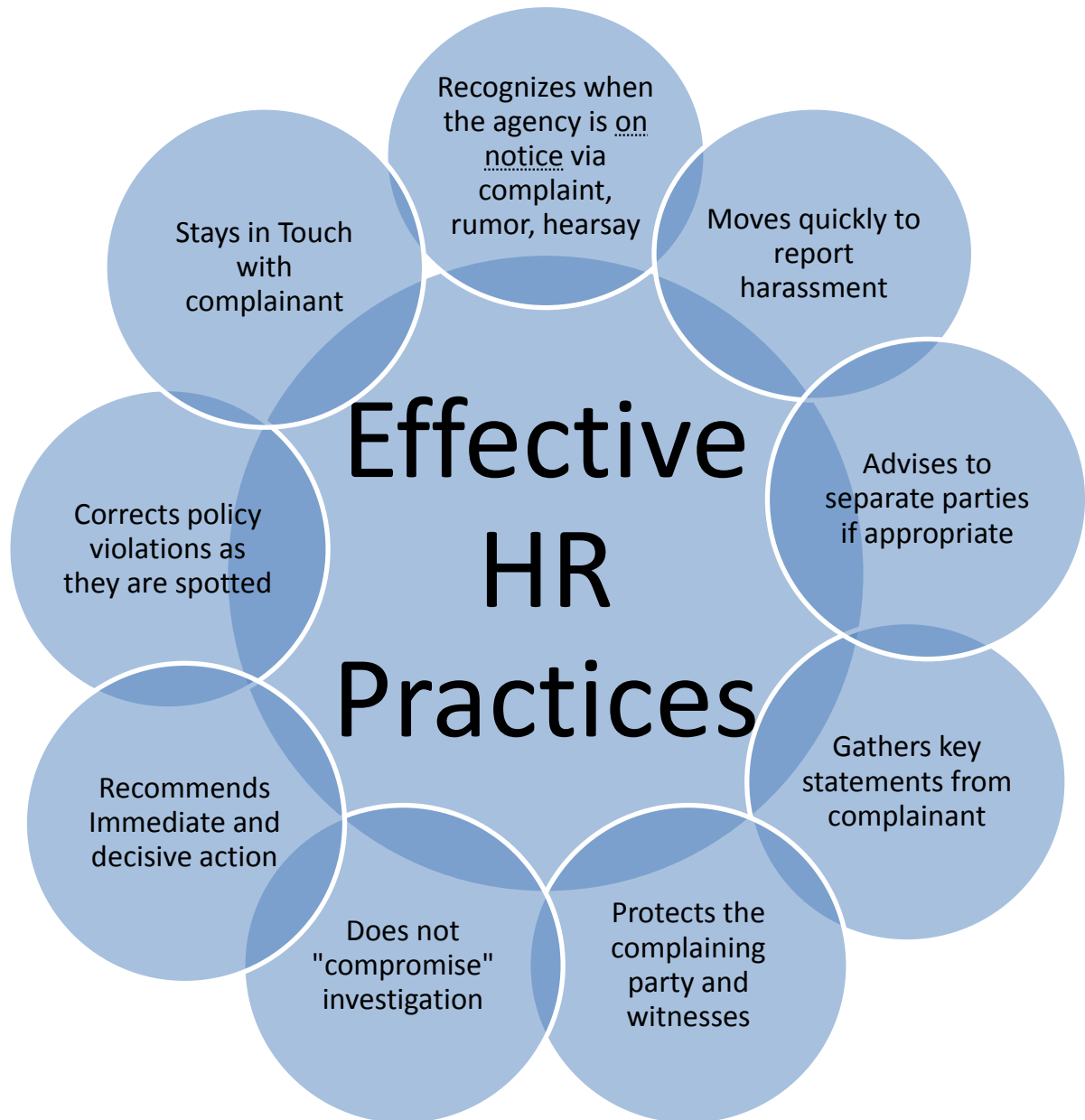
- Must investigate **all** harassment allegations
- ...even if already discontinued
- ...even if complainant does not want an investigation

Bottom line for HR

- HR is mandatory reporter
- HR must be able to identify harassment, discrimination, retaliation, violation of agency policies
- Role is **CRITICAL** in mitigating future lawsuits

YOUR CRITICAL ROLE

Preventing harassment in the workplace begins with maintaining an environment where others are comfortable communicating issues, concerns and observations, and you are clear on what constitutes harassment and discrimination and local protocols for evaluating complaints.



RECEIVING THE EMPLOYEE COMPLAINT

Hostile Work Environment	Quid Pro Quo	Retaliation	Other Policy Violations
<ul style="list-style-type: none">• Conduct that unreasonably interferes with work performance or creates an intimidating, hostile or offensive work environment based upon protected status	<ul style="list-style-type: none">• Submission to sexual conduct is made explicitly or implicitly as a term or condition of employment• Using sexual conduct as a basis for employment decisions	<ul style="list-style-type: none">• Adverse Actions that arise because an employee participated in an investigation	<ul style="list-style-type: none">• Violations of County Policies or Codes of Conduct that do not rise to level of harassment

CREATING AN INTAKE FILE

1. Gather Information from Complaining Employee

- Follow **non judgmental**, open-ended line of questioning
 - 5-W's, witness, who else knows
- Be careful to **remain objective** and not appear to have "conclusion", remain neutral
- Be careful what you reveal to complaining party
- Make **no promise of confidentiality**, shared with those who "need to know"
- Carefully protect confidential information

- Ensure employee leaves with notice letter, copy of policy, admonition not to talk with others

2. Prepare for the Investigation

- ✓ *Choose a qualified investigator*
- ✓ *Collect relevant data (e.g. org chart, policies, timesheets, phone list)*
- ✓ *Coordinate logistics, notice to employees*
- ✓ *Receive and monitor other complaints outside scope*
- ✓ *Make yourself available without becoming part of the story*
- ✓ *Assess violence potential*
- ✓ *Watch for **retaliation** Examples may include*
 - Changes in work assignment, workload, hours or work hours

3. Remain on “high alert” during investigation, watching for:

- Breach of communication/confidentiality
- Supervisor conduct
- Issues with other pending actions (promotions, reassignment, special assignment)

CONSIDER GUIDANCE OFFERED BY EEOC /DFEH

- **Confidentiality:** The complaining party should be told:
 - a. Information concerning complaint of harassment will only be shared with those who need to know, which would include the alleged harasser and, as necessary, potential witnesses.
 - b. Records relating to the complaint should be kept as confidential as possible on the same basis. Note that report may become a part of the Notice of Proposed Discipline as an attachment.

- **Promptness:** The investigation should begin immediately and completed as soon as possible.
 - a. Waiting until after the complainant files an administrative charge, or other substantial delay is not encouraged.
 - b. Employees on medical leave should be evaluated on a case-by-case basis.

- **Intermediate Measures:** After beginning an investigation
 - a. Employer must attempt to ensure that further harassment and retaliation does not occur (e.g., avoid contact between the complainant and alleged harasser, placing the alleged harasser on paid administrative leave or changing supervision).
 - b. Take caution to not initiate any action against the complainant, since such actions could be deemed retaliatory.

- **Objectivity:** The investigation should be conducted by an objective investigator
 - a. Consider chain of command and rank in determining who will investigate.

- **Inquiries:** The complainant, alleged harasser and third parties who could reasonably be expected to have relevant information should be interviewed.

- a. Maintain the scope of the initial complaint and ensure that extraneous information (e.g. the person life of the complaining party or their job performance) is not considered unless relevant.
 - b. The investigator should deal in factual information, and ask non-leading, open-ended, relevant questions.
- **Credibility:** When there are conflicting versions of events, the investigator must weigh the credibility of the witnesses. Factors to consider include the inherent plausibility of one version or another, demeanor, motive, and corroborative evidence such as timesheets, data and records. There is often no eyewitness to sexual harassment
- **Conclusion:** A determination as to whether or not sexual harassment occurred (applying the law and the Agency's policies) should be made by the employer or counsel for the employer.
- a. Where there are conflicting versions, and a lack of corroboration, a credibility assessment often serves as the basis for findings.
- **Remedial Measures:** If it is determined that harassment occurred, immediate and appropriate corrective action that is designed to:
- (1) Stop the harassment,
 - (2) Correct its effects on the complainant, and
 - (3) Ensure that the harassment does not recur and does not adversely impact the complainant, must be taken by the employer.
- a. In all cases, the employer should initiate preventive measures, such as training and monitoring.
- **Notice:** Both parties should be advised of the general results of the investigation however, discipline imposed, if any, is confidential personnel information

- Express gratitude for bringing claim
- Resolve non-policy violation conflicts
- No retaliation

Complainant

- Remind employees have a right to bring claims
- Find a "teachable moment"
- No retaliation

Violator

- Should not be told outcome
- Should be told investigation is complete
- Should understand

Witnesses

PUTTING THE WORKPLACE UNIT BACK TOGETHER

Taking Remedial Action

Remedial action should be designed to prevent future misconduct from occurring in the future, reaffirm the policy and expectations of employer, send a clear message that harassment will not be tolerated and not adversely impact the complaining party.

Document your follow up with employees

Resolving the Workplace Conflict

Check in one-on-one with the parties to debrief, discussing the process, concerns and any lingering impacts of the investigation

Provide additional training to resolve “wounds” identified in process

Consider Mediation (only after the investigation) if an apology, resolution at interpersonal level is appropriate. May also consider a focused meeting between the accuser and the respondent conducted through a professional or provided through EAP Services

Protecting the Parties and the Organization

Establish a Zero Tolerance harassment policy

Continue educating on policy and living up to standards defined

Watch for possible retaliation, which can occur even if investigation finds no harassment

Be careful with reassignments - Reassigning a complaining employee to a different job position following a complaint could be viewed as retaliation Even if the position has equal pay and benefits, but is less desirable or less prestigious, then a court could construe such a reassignment as retaliation.

WHAT IS RETALIATION?

California's Fair Employment and Housing Act (FEHA) deems it unlawful for a California employer to discharge, expel, or otherwise discriminate against any person because that person has opposed any practices forbidden under the statute or has filed a complaint, testified, or assisted in any proceeding under the statute. Cal. Govt. Code 12940(h).

The Federal Title VII has similar language. Under Federal EEO guidelines, protected "participation" means participating in an investigator or proceeding, (filing a complaint of discrimination, participating in internal investigation, or serving as a witness in the investigation or subsequent litigation). The guidelines further include requesting a reasonable accommodation based on religion or disability as a "protected activity."

Under either standard, an employer can discipline an employee as an outcome of an investigation and defend a retaliation claim.

ACTIONS THAT CAN BE DEEMED RETALIATORY

1. Moving complaining party, their office, their assignment
2. Criticizing or interfering with employee seeking advice of EEOC/DFEH or filing a complaint
3. Restricting access to development, training or promotional opportunities
4. Permitting office chatter about the complaint, the outcome of the complaint, the discipline of the harasser
5. Failure to address workplace needs, interactive meeting, leave requests
6. Failure to include parties in office events, communication, staff meetings, "shunning"

PREVENTING HARASSMENT IN YOUR AGENCY

1. Acknowledge your critical role in harassment prevention
2. Communicate policies and expectations to the organization
3. Take action when you spot a violation of policy
4. Educate supervisors and managers
5. Strive to create an environment of respect and professionalism
6. Hone your communication skills

References & Additional Reading

EEOC Guidance on Vicarious Employer Liability For Unlawful Harassment by Supervisors (BNA) N. 915.002 (6/18/99). (EEOC.gov/policy/docs/harassment.htm#VC1e)

EEOC Compliance Manual, ' 615.3 Sexual Harassment Guidelines, January 27, 2000, 29 C.F.R. ' 1604.11(f).

Placer County Policy against Workplace Discrimination, Harassment and Retaliation, 2004 revision

Resolving Bitterness and Wounded Feelings in the Office After a Workplace Investigation Ron S. Brand and Debra L. Reilly CAOWI Quarterly, January 2010

Investigating Workplace Harassment – How to be Fair, Thorough and Legal, Amy Oppenheimer JD and Craig Pratt SPHR

DFEH Poster on Discrimination (DFEH-162 English and DFEH-162S Spanish) can be obtained from the Office of Documents and Publications of the Department of General Services, by calling 1 800 884-1684 (from within California) or 1 916 227-0551 (from outside California). You can mail a request to DFEH, 2218 Karsen Drive, Suite 100, Elk Grove, California 95758. Or you can download the poster for free at www.dfeh.ca.gov/Publications/posters.asp

To Contact Mary Egan

Mary Egan
Municipal Resource Group LLC
P.O. Box 561
Wilton, CA 95693
(916) 261-7547
egan@municipalresourcegroup.com