

EMPLOYMENT LAW

Rules for Sexual Harassment Training

BY RONALD W. NOVOTNY AND MONICA BALLARD

A law that took effect on New Year's Day 2005 requires California employers with 50 or more employees to provide training in sexual harassment prevention to their supervisors by year's end. The law, AB 1825, amends the state Fair Employment and Housing Act (FEHA) by requiring those employers to provide such training to all supervisory employees employed as of July 1, 2005, and to all new supervisory employees within six months of assuming their positions. Employers that have provided training and education to supervisory employees after January 1, 2003, are not required to comply with the January 1, 2006, deadline but must provide the new training to each supervisory employee at least once every two years.

The provisions of the new law, codified at California Government Code section 12950.1, specifically require that the training consist of "at least two hours of classroom or other effective interactive training and education regarding sexual harassment." The training must include practical examples aimed at instructing supervisors to prevent harassment, discrimination, and retaliation and must be presented by "trainers or educators with knowledge and expertise." The statute also provides that the required training is intended to establish only a minimum threshold and should not discourage or relieve employers from providing "longer, more frequent, or more elaborate training and education." (Cal. Gov't Code § 12950.1(f).)

The new law provides that failing to provide the training "shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment." It also states that compliance "does not insulate the employer from liability for sexual harassment of any current or former employee or applicant." (Cal. Gov't Code § 12950(d).)

WHICH EMPLOYEES ARE COVERED?

The FEHA defines a supervisor as any individual having the authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that

action" as long as independent judgment is required. (Cal. Gov't Code § 12926(r).) The Legislature clearly intended for sexual harassment training to be provided to employees who meet this statutory definition.

However, determining whether someone is a supervisor under the FEHA is not always easy. Although higher-ranking managers and executives will almost always meet the test, questions often arise as to whether frontline supervisors and middle-management employees meet the statutory test. For example, in *Babbitt Eng'g & Mach. v. Agricultural Lb. Rel. Bd.* (152 Cal. App. 3d 310, 327-8 (1984)), the court concluded that an employee was not a supervisor merely by virtue of his limited ability to direct other employees.

Even more difficult is the question of whether such people exercise the authority with the required "use of independent judgment." Many middle- or lower-level supervisors may occasionally manage other workers in ways that require using judgment, while at other times they are merely required to enforce the policies in the company's policy manual or employee handbook.

There may be significant consequences to either providing or not providing the sexual harassment training to such people. Some employers, for example, may be reluctant to include frontline supervisors who spend most of their day working with rank-and-file employees in the sexual harassment prevention training given to higher-level management. But if such an employee is not properly trained to recognize conduct that may



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create a “hostile work environment” or to receive a complaint of harassment under the company’s antiharassment policy, the employer could be charged with failing to take “all reasonable steps necessary to prevent sexual harassment” as required. (Cal. Gov’t Code § 12940(k).) Moreover, if such a person is later found to actually be a statutory supervisor, an employee complaining of harassment may be able to argue that the offensive behavior could have been avoided if that person had received the newly required training.

On the other hand, providing the training to employees with “quasi-supervisory duties” may increase the company’s potential liability for unlawful harassment if that person does not actually meet the statutory test. Employers are strictly liable for unlawful harassment committed by their supervisors, including those with frontline supervisory duties. (*See, Carrisales v. Dep’t of Corrections*, 21 Cal. 4th 1132, 1136 (1999).) Complaining employees may argue that providing training to such a person is an admission that the person met the test of a statutory supervisor. This could be particularly significant in a quid pro quo type of situation, in which the alleged harasser conditions employment opportunities or benefits on submitting to sexual advances. (If the alleged harasser is not a statutory supervisor, then the employer is liable for unlawful harassment only if it knew or should have known of such harassment and failed to take immediate and appropriate corrective action.)

The legal effects of such a Hobson’s choice will have to be fleshed out in future cases interpreting the statute. However, one possible way to avoid this dilemma may be to provide similar training to all employees, so that merely including a “quasi-supervisor” in the training required by the new law cannot be argued to constitute an admission of supervisory status.

A LOOK AT THE TRAINING COMPONENTS

An effective sexual harassment training program should be tested and have a proven track record of success to meet the statutory requirement that it be “classroom or other effective interactive training.” A program should include various

forms of media so that it allows for people who learn in one mode more effectively than others to process the information provided. The training should also accommodate different types of learners, including visual, audio, and kinesthetic learners.

Visual learners. The most common educational models are reading and video. Younger supervisors and supervisors in creative industries learn best with visuals. Lawyers tend to process written information effectively and be less responsive to video.

Audio learners. Few people are pure audio learners, but most individuals process information at least partially through their auditory systems. Group discussions and the auditory part of video portions of the class contribute to audio learners. Telephone operators and customer service representatives, for example, often learn best when the session includes audio.

Kinesthetic learners. Participants learn through practicing skills and role playing, having the chance to build kinesthetic awareness. Also, intervening effectively in sexual harassment complaints requires so many diverse skills that during training supervisory employees *must* practice effectively both responding to a complaint and spotting questionable behavior.

Most adults learn optimally in twelve-minute segments. Effective training programs should be designed so that participants change learning modes every twelve minutes, never participating in longer periods of writing exercises, role playing, reading, or watching video. Having an expert deliver a lecture to supervisors for the required two-hour minimum is ineffective because after twelve minutes most participants are mentally reviewing their to-do lists. For this reason, the lecture format is an ineffective mode for educating employees who are not attorneys.

INTERACTIVE TRAINING

The new law requires the training to be interactive. In interactive training, the facilitator has less control than in a lecture format and allows the participants to discuss the subject presented. There is a

direct correlation between the amount that participants learn and the feeling of comfort they experience in the workshop. This is accomplished when the training provider facilitates the learning process in a nonconfrontational way. Dictating, lecturing, and opining about expected behaviors breeds resentment and defiance. The training provider must instead create a climate of mutual trust, openness, authenticity, and helping.

The law also suggests using practical examples and role playing in training. But many scenarios in sexual harassment training appear ridiculous, causing employees to discount the entire message. Video and instructional materials should be realistic and specific to each workplace. If they are not, cognitive dissonance occurs, in which the participant thinks, “This is not like my workplace. This has nothing to do with me.”

Training examples presented to lawyers might include the following situations:

■ You, your largest client, and your female paralegal are meeting over lunch when the client comments, “With legs like hers, it’s amazing you get any work done.” What should you say or do in this situation?

■ You play golf with some of your male associates. The female associates do not play golf. A complaint is made to the firm administrator that the men are receiving preferential treatment and “inside” coaching and development while all “the boys” are on the golf course. What do you say or do in this situation?

Such scenarios, either in textbooks or video or presented by actors, should stimulate discussion and opinion about the most effective way to protect all individuals involved. In selecting media to supplement the training, take caution to avoid video or other materials that stereotype harassers as drooling goons who stalk the halls of the workplace looking for innocent victims. This overdramatization and stereotyping injects the risk that participants will disregard the training overall.

TESTING STRENGTHS

Employers who have tested employees to prove that they know where to turn with

concerns about harassment, discrimination, or retaliation have stronger defenses against legal actions. Maintaining test records also assists an employer with defending a FEHA action, particularly when the employee must sign an attendance roster and an acknowledgement of having received the policy and any training materials.

Testing employees after they have received training also sends a message that the employer takes the subject seriously. It can help reinforce in employees proper procedures for reporting harassment and how they should respond to unwelcome conduct. Testing can also help employers establish the legal defenses discussed below, particularly when employees are required to sign an attendance roster and an acknowledgement of having received the policy and training materials.

LEGAL EFFECTS OF COMPLIANCE AND NONCOMPLIANCE

AB 1825 expressly provides that if an employer violates its requirements, the remedy shall be for the state Fair Employment and Housing Commission to “issue an order requiring the employer to comply.” (Cal. Gov’t Code § 12950(e).) However, in litigation involving sexual harassment claims, an employer’s compliance or failure to comply with the new training requirements for supervisors will have far greater implications.

First, in actions brought under Title VII of the Civil Rights Act (42 U.S.C. § 2000e), providing effective training may help an employer establish a defense to liability for sexual harassment of an employee by his or her supervisor. In the *Faragher* and *Ellerth* cases decided in 1998, the U.S. Supreme Court held that when a supervisor’s sexual harassment of an employee does not result in a “tangible employment action” such as a firing or demotion, an employer may assert an affirmative defense based on evidence that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and that the plaintiff employee unreasonably failed to take advantage of

any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. (*Faragher v. City of Boca Raton*, 524 U.S. 775, 807–8 (1998); *Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (1998).)

The federal courts applying this affirmative defense have expressly acknowledged that training employees to prevent sexual harassment and to be familiar with the employer’s complaint process can help establish the first prong of this two-prong defense. (*Holly D. v. California Inst. of Tech.*, 339 F3d 1158, 1177 (9th Cir. 2003).) Conversely, the courts have held that an employer who does not provide antiharassment training, even when mandated by corporate policy, cannot establish the defense. (*EEOC v. Harbert-Yeargin, Inc.*, 266 F3d 498, 510 (6th Cir. 2001).)

The courts have also held that providing sexual harassment training may be used as a means of defending against a

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claim for punitive damages in Title VII cases. Under the *Kolstad* decision, an employer’s “good faith effort to comply with Title VII” may defeat a claim for punitive damages based on an agent’s harassing conduct. (*Kolstad v. American Dental Ass’n*, 527 U.S. 526, 545 (1999).) Evidence that an employer has made an effort to “educate its employees about its policies and the statutory prohibitions” has been cited to preclude punitive damages in such cases. (*Cadena v. Pacesetter Corp.*, 224 F3d 1203, 1210 (10th Cir. 2000).)

Even more significant for California employers is providing effective sexual harassment training that may help limit or even eliminate damages for sexual harassment by supervisors. In *Department of*

Health Serv. v. Superior Court (31 Cal. 4th 1026 (2004)), known as the *McGinnis* case, the California Supreme Court held that an employer may plead and prove a defense based on the “avoidable-consequences” doctrine in a FEHA action against the employer for hostile environment sexual harassment by a supervisor. The three elements to such a defense are that (1) the employer took reasonable steps to prevent and correct workplace sexual harassment, (2) the employee unreasonably failed to use the preventive and corrective measures, and (3) reasonable use of the procedures would have prevented at least some of the harm that the employee suffered. (*McGinnis* at 1044.)

In *McGinnis* the court rejected the *Faragher/Ellerth* defense to acts of sexual harassment by a supervisor because employers are strictly liable for such conduct under the FEHA. However, it also stated that to the extent the Supreme Court grounded the *Faragher/Ellerth* defense on the doctrine of avoidable consequences, its reasoning also applies to California’s FEHA actions. If the employer can establish that the employee could have caused the harassing conduct to cease by taking reasonable steps in using available complaint procedures, it will be able to avoid liability for the harm the employee incurred. (*McGinnis*, 31 Cal. 4th at 1044.)

The *McGinnis* court specifically stated that to take advantage of the avoidable-consequences defense, the employer should be prepared to show “that it has adopted appropriate anti-harassment policies and has communicated essential information about the policies and the implementing procedures to its employees.” (*McGinnis*, 31 Cal. 4th at 1045.) It further stated that whether a harassed employee would have reported the harassment will “in many and perhaps most instances present disputed factual issues” to be resolved, which unquestionably include the extent and effectiveness of the employer’s antiharassment training. (*McGinnis*, 31 Cal. 4th at 1044.) **CL**