

ROAD MAP FOR TODAY

- “Discrimination” Under Title VII
- “Hostile Work Environment” & Sexual Harassment
- “Discrimination” Within the meaning of EERA

WHAT IS DISCRIMINATION UNDER TITLE VII?

- Unlawful discrimination occurs when an employee in a protected class is subject to an adverse employment action because of his or her protected status

WHAT ARE THE PROTECTED CATEGORIES?

- Race
- Religious Creed
- National Origin
- Disability (Mental or Physical)
- Medical Condition
- Marital Status
- Age
- Sexual Orientation
- Military and Veteran Status
- Sex
- Pregnancy

**NOT ALL TYPES OF
DISCRIMINATION
VIOLATE FEDERAL
AND/OR STATE LAWS;
SOME TYPES OF
UNEQUAL TREATMENT
ARE PERFECTLY LEGAL!**

DISCRIMINATION IS NOT:

- Different treatment due to personality differences or conflicts;
- General treatment not based on a protected characteristic;
- Different treatment or rewards based on differing levels of productivity;
- Responses or changes to employment based on poor performance;
- Different treatment to meet the special needs of certain individuals, such as accommodations for disabled employees;
- Bullying;
- Different treatment based on individual merit, such as talent, skills, and other qualifications.

WHAT MUST THE PLAINTIFF PROVE?

1. Status in Protected Class
2. Adverse Action
3. Nexus Between Adverse Action and Protected Class
4. That the Employer's "Justification" is Pretextual

SEXUAL HARASSMENT IS A FORM OF DISCRIMINATION



"All the other women in the office are suing you for sexual harassment. Since you haven't sexually harassed me, I'm suing you for discrimination."

SEXUAL HARASSMENT IS ILLEGAL

Vis-à-vis Students

“No person shall be subjected to discrimination [including harassment] on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, [or] sexual orientation . . . in any program or activity conducted by any postsecondary educational institution that receives, or benefits from, state financial assistance or enrolls students who receive state student financial aid.”

Cal. Ed. Code. 66270

Vis-à-vis other Employees

“It is an unlawful employment practice . . . For an employer [or] labor organization . . . because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract.”

Cal. Gov. Code 12940(j)(1)

THERE ARE 2 BASIC TYPES OF UNLAWFUL SEXUAL HARASSMENT

- **Quid Pro Quo, i.e. “This for That”**
 - Requiring as condition of education/employment
 - Submission to unwelcome sexual conduct

- **Hostile Work Environment**
 - Unwelcome sexual conduct (physical, material, verbal)
 - That is sufficiently severe OR pervasive to affect educational/employment conditions
 - From an objective (the “reasonable person”) AND subjective (the actual person involved) perspective

“SEXUAL HARASSMENT” MEANS UNWELCOME SEXUAL [CONDUCT] MADE BY SOMEONE FROM OR IN THE WORK OR EDUCATIONAL SETTING, UNDER ANY OF THE FOLLOWING CONDITIONS:

- (a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress.**
- (b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.**
- (c) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.**
- (d) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.**

(per Cal. Ed. Code 66262.5, 212.5)



QUICK
PRACTICE
TIP:

Everything
That
Happens on
Mad Men Is
Illegal.

PROVING SEVERE OR PERVASIVE

Courts consider:

- nature of unwelcome sexual acts or words; generally physical touching is more offensive than unwelcome verbal abuse
- frequency of offensive encounters (“[t]he required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct”)
- total number of days over which all of the offensive conduct occurs
- context in which sexually harassing conduct occurred



Pepe Le Pew: Severe AND Pervasive.

IS IT FLIRTING OR IS IT HARASSMENT?

■ Case Facts:

“Munoz propositioned him for sex. Munoz wrote to him that she dreamed of him in a bath, that she gave good ‘body wash,’ and that she wanted him ‘sexually.’ She performed gestures simulating fellatio, and gave him a photograph of herself emphasizing her breasts and possibly without clothes on. . . . After she recruited coworkers to pressure Lamas, they mocked him by suggesting that he was homosexual.”

EEOC v. Prospect Airport Services, 621 F.3d 991 (9th Cir. 2010).

Sexual harassment law “is not a ‘civility code’ and is not designed to rid the workplace of vulgarity; while the FEHA prohibits harassing conduct that creates a work environment that is hostile or abusive on the basis of sex, it does not outlaw sexually coarse and vulgar language or conduct that merely offends.”

Lyle v. Warner Bros. Television Productions (2006)
38 Cal.4th 264.

IS IT FLIRTING OR IS IT HARASSMENT?

■ FLIRTING

“Not all propositions for romance or more are sexual harassment. People spend most of their waking hours with other people at their workplaces, so that is where many meet and begin social relationships, and someone has to make the first overture. . . . Had Munoz merely asked Lamas to go out on a date, or to see whether they might have a romantic relationship, or straightforwardly propositioned him for sex, and then quit when he clearly told her no,” her actions would not have reached the level of harassment.

■ HARASSMENT:

“Munoz’s pursuit of Lamas was relentless. She would not leave him alone, despite his repeated clear rejections of her overtures. She recruited other co-workers to deliver messages to him; the campaign broadened to include the whole workplace. Other workers began mocking Lamas for his failure to respond to Munoz’s sexual advances. Lamas described over six months of constant (and often daily) sexual pressure and humiliation from Munoz and other co-workers.”

REALITY CHECK:

Could your behavior be construed as harassing?

- Is it mutual? Am I sure?
- Is there a power difference?
- Is it having an impact on working/educational conditions?
- What if my loved ones knew about this? The public?
- What if this happened to a loved one?
- Would a “reasonable person” find this objectionable?



IF YOU HAVE BEEN SUBJECT TO HARASSMENT

- Inform your employer
- Inform your union
- Consider legal options
 - File education-based complaint with the Office for Civil Rights of the U.S. Department of Education (OCR)
 - File employment-based complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and/or the California Department of Fair Employment and Housing (DFEH)
- Remember you are protected from retaliation when you make a good faith complaint

THE ROLE OF THE UNION

- Preventing discrimination by the employer
- Preventing discrimination within its own ranks
- Organize and educate members to demand working conditions and union structures that empower all workers

“It is unlawful . . . For [a] labor organization . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.”

Cal. Gov. Code
12940(k)

WHAT IS “DISCRIMINATION” UNDER EERA?

Prima facie evidence of “discrimination:

1. Charging party engaged in protected activity;
2. The employer was aware of that activity;
3. The employer took an adverse action toward the charging party;
4. The employer’s “adverse action” was motivated by the charging party’s protected activity.
5. Employer’s business justification is pretextual

“PROTECTED ACTIVITY”

- - attending union meetings?
- - holding position as steward or cite representative?
- - attending public board meetings?
- - complaining about your evaluation results?
- - filing a grievance?
- - engaging in speech that is critical of administration?
- - participating in contract negotiations?

“EMPLOYER KNOWLEDGE”

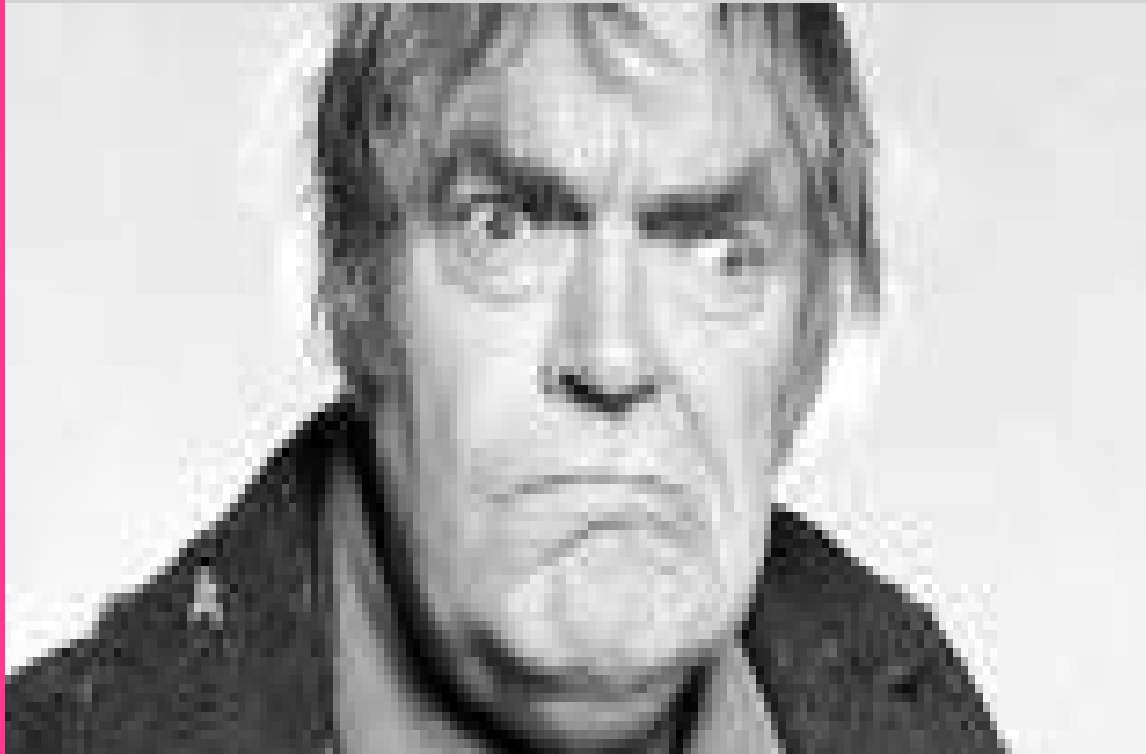
- Requires evidence that the employer “actually knew” or was “clearly informed” of the protected activity
- If an “agent” of the employer knew of protected activity *but was not involved in adverse decision* then the agent’s knowledge will *not be imputed* to the employer.
- Circumstantial evidence knowledge – must be “persuasive.”

“ADVERSE ACTION”

- - Reassignment to a less desirable job or schedule?
- - Losing a class assignment?
- - Poor evaluation?
- - A threat of future discipline?
- - Not being included on a committee?

PROVING NEXUS BETWEEN PROTECTED CONDUCT & ADVERSE ACTION

**“Dang, I hate Unions!
I’m going to fire every
last union supporter -
starting with *you!*”**



“BECAUSE OF” THE PROTECTED ACTIVITY

- Timing of action is persuasive but NOT enough alone;
- Disparate treatment
- Employer’s departure from *established* procedures & standards
- Statements by management suggesting union animus such as discouraging filing of grievances
- Failure to advise employee of justification for discipline at the time of incident
- Inconsistent, contradictory or exaggerated justifications for Employer’s actions
- Failure to investigate alleged misconduct *may* be relevant depending upon circumstances

PROCESS FOR FILING TITLE VII DISCRIMINATION CHARGE

■ EEOC:

1. File charge demonstrating basis for discrimination
2. Investigator assigned to the file
3. Employer provides response
4. If merit, EEOC may conduct “mediation”
5. EEOC submits “right to sue” notice
6. Plaintiff files suit in Federal court

PROCESS FOR FILING EERA DISCRIMINATION CHARGE

■ PERB

1. Charge is filed listing “prima facie” allegations;
2. PERB seeks response from the Charged Party;
3. If the Charging Party has failed to demonstrate element of “prima facie” case, a “warning letter” is issued, providing Charging Party the opportunity to cure defect;
4. If there is reason to believe that the facts if proven would violate EERA, a Complaint and Notice of Informal Conference issues;
5. If the matter is not settled at the “Informal,” it is set before an Administrative Law Judge.