

Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment

Chaffey College | March 18, 2024

Presented by: Alison R. Kalinski

LCW

LIEBERT CASSIDY WHITMORE

Preventing Harassment, Discrimination
and Retaliation in the Academic
Setting/Environment

Presented by:

Alison R. Kalinski / March 18, 2024

1

Agenda

1. Overview of Laws and Policies Related to
Discrimination, Harassment, and Retaliation

2. Protected Classifications

3. What is Unlawful Discrimination, Harassment,
and Retaliation?

4. Duties of a Supervisor

5. Addressing Unlawful Discrimination,
Harassment, and Retaliation in the Workplace

6. Title IX and Cal. Education Code Requirements

7. Abusive Conduct

LCW

LIEBERT CASSIDY WHITMORE

2

True or False?...

A violation of the district's policy on sexual
harassment does not always violate state law.

LCW

LIEBERT CASSIDY WHITMORE

3

Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment

Chaffey College | March 18, 2024

Presented by: Alison R. Kalinski

True or False?...

Unlawful discrimination does not occur when a supervisor applies job-related work rules to all subordinates without regard to their protected classification(s).

LCW LIEBERT CASSIDY WHITMORE

4

True or False?...

Employees who do not hear or see harassing behavior, but only learn about it later, have no right to make a complaint.

LCW LIEBERT CASSIDY WHITMORE

5

True or False?...

Co-workers, who are not supervisors, can be personally liable for harassment.

LCW LIEBERT CASSIDY WHITMORE

6

Overview of Laws and Policies Related to Discrimination, Harassment, and Retaliation

LCW

7

Sources of Law

Federal Law

- Title VI and VII of the 1964 Civil Rights Act
- Title IX of the Education Amendments of 1972
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act of 2008 (GINA)
- Section 1981 of United States Code
- Section 1983 of United States Code

LCW LIEBERT CASSIDY WHITMORE

8

Sources of Law

California Law

- Fair Employment and Housing Act (FEHA)
- Education Code
- Title 5 of the California Code of Regulations
- Labor Code
- Your District's Policy against harassment, discrimination and retaliation

LCW LIEBERT CASSIDY WHITMORE

9

Administrative Agencies

- Title VII and ADA - U.S. Equal Employment Opportunity Commission
- FEHA - California Civil Rights Department
- Title VI and Title IX – Office for Civil Rights
- Your District’s Policy – Human Resources/Personnel

LCW

LIEBERT CASSIDY WHITMORE

10

Essential Elements of a District Policy

- Prohibits employees and non-employees from engaging in discrimination, harassment and retaliation based on any protected status (all must be listed)
- Protects applicants, independent contractors and employees, interns, and volunteers
- Provides examples of prohibited conduct
- Requires supervisors to report

LCW

LIEBERT CASSIDY WHITMORE

11

Essential Elements of a District Policy

- Provides a thorough, prompt, objective and non-judgmental investigation procedure
- Provides confidentiality to the greatest extent possible
- Identifies Civil Rights Department/EEOC resources including website or link to training

LCW

LIEBERT CASSIDY WHITMORE

12

Protected Classifications and Key Definitions

LCW

13

Protected Classifications

- Sex/Gender/Gender Identity/Gender Expression
- Sexual Orientation
- Race/National Origin/Color
- Disability/Medical Condition
- Genetic Information/Characteristics
- Religious Creed
- Marital Status
- Military/Veteran Status

- Age (40 Years of Age and Older)
- Opposition to Discrimination/Harassment
- Association/Perception
- Reproductive Health Decisionmaking (new)

*Note NEW protections for cannabis use (when off the job and away from the workplace)

LCW LIEBERT CASSIDY WHITMORE

14

Protected Classifications: Race/National Origin

- Effective January 1, 2020, FEHA definition of “race” includes “hair textures” and “protective hair styles”
- Restrictions on “English-only” rules
 - Customer or co-worker preference not sufficient

LCW LIEBERT CASSIDY WHITMORE

15

Gender Identity / Expression

Employers **Must:**

- Permit employees to use the restroom that corresponds to the employee's gender identity/expression
- Refer to employees using the employee's preferred name, gender, and pronouns
- Designate single occupancy facilities using gender-neutral signage

LCW

LIEBERT CASSIDY WHITMORE

16

Gender Identity / Expression

Employers **Must Not:**

- Enforce dress codes more harshly against an employee based on their gender identity/expression
- Discriminate against an applicant for failing to designate a gender or designating a gender that is inconsistent with the applicant's sex assigned at birth
- Inquire about or require documentation or proof of an individual's sex or gender

LCW

LIEBERT CASSIDY WHITMORE

17

Key Definitions

ADVERSE ACTION

- Any action with material effect on "employment" or education taken within course and scope of "employment" or education
- Includes actions which impact:
 - Job Performance
 - Grades or Student Status
 - Opportunity for Advancement

LCW

LIEBERT CASSIDY WHITMORE

18

Key Definitions

SUPERVISOR

- Anyone who has any responsibility or discretion to lead others
 - Those with purely clerical or record-keeping responsibilities are excluded

Government Code Section 12926(r)

LCW

LIEBERT CASSIDY WHITMORE

19

Case Study

Julia, a Grounds Worker, is pregnant. Her doctors told her not to lift more than 20 pounds and to avoid prolonged standing during her pregnancy. Her position, however, requires that she be able to lift up to 50 pounds. Grounds Workers also spend the majority of their working hours standing.

Should the College tell Julia that she cannot work during her pregnancy because of her lifting restriction?

LCW

LIEBERT CASSIDY WHITMORE

20

What is Unlawful Discrimination, Harassment, and Retaliation?

LCW

21

Unlawful Discrimination

An adverse employment action taken *because of*

- A protected classification
- A perceived protected classification
- Association with another person of a protected classification

• Unpaid volunteers and interns are now protected from discrimination

• Adverse Employment Action = Action Taken Within the Course and Scope of Employment (e.g. Hiring, Firing, Demotion, Failure to Promote, Assignment of Job Duties, etc.)

LCW

LIEBERT CASSIDY WHITMORE

22

Unlawful Harassment

- Unwelcome physical, verbal, visual conduct related to or taken because of an employee's protected classification
- Harassment is **NOT** within the course and scope of employment
- Two types:
 - Quid Pro Quo
 - Hostile Work/School Environment

LCW

LIEBERT CASSIDY WHITMORE

23

Unlawful Harassment?

Is There Such a Thing as Lawful Harassment?

LCW

LIEBERT CASSIDY WHITMORE

24

Quid Pro Quo Harassment

Job or education benefits promised:

- Explicitly or implicitly
- In exchange for sexual favors **or** denied if sexual favors are not given

LCW

LIEBERT CASSIDY WHITMORE

25

Case Study

Johan has applied for a promotion to work in the District Office. Superintendent Mary invites Johan to lunch to discuss his application.

Is Mary guilty of quid pro quo harassment?

Would your answer be different if...?

LCW

LIEBERT CASSIDY WHITMORE

26

Hostile Work/Education Environment

- Physical, Verbal or Visual Conduct
- Based on a Protected Classification
- Objectively **and** Subjectively Offensive (Unwelcome)
- Severe **or** Pervasive
 - Single Incident May Establish Liability Under FEHA
- Unreasonably interferes with work or learning opportunities

LCW

LIEBERT CASSIDY WHITMORE

27

Hostile Work Environment
("Environmental" Harassment)

Changes After "Me Too" Movement:

- Decline in productivity not required to establish harassment – it is sufficient that the conduct "so altered working conditions as to make it more difficult to do the job"
- A single incident of harassing conduct may be sufficient to create a hostile work environment
- Totality of the circumstances matter, including "stray remarks" by non-decisionmakers
- Standards do not vary by workplace
- Rarely determinable "on paper" alone

LCW

LIEBERT CASSIDY WHITMORE

28


Physical Conduct

Obvious Examples:

- Sexual assault
- Touching/Groping
- Physical intimidation

Less Obvious Examples:

- Massages
- Hugging




LCW

LIEBERT CASSIDY WHITMORE

29

Verbal Conduct

- Sexual Comments
- Jokes
- Mocking Accent
- Teasing
- Slurs
- Stereotypes
- Non-preferred pronouns



LCW

LIEBERT CASSIDY WHITMORE

30

Case Study – Verbal Conduct

Although Daniela was assigned at birth as a male, she recently began presenting as a female, consistent with her gender identity. She notified her co-workers of her new changed presentation as she previously presented as male, named Daniel. John and Ashley refuse to refer to Daniela by her name or female pronouns and still call her “Daniel” and frequently ask “him” why “he” uses the Women’s Restroom and wears skirts.

Have John and Ashley created a hostile work environment?

LCW

LIEBERT CASSIDY WHITMORE

31

Visual Conduct

- Social media posts/images
- Emails
- Cartoons or drawings
- Gestures
- Staring/leering
- Sexual conduct/Affection between other employees at work

LCW

LIEBERT CASSIDY WHITMORE

32

“Gray” (Borderline) Areas

- “Private” and “consensual” relationships between supervisors and subordinates or educators/students? (**Warning:** Not for long!)
- Off-duty conduct
- Invitations to lunch, drinks or dinner
- References to appearance or dress
- “Casual” touching of non-intimate parts of the body

LCW

LIEBERT CASSIDY WHITMORE

33

Unlawful Retaliation

Elements of Unlawful Retaliation

- Protected Activity – Broad Standard
 - Reporting Discrimination or Harassment
 - Participating in an Investigation
 - Refusing to Follow Order Reasonably Believed to be Discriminatory
 - Taking or requesting protected leave
 - Accrued sick leave, emergency paid sick leave, FMLA, EFMLEA, pregnancy disability leave
- Adverse Action – Broad Standard
- Causal Connection

LCW

LIEBERT CASSIDY WHITMORE

34

Case Study

Daisy files a sexual harassment claim against her supervisor John. Susie, who is also supervised by John, participates in the investigation of this claim. John expresses annoyance with the investigation and complains to the other employees in the department that Susie is “looking for attention” and tells their higher-level supervisor that she is “difficult to work with,” resulting in Susie’s demotion to a lower position.

Has Susie been subjected to unlawful retaliation?

While this is going on, what if John ignores Daisy at work following the harassment complaint and leaves the room when she comes in because he does not want her to accuse him of anything else?

LCW

LIEBERT CASSIDY WHITMORE

35

Who Is Liable?

- The **employer** is liable for:
 - Discrimination
 - Retaliation
 - Harassment committed by a supervisor
 - Harassment not committed by a supervisor, but only if the employer knew or should have known about it and failed to take appropriate action

LCW

LIEBERT CASSIDY WHITMORE

36

Who Is Liable?

- Any employee can be held individually liable for harassment, discrimination, or retaliation, depending on the statute at issue:
 - California FEHA: Individuals may be liable for harassment only, not for discrimination or retaliation
 - Federal laws: Individuals can be liable for harassment and discrimination and retaliation, depending on the statute

LCW

LIEBERT CASSIDY WHITMORE

37

Consequences Damages Liability

- Employers are liable for the conduct of supervisors who harass
- Employees can be personally liable for harassment
- Liability can include:
 - Back pay
 - Damages
 - Compensatory & Punitive

LCW

LIEBERT CASSIDY WHITMORE

38

Prevention

- Never play favorites
- Report all complaints immediately
- Take all complaints seriously
- Monitor the workplace
- Follow District procedure
- Be a good role model

Don't Just Be an Idle Bystander!

LCW

LIEBERT CASSIDY WHITMORE

39

Duties of a Supervisor

LCW

40

Supervisor Responsibilities

- Report Observed/Overheard Conduct
- Forward Reports to Human Resources
 - Third-party complaints
 - Verbal complaints
 - Rumors

Remember:

The word “*harassment*” need not be used to trigger a supervisor’s duty to act

LCW LIEBERT CASSIDY WHITMORE

41

Supervisor Responsibilities

Supervisors have an obligation to report harassment, discrimination, and retaliation of which they become aware.

Next Steps:

- Cooperate in the investigation
- Prevent further harassment
- Ensure no retaliation

LCW LIEBERT CASSIDY WHITMORE

42

True or False?

Lucy, the Assistant Director of Human Resources, can ignore an anonymous handwritten complaint alleging that Gerald, an employee, made racially derogatory comments to another unidentified employee. Lucy knows Gerald well and is sure he would never make any offensive comments.

LCW

LIEBERT CASSIDY WHITMORE

43

Addressing Unlawful Discrimination, Harassment, and Retaliation in the Workplace

LCW

44

Appropriate Corrective Action

- Conduct prompt and thorough investigation
 - (Confidentiality is limited)
- Discipline perpetrator appropriately
- Counseling for Victim
- Preventative training to prevent policy violations from recurring
- Republish/update District’s Policy

LCW

LIEBERT CASSIDY WHITMORE

45

Title 5 Requirements

- Identify person responsible for coordinating investigation
- Establish option for informal resolution process
- Set forth investigation process, including report content requirements
- Provide notice of investigation results
- Provide for appeal to governing board and State Chancellor
- Provide required information to State Chancellor
- Establish timelines for completion of investigation

LCW

LIEBERT CASSIDY WHITMORE

46

What If You Are Accused?

- Refer the accuser to a superior, Human Resources, legal advisor
- Report the accusation to your supervisor and to Human Resources
- Refrain from **ANY** action that could be interpreted as retaliation
- Seek constructive counseling from Human Resources
- Cooperate in the investigation
- Follow your district's policy

LCW

LIEBERT CASSIDY WHITMORE

47

Options For Resolution

- Use the District's complaint procedure
- Report to the U.S. Equal Employment Opportunity Commission
- Report to the California Civil Rights Department
- Lawsuits

LCW

LIEBERT CASSIDY WHITMORE

48

Title IX

LCW

49

Introduction To Title IX

- Prohibits discrimination on the basis of sex
- Prohibits sexual misconduct that limits an individual's ability to participate in educational programs and activities

LCW LIEBERT CASSIDY WHITMORE

50

Legal Obligations Under Title IX

Upon actual notice of sexual harassment against a person in the United States in its education program or activity:

Must respond in a manner that is not deliberately indifferent.

34 CFR § 106.44(a)

LCW LIEBERT CASSIDY WHITMORE

51

Legal Obligations Under Title IX

Title IX Requires:

1. Policies/Procedures

2. Reporting of Possible Sexual Harassment

3. Investigation and Hearing

4. Training and Education

5. No Retaliation

LCW

LIEBERT CASSIDY WHITMORE

52

Amendments to the Cal. Education Code
(Senate Bill 493)

LCW

53

Senate Bill 493:
Effective Jan. 1, 2022

• Applies to institutions receiving state financial assistance including California Community Colleges

• Added additional protections re sexual harassment

• Amended the definition of “sexual harassment” (Cal. Ed. Code § 66262.5.)

• Added procedural requirements for responding to notice of sexual harassment (Cal. Ed. Code § 66281.8.)

LCW

LIEBERT CASSIDY WHITMORE

54

Identification of Sexual Harassment

"Sexual harassment" means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

- a) Made a term or condition of employment, academic status, or progress
- b) Used as the basis of employment or academic decisions affecting the individual
- c) Has the purpose or effect of having a negative impact on the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment
- d) 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

(Cal. Ed. Code § 212.5.)

LCW

LIEBERT CASSIDY WHITMORE

55

Identification of Sexual Harassment

"Sexual harassment" includes sexual battery, sexual violence, and sexual exploitation

- **"Sexual violence"** means physical sexual acts perpetrated without affirmative consent (including rape and sexual battery)
- **"Sexual battery"** means the intentional touching of another person's intimate parts without consent, intentionally causing a person to touch the intimate parts of another without consent, or using a person's own intimate part to intentionally touch another person's body without consent
- **"Sexual exploitation"** means a person taking sexual advantage of another person without that person's consent, including, but not limited to:
 - Prostituting, trafficking, recording or distribution of images or audio of another person's sexual activity or intimate parts, viewing of another person's sexual activity or intimate parts, in a place where that other person would have a reasonable expectation of privacy

(Cal. Ed. Code § 66262.5.)

LCW

LIEBERT CASSIDY WHITMORE

56

Procedural Requirements for Responding to Notice of Sexual Harassment

- Districts are required to have grievance procedures that provide for prompt and equitable resolution of sexual harassment complaints filed by a student against an employee or another student
 - All students must be provided notice of these procedures
- District's adopted rules and procedures must provide for certain elements in addition to the policies required by Title IX
 - E.g., A district must promptly investigate alleged conduct or otherwise respond if the district knows, or reasonably should know, about possible sexual harassment involving individuals subject to the district's policies, regardless of whether or not a complaint has been filed

LCW

LIEBERT CASSIDY WHITMORE

57

"Abusive Conduct"

LCW

58

Key Definition

"Abusive Conduct"

- Malicious conduct
- Objectively and Subjectively Hostile or Offensive
- Unrelated to employer's legitimate business interests
- BUT it is not harassment

LCW LIEBERT CASSIDY WHITMORE

59

Examples Of "Abusive Conduct"

- Repeated verbal abuse
- Threatening, intimidating, or humiliating verbal or physical conduct
- Gratuitous sabotage or undermining of person's work

LCW LIEBERT CASSIDY WHITMORE

60

“Abusive Conduct” Is Not:

- A supervisor holding a subordinate accountable for his/her performance
- An isolated incident of inappropriate behavior

LCW

LIEBERT CASSIDY WHITMORE

61

“Abusive Conduct” v. Unlawful Harassment

- Harassing conduct is directed at someone’s membership in a protected classification
 - Harassment is illegal
- “Abusive Conduct” is NOT directed at someone’s membership in a protected classification
 - NOT illegal, but should be addressed internally

LCW

LIEBERT CASSIDY WHITMORE

62

Case Study

You, a supervisor, overhear Diane (another supervisor) say to two other employees that Jessica is *“too ditsy to ever get promoted.”* Two days later, you overhear Diane telling Jessica directly that she is an “idiot.” Another day, during a team meeting, you witness Diane say to Jessica after giving a presentation, *“I can’t believe how lazy you were about that presentation, it was completely stupid.”* Other employees were within hearing distance when Diane made this comment.

What should you do?

LCW

LIEBERT CASSIDY WHITMORE

63

Prevention Of "Abusive Conduct"

- Make respect a core value
- Create a respectful workplace policy
 - Apply to all, not just protected classes
 - Define abusive conduct
 - Complaint procedure
 - Consequences for violators
 - Anti-retaliation provisions

LCW

LIEBERT CASSIDY WHITMORE

64

Prevention Of "Abusive Conduct"

- Pay attention and investigate
- Do not ignore or make excuses
- Do not require an employee to confront a bully alone
- Discipline
- Training
- Performance Improvement Plan
- Last chance agreement

LCW

LIEBERT CASSIDY WHITMORE

65

Courtesy, Sensitivity, And Respect

LCW

66

Case Study #1

Kelly and Victoria are both administrative assistants for Tralee Bay Community College District. Kelly has been having an affair with the Administrative Director, Derek, for months. Derek has also been having affairs with other administrative assistants in the department. As Administrative Director, Derek supervises all administrative assistants.

Victoria and Kelly both apply for the same promotion. Victoria is qualified for the position and has been at the department longer than Kelly has. However, Kelly gets the promotion, becoming an Administrative Manager.

LCW

LIEBERT CASSIDY WHITMORE

67

Case Study #1

Even after her promotion, Kelly is still supervised by Derek. At office social events, several administrative assistants witness Derek and Kelly rubbing each other's shoulders and grabbing each other's waists in a flirtatious manner. Eventually, Victoria witnesses this herself, and she also observes Derek behaving similarly with other administrative assistants that he supervises.

You are the Human Resources Director. Victoria comes to you to complain that she witnessed Derek inappropriately touching Kelly and other administrative assistants. Victoria tells you that she now suspects that this is why Kelly got the promotion instead of her.

LCW

LIEBERT CASSIDY WHITMORE

68

Case Study #1

(1) Has Derek created a hostile work environment?

(2) Has Victoria been harassed? Discriminated against? Retaliated against?

(3) What should you do about Victoria's complaint?

LCW

LIEBERT CASSIDY WHITMORE

69

Case Study #2

Cory is an accounting analyst for the Smithtown Community College District, and is African American. Cory has noticed that several of his non-African American peers in his department often take lengthy, unauthorized lunches without repercussion. This sometimes causes them to arrive late to meetings, without consequence. One day, Cory and a Caucasian coworker arrived late to a staff meeting. When they walked in, his supervisor Christine, who is Latina, said “Cory, next time arrive early.” Christine said nothing to the Caucasian coworker.

LCW

LIEBERT CASSIDY WHITMORE

70

Case Study #2

(1) Has the District discriminated against Cory?

(2) Would it make a difference if Christine, Cory’s supervisor, was also African American?

LCW

LIEBERT CASSIDY WHITMORE

71

Case Study #3

Tom is a basketball player for Green Hills Community College. He is in the starting lineup for the varsity team, and is generally viewed as having a good chance at a scholarship to a four-year university. However, Tom and his father have met with the Athletic Director, Vince Andrews, to tell him that Tom is quitting the team because of rampant sexual harassment.

LCW

LIEBERT CASSIDY WHITMORE

72

Case Study #3

Tom and his father report the following conduct:

- Coach puts his arms around players’ shoulders when giving them directions and puts them on the buttocks when sending them out on the court.
- Other members of the basketball team tease Tom about engaging in sexual activity. When Tom complained to the coach, he laughed and said, “What do you expect when you look the way you do?”
- Members of visiting teams often shout sexually explicit insults at the team in an effort to break their concentration.

LCW

LIEBERT CASSIDY WHITMORE

73

Case Study #3

(1) Which of the allegations, if any, could subject the college to liability?

(2) How should the District respond?

LCW

LIEBERT CASSIDY WHITMORE

74

Case Study #4

Matt Ryan is an instructor at the Claiven Community College District. Ryan, a relatively new faculty member, is not too much older than the students he teaches. He is quite popular with both students and faculty. Ryan takes an interest in one of his students, Lisa. In return, she frequents his office hours to discuss both course-related and personal matters. This soon turns into formalized dates. For a few weeks things go well, but then, for reasons that are unclear, their relationship turns sour and they break up.

LCW

LIEBERT CASSIDY WHITMORE

75

Case Study #4

Ryan is visibly agitated when he must interact with Lisa. He begins making snide remarks to her in class, which sometimes border on insults. Lisa believes that her grades have declined as a result of their break up and is unable to get the academic guidance she needs from Ryan. On campus, Lisa sometimes catches Ryan staring at her from across campus and bumps into him unexpectedly on various parts of campus. Lisa, feeling uncomfortable, paranoid, and concerned about her grades, meets with Gloria Thomson, the area dean.

LCW

LIEBERT CASSIDY WHITMORE

76

Case Study #4

Thomson listens to Lisa’s concerns carefully and asks detailed questions about the history of the relationship and specific incidents. Thomson then tells Lisa that she is over-reacting and may just be wishing that Ryan still had feelings for her. She advises Lisa that it is normal to fantasize about a teacher and that if she studies enough her grades will be fine.

LCW

LIEBERT CASSIDY WHITMORE

77

Case Study #4

(1) Any problems with Ryan and Lisa dating?

(2) Was Lisa sexually harassed?

(3) Can Ryan be disciplined?

(4) Is the District potentially at risk?

LCW

LIEBERT CASSIDY WHITMORE

78

Preventing Harassment, Discrimination and Retaliation in the Academic Setting/Environment

Chaffey College | March 18, 2024

Presented by: Alison R. Kalinski

The Ultimate Goal is to Establish a Workplace Defined by Courtesy, Sensitivity, and Respect

LCW

79

Thank You!

Alison R. Kalinski

Senior Counsel | Los Angeles

310-981-2000 | akalinski@lcwlegal.com

www.lcwlegal.com/our-people/alison-kalinski

LCW LIEBERT CASSIDY WHITMORE

80
