ITEM NO. 5.

SEXUAL HARASSMENT AWARENESS TEST

1. If an employee engages in conduct of a sexual nature in the presence of ten people, and only one person is offended, that person can complain of sexual harassment.

   A) True **B) False**

2. Only a manager or supervisor can sexually harass an employee.

   A) True **B) False**

3. A worker cannot sexually harass a supervisor.

   A) True **B) False**

4. You have to actually touch or say something to an employee in order to commit an act of sexual harassment.

   A) True **B) False**

5. If you are talking to a friend on the job about your sexual fantasies and another employee overhears the conversation, that individual cannot complain of sexual harassment because the comment was not directed at him or her.

   A) True **B) False**

6. An employee does not have to repeat an act of a sexual nature before it can constitute sexual harassment.

   A) True **B) False**

7. A person cannot complain about sexual discrimination or harassment from persons equal or lower than himself/herself in the organization, because a non-supervisor cannot threaten a person's career.

   A) True **B) False**

8. An employer can be held responsible if a customer, contractor, or other non-employee sexually harasses an employee.

   A) True **B) False**

9. It is all right to hug people as you welcome them to your department if you have a standard practice of greeting new people in this manner.

   A) True **B) False**

10. Conduct of a sexual nature must create an intimidating, offensive, and hostile working environment before the conduct can constitute sexual harassment.

    A) True **B) False**

11. It is okay for women to engage in conduct of a sexual nature on the job because they cannot offend most men.

    A) True **B) False**

12. A worker can accuse a co-worker of sexual harassment for staring at him or her.

    A) True **B) False**

13. The impact of sexual harassment only affects the victims.

A) True **B) False**

14. Women must realize that sometimes sexual harassment just comes with the job and they must learn to tolerate it.

A) True **B) False**

15. Before an individual can complain of sexual harassment or discrimination, he or she must have lost some tangible job benefit.

A) True **B) False**

16. When an individual complains of sexual harassment against a popular individual, he or she must accept the backlash from other employees.

A) True **B) False**

17. Sexual harassment laws do not control employees' social lives outside the office.

A) True **B) False**

18. It isn't sexual harassment if you don't engage in language or physical conduct of a sexual nature or make actual sexual advances.

A) True **B) False**

19. In order to sexually harass a person, you must engage in conduct of a sexual nature and have the intention of unreasonably interfering with that individual's performance or creating an intimidating, hostile, or offensive environment.

A) True **B) False**

20. The laws on sexual discrimination and harassment protect men as well as women.

A) True **B) False**

21. Most sexual harassment is based on sexual advances.

A) True **B) False**

22. The employer is not strictly liable for a supervisor's acts of harassment resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours.

A) True **B) False**

23. The organization can beheld liable for the actions of individual supervisors or employees with regard to sexual harassment.

A) True **B) False**

24. If a person submits to sexual harassment and engages in a sexual act with someone from the office he or she cannot complain about it afterward.

A) True **B) False**

CASE STUDY 1

BB&K Sexual Harassment Training

Plaintiffs Edna Miller and Frances Mackey were employees of the California Department of Corrections and were both transferred to work at the Valley State Prison for Women. The prison's warden, Lewis Kuykendall, was alleged to have engaged in sexual relations with several of his staff, including (1) his secretary; (2) an associate warden; and (3) a correctional counselor.

Evidence suggested that the three women were known to squabble over the warden, sometimes in emotional scenes witnessed by other employees, including Miller. There was evidence that the secretary had bragged about her power over the warden, and that she received promotions for which she did not meet the minimum qualifications.

Plaintiffs also complained that the correctional counselor ascended through the ranks with unprecedented speed, receiving a promotion over Miller despite having less education and experience.

Plaintiffs ultimately filed a claim for sexual harassment, alleging that women only got ahead and were promoted at the prison if they performed sexual favors for the warden.

Do you think the warden's behavior amounts to sexual harassment of the Plaintiffs?

Miller v. Department of Corrections, 36 Cal.4th 446 (2005).

CASE STUDY 2

BB&K Sexual Harassment Training

Catherine McCoy worked as a marine clerk for the Pacific Maritime Association, a non-profit organization. McCoy was pursuing a vessel planner position, which offered increased compensation and higher prestige. McCoy filed a lawsuit for alleged sexual harassment by one vessel planner, Anthony Spanjol, who was largely responsible for providing McCoy the training necessary for her promotion.

In support of her claim, McCoy asserted that she witnessed the following alleged actions by Spanjol: (1) he used the n-word in describing the kind of posterior a female had; (2) he said another female had a "J-Lo ass"; (3) he mocked female employees on various occasions; and (4) he made crude gestures toward one female when she had her back turned.

During this four-month period of training, McCoy allegedly heard "five to nine" of these vague sexual comments from Spanjol, a non-supervisor.

Assuming that all of McCoy's allegations are true, do these comments – alone – establish a sexually charged hostile work environment?

McCoy v. Pacific Maritime Association, 216 Cal. App. 4th 283 (2013)

CASE STUDY 3

BB&K Sexual Harassment Training

Lindsey Tofsrud was a postal worker for the United States Postal Service. She was sometimes supervised by David Kennedy, a Mail Processing Clerk. The Postal Service provides responsible sexual harassment avoidance training, had clear policies prohibiting sexual harassment, and a well-articulated internal complaint procedure.

Tofsrud claimed that Kennedy expressed sexual interest in her and acted out sexually in a number of ways, including the following:

1. Repeated reference to Tofsrud as his "girlfriend".

2. Refusal to allow Tofsrud to leave work unless she agreed to have drinks with him.

3. Denial of a requested day off work unless Tofsrud agreed to a date.

4. Intentional brushing up against Tofsrud's body.

5. Various instances where Kennedy "leered" at Tofsrud.

Months after these activities ceased, Tofsrud filed a letter of resignation, effective at a later date. The senior manager asked her why she was resigning, and Tofsrud refused to give any reason. Tofsrud did not tell the senior manager of the alleged misconduct until her final workday.

On that final day (approximately a month after she submitted her letter of resignation) the senior manager offered to assign Tofsrud to a different shift or to move her to a different station away from Kennedy. Tofsrud declined both options. Kennedy was later removed as a supervisor.

Should the "reasonable care" defense apply in this case?

Tofsrud v. Potter, 2012 U.S. App. LEXIS 15271, No. 11-35366 (9th Cir., July 24, 2012).

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PREVENTING WORKPLACE HARASSMENT

A GUIDE FOR EMPLOYERS AND SUPERVISORS

Presented By:

BEST BEST & KRIEGER LLP

ATTORNEYS AT LAW

PREVENTING WORKPLACE HARASSMENT

Workplace harassment continues to be an area of attention and concern to employers as the number of claims and lawsuits based on alleged harassment increase. At the same time employers are becoming more aware than ever before of their obligations to prevent harassment in the workplace through the adoption of anti-harassment policies, training of supervisors and managers, and increased awareness of and response to all harassment complaints.

Employers and their supervisory employees have a responsibility to provide a workplace free of harassment. In order to do so, all employees must know what constitutes harassment and what standards administrative agencies and the courts use in evaluating harassment claims. The employer must adopt and implement adequate preventative measures to stop harassment from occurring in the workplace and to appropriately investigate, evaluate, and act upon harassment claims.

This handout will discuss recent developments and present an overview of the legal definition of harassment, the standards for evaluating conduct, a summary of the laws which govern potential liability, and guidelines as to the policies and procedures employers should adopt regarding harassment.

A. WHAT IS HARASSMENT?

In the employment context, harassment is a form of discrimination generally defined as unwelcome and inappropriate conduct directed at employees based upon one of the characteristics protected under the federal and state anti-discrimination laws such as race, sex, age or disability. The harassment may take many forms, including:

1. Verbal conduct: epithets, foul language, derogatory comments, slurs, repeated romantic overtures, sexual comments, jokes, or prying into another employee's affairs;

2. Physical harassment: unwanted touching, rubbing against someone, assault or physical interference with movement or work; or

3. Visual harassment: derogatory cartoons, drawings, photographs, posters, or lewd gestures.

4. The harassment may also be communicated in many different ways, including via new technologies typically present in the modern workplace such as the Internet, e-mail and voicemail.

B. SCOPE OF EMPLOYEE PROTECTION

Federal and state law prohibit harassment based upon race, religious creed, color, national origin, ancestry, age, physical disability, mental disability, medical condition, marital status, sex, sexual orientation or transgender status.

Employers are responsible for protecting employees from harassment by other employees, supervisors and managers, and customers. A 2003 amendment to the California Fair Employment

and Housing Act ("FEHA") requires employers to protect employees from harassment by third parties.

C. TYPES OF HARASSMENT

There are two distinct types of harassment, "hostile work environment" and "quid pro quo." A hostile work environment may be created by conduct based upon any of the protected classifications, while quid pro quo harassment only applies to harassment based on sex.

1. "Hostile work environment." Harassment which occurs when unwelcome and offensive conduct (based on any of the protected classifications) unreasonably interferes with an individual's job performance or creates an intimidating, hostile, or offensive work environment.

2. "Quid pro quo." Harassment which occurs when an employee's submission to unwelcome sexual conduct becomes an explicit or implicit condition of employment or when personnel actions such as promotion, transfer, compensation, or discipline, are determined on the basis of an employee's response to such conduct.

D. WHAT IS A HOSTILE WORK ENVIRONMENT?

In a hostile environment case, the victim must show that the offensive or abusive conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

1. Factors Considered. In determining whether a particular environment was hostile, the following factors will be considered:

a. Whether the conduct was verbal, physical, or both;

b. How frequently the conduct was repeated;

c. Whether the conduct was hostile and patently offensive;

d. Whether the alleged harasser was a co-worker or supervisor;

e. Whether others joined in the harassment; and

f. Whether the harassment was directed at more than one individual.

Employers, supervisors, coworkers, customers, or clients can create a hostile work environment under proper circumstances. Generally, a single isolated incident of offensive conduct is not enough to prove a hostile environment, although it can if the isolated incident is particularly severe.

In some cases, an employee who was never the direct object of harassment may have a hostile environment claim if he or she were forced to work in an atmosphere where such harassment was pervasive. This type of harassment may include situations in which male supervisors have romantic relationships with female subordinates and afford them job benefits to the detriment of other employees.

2. The "Reasonable Person" Standard

The standard for hostile environment type harassment is judged from a reasonable person in the victim's position, considering all the circumstances. Fuller v. City of Oakland (9th Cir. 1995) 47 F.3d 1522. The Ninth Circuit previously had judged this from a reasonable woman's standard, recognizing the great percentage of cases that involve female victims; but more recently the court has adhered to a standard which measures whether a reasonable person would find that the conduct was sufficiently severe and pervasive to alter the conditions of employment and create an abusive working environment. Crowe v. Wiltel (9th Cir. 1997) 103 F.3d 897.

E. QUID PRO QUO SEXUAL HARASSMENT

Harassment may take the form of an economic quid pro quo where a supervisor's requests for sexual favors are linked to the grant or denial of job benefits, such as getting or retaining a job, or receiving a favorable performance review or promotion. The essence of the quid pro quo theory of sexual harassment is that a supervisor relies upon his or her apparent or actual authority to extort sexual consideration from an employee. Thus, quid pro quo harassment exists where the supervisor conditions job advantages or advancement upon submission to sexual contact or favors, gives advantages to employees who consent, or withholds advantages from those employees who refuse.

F. PROMPT AND APPROPRIATE REMEDIAL ACTION

Employers are required under federal and state law to intervene promptly and effectively to put an end to workplace harassment. An employer is responsible for acts of harassment in the workplace where the employer knows or should have known of the conduct unless it can show that it took immediate and appropriate corrective action. Some courts have held that appropriate corrective action requires some form, however mild, of disciplinary measures, since action is corrective only if it contributes to the elimination of the problem at hand. The corrective actions must be reasonably calculated to end the harassment. In Intlekofer v. Turnage (9th Cir. 1992) 973 F.2d 773, the Court considered the appropriateness of the remedy depends on the seriousness of the offense, the employer's ability to stop the harassment, the likelihood that the remedy will end the harassment, and the remedy's ability to persuade potential harassers to refrain from unlawful conduct.

G. DEALING WITH A COMPLAINT FROM AN EMPLOYEE

When a claim of harassment is brought to an employer's attention, the seriousness of the matter must be recognized and claims investigated promptly and thoroughly. Under the law, an employer has an affirmative duty to investigate complaints, deal appropriately with offending personnel, make the victim whole by restoring lost benefits or opportunities and prevent the misconduct from recurring. Failure to do so will almost certainly result in liability. If the employer is ultimately held liable but has done everything in its power to prevent harassment through a policy which includes sound investigation and remedial measures, damages may be reduced or eliminated.

In addition, the supervisors and managers should remain aware of the sensitive nature of this area. The investigation of complaints should be handled confidentially in order to avoid charges of defamation or invasion of privacy by the alleged harasser or by the victim. Although harassment investigations are a very interesting topic for office gossip, confidentiality must be observed. Finally, the employer must balance the rights of the persons accused of harassment in the process. Courts have awarded damages to accused employees who were improperly disciplined or discharged for harassment. Most frequently, this occurs because the employer did not conduct a proper investigation and therefore lacked a good faith basis to conclude that harassment occurred.

H. GENERAL GUIDELINES FOR HANDLING A SEXUAL HARASSMENT COMPLAINT

The following are guidelines and suggestions for handling a sexual harassment complaint.

1. Know the employer's policy;

2. Know the type of conduct which may be considered harassment;

3. Take all complaints seriously;

4. Maintain an objective demeanor;

5. Document the complaint;

6. Investigate the complaint;

7. If you observe conduct which may be considered harassment, you should take action to stop it; and,

8. Do not ignore rumors of harassment, investigate even though no formal complaint has been filed.

I. LIABILITY OF EMPLOYERS AND SUPERVISORS

In California an employer is strictly liable for the harassing conduct of its supervisory employees whether or not the employer was aware of the conduct. In addition, supervisors and managers may be held personally liable for harassment in which they participate.

In 1998, the United States Supreme Court rendered several important decisions regarding employer liability for employee harassment under Title VII. In Burlington Industries, Inc. v. Ellerth (1998) 524 U.S. 742 and Faragher v. City of Boca Raton (1998) 524 U.S. 775, the Court concluded that, under Title VII, employers are strictly liable for the harassment caused by their supervisors. However, where there is no adverse employment action, the employer may raise an affirmative defense that: 1) it used reasonable care to prevent and promptly correct the harassing behavior; and/or 2) the employee failed to take advantage of preventive or corrective opportunities afforded him/her to avoid the harm.

Similarly, in 2003, the California Supreme Court adopted a standard akin to the federal standard discussed above. The Court held that an employer may assert a defense based on the "avoidable consequences doctrine." State Department of Health Services v. Superior Court (McGinnis) (2003) 31 Cal.4th 1026, 1044. Specifically, the defense has three elements: (1) the employer took reasonable steps to prevent and correct workplace harassment; (2) the employee unreasonably failed to use the preventative and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.

J. PREVENTATIVE MEASURES FOR EMPLOYERS

Workplace harassment is an area in which the employer can and must take effective steps to avoid or minimize liability. What the federal Equal Employment Opportunity Commission, the California Fair Employment and Housing Commission, and the courts are saying more and more is that an employer goes wrong not when an incident of harassment occurs, but when a complaint is made or the employer otherwise has knowledge of the harassment and the employer fails to adequately remedy the situation. While an employer probably cannot avoid all incidents of harassment, an employer can deal effectively with every complaint it receives and every situation of which it has knowledge, and must adopt and implement an effective harassment policy and train its employees accordingly. Cases have found that prompt remedial action to a complaint of harassment prevented the victim from suffering any tangible job detriment even though impermissible sexual advances may have been made by a supervisor.

K. TIPS FOR AVOIDING HARASSMENT LIABILITY

1. Set a positive example: be professional and respectful, and be conscious of your own words and actions.

2. Think twice before asking personal questions or making personal comments.

3. Don't assume that jokes and gestures meant to be friendly or funny are inoffensive.

4. Know the City's policy.

5. Don't participate in or accept behavior that may be offensive or a violation of the City's policy.

6. Voice your concerns. You are protected from retaliation.

7. Examine your own attitudes. How would you feel if you or a family member were harassed? What if it were your child, spouse or other loved one?

8. Support people who are being harassed. Remember that harassment is never the victim's fault.