

# Harassment Prevention Training for Supervisors and Officials (AB 1661)

Planning Commissioners Academy

**Wednesday, March 29, 10:00 am**



# HOUSEKEEPING

You **MUST** be  
signed in

You must be  
present for the full  
two-hour training

You will receive  
your certificate at  
the end of the  
training

We also have  
certificates for  
attorneys for MCLE  
credit

Contact Taylor Buck  
([tbuck@ca-ilg.org](mailto:tbuck@ca-ilg.org))  
with questions or  
concerns

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- Together with our affiliates, we serve over 2,500 local agencies – cities, counties and special districts
- We provide practical and easy-to-use resources so local agencies can effectively implement policies on the ground



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Our mission is to help local government leaders **navigate complexity**,  
**increase capacity & build trust** in their communities



# Recognizing and Preventing Harassment and Abusive Conduct in the Workplace

Presented by

**Jennifer Martinez**

March 2023

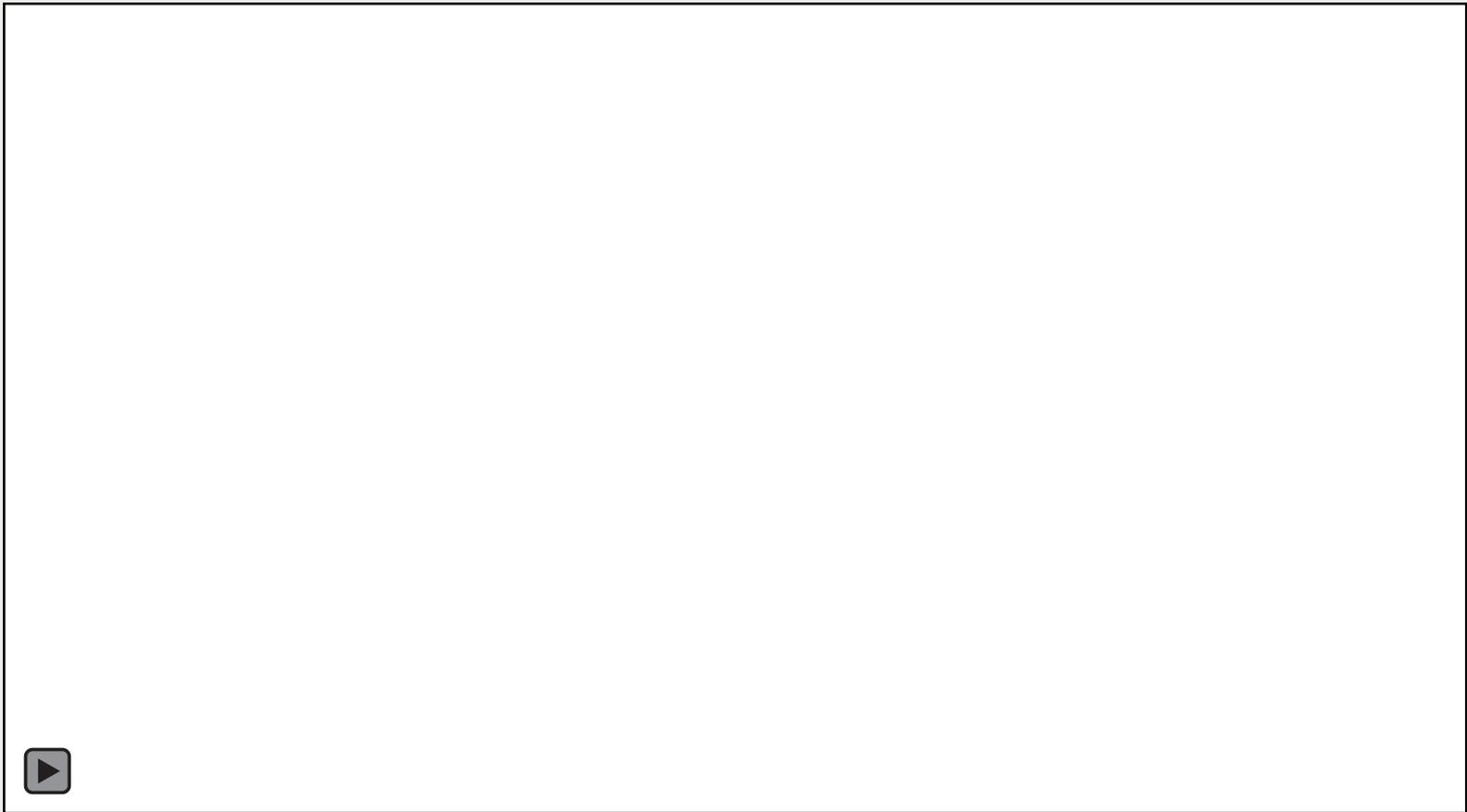
# WELCOME

- Today's training is not legal advice
- Some content we will be going over may be perceived as offensive
- Despite any *attempts* at humor, harassment and discrimination are serious issues
- Please feel free to ASK QUESTIONS

# Preventing Harassment - Agenda

- What is harassment
- Who can be a victim of harassment and who can be liable for harassment
- Abusive conduct/bullying
- Monitoring the workplace for harassment/abusive conduct
- What to do when harassment occurs
- Avoiding retaliation
- Microaggressions and unconscious bias

# We Know This Is Difficult...



# Why are we here again?

- AB 1825 - passed in 2004
- Prevalence - **60% of women** experience unwanted sexual attention or coercion or sexually crude conduct or sexist comments in the workplace. 19% of **men** report unwanted sexual attention or coercion.
- Covert harassment
- Technology
- Costs
  - To individual – economic, emotional, career
  - To company – economic, morale, public relations



## Sexual Harassment Costs

- 1994: Legal secretary accused supervising attorney of lunging at her chest, pouring M&Ms down breast pocket, grabbing at her hips.
  - Jury awarded \$7.1 million including **\$225,000 in punitive damages against the individual harasser.**
- 2007: Harassment claim filed against Isaiah Thomas and Madison Square Garden. Plaintiff also alleged she was fired within a month after complaining.
  - Jury awarded \$11.6 million.
- 2011: 51-year-old employee claimed supervisor made repeated comments about her breasts, his penis and his sexual fantasies; she was fired shortly after
  - Jury awarded \$10.6 million.
- 2012: Physician's assistant claimed doctors asked her for sex, had explicit sexual discussions around her, one doctor intentionally stuck her with a needle; when she reported to her supervisor, her supervisor laughed at her and then fired her.
  - Jury awarded \$168 million (\$125 million of which was punitives).
- 2010: Largest verdict in a gender discrimination case; no harassment claims, but was first time “microaggressions” alleged in a case, e.g., being punished for using the restroom and told not to apply for management jobs.
  - Jury awarded \$250 million.

## Importance of Early Intervention

*If you have a **big** problem **now**, at some point in the past you had a **small** problem.*

*The earlier you intervene, the easier it is to prevent and correct problem behavior.*

# Before We Dive In...Is This Sexual Harassment?

- Male supervisor gives his assistant a pat on the butt.
- Male NFL coach pats the quarterback on the butt.
- A female construction worker with a short hair cut is called “butch” by her co-workers, male and female.
- An employee tells a “blonde” joke.
- Supervisor asks to discuss promotion with employee in a hotel room.
- Supervisor asks to discuss promotion with employee over dinner.
- Single employee seeks love advice from married co-worker.
- An employee has a loud personal phone conversation about their date last night, where everyone can hear.
- An employee compliments a coworker on their outfit.
- An employee hangs a Sports Illustrated swimsuit calendar in their workspace.

# Anti-Discrimination and Harassment Laws

## Federal

- Title VII of the Civil Rights Act
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- Equal Pay Act

## State

- Fair Employment and Housing Act (FEHA)
- Pregnancy Disability Leave Act
- Local ordinances

# What is “Discrimination”?

## DISCRIMINATION

To refuse to hire or employ a person or to bar, or to discharge a person from employment, or to discriminate against a person in compensation or in terms, conditions or privileges of employment based upon a protected category.

# What is “Harassment”?

## HARASSMENT

Conduct or employment decisions based on a worker’s protected category that unreasonably interfere with an employee’s equal employment opportunities **OR** create an intimidating, hostile, or offensive working environment

# Protected Categories Under Federal Law

It is unlawful for an employer to discriminate against or harass an employee because of:

- Race
- Color
- National origin or ancestry
- Alienage/citizenship
- Sex (including pregnancy)
- Age (40 and over)
- Physical or mental disability
- Religion

# Protected Categories Under Federal Law

“Religion” = a belief system, that is recognized and not an isolated teaching, which occupies a place of importance in someone’s life equal to that of traditionally recognized religions

- Atheism included
- Veganism not

# Protected Categories Under Federal Law

It is unlawful for an employer to discriminate against or harass an employee because of:

- Race
- Color
- National origin or ancestry
- Alienage/citizenship
- Sex (including pregnancy)
- Age (40 and over)
- Physical or mental disability
- Religion
- Military service
- Exercising leave rights under FMLA
- Genetic information

## Protected Categories Under California Law

- Race
- Color
- National origin or ancestry
- Sex (gender)
- Pregnancy
- Age (40 and over)
- Physical/mental disability
- Religion
- Military service
- Request for statutory leaves (CFRA/PDL)
- Sexual orientation
- Gender identity
- Gender expression
- Medical condition
- Marital status
- Local laws
- **KEY TAKEAWAY IS THAT EVERYONE FALLS INTO MULTIPLE PROTECTED CATEGORIES**

## Protected Categories – Sexual Orientation, Gender Identity, Gender Expression

- “**Gender**” is one’s sex assigned at birth.
- “**Gender identity**” is a person’s internal understanding of and identification with gender, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person’s sex assigned at birth, or transgender.
- “**Gender expression**” is a person’s gender-related appearance or behavior. It is how individuals present their gender to the world.
- “**Transgender**” is “a general term that refers to a person whose gender identity differs from the person’s sex assigned at birth.”

# Protected Categories-Sexual Orientation, Gender Identity & Gender Expression

- Refrain from gossip, rumors, speculation, or other discussion about employees' sexual orientation or gender identity.
- Employees should be addressed by their preferred name and pronoun.
- Have informed HR infrastructure to assist transitioning employees to ensure legal access to facilities, accommodate dress code issues, and help ensure respectful and proper communications about the transition process.
- Beware of common microaggressions.

## Protected Categories – Perception/Association

- Federal and California law also protect perceived membership in one or more protected category
- Federal and California law also protect employees associated with a person who is a member of (or is perceived to be a member of) a protected category

# Proactive Obligation re Anti-Harassment

- Federal and state law not only *prohibit* harassment...but also:
- Require employers to take all “reasonable steps” to prevent harassment from occurring....



# Who Can Be Liable for Harassment?

- **Employer**
  - When quid pro quo
  - Harassment by a supervisor
  - When employer does not act to correct alleged harassment
- **Individual Supervisors**
  - Harassing supervisor
  - Non-harassing supervisor who does not act to correct potential harassment
- **Other Employees**
  - Not individually liable under Title VII or FEHA
  - However, they can create liability for the employer as agents
  - Can also be individually liable for tort claims

# Who Can Engage in Harassment?

- Someone of the opposite sex
- Someone of the same sex
- Temporary employee
- Contractor
- Customer, vendor, visitor, client, member of the public, some other non-employee
  - The customer is not always right

# Different Types of Harassment

- **Physical Conduct** – inappropriate touching, massaging, hugging, blocking exits, “overly familiar” gestures, standing or sitting too close
- **Verbal Conduct** – off-color jokes, slurs, sexual degrading words, graphic comments about anatomy or clothing, repeated requests for a date, asking invasive personal questions, gossip about own personal life, belittling expressions
- **Nonverbal Conduct** – unwelcome gifts, leering, posters, emails, sexual gestures, winking, sexually suggestive objects or pictures
- **Auditory** – music, video clips

## Different Types of Harassment (cont.)

Sexual harassment can also be nonsexual hostile conduct directed at an employee because of his or her gender:

- Unequal treatment of an employee because of the employee's gender, including unequal discipline
- Unequal targeting of an employee of one gender for pranks, jokes, yelling, or other offensive conduct

# Physical Conduct



# THE TEST

## THE SACRAMENTO BEE

**[Your Company] Bikini Car Wash Fundraiser Raises Eyebrows Around The Capitol Employees Felt They Had To Participate Or Risk Retaliation**



A LexisNexis® Company

**[Your Company] supervisor buys edible underwear for all female legal secretaries for Valentine's Day**

## The New York Times

**[Your Company] Supervisor Sued For Sexual Harassment After Inviting Associates To Her Hot Tub**



**[Your Company] supervisor accused of locker room talk and commenting on tightness of female employees' skirts**

## San Francisco Chronicle

**[Your Company] Employee Alleges He Was Not Promoted After Reporting Sexual Harassment To HR**

## Types of Harassment

- Quid Pro Quo
- Hostile Work Environment

# Quid Pro Quo Harassment



## Quid Pro Quo Harassment

- Literally, harassment based on “this for that”
- Occurs when “submission to or rejection of sexual conduct by an individual is used as the basis for employment decisions affecting such individual”
- Also considered “economic harassment” because it involves an employment decision by a supervisor that affects compensation
- Strict liability for employers

## Quid Pro Quo Harassment

- The supervisor's threat may be express or implied
- California and federal courts apply the reasonable **victim** standard – *Ellison v. Brady*
  - “We realize there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are the victims of mild sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.”

## Example

Bill is a new supervisor in a department with 4 other people. It's his first supervisory position. Terri, one of the employees in his unit, finds a note from Bill on her desk, which says "I would like to get to know you outside of the office. Can we go out sometime soon?" Terri has no interest in seeing Bill outside of the office and says nothing to Bill or anybody else about the note.

Bill gradually stops having personal communications with Terri. He directs assignments to her through other employees, critiques her work through written memos, and calls staff meetings when she is not around.

**Is this there a quid pro quo sexual harassment claim here?**

## Hostile Work Environment Harassment

- “Unwelcome” or “unwanted” conduct
- Because of a protected category
- Severe or pervasive
- Such that a reasonable person would consider the workplace to be intimidating, hostile, or abusive

## “Unwelcome” Conduct

- Not the same as “intentional” – unwelcomeness determined not by what the harasser intends, but by what the victim perceives
- Conduct of a sexual nature is presumed to be unwelcome and unwanted
- Consider the effect of the power dynamic on whether something is truly “consensual”

# When Is Conduct “Unwelcome”?



# “Unwelcome” Conduct

- How do you tell when something is welcome or unwelcome?
  - Verbal response (or lack thereof)
  - Facial expression and body language
  - Remember third party witnesses too
- Context and optics alone is often enough – *Orlando v. Alarm One*
  - “Spankings obviously had a greater impact on the plaintiff simply because of her gender and age than on male employees. No middle-aged woman would want to be up there before a group of young men, turned around to show her buttocks, get spanked and called abusive names, and told it was to increase sales and motivate employees.”

## Example

Frank is a touchy feely supervisor who works at a supermarket. He hires Julie to be a stocking clerk. On Julie's first day of work Frank comes out to her as gay and jokingly insists that Julie call him "daddy." Over the next few weeks, he insists that Julie give him hugs and tells Julie on several occasions "make sure you complete your tasks to make daddy happy." Julie resists Frank's hugs and refuses to call him "daddy."

**Is Frank's sexual desire relevant to the issue of whether there was unwelcome conduct because of sex?**

## Sexual Desire Irrelevant

- Effective January 1, 2014, an amendment to FEHA provides that sexual desire need not be shown to establish a claim of sexual harassment.
- Joking or taunting someone in a way that is related to gender or sexual acts is even more dangerous territory.
- This amendment may have a particular impact in same-sex harassment cases where sexual desire is not necessarily presumed.

## Example

A manager walks into the lunchroom and overhears an employee telling an off-color joke to 5 or 6 other employees. The joke does not contain any extreme language, but there is some mild profanity and sexual connotation. All of the employees laugh at the punch line.

**What should the manager do?**

- 1. Nothing**
- 2. Immediately stop the activity**
- 3. Talk to joke teller later**

# “Because of” Protected Category

Most common categories we see alleged in hostile work environment claims:

- Gender
- Race/ethnicity
- Religion
- National Origin
- Age
- Disability
- Sexual Orientation

## “Severe OR Pervasive”

- A single incident might be **severe** enough to constitute harassment, though such cases usually involve physical conduct or touching.
- Even if not “severe” on their own, many seemingly trivial incidents can be **pervasive** enough to constitute harassment.



## Severe OR Pervasive (Cont.)

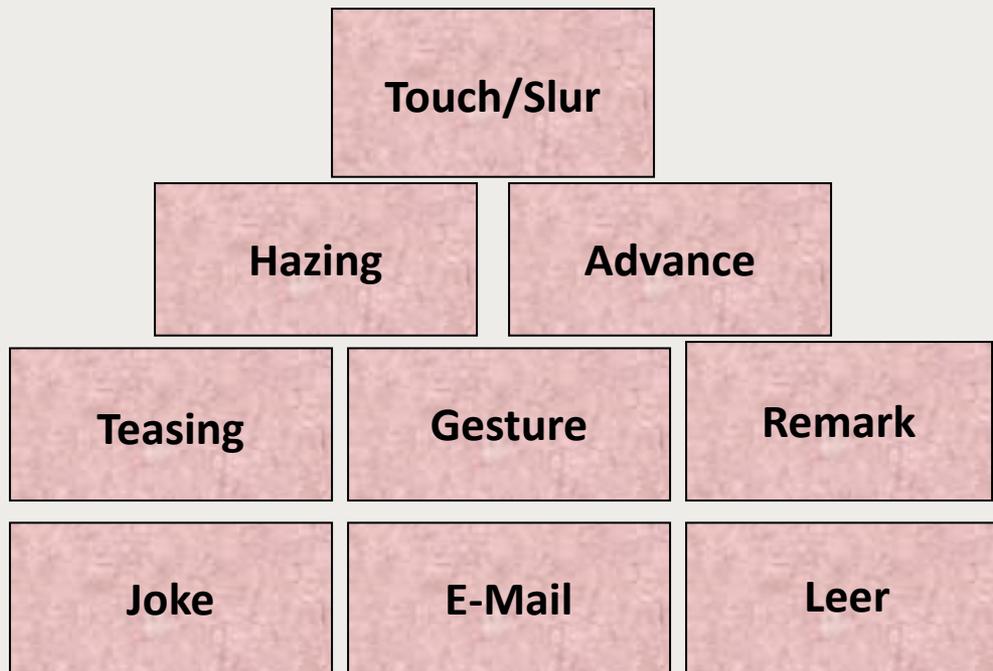
- Factors considered
  - Whether the conduct was verbal, physical, or both
  - Whether the conduct was physically threatening or humiliating vs. a mere offensive utterance
  - Whether the conduct interferes with the ability to work
  - Frequency of conduct
  - Whether the harasser is a supervisor or occupies a position of authority over the victim
  - Whether others joined in the harassment
  - Whether the harassment was directed at more than one person
  - Whether the harasser was involved in other incidents

# The Reasonable Person Standard

- This standard is both *objective* and *subjective*.
- “Subjective” because it is from the point of view of the target or victim, not from the point of view of the harasser.
- “Objective” because the person must be reasonable considering the circumstances.
  - For example, if the plaintiff is a woman, this standard asks whether a “reasonable woman” would be offended by the allegedly harassing behavior.

# ZERO TOLERANCE = PREVENTION

Every brick violates zero tolerance



Together the bricks form a pattern of conduct...  
**that creates a Hostile Work Environment**

# Romantic Relationships in the Workplace

- “Welcome” now, unwelcome later?
- Can consensual relationships give rise to sexual harassment complaints?
- Consider the power dynamic
- Consider “third-party” observers
- Consider impression of sexual favoritism
- Consider the supervisor’s obligation

## “Abusive Conduct”

- AB 2053, effective January 1, 2015, requires all anti-harassment training to include prevention of “abusive conduct” in the workplace
- Abusive Conduct = Conduct of an employer or employee in the workplace, with **malice**, that a **reasonable person** would find hostile, offensive, and **unrelated to an employer’s legitimate business interests**

## Abusive Conduct – What Is “Malice”?

"Malice" = acting with intent to cause injury; engaging in conduct that is despicable and done with willful and knowing disregard of the rights or safety of another

"Despicable" = conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people

## “Abusive Conduct”

- Statutory examples from AB2053:
  - Repeated infliction of verbal abuse
  - Use of derogatory remarks, insults, and epithets
  - Gratuitous sabotage or undermining of a person’s work performance
  - Verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating

# Common Workplace Bullying Tactics

- Falsely accusing someone of “errors” not actually made
- Using the “silent treatment” to “ice out” and separate from others
- Purposely not greeting someone and greeting everyone else
- Rolling eyes when one particular person speaks in a meeting
- Taking credit for work done by others
- Creating unrealistic demands or assigning undesirable work to a person singled out
- Starting or failing to stop destructive rumors or gossip
- Launching a campaign to oust someone
- Unnecessarily copying superiors on emails in an attempt to make someone look bad
- “Micromanaging”

## Conduct That Is NOT Bullying

- Legitimate performance reviews
- Disciplinary action
- Coaching and counseling
- Non-malicious conduct
- A single instance of conduct, unless severe and egregious

# Defining the Workplace

## QUESTION

The things that an employee does on his or her “personal time” (e.g. breaks, lunch, after work, etc.) cannot be considered harassment because they are not done “at work”?

**TRUE OR FALSE?**

## Defining the Workplace (Cont.)

**Is this activity “away” from the workplace such that employment laws do not apply?**

- Texting with a coworker after work hours
- Commenting on or “liking” social media postings by coworkers
- “Matching” with a coworker on Tinder, Bumble, or similar dating app
- Office party, off-site, not during work hours
- Informal happy hour after work
- Barbeque at co-worker’s house with both work and non-work friends

## Defining the Workplace – Technology

Technology has made these issues in harassment cases much more difficult

- Where is the workplace
- When is harassment occurring
- How to investigate harassment
- How to prevent harassment
- More mediums for harassment

# Technology and Harassment

## **Think About Emails Before You Hit Send!**

- Can they be misinterpreted?
- Do you want to have to explain this email?
- And remember...

**The “E” in “E-Mail” Stands for “Evidence.”**



# Think about emails before you send

## 9 Word Exercise

I never said I thought your email was stupid.

I never said I thought your email was stupid.

I never said I thought your email was stupid.

I never said I thought your email was stupid.

I never said I thought your email was stupid.

I never said I thought your email was stupid.

I never said I thought your email was stupid.

I never said I thought your email was stupid.

I never said I thought your email was stupid.



## Monitoring the Workplace

- **Be alert to potential trouble areas:**
  - Joking and off-color language
  - Pictures, posters and publications
  - Disputes between employees
- **Act quickly if you *suspect* a problem**
  - Don't wait for someone to complain
- **Your goals:**
  - Stop problems before they arise
  - Impress upon employees the commitment to providing a good work environment



# Harassment Complaints



## Question:

If there is no internal complaint about questionable or inappropriate behavior first, there is no basis later for a lawsuit alleging harassment.

**TRUE OR FALSE?**

# Constructive Knowledge Standard

- Employers are liable for harassment when:
  - They *actually* knew about the offending behavior; or
  - *Should have known...*
- And failed to take action.

# Harassment Complaints

- **“Formal” complaint not required**
  - Casual statements
  - Second or third hand statements
  - Observations
  - Doesn’t need to be to any specific person
- **Confidentiality**
  - Can’t be promised
  - Obligation to correct may override privacy concerns
  - No such thing as “off the record”
- **For supervisors, especially**
  - You are a resource for employees
  - Informal resolution if possible
  - Not reporting is not an option

# Responding to Harassment

## *What if YOU are the accused?*

- If you are notified that your conduct is offensive, be respectful and CHANGE your behavior
- Cooperate in the investigation
- Maintain confidentiality

## Preventing Retaliation

Federal and state law prohibit an employer from taking “adverse employment action” towards an employee who has engaged in “protected activity”

“Protected Activity” includes:

- Filing an administrative or civil complaint in good faith
- Reporting harassment/discrimination internally at work
- Participating in a harassment or discrimination investigation or proceeding

## Retaliation – “Adverse Employment Action”

- Obvious (e.g., disciplinary action, demotion, withholding a benefit, etc.)
- Not so obvious (e.g., ostracism? interference with work? disclosure of complaint?)
- Standard: any action that “could well dissuade” an employee from engaging in protected activity in the future

# Retaliation

- Relationship between the “protected activity” and “adverse employment action”
  - Same actor
  - Concurrent statements/actions
  - Timing

## Closing Thoughts – How Do These Cases *Really* Play Out?

- Microaggression = an instance of indirect, subtle, or unintentional discrimination against members of a marginalized group
  - Can be unconscious or unintentional
  - Can come out in seemingly innocuous comments by people who might be well-intentioned
- Most victims of microaggressions do not respond in the moment because the aggression is, by definition, “micro”
- The point is the accumulation over time of indignities that the majority group is not subjected to – it’s a tax

## Closing Thoughts – How Do These Cases Really Play Out?

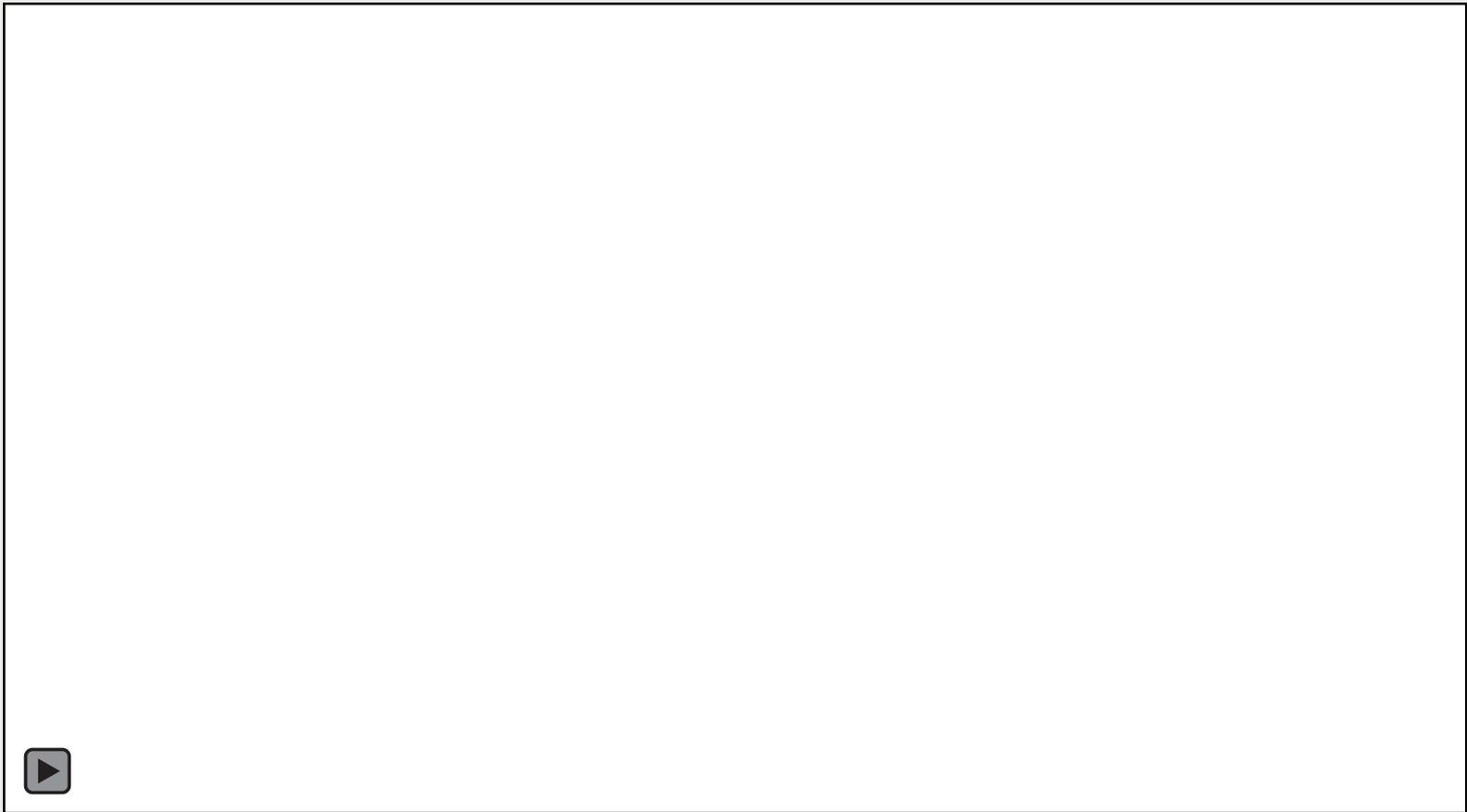
- Why is this important – changing workplace demographics
  - 43 percent of millennials are people of color, and each ensuing generation is even more diverse
  - Generation Z (born 1996–2010) is 47 percent Latinx, African-American, Asian-American, or multiracial
  - By about 2043, America will become a majority people of color nation, with more than half its population non-White
  - Since about 2000, a higher percentage of women have obtained college degrees than men (the rate is currently ~40% to ~33%)
- Despite these numbers, management and c-suite executive positions still predominantly straight, white, male

# Closing Thoughts – How Do These Cases *Really* Play Out?

Common gender-based microaggressions:

- “When are you thinking of starting a family?”
- “Have you met Jennifer yet? She’s a lovely girl.”
- “Jennifer can be too assertive in meetings” vs. “I like how Joe always speaks up and stands his ground in meetings”
- “That’s not very lady-like.”
- Assuming a position/role
- Interrupting
- Taking credit
- Mansplaining

# Mansplaining...Mansplained



## Closing Thoughts – How Do These Cases Really Play Out?

Common orientation/identity-based microaggressions:

- “You're transgender? Wow, you don't look like it at all.”
- “Is that a man or a woman?”
- “Oh, you're gay? You should meet my friend, they're gay too!”
- “He/She is gay? What a waste.”
- “You don't sound gay” or “You don't look gay”
- “Which one of you is the man/woman in the relationship?”
- Repeatedly using non-preferred pronoun

# Closing Thoughts – How Do These Cases *Really* Play Out?

Common race-based microaggressions:

- “You speak so well” or “You’re so articulate” or “Your English is good”
- “What are you?” or “No, where are you *really* from?”
- “You don’t act like a \_\_\_\_\_ person”
- “I don’t see color” or “I don’t care if you’re black, white, green, or purple”
- “Oh sorry, wrong person”
- “Your name is so hard to pronounce”
- “Where can I get the best [food item]?” or “You’re \_\_\_? I love [food item]!”
- “I’m not racist, my friend/significant other is \_\_\_\_\_”
- Policing presence
- Touching hair

# Closing Thoughts – How Do These Cases *Really* Play Out?

Combating microaggressions:

- Drop the defensiveness
- If someone says you offended them, listen
- Think before you speak – would you make this comment or ask this question to someone of a majority group?
- Do your own occasional gut check
- Seek out articles, podcasts, and other media to learn about why some things might be problematic – don't rely on the labor of others
- Use your privilege to confront microaggressions when you see or hear them

**QUESTIONS?**



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