

# Unveiling the Complexities of Sexual Harassment Laws

*ACCA Presentation*

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# Sexual Harassment: The Basics

- What is Sexual Harassment?
- UNWELCOME sexual advances, requests for sexual favors, and other verbal or physical conduct of a **SEXUAL NATURE** constitute sexual harassment when they are:
  - A term or condition of employment or used as a basis for employment decisions or
  - sufficiently severe or pervasive to interfere with performance and/or creating a hostile work environment

# Sexual Harassment: State v. Federal

- California Law: FEHA
- Federal Law: Title VII
  - California law is more protective of employees
    - Strict liability
    - Supervisor liability
      - No Ellerth/Faragher “defense”
    - Co-worker liability
    - Third party liability
    - Mandatory supervisor training (AB 1825)



# Liability For Supervisor Harassment

- The employer is strictly liable for environmental harassment created by the conduct of a supervisor
- Under California law, employers may reduce an employee's recovery **if**: (1) there has been no tangible job loss or detriment; (2) the employer has established and disseminated sexual harassment policy and complaint procedure; and (3) the complainant unreasonably failed to complain about the unwelcome conduct. This is NOT a defense to sexual harassment. It is a damages issue.
- Supervisors may also be held personally liable for such conduct



# Liability For Co-Worker Harassment



- An employer becomes liable for sexual harassment between co-workers when it **KNOWS** or **SHOULD HAVE KNOWN** of the conduct and fails to take immediate and appropriate corrective action
- Effective January 1, 2000
  - In California, individual, non-supervisory employees can be held personally liable for sexual harassment

# Liability For Third Party Harassment

- ❑ When a vendor or customer harasses an employee, the same standard applies to harassment that occurs between two employees
- ❑ An employer becomes liable for sexual harassment between customers/vendors and employees when IT KNOWS or SHOULD HAVE KNOWN of the conduct and fails to take immediate and appropriate corrective action



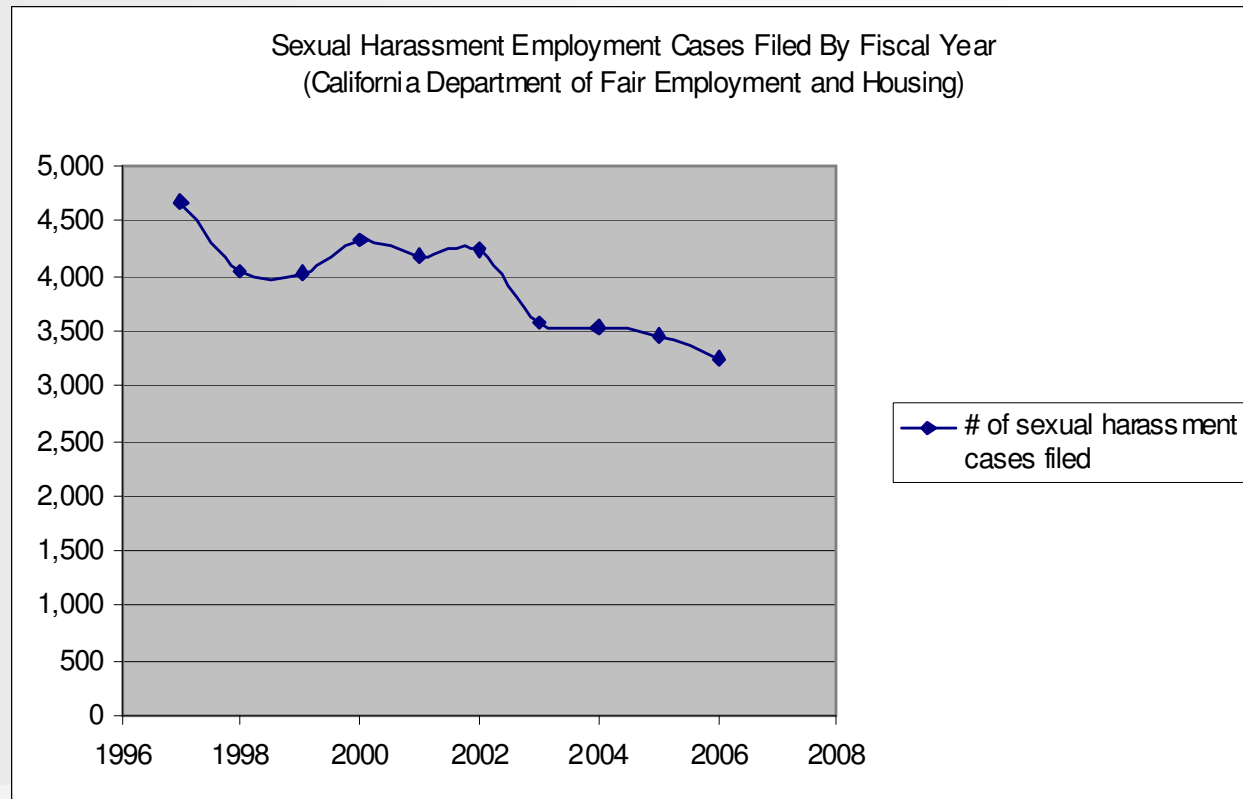
# Some Good News: Decline in Number of Filed Claims

- Less Federal and State court filings as of 2006
- Less Federal and State governmental agency filings as of 2006



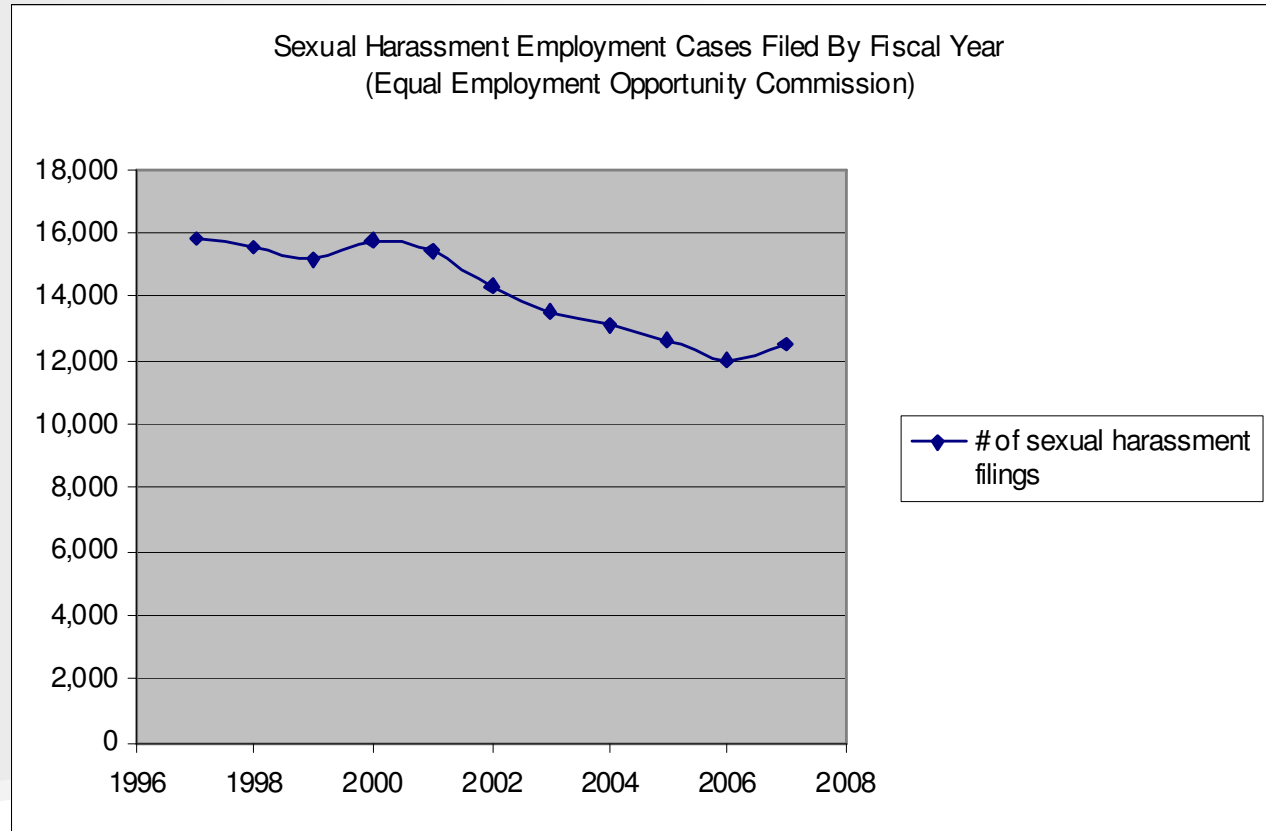
# The Good News: Statistical Data

Year	# of sexual harassment cases filed
1997	4,677
1998	4,051
1999	4,036
2000	4,343
2001	4,189
2002	4,231
2003	3,571
2004	3,544
2005	3,465
2006	3,260



# The Good News: Statistical Data (Cont'd.)

Year	# of sexual harassment filings
1997	15,889
1998	15,618
1999	15,222
2000	15,836
2001	15,475
2002	14,396
2003	13,566
2004	13,136
2005	12,679
2006	12,025
2007	12,510



# AB 1825 – Mandatory Supervisor Training

- Employers with 50 or more employees must provide training to “supervisors” once every 2 years
  - “supervisor” defined broadly
  - independent contractors and temporary service employees must be included in calculating the 50 employees
  - new supervisory employees must receive their initial training within six months
  
- Preventing Harassment
  - Easy reporting procedures (hotline, committee etc)
  - Posters, policies and training for all employees
  - Leadership and manager training
  
- Impact on new court/agency filings?

# California Jury Verdicts in Sexual Harassment Cases in Last 10 Years

- Relatively few in California -- damages range from \$0 - \$30 million
- Very few in San Diego – but beware San Diego jurors:
  - > Marcisz v. UltraStar Cinemas – 4 plaintiffs awarded \$6 million in punitive damages and \$850,000 in compensatory damages
  - > Gober v. Ralphs – 6 plaintiffs awarded \$30 million in punitive damages (later reduced to \$3.3 million i.e. 6 times the compensatory damages of \$550,000)
  - > Roberts v. Starbucks – same sex sexual harassment plaintiff awarded \$7,500 compensatory damages and \$250,000 punitive damages (reduced to \$145,000)



## Other Sexual Harassment Verdicts

- Sornia v. El Centro Elementary School District: (U.S.D.C. Southern District of California April 2008)
  - 9<sup>th</sup> Circuit affirmed jury verdict of \$400,000 in emotional distress damages and \$32,500 in punitive damages against harasser (24% of his net worth)
  
- New York Knicks: \$11.6 million jury verdict October 2007
  - \$6 million for condoning a hostile work environment -
  - \$2.6 million for retaliation
  - \$3 million against the chairman of Madison Square Garden for retaliatory firing (1 month after receiving complaint)

# Workplace Romance

- The Reality
  - Anywhere between 60% and 80% of all employees are or have been involved in an office romance
- Danger → “Welcome” becomes “unwelcome”
  - The scorned man example
  - The scorned woman example
- Favoritism Allegations: Miller v. Department of Corrections
- Policies regarding workplace dating
  - No dating
  - Dating register
  - Disclosure requirements



# Investigating Sexual Harassment Claims

- Criteria for an effective investigation
  - Promptness, neutrality, thoroughness and fairness
  
- Planning the investigation
  - Attorney Client Communication Privilege
  - Who will investigate? (HR, Licensed Investigator, Outside Counsel)
  - Conducting interviews
    - the accused, the complainant, other employee witnesses
  - Confidentiality
  - Concluding the investigation
    - Documentation
    - Corrective action
    - Avoiding retaliation



# A Poor Investigation Is No Investigation

- Fuller v. City of Oakland
  - Failure to promptly interview accused
  - Leaked allegations to accused allowing him to prepare advance
  - Failure to corroborate accused's version of events
  - Failure to interview witnesses favorable to complainant
  - Investigator bias



# Investigation Mistakes

## ■ Neutrality

- Investigator failed to review personnel file and relied entirely on supervisor's version of events
- Investigator was involved in drafting disciplinary documentation that complainant contested
- Investigator was personal friends with accused and socialized with him on weekly basis outside work
  - **Note: Most juries do not believe that HR employees are neutral!**

## ■ Effectiveness

- Assigned investigator was a “benefits” representative who had never conducted an investigation before

## Investigation Mistakes

### ■ Thoroughness

- HR representative spent 10 minutes taking complainant's statement, asked no questions regarding witnesses or documents and never got back to complainant (put statement in a file)
- Investigator failed to review/discover performance memoranda kept in supervisor's file
- Investigator failed to distinguish between time periods when accused was co-worker versus supervisor
- Early report contained absolute statements "Jane is not a team player" without any details or examples
- Key decision-makers involved in a suspension not interviewed

### ■ Promptness

- Doctor's note claimed hostile work environment in August, no investigation launched until December, complainant not interviewed until January, investigation not concluded until October

# Tools For An Effective Investigation

- Investigation outline (including witness list)
- Investigation matrix
- Timeline/chronology
- Thorough interview outlines
- Active listening and follow-up
- Interviewing in order of: complainant, other witnesses, and accused
- Thorough review of documents (other employees' personnel files, supervisor file etc)



# Discovery Limitation In Sexual Harassment Cases

## ■ California Code of Civil Procedure Section 2017.220

- (a) In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator shall establish specific facts showing that there is good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. This showing shall be made by a noticed motion, accompanied by a meet and confer declaration under Section 2016.040, and shall not be made or considered by the court at an ex parte hearing. (b) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for discovery under subdivision (a), unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

# Evidentiary Limitation In Sexual Harassment Cases

## ■ Evidence Code Section 1106

- (a) In any civil action alleging conduct which constitutes sexual harassment ... opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct, or any of such evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium. (b) Subdivision (a) shall not be applicable to evidence of the plaintiff's sexual conduct with the alleged perpetrator. (c) If the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff. (d) Nothing in this section shall be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783.
- Rieger v. Arnold (2002) 104 Cal.App.4th 451, 462. ("conduct" as used in section 1106 includes all active or passive behavior that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity)

# Recent Trends: Federal Court is the Place to Be

- Exposure to pornography not enough
  - Fonseco v. Secur. Int'l
  
- Faragher/Ellerth Defense
  - Hardage v. CBS Broadcasting, Inc.
  
- Isolated Incidents won't suffice
  - Mokler v. County of Orange
  - Jones v. Dept. of Corrections
  
- Practical effect of Federal court rulings

# Recent Trends: Expanding the Scope of California Harassment Claims

- Third Party Affairs
  - Miller v. Department of Corrections
  
- Conduct Directed Toward Others
  - Dominguez-Curry v. Nevada Transportation Dept.
  
- Behavior Away From Work
  - Myers v. Trendwest Resorts, Inc.

# Managing Outside Counsel

- Establish expectations early on
- Conduct preliminary investigation to minimize costs
- Request litigation budget
- Ask for discovery plan and assess for reasonableness/effectiveness
- Ask for early resolution strategies
- Consider cost v. benefit of dispositive motions
- Address performance deficiencies quickly



*Thank You*