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MCLE Self-Study:

Guidelines for Responding to Sexual Harassment in the Workplace: An Update

By Amy Oppenheimer and Alezah Trigueros

New Guidelines

Sexual harassment has never been in the spotlight so much as it has over the last few months. One issue that has been under scrutiny is how institutions respond to harassment complaints. A place to turn when determining an appropriate institutional response are guidelines provided by enforcement agencies, such as the U.S. Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment and Housing (DFEH). Many practitioners are unaware that DFEH recently published new guidelines that are of great assistance in determining an appropriate response to claims of discrimination and harassment (DFEH, *Workplace Harassment Guide for California Employers* (2017)). Other government guidelines to consider are the EEOC *Enforcement Guidance on Vicarious Employer Liability for Harassment by Supervisors*, which was published in 1999 in the wake of the Supreme Court decisions in the *Ellerth* and *Faragher* cases.¹

Until recently, the 1999 EEOC guidelines were the only government guidelines available that addressed appropriate employer responses. These guidelines were very helpful; however, EEOC is updating them. Last year, the EEOC held hearings evaluating the effectiveness of prevention measures, including training and investigations, and published a paper based on

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its findings.² The EEOC has now proposed new guidelines, which are awaiting finalization and publication. In addition to government guidelines, practitioners can look to guides published by law firms and professional organizations such as the Society for Human Resource Management (SHRM) (*see, e.g.,* Amy Oppenheimer and Craig Pratt, *Investigating Workplace Harassment* (2003)), and publications such as the *Guiding Principles for Investigators Conducting Impartial Workplace Investigations*, published by the Association of Workplace Investigators (AWI) in 2012.

The DFEH guidelines, which were published in May of 2017, are the most up-to-date and complete guidelines that discuss an employer's investigative response. The DFEH developed them through its Task Force on the Prevention of Sexual Harassment in the Workplace, which was formed in 2016 to study the problem of sexual harassment, the effects of ten years of harassment prevention training in the state of California, and best practices to prevent harassment. The DFEH guidelines include some big-picture information, such as designing and

implementing effective harassment programs, but also zero in on how to conduct a prompt, thorough, and fair investigation.

This article compares and contrasts the new DFEH guidelines with the 1999 EEOC guidelines, the proposed EEOC guidelines, and the AWI guiding principles.

The DFEH guidelines utilize frequently asked questions (FAQs), which address a broad range of topics, including how to respond to complaints, credibility factors, the burden of proof, and other issues. Rather than being a treatise on the law similar to the 1999 EEOC guidelines, the DFEH guidelines have a more practical application. They also provide more practical information than the proposed EEOC guidelines, which are also a treatise on the law, albeit updated from 1999, and address what the EEOC calls "promising practices" that emphasize resourcing, prevention, and investigations.

Due Process

The DFEH guidelines specifically use the term "due process" in relation to providing a fair investigation. Although

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the EEOC and AWI have not used this term specifically, the concept exists in all of the guidelines. Each set agrees that those accused of harassment should have an opportunity to tell their side of the story. The DFEH guidelines specifically state that the investigation should start with a thorough interview of the complainant and also specify that while the investigation should afford the alleged harasser due process and an opportunity to be heard, it is not necessary to give the accused the allegations prior to the interview or to provide a copy of a written complaint. Rather, the DFEH guidelines state that it is acceptable practice to reveal allegations during the interview, so long as the accused has an opportunity to fully respond. The DFEH guidelines further specify the need to interview relevant witnesses and collect relevant documents, but state that the investigator need not interview every potential witness. Lastly, the DFEH guidelines, in addressing due process, emphasize that the investigator should come to a “reasonable and fair conclusion.” The proposed EEOC guidelines refer to this concept as arriving at a “reasonably fair estimate of truth,” and AWI articulates this concept as striving “in good faith to make reasoned findings.”

Confidentiality

One issue that has become more complicated over recent years is how to handle confidentiality. On one hand, the employer (and thus the investigator) is expected to keep the matter as confidential as reasonably possible. On the other hand, decisions

such as *Banner* from the National Labor Relations Board (NLRB)³ state that employers cannot require employees to keep matters confidential, because doing so could interfere with employees' rights to unionize under Section 7 of the National Labor Relations Act. Since *Banner* was decided after the 1999 EEOC guidelines were issued, it is not addressed; the EEOC guidelines simply identify the need for confidentiality. Nor do the proposed EEOC guidelines or the AWI guiding principles address *Banner*. The DFEH guidelines acknowledge that mandating employees to keep an investigation confidential is complicated and could be inappropriate under current law. This is an evolving area of the law about which employers and investigators need to be aware and evaluate on a case-by-case basis.

Timeliness

Another issue both the EEOC and DFEH guidelines address, though not AWI's, is timeliness. The 1999 EEOC guidelines state that the investigation “should be launched immediately,” and the proposed EEOC guidelines say that the investigation is “prompt if it is conducted reasonably soon after the complaint is filed.” The proposed EEOC guidelines also give examples and cite case law. The DFEH guidelines give parameters, including contacting the complainant within a day or two to launch an investigation, unless the matter is urgent, and striving to finish the investigation in a few weeks, depending on factors such as witness availability.

Impartiality

All of the guidelines address impartiality, also called objectivity. The EEOC's discusses an “objective” investigation conducted by an “impartial” party. The AWI guiding principles also use the term “impartial.” The DFEH uses the term “impartial” and speaks directly to investigators addressing whether they have biases and assessing those biases. The AWI and DFEH guidelines state that the employer should also consider whether there could be a perception of bias based on the chosen investigator. The DFEH posits that it is generally a bad idea for the investigator to have less authority than either the complainant or respondent. The 1999 EEOC guidelines state that the alleged harasser should not have supervisory authority over the individual who conducts the investigation, or direct or indirect control over the investigation. The proposed EEOC guidelines discuss this in terms of the “authority, independence, and resources required to receive, investigate, and resolve complaints appropriately.”

Investigator Qualifications

The DFEH and EEOC guidelines also address investigator qualifications and training. The 1999 EEOC guidelines recommend an investigator who is “well-trained in the skills that are required for interviewing witnesses and evaluating credibility.” The proposed guidelines also use the term “well-trained.” The DFEH guidelines reflect that the investigator should have knowledge of the laws, policies, investigative techniques, and documentation skills needed; have good communication skills; and have received training from a professional organization (such as the SHRM or AWI, for example).

The guidelines also address the types of questions that investigators should ask. The 1999 EEOC guidelines provide sample questions. The AWI guiding principles encourage the use of open-ended questions. The DFEH guidelines state that investigators

should use open-ended questions and that the investigative interview is not an interrogation.

Credibility Determinations

The 2017 DFEH guidelines also provide considerably improved guidance on making credibility determinations. The EEOC addressed this in 1999, stating that the investigator should make a credibility finding when necessary, including a “he said/she said” situation, noting that an independent witness is not needed. This is an important concept, as many employers erroneously believe some independent evidence is necessary and therefore will not find that harassment occurred when the evidence is simply one employee’s word against another’s. Often, there are no witnesses to harassment, especially sexual harassment. It is important for employers to understand that the credibility of one individual’s statement can be weighed against another’s in order to make a finding.

The proposed EEOC guidelines also state that they can be used to assist in weighing the credibility of all relevant parties. The DFEH guidelines set forth credibility factors that can be used for this purpose. Some of these credibility factors the EEOC included in its 1999 guidelines; however, the EEOC mentions five, as opposed to the nine that the DFEH identifies. The DFEH’s factors also are nearer to those the evidence code identifies, at least to some extent.⁴ The credibility factors DFEH identifies include: inherent plausibility or implausibility; motive to lie; corroboration; the witness’s ability to perceive and recall; history of honesty or dishonesty; habit or consistency; inconsistent statements; the manner of the testimony, including hesitation and indirect answers; and demeanor. While the EEOC guidelines encourage the use of demeanor evidence, the DFEH encourages caution in relying on demeanor. New empirical evidence shows that relying on demeanor can

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lead to erroneous findings. Most people are not particularly good at determining truthfulness based on demeanor.

Burden of Proof

Burden of proof has become controversial in the Title IX setting. Under President Obama, the U.S. Department of Education published “Dear Colleague” letters, stating that Title IX investigators should use a “preponderance of the evidence” burden of proof.⁵ The Trump administration changed that in a September 22, 2017 directive, stating that a “clear and convincing” standard may be used, and leaving the issue somewhat ambiguous.

When it comes to workplace investigations under Title VII or the California Fair Employment and Housing Act (FEHA), there appears to be general agreement that the burden of proof is a preponderance of the evidence. Although the EEOC guidelines do not address burden of proof, the AWI guiding principles state that many workplace investigations should utilize the preponderance of the evidence standard. The 2017 DFEH guidelines specifically articulate that findings should be based on a preponderance of the evidence, which the DFEH explains means “more likely than not.” The DFEH guidelines clarify that the standard is not “clear and convincing” or “beyond a reasonable doubt,” as employers sometimes mistakenly insist

when the allegations are serious. The DFEH guidelines should help California employers understand they must not apply a burden of proof any greater than a preponderance of the evidence.

Findings

The DFEH guidelines also address an important topic that the EEOC guidelines do not cover: the type of findings investigators should make. The DFEH recommends making factual findings rather than legal conclusions, and acknowledges that investigators might also make findings regarding policy violations. These distinctions are significant, and it is helpful that DFEH has clearly articulated the types of findings employers should make in workplace investigations.

The DFEH guidelines also specify that there should be careful and objective documentation of interviews, findings, and steps taken to complete the investigation. The guidelines acknowledge that there are different documentation methods that are acceptable, but warn that documentation should be consistent throughout an investigation and that employers should retain all original documentation. This addresses the sometimes problematic practice of investigators who destroy original notes and rely on summaries of those notes. The 1999 EEOC guidelines do not address documentation; however, the proposed EEOC guidelines suggest appropriately documenting every complaint, from the initial intake through the investigation and resolution. The AWI guiding principles are similar to the DFEH’s guidelines.

Retaliation and Other Issues

By utilizing an FAQ format, the DFEH was able to address some issues that arise in workplace investigations that neither the EEOC nor AWI have addressed. For example, what should an employer do if it learns of harassment, but the target of that harassment asks

the employer to not take action? The DFEH suggests that if the issue is a minor one, it is possible to coach the complainant about how to handle the situation, assuming the employer adequately follows up. Regarding more serious allegations, however, DFEH emphasizes the employer must take action, regardless of the fact that the target requests no action be taken.

The DFEH guidelines, but not the EEOC's or AWI's, also address anonymous complaints. The DFEH recommends investigating anonymous complaints using methods that will vary based on the information known to the employer, and also suggests that an environmental assessment may be useful to determine whether harassment exists in the workplace, in the wake of an anonymous complaint.

Lastly, EEOC, DFEH, and AWI guidelines all address retaliation. Retaliation complaints have grown over the last 20 years. In 2016, retaliation complaints accounted for 21 percent of DFEH complaints, and 45.9 percent of EEOC filings. DFEH states that complainants and witnesses must be protected from retaliation, and urges employers to inform employees that retaliation violates both the law and the employer's policies. Moreover, the DFEH guidelines recommend

that employers monitor the work environment to prevent retaliation after receiving a complaint. The EEOC addresses retaliation in separate sections both in the 1999 guidelines and in the proposed guidelines. AWI discusses retaliation under the guiding principle regarding witness interviews. Regardless of where in the respective guidelines retaliation is covered, clearly, addressing retaliation is an important component of an effective employer response. Indeed, the fear of retaliation is a strong driver in preventing employees from complaining, and thus an effective employer program to prevent and respond to harassment must include safeguards against retaliation.

The DFEH guidelines are an important tool for employers to use in complying with the law, preventing workplace harassment, and responding to complaints. Although the department's sexual harassment taskforce developed them, the DFEH guidelines apply to all forms of workplace harassment and complaint investigations. As employers become more knowledgeable and, hopefully, more savvy about the critical need to conduct fair and thorough investigations, these guidelines will become increasingly important. ⁴²

ENDNOTES

1. *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
2. Select Task Force on the Study of Harassment in the Workplace, EEOC, *Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016).
3. *Banner Health Sys.*, 362 NLRB No. 137 (June 26, 2015).
4. See Cal. Evid. Code § 780 (2015).
5. See Office for Civil Rights, U.S. Department of Education, *Dear Colleague Letter on Sexual Violence* (2011).



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