

4. Examples of Conduct

- (a) Physical assault
- (b) Physical touching
- (c) Comments or solicitations
- (d) “Jokes” or cartoons
- (e) Use of work internet
- (f) Anything “sexual” in nature which a reasonable person would find hostile or abusive

5. The work environment must be both objectively and subjectively hostile. *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21-22

- (a) A reasonable person in the victim’s circumstances would have considered the work environment to be hostile or abusive, judged from the vantage point of a person in plaintiff’s position. *Oncale*, at 81
- (b) The victim actually did consider the work environment to be hostile or abusive

6. The harassing conduct was engaged in by a supervisor or, if engaged in by a coworker or agent of the employer, the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action

7. The conduct was a substantial factor in causing actual harm to the victim

8. Employee complains about sexual harassment and/or use of the employer’s complain procedures

- (a) It may be important to complain or use employer’s complaint process
- (b) Generally a good practice is to complain of the conduct

- (c) Under Federal law, unreasonable failure to take preventative action may provide a defense to the employer. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775
- (d) Under State law, failure to complain may lead to “avoidable consequences” which may limit an employee’s damages. *State Dept. of Health Services v. Superior Court* (McGinnis) (2003) 31 Cal.App.4th 1026

C. Hostile Work Environment Caused by Harassment Directed at Others

- 1. Claims of hostile environment can be based upon or include conduct not aimed directly at complainant. *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285
- 2. Claims of hostile environments can include hearsay conduct, such as knowledge that others are being sexually harassed. *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519

D. Hostile Work Environment Caused by Widespread Sexual Favoritism

- 1. Similar to Hostile Work Environment except the conduct which brings about the finding of hostile work environment is preferential treatment of another person with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because that person has a sexual relationship with an individual representative of the employer who is in a position to grant those preferences. *Miller v. DOC* (2005) 36 Cal.4th 446, 466

E. Gender Based Harassment Also Illegal

- 1. Hostile conduct due to the employee’s gender is also prohibited *EEOC v. National Ed. Ass’n.* (9th Cir. 2008) 422 F.3d 840.
- 2. Harassing an employee because “this is man’s work”, for example, prohibited, even if the harassment is not sexual in nature

II. IS THIS SEX OR GENDER DISCRIMINATION?

A. Sex/Gender Discrimination Defined

1. Sex discrimination includes discrimination based upon either sex or gender
2. This includes discrimination in the terms and conditions of employment, including hiring, reviews, promotions, wages, terminations and layoffs
3. Gender stereotypes prohibited
 - (a) Terminating a female employee because she does not meet the stereotyped expectations for a woman, is prohibited. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 251
 - (b) Pervasive sex-role stereotype that caring for family members is “women’s work” is an example of a gender based stereotype. See generally, *Nevada Department of Human Resources v. Hibbs* (2005) 538 U.S. 721, 731 (accounts for leave policy treating men and women differently)

B. Adverse Action

1. Plaintiff must show that an adverse action was taken
2. Adverse actions include terminations, demotions or a course or pattern of conduct that, taken as a whole, materially and adversely affects the terms, conditions or privileges of employment. *Yanowitz v. L’Oreal USA, Inc.* (2005) 35 Cal.4th 1028

C. Causation

1. The employee should prove that sex or gender was a substantial motivating factor in the adverse action. *Harris v. The City of Santa Monica* (2013) 56 Cal.4th 232

D. Discrimination can be Proven by Direct or Indirect Evidence

1. Since direct evidence of discrimination is difficult to obtain, an employee can use circumstantial or indirect evidence. *Sandell v. Taylor Listug, Inc.* (2010) 188 Cal.App.4th 297, 307
2. Discrimination can be proven by demonstrating that the employee was qualified to perform the job and the employer's reasons for the adverse action was a pretext for discrimination *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 142
3. Indirect evidence can include, among other things, evidence that comparative employees who were similarly situated were treated more favorably. *McDonald Douglas Corporation v. Green* (1973) 411 U.S. 792, 804; *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th, 803, 816-817
4. Failure to follow the employer's own policies and procedures may support an inference of discrimination, *Bass v. Board of County Commissioners Orange County, Florida* (11th Cir. 2001) 256 F.3d 1095, 1108

E. Sex/Gender Discrimination not the Sole Reason

1. Employee need not prove that (sex or gender) discrimination was the sole reason for the wrongful action *Mixon v. FEHC* (1978) 192 Cal.App.3rd 1306
2. Discrimination Based upon Combination of Protected Statuses
 - (a) There may be a variety of reasons some legal and some illegal. It is discriminatory to take adverse action based upon a combination of protected statuses such as sex and age/race/national origin/marital status, or pregnancy. *Lam v. University of Hawaii* (9th Cir. 1994) 40 F.2nd 1551, 1562; *Jefferies v. Harris County Community Action Association* (5th

Cir. 1980) 615 F.2d 1025, 1032 (discrimination against African American women)

3. "Sex Plus" Discrimination

- (a) Discrimination against particular sub-groups of women, such as women with children prohibited. *Phillips v. Martin Marietta Corporation* (1971) 400 U.S. 542, 543

III. BEWARE OF RETALIATION AGAINST EMPLOYEES WHO PROTEST DISCRIMINATION

1. Retaliation for opposing discrimination or participating in a discrimination complaint is prohibited
2. Where an employee engages in this type of protected activity, and the result is an adverse employment action caused by the protected activity, this constitutes prohibited retaliation. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028
3. Oppositional Activity is Protected
 - (a) Opposing unlawful acts such as sex discrimination or pregnancy discrimination
4. Participation is protected
 - (a) Making a charge, testifying, assisting or participating in discrimination hearings or charges
5. The employee who opposes the illegal conduct need not be correct about whether the conduct is illegal or not. The employee can be wrong and still bring a retaliation action if the employee was reasonable and acted in good faith. *Yanowitz* at 1028.

IV. OTHER IMPORTANT CLAIMS AND ISSUES FOR WOMEN SCIENTISTS

- A.** Other Basis of Discrimination or Protected Statuses
- B.** Family Leave
- C.** Breach of Contract
- D.** Fraud or Misrepresentation
- E.** Defamation: Libel or Slander
- F.** Unequal Pay Claims
- G.** Wrongful Termination in Violation of Public Policy
- H.** Invasion of Privacy