

Management Workshop on Employee Relations Issues

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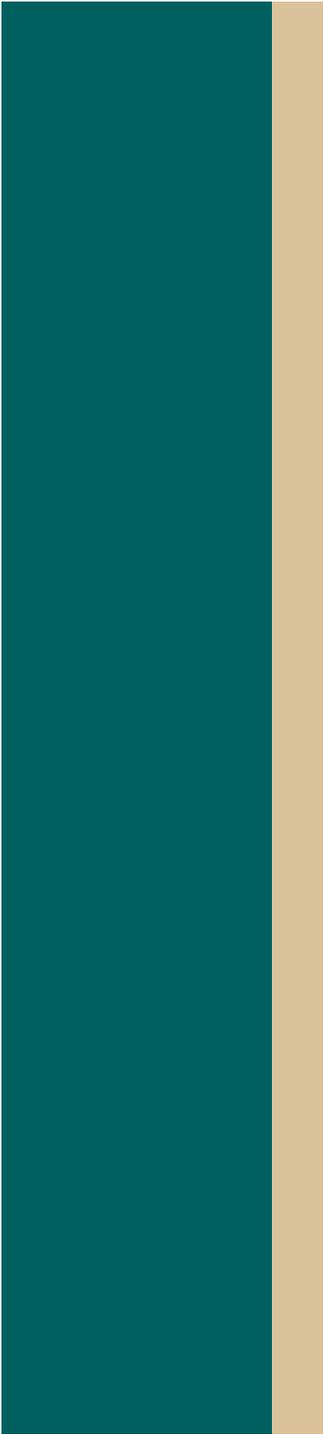
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Agenda for Today

- Session 1: Anti-Harassment & Anti-Bullying
- Session 2: Hot Topics in Employee Relations
 - 1) Disability Accommodation
 - 2) Grievances
 - 3) Performance Evaluations
- Session 3: Documenting Performance Problems and Misconduct
- Session 4: Progressive Discipline



Session 1: Anti-Harassment & Anti-Bullying

Training Objectives

- Learn about legal and District expectations regarding anti-harassment and anti-bullying
- Learn how to identify harassment and workplace bullying
 - ❑ Be Self Aware – notice language and behavior – work filter
 - ❑ Recognize harassing/bullying behavior in others
- Learn how to prevent harassment and abusive conduct and promote positive behaviors
- Learn how to report harassment
- Understand the prohibition on retaliation

Course Overview

I. Federal and State Laws

II. What is Harassment?

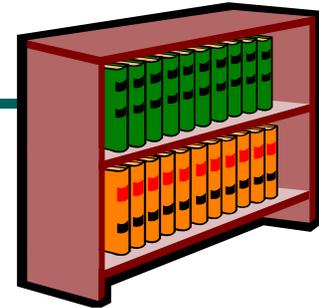
III. Types of Harassment

IV. Abusive Conduct & Bullying

V. Retaliation

VI. Prevention & Best Practices

Anti-Discrimination/Harassment Laws



- **Federal:**

- Title VII [Civil Rights Act: Prohibits Discrimination in Employment Based on Race, Color, National Origin, Religion, Sex]
- ADEA [Age Discrimination in Employment Act - over 40 yrs old]
- ADA [Americans with Disabilities Act]
 - EEOC [Equal Employment Opportunity Commission: plaintiff must go through administrative complaint process first]
- Title IX [Education Amendments of 1972: Prohibits discrimination on the basis of sex in education programs or activities]
 - OCR [Office of Civil Rights, Department of Education: enforces Title IX]

California Law - FEHA

Cal. Fair Employment & Housing Act (FEHA)

- Broader Protection Than Federal Law
 - ❑ Failure to take “all reasonable steps necessary” to prevent harassment is a separate cause of action
 - ❑ **Protects additional traits, including prohibiting harassment based on sexual orientation, gender identity or gender expression**
 - ❑ Protects employees, applicants, volunteers and independent contractors
 - ❑ Imposes personal liability on harassers

- Enforced by the DFEH



Other Applicable Laws/Policies

- State Chancellor's Office
 - Title 5, California Code of Regulations, section 59300 et. seq.
- Cal. Education Code Sections 212.5, 66252, and 66281.5;
- PCCD Policies/Procedures
 - Administrative Procedure 3430 (Prohibition of Unlawful Harassment)
 - Administrative Procedure 3435 (Discrimination and Harassment Complaints and Investigations)
 - Board Policy 3430 (Prohibition of Harassment)



PCCD Policies on Harassment

- Board Policy 3430: Prohibits all forms of discrimination and retaliation
- Administrative Policy 3430: Defines harassment, including sexual harassment, provides guidelines related to consensual relationships
- Administrative Policy 3435: Sets forth process for lodging complaints of discrimination, harassment, and retaliation and the investigation of such claims



PCCD Policies on Harassment

- PCCD policies prohibit discrimination in all forms - verbal, visual, physical, and environmental - in all aspects of the academic environment
- Supervisors who learn of any incident should immediately report to Employee Relations
- Complaints will be promptly and thoroughly investigated and appropriate action taken



Applying Harassment Policies

- SMALL GROUP ACTIVITY
 - Employee Relations calls you to tell you about a complaint by a direct report regarding an incident that happened in your department. You didn't know about it before you received the call.

 - How would you react? How should you react?

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- I. Federal and State Laws
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The Definition of Harassment

Conduct that:

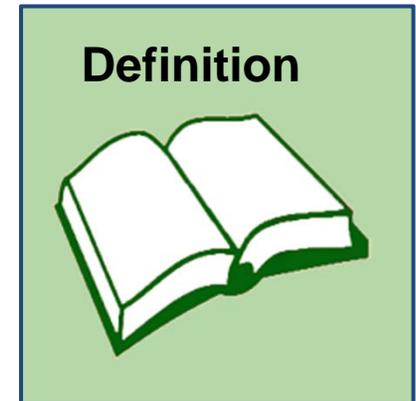
1. Is based on a **protected trait**;

2. Is **unwelcome**;

3. Leads to **workplace harm** that:

- Creates a hostile working environment (HWE); or
- Results in a tangible employment action (Quid Pro Quo)

4. **AND, Relationship of Harasser or Victim to Employer is basis for imposing liability**



Protected Traits – Discrimination and Harassment

- Age
- Race
- Color
- National Origin
- Ancestry
- Religious Creed
- Military & Veteran status
- Marital Status
- Disability
- Medical Condition
 - ❑ Genetic Information
- Sexual Orientation
- Gender Identity
- Gender Expression
- Sex

California Law on Gender Identity/Expression

- California now recognizes three genders – female, male, and nonbinary.
- SB 179 allows individuals to update their gender on a birth certificate, a driver's license (beginning January 1, 2019), and obtain a court judgement (beginning September 1, 2018) without undergoing clinical treatment. Instead, the individual has to attest, under penalty of perjury, that the request for a change in gender is to confirm the person's legal gender to the person's gender identity and not for fraudulent purposes.
- Sex stereotype: refers to assumptions about a person's appearance or behavior, or about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual's sex.

Gender and Sex Terminology

- Gender expression: refers to a person's gender-related appearance or behavior, whether or not stereotypically associated with the person's sex at birth.
- Gender identity: refers to a person's identification as male, female, a gender different from the person's sex at birth, or transgender.
- Transgender: refers to a person whose gender identity differs from the person's sex assigned at birth.
- Transitioning: refers to the process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth.
- Sex: refers to, but is not limited to, pregnancy, childbirth, medical conditions related to pregnancy, childbirth, or breastfeeding; gender; gender identity; and gender expression.
- Sex stereotype: refers to assumptions about a person's appearance or behavior, or about an individual's ability or inability to perform certain kinds of work based on a myth, social expectation, or generalization about the individual's sex.

Using Preferred Names and Pronouns

- Employers must honor the requests from employees to identify them by a preferred gender, name or pronoun.
- An employee may wish to change from using she/her/hers to he/him/his, or vice versa.
- An employee may request to be addressed by gender-neutral pronouns, such as the singular they/them/their or by ze/hir/hirs or by other pronouns.
- Some employees may request to be addressed by their name only, and by no pronouns at all.

Who is subject to the prohibition against sexual harassment? Who is protected?

- Employees
- Students
- Trustees
- Volunteers
- Interns
- Vendors
- Contractors
- Public, bystanders

Unwelcome Conduct

- Was there consent between the persons?
 - Did the conduct offend the recipient/observer?
 - Did the person invite or solicit, or regard it as offensive or undesirable?
 - *Intent* of the harasser does not matter – it is how the conduct is perceived / received that matters.
 - Would a *reasonable person* of that age, gender, race, etc. perceive the conduct as unwelcome?
 - Did the person complain? Why not?
 - Third parties might be offended by consensual behavior between others and they have a right to respectful workplace
-

Hypothetical – Unwelcome Conduct

- Mary and John are peers who work on student loans and other student services.
 - ❑ Mary has been ill, and has starting taking days off and working shorter days.
 - ❑ John resents this, because he has to take on the bulk of an already demanding workload.
- When no one else is around, John calls Mary “sweetheart” a few times and comments a few times on her well-fitting outfits. Mary complains.
- During the investigation, all of their co-workers assure the investigator that John has never expressed any interest in Mary and has always been professional.
- John denies the allegations and protests that he is not at all attracted to Mary, and would never hit on her. It is his word against hers.
- You are the supervisor, how do you respond?

Liability for Harassers



- Harassers
 - ❑ *Personal liability to victims*
 - ❑ Subject to disciplinary action up to and including termination
- Employers: Determined by identity of harasser:
 - ❑ Manager?
 - ❑ Co-Worker?
 - ❑ Non-Employee?
 - ❑ Did the employer have knowledge?

Liability for Manager

- The employer may be **strictly liable** for harassment by managerial employees
 - Manager is considered an agent of the employer
 - Their knowledge/actions = Employer knowledge/actions
 - Employer's lack of direct knowledge is not a defense



Liability for Coworker

- Employer is liable if:
 - It knew or should have known of harassment**;
and
 - Failed to take immediate and appropriate action to correct the situation.

** Victim complains; occurs in presence of manager; or conduct is widespread



Liability for Non-Employee

Non-Employees:

Includes Students, Volunteers, Vendors, Board Members



- Occurs in line of work;
- Employer knew or should have known; and
- Failed to take immediate and appropriate corrective action within its control

When does the prohibition against sexual harassment apply?

- ***Always*** when on paid work time
- ***Sometimes*** outside of work - if there is a nexus (link) to the job

Examples?

Is there a legitimate reason?
(protective service employees, others?)

What about Relationships with Coworkers?

- Dating relationships are not prohibited under federal or state law. They are discouraged under AP 3430 as between (i) employees and supervisors and (ii) administrators, faculty or staff and students.
- PCCD policy highlights the power imbalances and potential for exploitation and conflicts of interest.
- PCCD reserves the authority to transfer involved employees or alter the supervisory relationship of one employee over another
 - Such action by PCCD is proactive and preventative, **not disciplinary**
- Even when not illegal or policy violation – may result in paramour favoritism

Hypothetical

- Juanita just got her A.A. and landed her first office job in your office. Her job requires regular contact with the public.
- She wears a skirt and blouse most days to work and sometimes her blouses are moderately low cut.
- Jayson, an analyst, finds Juanita attractive and asked her out for coffee. Juanita accepts the invitation as she thinks Jayson is handsome and makes her laugh.
- The following week, Joseph (another analyst) learns about Juanita's coffee date with Jayson. He is also attracted to her and invites her to lunch. Juanita politely declines Joseph's offer. He waits a few weeks and ask her for another date.
- Juanita comes to you and complains that she feels uncomfortable by Joseph's requests.
- **As the manager, what should you do?**

Supervisors' Legal Duty

- Communicate policies and expectations to help ensure a respectful and lawful work environment
- Training for supervisors required
- Observe and monitor workplace interactions
- Take all allegations seriously (don't make assumptions) and report to manager and HR for next steps and/or investigate
- Maintain confidentiality to the extent possible and ensure no retaliation to all involved
- Take corrective action to stop any behavior: training, warnings, discipline (but respondent has appeal rights)

*Supervisors are the **agents** of the employer; when a supervisor acts, it is as if the employer is acting.*

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Types of Sexual Harassment

Unlawful Hostile Work Environment

Unwelcome sex-based behavior creating an offensive, hostile or threatening work environment.

- Must be *severe* or *pervasive* and unreasonably interfere with work.

NOTE: Behavior doesn't need to reach this standard to violate a zero tolerance policy - corrective action must be taken to stop any inappropriate behavior.

Types of Sexual Harassment

Unlawful Hostile Work Environment

- An adverse employment action; OR

- Severe & Pervasive Conduct:
 - ❑ Psychological damage / impact
 - ❑ The law is not a general civility code
 - ❑ Simple teasing and isolated instances that are not extremely serious are not unlawful

Types of Sexual Harassment

Unlawful Hostile Work Environment

- Measured from viewpoint of reasonable person who shares victim's same protected status
 - Factors
 - Frequency of conduct
 - Severity
 - Physically threatening/humiliating
 - Unreasonably interferes with work performance
 - But: Perpetrator's intent to offend is irrelevant
 - Saying "It was a joke" or "That's just my personality" is no excuse
-

Types of Sexual Harassment

Unlawful Hostile Work Environment

- Example:
 - A manager with anger issues who yells at both male and female subordinates may still be guilty of sexual harassment
 - Even where the behavior is directed at both sexes, if there are objective qualitative or quantitative differences in the conduct towards one gender, it may be harassment. The subjective effects on the victims will also be considered.

Types of Sexual Harassment

Quid Pro Quo - form of illegal discrimination

- Employee's submission to or rejection of unwelcome behavior is used as a basis for taking a tangible employment action
- The threat or extortion must actually be carried out, i.e., a benefit gained or a detriment incurred

Types of Sexual Harassment

Quid Pro Quo - form of illegal discrimination

- Once is enough to be actionable
- Employer is strictly liable
- Submission to the conduct does not defeat claim that it was unwelcome
- Conduct by a manager (broadly defined / outside chain of command)

Sexual Harassment

- Sexual Harassment Has Many Forms:
 - ❑ Conduct of a sexual nature
 - ❑ Conduct which exposes one gender to disadvantageous conditions to which the other gender is not exposed
 - ❑ Conduct motivated by gender hostility but need not be motivated by sexual desire
 - ❑ It may be (i) verbal, (ii) visual, or (iii) physical

Verbal Sexual Harassment

- Sexual language: slang, cursing, banter, “flirting”
- Motivation could be out of desire, hostility (bullying), or ignorance
- Suggestive comments jokes, slurs, double meaning
- Comments about body and clothing in sexual suggestive manner
- Gossiping/spreading rumors of a sexual nature
- Persistent unwelcome invitations to date

Visual Sexual Harassment

- Unwanted e-mails, texts, letters, gifts, etc. (displays on screens or viewing)
- Sexually explicit photos or on computer or calendars
- Inappropriate Internet sites (use policy) Facebook and other uses may impact your workplace (how?)
- May violate internet use policy even if no one else sees the site or is offended

Physical Sexual Harassment

- Unwanted hugging, kiss (appropriate at all?)
- Touching areas of body which are not customary, or pulling clothing
- Blocking one's path / invading one's personal space (getting too close)

If serious, can lead to criminal or civil charges

If consensual, is it professional or appropriate?

Teasing, isolated comments?

- Are not considered unlawful sexual harassment, however if continued, it could lead to harassment
- One inappropriate comment could be considered unprofessional or discourteous – but likely not illegal/policy violation
- Supervisors should take quick action to ensure professional behavior at work and should be addressed early on
- Would conduct violation Board Policy 7380?
 - Why is it there and how is it used?

Hypothetical

- Revisit the situation with Juanita, Jayson and Joseph on Slide 27
 - Did the conduct of either Jayson or Joseph constitute harassment?
 - If so, what form of harassment?
 - Would it make a difference if one of them was Juanita's supervisor?
 - What kind of conduct could elevate this to a "quid pro quo" situation?

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Harassment versus Bullying

Harassment

- Is a type of illegal discrimination generally based on the target's membership in a **protected class**

Bullying

- Is generally **NOT** based on a target's membership in a protected class.



Abusive Conduct: Applicable Laws/Policies

- Abusive conduct in the workplace is not prohibited under California law.
- However, employers are required to provide training on how to prevent abusive conduct
 - Definition from AB 2053-2015: Conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to any employer's legitimate business interest.
- Board Policy 7380 – Ethics, Civility & Mutual Respect
 - Sets for expectations for treating other community members with civility and respect
 - Defines unacceptable behaviors as "[d]emeaning, intimidating, threatening, or physically or emotionally violent behaviors that affect the ability to learn or work in the college environment"

What is Abusive Conduct?

- Derogatory remarks, insults, slurs, verbal or physical conduct
 - Personal insults, abusive language
 - Verbal and Nonverbal
- Threatening, intimidating, humiliating, sabotage or undermining an employee's work
 - Excessive criticism of work
 - False accusation of wrongdoing
- Single incident insufficient
- Distinguish between proper supervision and discipline and prohibited conduct

Hypothetical

- Will Rawls, a Department Chair, is well behaved toward faculty, but he often raises his voice and is rude to non-academic staff. He sometimes slams doors and phones.
- His reputation for this behavior is well-known. Most recently, he “went off” on Kima Greggs, a female probationary instructor, by criticizing her teaching skill in front of other faculty at a departmental meeting. She complained to the dean, who try to mediate, without success. Greggs then filed a complaint of harassment and bullying with HR.
- **If you were reviewing the complaint, how would you respond?**

Bullying impacts

- Hidden costs on people and employer
- Significant health problems for people
- Poor morale
- Lost productivity
- Absenteeism/high rates of turnover
- Damage to Employer's reputation

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What is Retaliation?

- Retaliation occurs when an employer punishes an employee for engaging in legally protected activity
 - Negative job action
 - Demotion
 - Discipline
 - Firing
 - Salary reduction
 - Job or shift assignment

Elements of Retaliation

- ***Protected Activity:*** reporting discrimination or harassment, and/or participating in an investigation, *plus*
- ***Adverse Action:*** any action with material effect on employment, *plus*
- ***Causal Connection:*** time sequence
(demotions, negative transfers or evaluations)

Other Retaliatory Actions

Employee opposes discrimination of another employee and participates in the investigation, then:

- Employee stripped of managerial position;
- Barred from completing manager certification courses;
- Embarrassed in front of his subordinates;
- Excluded from meetings;
- Deprived of information necessary to carry out duties;
- Accused of being confrontational;
- Labeled troublemaker to prospective managers in other groups; and
- Disclosed confidential information about the employee to co-workers.

Preventing Retaliation

- It is unlawful to retaliate against a person because:
 - The person has filed a complaint of harassment; or
 - Opposed harassment; or
 - Participated in an investigation into harassment
 - *Employee protected from retaliation even if harassment complaint turns out to be unfounded*

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Employer Obligations

- **Duty to Prevent Harassment:**

- Conduct Regular Trainings, etc.
- Anti-Harassment Policy Review & Enforcement
- Exercise reasonable care to prevent and promptly correct harassment



- **Duty to Correct Harassment:**

- Conduct prompt, thorough and impartial investigations
- Take appropriate corrective action at conclusion of investigation

Do non-supervisory employees have a legal obligation to report?

- They do not, but some employers have policies to encourage reporting to ensure a respectful workplace and prevent harassment.
- Employees can be encouraged to report anonymously – think of it as helping your co-workers feel safe and comfortable - to stop behavior from escalating/worsening

Basic elements of a proper investigation

- Inform the employee that the complaint will be investigated.
- Who investigates? Depends on the seriousness of allegations or if is a manager
 - Must be neutral fact finder and competent in investigations work
- Reach a conclusion based on the evidence:
 - Standard of evidence: did it most likely happen or not?
 - Assess credibility of all interviewed
- Provide brief written response to both parties
- Employees may have the right to appeal

Remedial Action

- Set forth in AP 3435 (list is not exclusive)
 - ❑ Provide escort to ensure complainant safety;
 - ❑ Ensure complainant and perpetrator do not attend the same classes/work in the same area;
 - ❑ Prevent offending third parties from entering campus;
 - ❑ Provide counseling/medical services or a referral to such services;
 - ❑ Provide academic support services, such as tutoring;
 - ❑ Arrange for a student-complainant to re-take a course or withdraw from a class without penalty; and
 - ❑ Review any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct that may have resulted in the complainant being disciplined.

Complaints to EEOC or DEFH

- Complainants may file directly with: Department of Fair Employment & Housing and/or Federal Equal Employment Opportunity Commission (up to one (1) year to file)
- They will review and/or investigate before they decide if the complaint has merit. They will either take the matter themselves or give notice to employee of their right to sue in court.
- Employer will receive a notice to answer the charge and EEOC/DFEH may interview employees via phone or visit. (Employees can also seek an attorney at any point)
- Employees are not required to use their employer's internal complaint policy before going to EEOC or DFEH.
- Depending on nature of complaint, may also be filed with the State Chancellor's Office or with the Office of Civil Rights for the Federal Department of Education

How to Prevent Harassment?

- If you see or hear about offensive behavior:
 - Stop the behavior if you see or hear about it
 - Notify the Human Resources Department immediately**
- Communicate the right message when someone complains
 - Exercise: What is the right message?***
- Spot toxic or retaliatory behavior and stop it/speak to supervisor or HR
 - Exercise: How can we prevent retaliatory conduct?***

How to Prevent Harassment?

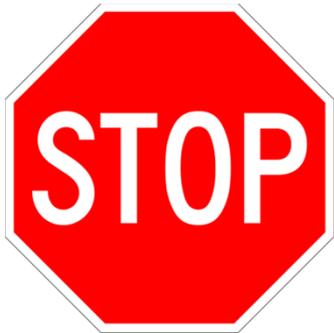
Model appropriate behavior

- Employ respect and common decency.
- Your intent is irrelevant; it is how your conduct is perceived that matters.
- If you are going to tell a joke or story or make a remark, apply the **Newspaper Litmus Test**.
- Do not assume that others will tell you if they are offended.
- **If asked to stop, stop.**

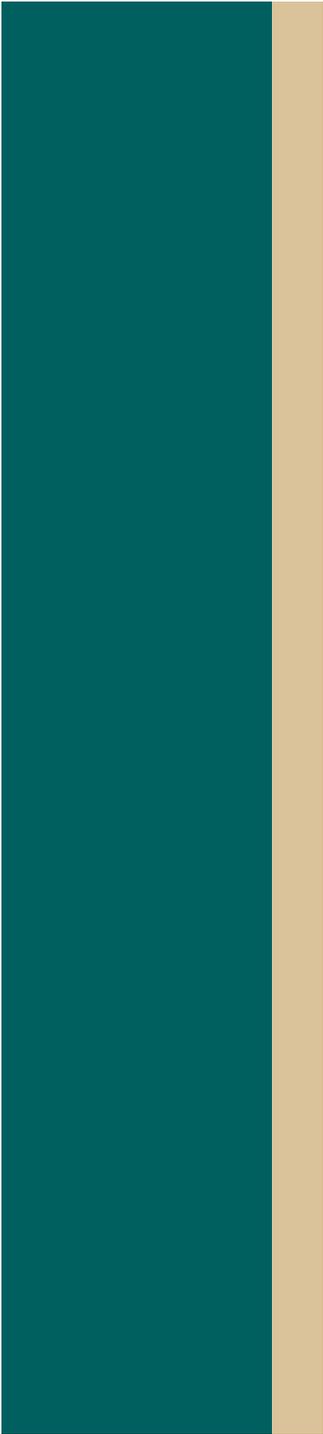


How to Prevent Harassment?

If you experience offensive behavior:



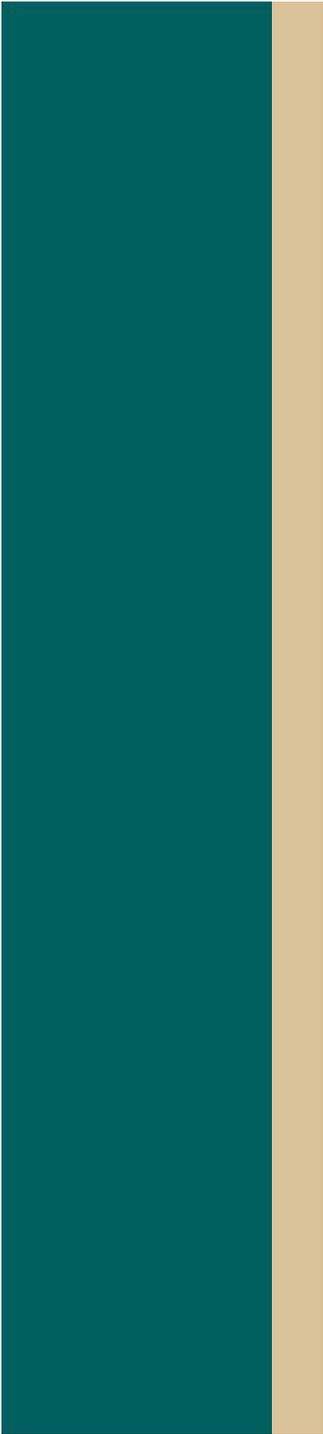
- If you feel safe doing so, tell the offender that you want it to stop
- If it doesn't stop or you don't want to confront offender, **tell a manager or HR**
- Never go along with the crowd or accept behavior that offends you
- Don't wait for the last straw. Report behavior before it becomes severe or pervasive.



Session 2: Hot Topics in Employee Relations

Hot Topics in Employee Relations

1. Disability Accommodation
2. Grievances
3. Performance Evaluations



Disability Accommodation

Disability Accommodation

- Extensive framework of state and federal laws govern the rights of employees with disabilities
- Key takeaway: Don't Go It Alone – and Don't Make Assumptions!
 - If you are concerned that a fellow employee, including someone you supervise, has a disability – Reach out to Risk Management

Disability Accommodation

- Employer duties to employees:
 - ❑ No discrimination of EE based on disability
 - ❑ Duty to provide reasonable accommodation for known disability
 - ❑ Duty to engage in timely, good faith interactive process to determine reasonable accommodation (Independent basis for liability)

Disability Accommodation

- When is a “reasonable accommodation” not required?
 - Undue hardship
 - Unable to perform Essential Job Function (EJF)
 - Direct Safety Threat
 - Medical Inquiries/FFD Exam

Disability Accommodation

- When is a “reasonable accommodation” not required?
 - Undue hardship
 - Action requiring significant difficulty or expense – considering:
 - Nature/cost of accommodation
 - Overall financial resources of Organization (not just dep't)
 - Composition/structure/functions of workforce
 - Burden of Proof on Employer – and it is a heavy burden
 - Inconvenience ≠ Undue Hardship
 - Hiring a replacement ≠ Undue Hardship (per se)
 - Distributing workload amongst other staff ≠ Undue Hardship (per se)

Disability Accommodation

- When is a “reasonable accommodation” not required?
 - Unable to perform Essential Job Function (EJF)
 - How to prove a job function is essential?
 - Employer’s judgment
 - Job descriptions and/or validated job analysis
 - Amount of time spent performing function(s)
 - Consequences of not performing function(s)
 - Work experience of current or prior EE's in position

Disability Accommodation

- When is a “reasonable accommodation” not required?
 - Direct Safety Threat
 - Direct threat means the risk of **substantial harm** that cannot be eliminated by reasonable accommodation – taking into consideration:
 - Duration of risk
 - Nature/severity of potential harm
 - Likelihood harm will occur
 - Imminence of potential harm
 - Cannot be speculative (e.g. fear of workers’ comp claim or employee injury)

Disability Accommodation

- When is a “reasonable accommodation” not required?
 - Medical Inquiries/FFD Exam
 - Must be “job related and consistent with business necessity”
 - Employer must have reasonable belief based on reliable, objective evidence that an employee may need accommodation to perform an EJP or may pose a direct safety threat
 - Managers cannot ask “Do you have a disability?” or “What is your disability?”

Disability Accommodation

- Performance problems and misconduct caused by disability
 - Can an employer discipline an employee if disability caused the performance issues/misconduct?
 - What if the employee doesn't disclose the disability until after disciplined?

Disability Accommodation

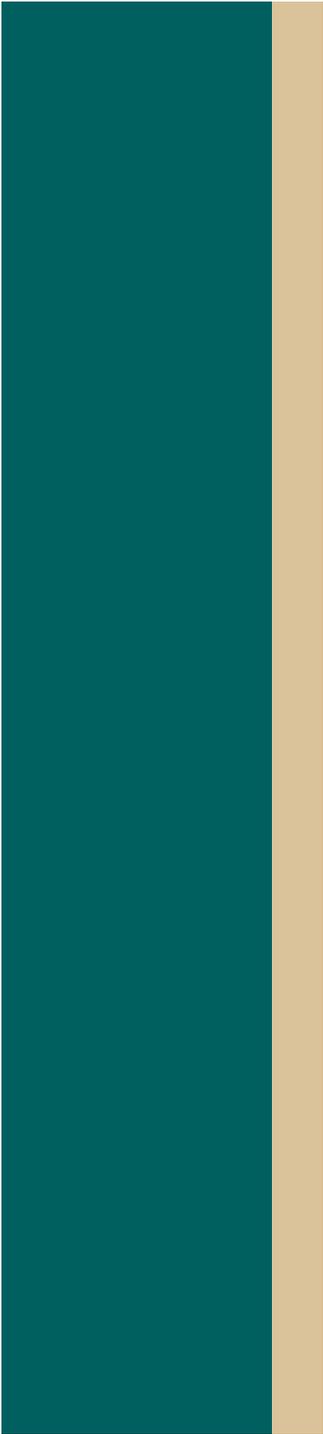
- Performance Problems & Misconduct Caused By Disability
 - ❑ **Ninth Circuit Court of Appeals**: Conduct resulting from disability is considered part of disability
 - ❑ **EEOC Enforcement**: OK to move forward with discipline/performance improvement plan/negative performance evaluation if employer wasn't previously aware of disability
 - ❑ **California Court of Appeal**: *Wills v. Superior Court of Orange County (2011)*

Disability Accommodation

- Interactive Process
 - Human Resources: Responsible for facilitating the Interactive Process
 - Managers/Supervisors: Responsible for cooperating and participating
 - Provide Essential Job Function information
 - Attend Interactive Process meetings
 - Provide any other information HR requests
 - Managers/Supervisors are also responsible for:
 - Brainstorming reasonable accommodation ideas/options
 - Responses to employee suggestions
 - Assist in assessing undue hardship

Hypothetical

- Steve Rogers, a staff assistant in the Office of Instruction, has recently been falling asleep at his workstation. Rogers suffers from narcolepsy but has not disclosed his condition to his supervisor, Peggy Carter. Carter, having observed Rogers' behavior, and having watched numerous episodes of Dr. Oz, believes that Rogers is suffering from some medical condition that is causing him to sleep on the job. She schedules a meeting with Rogers to begin an interactive process to determine whether there is a reasonable accommodation for Rogers' condition. Rogers, believing he is going to be disciplined for poor performance, requests union representation. Carter denies his request and tells him the meeting will not lead to discipline.
- **What would you have done in Carter's position?**



Grievances

Grievances

What is the Grievance Process?

- The process for reviewing alleged violations of a CBA
- Often includes binding arbitration as the last level of review
- Effectively a less formal and less expensive alternative to litigation

Grievances

What is a Grievance?

- Definition depends on the CBA (can be as broad as the parties decide)
- Usually encompasses disputes related to:
 - Interpretation or application of the terms of the CBA
 - PFT CBA permits grievances related to violations of Board policy, violations of union rights guaranteed under the Ed Code, Labor Code, EERA and other laws related to faculty wages and terms & conditions of employment
 - Discipline action
- Compare
 - PFT CBA, Art. 19
 - SEIU CBA, Art. 21
 - Local 39 CBA, Art. 22

Grievances

Types of Grievances

- Contract/Policy Interpretation
- Discipline
 - May be filed by an individual employee or as a “group” grievance
 - May be filed by the union or independently by employee(s)

Grievances

Not Everything is Grievable!

- Examples of “non-grievable” issues
 - ❑ Performance evaluations (except for failure to follow the process)
 - ❑ Decision not to provide part-time faculty with an assignment (except for failure to follow the process)
 - ❑ Probationary terminations (except for allegations that termination was untimely or based on protected status)

Grievances

Steps in the Grievance Process*

- Informal Step: Discussion with Manager
- Step 1: College President or Area Vice President
- Step 2: Vice Chancellor of Human Resources and Employee Relations
- Step 3: Mediation/Arbitration

*Certain disputes skip informal step and Step 1 (e.g. class actions, salary placement, faculty service areas, seniority)

Grievances

Timeline for Grievance Process (PFT Example)

- Informal Process: Up to seven (7) working days from start of process
- College President Review: Up to twenty-seven (27) working days from submission of grievance to College President response deadline
- Vice Chancellor for Human Resources and Employee Relations Review: Up to twenty-seven (27) working days from submission of grievance to Vice Chancellor for Human Resources and Employee Relations response deadline
- Chancellor Review: Up to thirty (30) days from submission of grievance to Chancellor response deadline

Grievances

Mediation and Arbitration

- Only available when grievant is the union
- **Mediation**: Available when parties mutually agree; occurs prior to arbitration
- **Arbitration**: Final step in grievance process
 - ❑ Binding in most situations
 - ❑ In case of grievances, burden is on grievant to prove that the employer acted improperly
 - ❑ Though arbitrators are generally prohibited for adding terms to/modifying terms of CBAs – arbitration does turn over questions of contract interpretation to a third party

Grievances

Questions to Ask When You Receive a Grievance

- Process questions:
 - Is the matter grievable?
 - Look to CBA
 - Did the employee/union waive their right to file a grievance?
- Substantive considerations:
 - Issue of CBA Interpretation: Look to contract law/labor law/past practice
 - Issue of Discipline: Look to just cause standard (for permanent employees)

Practice Point: Grievances aren't always a bad thing – can be an opportunity to for clarity/relationship building

Grievances

Responding to Grievances

- Notify Employee Relations of any dispute that could lead to a grievance – “share the risk”
- Get specifics regarding the grievance
- Determine timeliness
- Determine applicable CBA or policy provisions
- Identify the issue
- Determine the remedy desired
- Fully document your analysis and actions
- Do not agree to a grievance resolution without talking to HR/ER to be sure the resolution does not violate the CBA, the Ed Code or EERA
- Understand past practice, if applicable

Seek support from HR/ER

Grievances

Impact of *Janus* on Grievance Process

- *Janus v. AFSCME*: June 2018 U.S. Supreme Court decision holding that union security/agency fees in public employment violate the First Amendment rights of public employees
- Consequence: Public employees are no longer obligated to pay fees to union to cover costs, of among other things, collective bargaining and grievance processing
- Expected impact on employers:
 - ❑ Unions may be more aggressive in pursuing grievances in order to “prove their worth”
 - ❑ Alternatively, if union funding drops dramatically, they may be less likely to pursue grievances that aren’t clear winners for them

Grievances

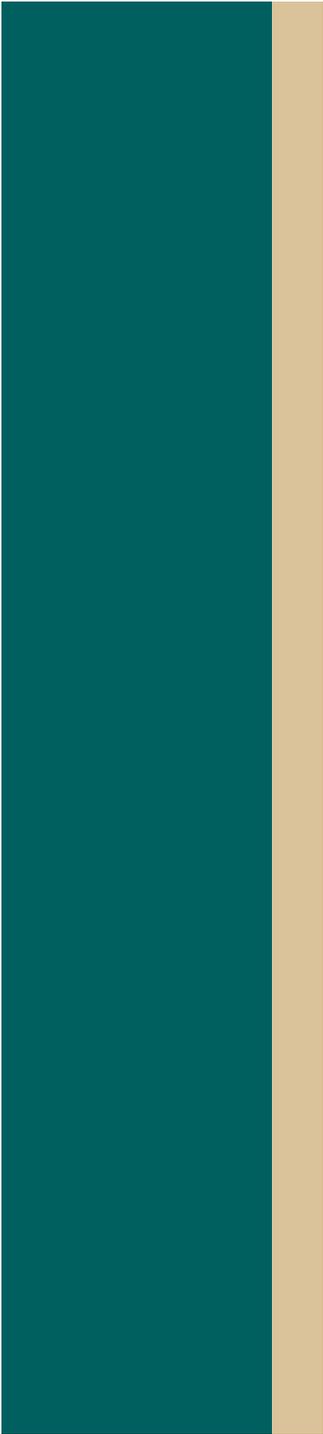
Knowing and Working with the CBAs

- Grievance processes are governed by the applicable CBA – so it's critical that managers understand its terms when moving through the grievance process
 - ❑ Know the contract limitations
 - ❑ Know what the contract provides for
 - ❑ Be consistent and even in applying contract terms
 - ❑ Know the practices that are in place that may help in the interpretation of the CBA

Grievances

Public Employment Relations Board

- State administrative body that enforces, among other statutes, EERA and HEERA
- When might you deal with them?
 - If union/staff file an “unfair labor practice” charge as alternative or subsequent to grievance
 - Most typical: Unilateral change in working conditions
 - Employer cannot change matters within the scope of bargaining without providing notice to union and opportunity to bargain
 - Examples: Modifying policy regarding use of PCCD email/facilities for union business
Permanent changes to employee work hours



Performance Evaluations

Performance Evaluations

- Purposes of performance evaluation system
 - ❑ Inform employees of job expectations
 - ❑ Encourage productive two-way communications
 - ❑ Recognize and reward good performance
 - ❑ Identify/confirm performance issues and problems
 - ❑ Improve performance
 - ❑ Document performance deficiencies for disciplinary purposes
 - ❑ Serve as predicate for personnel actions
 - ❑ Reinforce positive workplace culture

Performance Evaluations

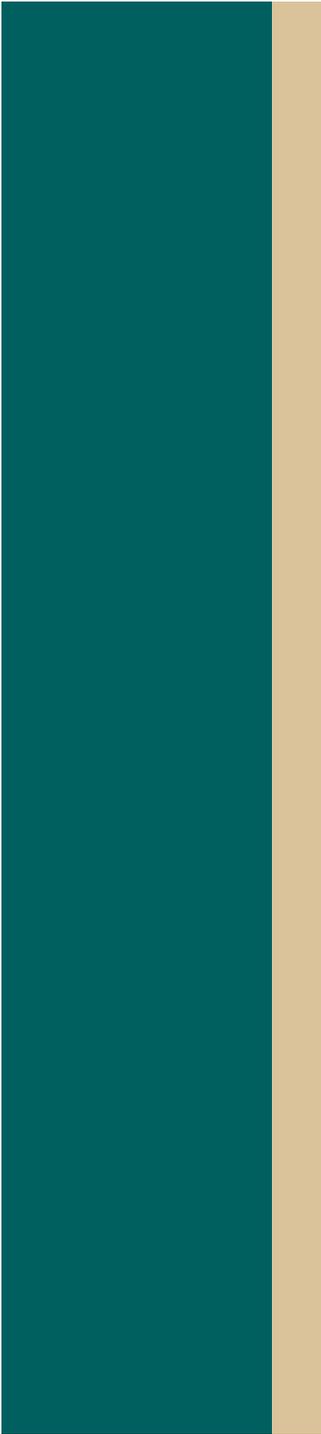
- Special considerations for probationary employees
 - Probationary period is effectively an extension of the selection process
 - Extension of probationary period is permissible under District/SEIU CBA, but not others
 - Critical to follow evaluation process and address problem employees during probationary period
 - Once employees leave probationary period, they gain significant due process rights

Performance Evaluations

- Periodic, formal performance evaluations are inseparable from ongoing and positive supervision
 - ❑ Cultivate relationships (especially with “problem employees”)
 - ❑ Coach all employees to reinforce expected standards of performance
 - ❑ Communication and team-work
 - ❑ MBWA (“Manage By Walking Around”)
 - ❑ Appropriately document both formal and informal meetings and all substandard performance
 - ❑ Assess needed training and development needs and opportunities (both formal and informal)
 - ❑ Fulfill in a timely and complete manner your duty to make the annual evaluation process an important event
 - ❑ Update and enforce work rules

Performance Evaluations

- Although supervisors should be giving feedback on a continuous basis, the frequency of formal evaluations vary among employee groups
 - ❑ Tenured faculty: Every three (3) years (Ed. Code §87663/PFT Side Letter/Board Policy 3.30)
 - ❑ Contract (Tenure track) faculty: PFT Agreement, Appx. 20
 - ❑ Part-time faculty: First year and once every six (6) semesters thereafter (Ed. Code §87663(a))
 - ❑ Permanent classified employees: Annually
 - ❑ Probationary classified employees: During six month probationary period
 - One evaluation at the end of two (2) months
 - Second evaluation at the end of the fifth (5th) month
 - District can extend the probationary period for staff represented by SEIU but not Local 39-represented staff
- PCCD has developed a timeline for 2018-19 Management Performance Evaluations



Session 3: Documenting Performance Problems and Misconduct

Documenting Performance Problems and Misconduct

- The most crucial aspect of an effective performance evaluation system and system of positive discipline
- Duty of supervisors/managers:
 - Fully document employee performance – both good and bad
 - Use the supervisor's work file if performance concerns are not serious enough for personnel file
 - E.g. confirmation of discussions, counselling memos, calendar entries, other significant events
 - Documentation of any matter that could lead to discipline should be copied to employee and placed in the personnel file, with the employee having the opportunity to respond
 - Review applicable CBA(s) to determine if there are any other requirements related to placing info in employee personnel files

Documenting Performance Problems and Misconduct

- Today's training will cover the steps in a typical progressive discipline process and documentation expectations related to that process
 - The steps/standards apply to classified employees and, by and large, to academic personnel
 - However – academic personnel enjoy far stronger procedural protections

Practice Point: When you are addressing serious discipline of an instructor – **it is critical to loop in HR/ER**

Documenting Performance Problems and Misconduct

- What do you think the duty of high level managers should be in connection with the foregoing slide?

- What overall rating would you give to District management with respect to that process?

Documenting Performance Problems and Misconduct

- Why does documentation matter?
 - Critical to just cause analysis – it should confirm
 - Employee had notice
 - An investigation occurred
 - Evidence of wrongdoing exists
 - Consistency of discipline
 - Enables comparison to other employees for “equal treatment purposes”
 - Evidences that the penalty is appropriate

In summary: If it isn't documented, IT DIDN'T HAPPEN

Documenting Performance Problems and Misconduct

- **Reflection Question:** How am I doing lately?
 - ❑ Do the employees you supervise understand how important documenting performance of their subordinates is?
 - ❑ What do you do when staff who report to you raise problems/concerns that might not have occurred if they had been properly documented?
- How do you grade yourself on the following?
 - ❑ Regularly providing feedback (good or bad) to the staff you supervise?
 - ❑ Coaching your direct reports on how to manage their teams?
 - ❑ Addressing performance concerns promptly and directly?
- When you evaluate your reports – to what extent are you direct and appropriately serious about the need to do these things?
- What should District management be doing differently to improve in this area?

Documenting Performance Problems and Misconduct

- Do's and Don'ts of Discipline Documentation
 - ❑ **Do** prepare documents promptly
 - ❑ **Don't** wait for the last straw
 - ❑ **Don't** backdate documents
 - ❑ **Do** be specific and provide examples
 - ❑ **Do** be consistent in documentation
 - ❑ **Do** pay attention to grammar, spelling etc.
 - ❑ **Do** be mindful of tone and objectivity
 - ❑ **Don't** express opinion or impressions
 - ❑ **Do** have Human Resources review it before it's issued

Documenting Performance Problems and Misconduct

- Methods to communicate rules to groups of employees
 - Work group meetings
 - Confirming memos to employees
 - Coordinate with supervisors in different work groups
 - **Practice Point**: By implementing a rule differently in one department, that manager may create a District-wide past practice
 - Notify staff verbally of rules
 - Problem with verbal notice: (i) employee denies receiving it or (ii) employee says they misunderstood the rule

Documenting Performance Problems and Misconduct

- What about rules/policies that have not been previously and/or consistently enforced?
 - Provide notice of the standard to all impacted employees
 - Following issuance of that notice, enforce the re-stated standard in a uniform manner
 - But also consider any meet and confer responsibilities
 - Use progressive discipline for failure to follow rules
 - Provide training as needed

Documenting Performance Problems and Misconduct

- Managers should regularly document observations regarding staff – both good and bad
 - ❑ Makes performance evaluations easier to write
 - ❑ Also serves as a risk management tool
 - ❑ Managers can maintain records for confidential use – through supervisory file, notebook, daily calendar, or computer log

Documenting Performance Problems and Misconduct

Typical Steps in Progressive Discipline

- Counseling (pre-disciplinary)
- Warning
- Reprimand
- Suspension
- Termination
 - Additional steps are possible/may be required

Documenting Performance Problems and Misconduct

- Opportunity to alert employee that performance expectations are not being met
 - Examples: missing deadlines, tardiness, quality of work product
- Employee may be unaware of expectations prior to counseling
- Can be used whether the issue is based on performance or conduct
- Not discipline
- Typically concludes with a counseling memo

Documenting Performance Problems and Misconduct

- Step 1: Counseling (pre-disciplinary)
 - Conducting a Counseling Session
 - **Not punitive – remedial and informational**
 - Provide details of facts & rules
 - Ask for the employee’s perspective
 - If issue is performance-related, help employee develop solutions and agree on an action plan
 - Express confidence that employee can succeed
 - Make notes of the conversation, including employee responses
 - **Provide copy of counseling memo to employee**

Documenting Performance Problems and Misconduct

- Step 1: Counseling (pre-disciplinary)
 - Elements of a counseling memo
 - It should be labelled appropriately
 - Specific description of the event giving rise to counseling
 - Identify standard, rule, or policy at issue
 - State performance expectations
 - State consequences of not meeting expectations

Documenting Performance Problems and Misconduct

- Step 1: Counseling (pre-disciplinary)
 - Counseling memos are generally not placed in the employee's personnel file
 - May later be attached to discipline if performance/conduct does not improve
 - May be referenced in performance evaluation if performance/conduct at issue has not been corrected at the time of the performance evaluation
 - Alternatively, it may be referenced to confirm that employee has improved performance/conduct

Documenting Performance Problems and Misconduct

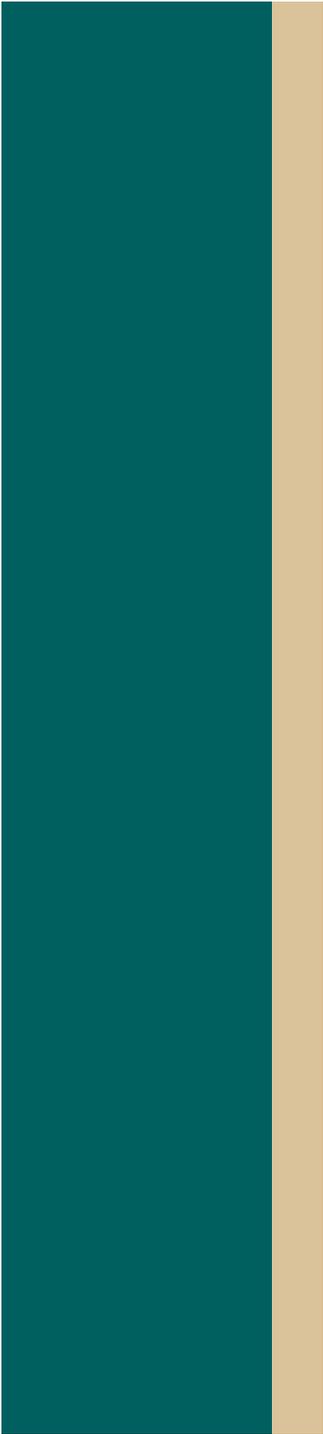
- Steps 2 & 3: Verbal Warnings and Written Reprimands
 - Meeting with the Employee
 - Describe facts of the issue and the relevant rules
 - Communicate that change is required
 - Clearly explain future expectations and consequences for failure to meet those expectations
 - Develop an action plan with employee and follow up as necessary
 - Invite comments from employee
 - Take notes on discussion, including the employee's response
 - Provide employee with a copy of the relevant documentation

Documenting Performance Problems and Misconduct

- Steps 4 & 5: Suspension and Termination
 - Key Document: Notice of Proposed Disciplinary Action
 - Elements of Notice
 - Specific recommendation for discipline and effective date
 - Charges and factual support
 - Identify rule(s) violated
 - Provide details on prior employee notice/forewarning
 - Describe how determination was made for level of discipline
 - Identify *Skelly* rights
 - Attach all materials relied upon

Documenting Performance Problems and Misconduct

- Steps 4 & 5: Suspension and Termination
 - Key Document: Final Notice of Disciplinary Action
 - Issued after conclusion of *Skelly* hearing
 - Usually tracks closely the Notice of Proposed Discipline – except where information from the *Skelly* hearing warrants deviation from proposed discipline
 - Includes employee’s evidence from *Skelly* hearing and an evaluation of that evidence
 - Analyzes other factors (employee record, aggravating/mitigating factors)
 - Describes appeal rights



Session 4: Progressive Discipline

Progressive Discipline

The Basics

Key Principles of Progressive Discipline

- Purpose is to be corrective, not punitive
- Process should start informally, except in cases of serious misconduct
- Regular counselling & timely performance evaluations are key
- Performance issues must be documented
- No surprises!

Progressive Discipline

The Basics

Key Principles of Progressive Discipline

- Allegations of serious misconduct must be investigated before action is taken – even (and perhaps most importantly) when not subject to progressive discipline

Progressive Discipline

The Basics

Types of Employees

- Academic
 - Instructors
 - Tenured
 - Categorical
 - Contract employees (tenure track)
 - Part-time instructors
 - Management academic employees
- Classified Employees
 - Represented by Union
 - Unrepresented by Union

Progressive Discipline

The Basics

Common elements of discipline for all employees*:

- Just Cause
- Due Process
- **Fair and Complete Investigation**

*Probationary employees are subject to special rules that do not require just cause to terminate employment

Progressive Discipline

The Basics

What is “just cause”?

- Seven elements
 1. Forewarning, knowledge, or notice of the rule and the disciplinary consequences?
 2. Reasonable rule or order?
 3. Fair and complete investigation?
 4. Substantial evidence?
 5. Consistent, non-discriminatory application?
 6. Progressive discipline?
 7. Seriousness of offense/work record of the employee

Progressive Discipline

The Basics

To establish just cause, managers must have positive corrective discussion of the problems before engaging in formal discipline – except in the case of serious misconduct

Progressive Discipline

What is the Process?

Typical Steps in Progressive Discipline

- Counseling (pre-disciplinary)
- Warning
- Reprimand
- Suspension
- Termination
 - Additional steps are possible/may be required

Progressive Discipline

Exceptions

Serious misconduct is generally not subject to progressive discipline

- Typically must be subject to an investigation conducted by a neutral third party
- Examples:
 - Harassment/discrimination
 - Violence or fighting
 - Theft
 - Insubordination
 - Destruction of District property
 - Serious safety violations

Progressive Discipline

Appropriate Level of Discipline?

- How do you decide whether to skip levels in discipline process?
 - Consider the following:
 - Severity of misconduct
 - Aggravating and mitigating factors
 - Employee's work record
 - Use of progressive discipline
 - Similarly situated employees

Progressive Discipline

- Due Process Requirements
 - ❑ Timely employer action
 - ❑ Fair investigation
 - ❑ Precise statement of charges
 - ❑ Employee right to be heard
 - ❑ *Weingarten* Rights
 - ❑ Compliance with *Skelly*

Progressive Discipline

- Special due process rules for probationary employees
 - Regular evaluation
 - Know the applicable deadlines
 - Extension of probationary period?

Progressive Discipline

Tenured Faculty

- Cause for discipline for tenured faculty is set forth in Education Code §87732
- *Morrison* factors (*Morrison v. State Board of Educ.* (1969) 1 Cal.3d 214)
- Progressive discipline applies except for serious misconduct
- The process for terminating tenured faculty is complex and extensive
 - 90 day notice required for unprofessional conduct or unsatisfactory performance (Ed. Code §87734)
- Appropriate monitoring of faculty can include classroom observation

Progressive Discipline

Probationary & Part-Time Faculty

- Probationary faculty typically have a four (4) year probation period
 - ❑ Involves an intensive evaluation process
 - ❑ Sequential employment contracts
 - ❑ Lower standard for non-renewal than for tenured faculty
- Part-time faculty do not have tenure rights
 - ❑ Serve “at-will” subject to negotiated protections in the collective bargaining agreement between the District and PFT
 - ❑ District is required to provide reasoning if District does not give part-timer an assignment (PFT CBA § 30.H.3)

Progressive Discipline

Classified Employees

- Generally serve for cause (except probationary employees)
- Progressive discipline principles typically apply
- Appeals of discipline are subject to the process set forth in the applicable collective bargaining agreement

Progressive Discipline

Right to Representation

- Employees have a right to be represented by a union representative in investigative meetings that could lead to discipline

BUT

- This right is not unlimited
-

Progressive Discipline

Right to Representation

- Employee is obligated to request representative
- No right to a particular representative
- Union representatives must be afforded an opportunity to have a meaningful role but cannot disrupt the meeting
 - They may be ejected if, after being warned, they continue disruptive tactics
- District has the right to demand employees respond to questions in investigative interview

Progressive Discipline

Right to Representation

- When in doubt: Err on the side of allowing a representative
 - Example: In general, employees are not entitled to a union representative during performance evaluations

However

- Right to representation may extend to these meetings if the meeting becomes an investigatory interview about the employee's performance

Progressive Discipline

Skelly Process

- Employees have the right to notice of charges against them and an opportunity to respond before the employer makes a final decision

 - Notice should:
 - ❑ Be in writing
 - ❑ Identify all rules/policies violated
 - ❑ State all facts relevant to the decision
 - ❑ Include other factors relied upon
 - ❑ Attach all materials relied upon
 - ❑ Identify opportunity for pre-disciplinary response
-

Progressive Discipline

Skelly Process

- *Skelly* hearing is at the employee's option
 - ❑ Employee should be permitted to provide a written response to the charges against them
 - ❑ Provides an opportunity for further investigation, if warranted
- *Skelly* officer
 - ❑ Must be a different person than the one recommending action
 - ❑ Strong presence

Progressive Discipline

Skelly Process

- After the *Skelly* hearing, the hearing officer needs to consider:
 - ❑ Whether the employee has created doubt?
 - ❑ Is further investigation warranted?
 - ❑ Whether the defenses raised by the employee are valid/mitigate the performance or conduct?
 - Are the defenses supported by facts presented during the hearing?
 - ❑ It is critical that the hearing officer's report evaluate the employee's explanations/defenses and not reject them out of hand
 - Employees may appeal the decision following the *Skelly* hearing
 - ❑ Appeal rights are outlined in applicable CBAs/statutes
 - ❑ Typically will result in a full evidentiary hearing as part of an arbitration process
-

Questions?

Sloan Sakai
ATTORNEYS AT LAW

