

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

Order Instituting Rulemaking on Regulations
Relating to Passenger Carriers, Ridesharing,
And New On-Line-Enabled Transportation
Services

R.12-12-011

**OPENING COMMENTS OF THE SAN FRANCISCO MUNICIPAL TRANSPORTATION
AGENCY AND SAN FRANCISCO INTERNATIONAL AIRPORT ON ASSIGNED
COMMISSIONER'S RULING ORDERING PARTIES TO COMMENT ON QUESTIONS
REGARDING SEXUAL ASSAULT AND SEXUAL HARASSMENT**

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DATE: June 26, 2020

In response to the June 9, 2020 Assigned Commissioner’s Second Amended Phase III.C Scoping Memo (“Scoping Memo”) ordering the parties to comment on questions regarding sexual assault and sexual harassment, the San Francisco Municipal Transportation Agency (“SFMTA”) and the San Francisco International Airport (“Airport” or “SFO”), collectively “the City,” submit these joint comments.

I. INTRODUCTION

As articulated in the City’s Reply Comments to Uber Technologies, Inc. Response to ALJ’s Order to file and serve its US Safety Report for 2017-2018 (“Safety Report”) and to Answer Questions Regarding Alleged Sexual Assault and Sexual Misconduct Incidents, the City is very concerned about the high number of sexual assaults that were reported by Uber last year, as well as the nine reported murders and fifty-eight reported deaths.¹ As the City articulated in past comments, “TNC customers and members of the public assume that TNC drivers are not sexual predators, violent felons or reckless drivers. They assume that if the government or a TNC company says the drivers are safe, then the drivers are safe. But hundreds of TNC customers in the United States have discovered their assumptions were wrong.”²

While we applaud the Commission’s decision to exercise its regulatory oversight of TNCs to prevent sexual harassment and sexual assault incidents, and investigate and resolve sexual assault and sexual harassment claims, we strongly urge the Commission to develop rules and regulations in this area only after hearing from advocates and experts in the field, as well as directly from complainants, and from law enforcement voices that may have views about the intersection of CPUC regulation and criminal law enforcement. As the City pointed out in its request for public hearing submitted to the Commission on June 15, 2020, few if any of those experts likely have familiarity with CPUC proceedings or would even be aware of the Scoping Memo. Yet it would be inappropriate to develop rules in this arena without hearing from this community of advocates and experts, complainants, and

¹ <https://www.nytimes.com/2019/12/05/technology/uber-sexual-assaults-murders-deaths-safety.html>
² See Opening Comments of San Francisco International Airport and the San Francisco Municipal Transportation Agency to Phase III.B Scoping Memo and Ruling of Assigned Commissioner Track 1 – Background Check Requirements, page 1.

law enforcement. The City responses to the questions posed by the Commission's Scoping Memo on this topic, in particular, would benefit from public hearing testimony of experts and evidence from the broader community in advance of submitting opening comments. Other parties have agreed with the City's position, as well, including the Los Angeles Department of Transportation, the San Francisco Taxi Workers Alliance, and even Lyft. The City again reiterated its request for a public hearing on June 18, 2020, but as of the filing deadline for these Opening Comments has not received a response.

As such, the City submits these Opening Comments by acknowledging that each question merits robust discussion and should be informed by feedback from the general public and experts in this area. Without benefiting from a discussion regarding best practices and hearing the recommendations of experts, the City is limited in its ability to meaningfully comment on the four questions posed by the Commission.

II. COMMENTS

The Commission has posed the following four questions:

1. What definitions of sexual assault and sexual harassment should the Commission adopt that should be applicable to all TNCs subject to its jurisdiction?
2. What minimum training protocols should the Commission require TNCs to adopt to train its drivers that sexual assault and sexual harassment are punishable by law and must be prevented?
3. What minimum standards should the Commission require TNCs to adopt for investigating and resolving claims of sexual assault and sexual harassment?
4. What reporting requirements should the Commission adopt that TNCs must follow regarding claims of sexual assault and sexual harassment?

We submit the City's responses as follows.

A. **Question 1 - Definitions of Sexual Harassment and Sexual Assault (Battery)**

As much as possible, the City urges the Commission to look to existing California law for guidance about definitions of sexual harassment and sexual assault. A public hearing might garner testimony outlining reasons the definitions in California law may or may not be appropriate for

purposes of regulating TNC prevention of and response to sexual harassment and sexual assault; however, at a minimum, the existing definitions in California law provide a starting point for analysis.

These sources may offer different standards and expectations when considering complaints of harassment or assault made by TNC passengers versus complaints made by TNC drivers. With respect to an existing definition for the term “sexual harassment” that may be appropriate for purposes of complaints filed by passengers, the California Unruh Act (Cal. Civil Code sections 51, *et seq.*) outlaws discrimination on bases such as sex, race, age, and sexual orientation, and applies to all businesses in California to ensure full and equal accommodations. Civil Code section 51.9 prohibits sexual harassment where a “business, service or professional relationship” exists. Under California law, sexual harassment is prohibited when some type of business arrangement exists between the parties as set forth in the statute, and (1) the perpetrator made unwanted sexual advances (which can include physical, visual, or verbal) and (2) the victim suffered or will suffer economic loss or personal injury including emotional distress as a result. We believe that this standard is appropriate in the TNC context.

We note that Appendix IV: Sexual Misconduct and Sexual Violence Taxonomy from the Uber Safety Report provides a definition for “sexual misconduct.” Although this definition appears to provide a higher threshold for victims to allege a violation based on “sexual misconduct” than provided by California state law for sexual harassment, we believe that the examples provided would be appropriate to include in any regulations adopted by the Commission.

With respect to complaints made by drivers, we note that the Scoping Memo conforms with the presumption codified in AB 5 that drivers are TNC employees. As a result, TNC obligations with respect to complaints made by drivers should be guided by existing law applicable to California employers. The Fair Employment and Housing Act (“FEHA”) prohibits harassment, including sexual harassment, and the implementing state regulations define “harassment” to include verbal harassment (including obscene language, demeaning comments, slurs or threats), physical harassment like unwanted touching or physical interference, visual harassment (such as offensive posters or drawings), and unwanted sexual advances. California Code of Regulations (“CCR”) Title 2, section 11019. California Government Code section 12940 (“Unlawful Employment Practices”) states that employers

have an affirmative duty to “take all reasonable steps necessary to prevent discrimination and harassment from occurring.” This includes affirmatively taking steps to both protect customers from harassment by employees and protect employees from harassment by customers.

With respect to sexual assault, California law uses the term “sexual battery” and not “sexual assault,” which can be both a criminal and civil offense. We recommend that the Commission consider the standard provided by both California Civil Code section 1708.5 and the California Civil Jury Instructions (“CACI”) 1306.

Civil Code section 1708.5 provides that a person commits a sexual battery when any of the following occurs: (1) acts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results, (2) acts with the intent to cause a harmful or offensive contact with another by use of his or her intimate part, and a sexually offensive contact with that person directly or indirectly results, or (3) acts to cause an imminent apprehension of the conduct described in paragraph (1) or (2), and a sexually offensive contact with that person directly or indirectly results. A person who commits a sexual battery upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages.

CACI 1306 provides that a sexual battery occurs when: (1) the perpetrator intends to cause harmful or offensive contact or caused imminent fear of a harmful or offensive contact with a person’s sexual body part(s) or by use of the victim’s sexual body part(s) and a sexually offensive contact occurred either directly or indirectly, (2) the victim did not consent to the touching, and (3) the victim was harmed or offended by the perpetrator’s conduct. “Offensive contact” is defined as contact that offends a reasonable sense of personal dignity.

B. Question 2 - Minimum Sexual Assault and Sexual Harassment Training Protocols

In California, Government Code section 12950.1 imposes training and educational requirements regarding sexual harassment as a result of the passage of AB 1825 in 2004. Under state law effective in January 2020, employers with five or more employees are required to provide a minimum of two hours of sexual harassment education and training and training for each supervisory employee and one hour of training for every non-supervisory employee once every two years in order

to ensure that a workplace is free of sexual harassment. Effective January 1, 2021, the required training for non-supervisory employees must be completed within six months of hire. Presumably, this law already applies to the many employees, supervisors, and managers that TNCs have properly classified as such. Regardless of whether TNC drivers are supervisory or non-supervisory employees, TNCs should be required to provide appropriate sexual harassment education and training for their drivers as required for supervisors by Government Code 12950.1.

Indeed, in San Francisco, *all* City employees who work a regular schedule of at least twenty hours per week must undergo yearly training that satisfies Government Code section 12950.1, regardless of whether they are supervisors or managers.³ Other cities or counties may similarly have adopted California’s required training obligations for broader categories of employees. As a result, we recommend that the Commission consider applying the requirements of Government Code section 12950.1 to all TNC drivers. Further, each TNC’s training program should be submitted to the Commission in advance of any scheduled training and be subject to the advanced approval of the Commission.

Finally, employers – in this case TNCs – can be liable for harassment of their employees by customers and clients where the employer knew or should have known about harassment by customers or clients and failed to take immediate and appropriate corrective action. *See Folkerson v. Circus Enterprises, Inc.* (9th Cir. 1997) 107 F.3d 754; *Galdamez v. Potter* (9th Cir. 2005) 415 F.3d 1015. The Commission expectations of TNCs protecting drivers from harassing customers should be consistent with this standard.

C. Question 3 – Minimum Standards For Investigating and Resolving Sexual Assault And Harassment Claims

California Government Code section 12940 requires that employers adopt employment practices to create a workplace that is free from harassment and discrimination. The City recommends that the Commission adopt the requirements set forth in the statute’s implementing regulations, CCR Title 2, section 11023, to the TNCs business model to (1) take affirmative steps to prevent and correct

³ San Francisco Administrative Code section 16.9-27.

discriminatory and harassing conduct by their employees, including their drivers; (2) distribute the California Department of Fair Employment and Housing's ("DFEH") sexual harassment prevention policy; and (3) develop and distribute policies of their own which satisfy the requirements set forth in subsection (b)(1)-(10). In order to provide further guidance, DFEH issued a "Harassment Prevention Guide for California Employers." (See Appendix A.) This Guide was prepared to provide guidance to California employers regarding what effective anti-harassment programs should include, training for supervisors and managers, specialized training for persons who handle complaints, policies and procedures for responding to and investigating complaints, how to conduct prompt, thorough and fair investigations of complaints, and procedures for remedial action. Given that TNC drivers are employees, the City recommends that any sexual harassment prevention policy adopted by the TNCs apply to all of their employees. This should include a requirement that the TNCs provide notice of and an easy opportunity to file complaints to the TNCs and DFEH by employees, passengers, and any other third party with whom their employees have contact.

The DFEH process requires that an intake form be submitted with any relevant facts and supporting documents. For most cases, the report must be made within 1 year of the incident, except for employment cases where it must be reported within 3 years. DFEH evaluates the report and decides whether to investigate. If DFEH investigates, it will prepare a complaint.

The respondent must answer the complaint prepared by DFEH. DFEH assists and offers dispute resolution. If there is no resolution, DFEH investigates for evidence of violation of California law. In addition, DFEH assists with mediation. If mediation fails, DFEH may file a lawsuit. DFEH only accepts cases if there is a clear violation of civil rights law, including the Unruh Act.

The City also notes that the Commission has adopted a "Zero Tolerance Policy" for intoxicating substances which applies to TNC drivers, and recommends that the Commission use the types of tools used in the "zero tolerance policy" with respect to sexual harassment and assault complaints. The "Zero Tolerance Policy" requires that (1) TNCs include on their website, mobile application, and riders' receipts, notice and information regarding the TNC's policy and the methods passengers can report a driver whom is suspected to be under the influence of drugs or alcohol; (2) TNC websites and mobile application include a phone number or in-app call function and email

address contact to report violations of this policy; and (3) TNC websites and mobile application include the phone number and email address for the appropriate investigative authority.

If these types of tools are implemented, the Commission should ensure that drivers are given a meaningful opportunity to appeal any investigation conclusion reached by a TNC.

D. Commission Reporting Requirements Regarding Sexual Assault and Harassment Claims

Since DFEH already provides a process for filing complaints regarding sexual assault and harassment, the City suggests that the Commission request copies of any complaints filed by TNC passengers as well as drivers on an on-going basis. The Commission should consider the complaints as part of the TNC permit renewal process.

III. CONCLUSION

The City again urges the Commission to hold a hearing for testimony by advocates and experts regarding sexual assault and harassment, as well as directly from complainants, and from law enforcement voices that may have views about the intersection of CPUC regulation and criminal law enforcement. Without the benefit of this testimony, the City has provided some initial comments on the issues put forward by the Commission.

The City recommends that the Commission look to existing California law for guidance about definitions of sexual harassment and sexual assault as a starting point for analysis. The City further recommends that the Commission look to Government Code section 12950.1, which imposes training and educational requirements regarding sexual harassment and require TNCs to provide appropriate sexual harassment education and training for their drivers.

California Government Code section 12940 requires that employers adopt employment practices to create a workplace that is free from harassment and discrimination. The City suggests that the Commission apply the requirements of CCR Title 2, section 11023 to make TNCs (1) take affirmative steps to prevent and correct discriminatory and harassing conduct by their employees including their drivers; (2) distribute the California Department of Fair Employment and Housing's ("DFEH") sexual harassment prevention policy; and (3) develop and distribute policies of their own

which satisfy the requirements set forth in subsection (b)((1)-(10). The City recommends that any sexual harassment prevention policy adopted by the TNCs apply to all of their employees, including drivers. This should include a requirement that the TNCs provide notice of and an easy opportunity to file complaints to the TNCs and DFEH by employees, passengers, and any other third party with whom their employees have contact.

The City also notes that the Commission has adopted a “Zero Tolerance Policy” for intoxicating substances which applies to TNC drivers, and recommends that the Commission use the types of tools in the “zero tolerance policy” with respect to sexual harassment and assault complaints. If these types of tools are implemented, the Commission should ensure that drivers are given a meaningful opportunity to appeal any investigation conclusion from DFEH and TNCs.

Finally, since DFEH already provides a process for filing complaints regarding sexual assault and harassment, the City suggests that the Commission request copies of any complaints filed by TNC passengers as well as drivers on an on-going basis. The Commission should also consider the complaints as part of the TNC permit renewal process.

Dated: June 26, 2020

Respectfully submitted,

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EXHIBIT A

CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING WORKPLACE HARASSMENT PREVENTION GUIDE FOR CALIFORNIA EMPLOYERS

California law (called the Fair Employment and Housing Act or FEHA) prohibits discrimination, harassment and retaliation. The law also requires that employers “take reasonable steps to prevent and correct wrongful (harassing, discriminatory, retaliatory) behavior in the workplace (Cal. Govt. Code §12940(k)). The Department of Fair Employment and Housing (DFEH) is the state’s enforcement agency related to the obligations under the FEHA.

California’s Fair Employment and Housing Council (FEHC) enacted regulations in 2016 to clarify this obligation to prevent and correct wrongful behavior. This document was produced by the DFEH to provide further guidance to California employers.

WHAT DOES AN EFFECTIVE ANTI-HARASSMENT PROGRAM INCLUDE?

- A clear and easy to understand written policy that is distributed to employees and discussed at meetings on a regular basis (for example, every six months). The regulations list the required components of an anti-harassment policy at [2 CCR §11023](#).
- Buy in from the top. This means that management is a role model of appropriate workplace behavior, understands the policies, walks the walk and talks the talk.
- Training for supervisors and managers (two-hour training is mandated under two laws commonly referred to as AB 1825 and AB 2053, for more information on this see [DFEH training FAQs](#)).
- Specialized training for complaint handlers (more information on this below).
- Policies and procedures for responding to and investigating complaints (more information on this below).
- Prompt, thorough and fair investigations of complaints (see below).
- Prompt and fair remedial action (see below).

IF I RECEIVE A REPORT OF HARASSMENT OR OTHER WRONGFUL BEHAVIOR, WHAT SHOULD I DO?

You should give it top priority and determine whether the report involves behavior that is serious enough that you need to conduct a formal investigation. If it is not so serious (for example, an employee's discomfort with an offhand compliment), then you might be able to resolve the issue by counseling the individual. However, if there are allegations of conduct that, if true, would violate your rules or expectations, you will need to investigate the matter to make a factual determination about what happened. Once your investigation is complete, you should act based on your factual findings.

An investigation involves several steps and you need to consider a variety of issues before you begin your work. The following section will address many of those issues.

WHAT ARE THE BASIC STEPS REQUIRED TO CONDUCT A FAIR INVESTIGATION?

A phrase that you might see related to investigations is “due process.” Due process is simply a formal way of saying “fairness” – employers should be fair to all parties during an investigation. From a practical perspective, this means:

- Conduct a thorough interview with the complaining party, preferably in person. Whenever possible, the investigation should start with this step.
- Give the accused party a chance to tell his/her side of the story, preferably in person. The accused party is entitled to know the allegations being made against him/her, however it is good investigatory process to reveal the allegations during the interview rather than before the interview takes place. It may not be necessary to disclose the identity of the complaining party in some cases. Due process does not require showing the accused party a written complaint. Rather, it means making the allegations clear and getting a clear response.
- Relevant witnesses should be interviewed and relevant documents should be reviewed. This does not mean an investigator must interview every witness or document suggested by the complainant or accused party. Rather, the investigator should exercise discretion but interview any witness whose information could impact the findings of the investigation and attempt to gather any documents that could reasonably confirm or undermine the allegations or the response to the allegations.
- Do other work that might be necessary for you to get all the facts (perhaps you need to visit the work site, view videotapes, take pictures, etc.).
- You should reach a reasonable and fair conclusion based on the information you collected, reviewed and analyzed during the investigation.

DO I HAVE TO KEEP ALL INFORMATION FROM AN INVESTIGATION CONFIDENTIAL?

You need to look at confidentiality from two sides – the investigator’s and the employees’. The first question is how confidential the investigator (internal or external) will keep the information obtained; the second is whether an employer can require that employees keep information confidential.

- **Can the investigator keep the complaint confidential?**

The short answer is no. Employers can only promise *limited* confidentiality – that the information will be limited to those who “need to know.” An investigator cannot promise complete confidentiality because it may be necessary to disclose information obtained during the investigation in order to complete the investigation and take appropriate action. It is not possible to promise that a complaint can be kept entirely “confidential” for several reasons:

1. If the complaint is of potential violation of law or policy, the employer will need to investigate, and in the process of investigating it is likely that people will know or assume details about the allegations, including the identity of the person who complained. This is true even when the name of the complainant is kept confidential since allegations are often clear enough for people to figure out who complained about what.
2. The individual receiving the complaint will usually have to consult with someone else at the company about what steps to take and to collect information about whether there have been past complaints involving the same employee, etc. That means the complaint will be discussed with others within the organization.
3. The company may need to take disciplinary action. Again, while the identity of the person who brought the complaint may in some cases be kept confidential, the complaint itself cannot be.

- **Can I tell employees not to talk about the investigation?**

This is a complicated issue. Managers can, and should, be told to keep the investigation confidential. However there have been court rulings that say it is inappropriate for an employer to require that employees keep the information secret, since employees have the right to talk about their work conditions. There are exceptions to this. If you want to require confidentiality, you might want to check with an attorney about when it is appropriate and how to do so.

HOW QUICKLY DO I NEED TO BEGIN AND FINISH MY INVESTIGATION?

The investigation should be started and conducted promptly, as soon as is feasible. Once begun, it should proceed and conclude quickly. However, investigators also must take the time to make sure the investigation is fair to all parties and is thorough. Some companies set up specific timelines for responding to complaints depending on how serious the allegations are (for example, if they involve claims of physical harassment or a threat of violence, act the same day as the complaint is received). If the allegation is not urgent, many companies make it a point to contact the complaining party within a day or two and strive to finish the investigation in a few weeks (although that depends on several factors, including the availability of witnesses).

A prompt investigation assists in stopping harassing behavior, sends a message that the employer takes the complaint seriously, helps ensure the preservation of evidence (including physical evidence such as emails and videos, and witnesses' memories), and allows the employer to fairly address the issues in a manner that will minimize disruption to the workplace and individuals involved.

WHAT ARE SOME RECOMMENDED PRACTICES FOR CONDUCTING WORKPLACE INVESTIGATIONS?

IMPARTIALITY

The investigation should be impartial. Findings should be based on objective weighing of the evidence collected. It is important for the person conducting the investigation to assess whether they have any biases that would interfere with coming to a fair and impartial finding and, if the investigator cannot be neutral, to find someone else to conduct the investigation.

Even if investigators determine they can be neutral and impartial, they must evaluate whether their involvement will create the perception of bias. A perception of bias by the investigator will discourage open dialogue with all involved parties. For example, in a case in which the investigator has a personal friendship with the complainant or accused, either actual or perceived, the investigator may need to recuse him- or herself to avoid the appearance of impropriety. It is generally a bad idea to have someone investigate a situation where either the complainant or accused party has more authority in the organization than the investigator.

INVESTIGATOR QUALIFICATIONS AND TRAINING

Qualifications:

The investigator should be knowledgeable about standard investigatory practices. This includes knowledge of laws and policies relating to harassment, investigative technique relating to questioning witnesses, documenting interviews and analyzing information. He or she should have sufficient communication skills to conduct the interviews and deliver the findings in the written or verbal form. For more complex and serious allegations it is also important for the investigator to have prior experience conducting such investigations.

For workplace investigations, employers may utilize an employee as an investigator or hire an external investigator. In instances of harassment allegations, the employee investigator is often someone from human resources. In California, external investigators (those who are not employed by the employer) must be licensed private investigators or attorneys acting in their capacity as an attorney (See Business and Professions Code Section 7520 et seq.)

Training:

There is no one standard training program for workplace investigators. Internal investigators usually obtain training by professional organizations for HR professionals (such as The Society for Human Resource Management (SHRM), Northern California Human Resource Association (NCHRA), Professionals in Human Resource Association (PIHRA), professional

organizations for workplace investigators (such as the Association of Workplace Investigators - AWI) and enforcement agencies (such as DFEH or EEOC). Many law offices and vendors that provide harassment prevention training also provide training for investigators. At a minimum, training should cover information about the law shaping investigation recommended practices, how to determine scope (what to investigate), effective interviewing of witnesses, weighing credibility, analyzing information and writing a report. An introductory training program typically lasts a full day (some training is longer) and includes skill-building exercises.

TYPE OF QUESTIONING

Investigations should not be interrogations. Neither the complainant nor the accused party should feel they are being cross-examined. Studies have shown that open-ended questions are better at eliciting information while not causing people to feel attacked. Investigators should ask open-ended questions on all areas relevant to the complaint to get complete information from the parties and witnesses.

MAKING CREDIBILITY DETERMINATIONS

Making a determination:

If there is no substantial disagreement about the factual allegations it may not be necessary to make a credibility determination. However, many investigations require a credibility determination, including the classic “he said/she said” situation, and it is up to the investigator to make this determination. An investigator can still reach a reasonable conclusion even if there is no independent witness to an event. In most cases, if the investigator gathers and analyzes all relevant information, it is possible to come to a sensible conclusion.

He said/she said situations:

It is not uncommon for there to be no direct witnesses to harassment. Yet there may be other evidence that would tend to support or detract from the claim. For example, a complainant who complains about harassment may have been seen to be upset shortly after the event, or may have told someone right after the event. This would tend to bolster his or her credibility. On the other hand, it would tend to bolster the accused party’s credibility if the investigator learned that the complainant complained many months after sexual joking with a supervisor, was just given a negative performance review, and told a co-worker that he or she could use the joking against the supervisor in the future. In other cases documents such as emails or texts might bolster or reduce a witness’s credibility.

Even if there is no evidence other than the complainant’s and accused party’s respective statements, the investigator should weigh the credibility of those statements and make a finding as to who is more credible. The investigator can utilize the credibility factors stated below.

Credibility factors:

Credibility factors include the following (these are also referred to in statutes and enforcement agency guidance):

1. Inherent plausibility – this refers to whether the facts put forward by the party are reasonable: whether the story holds together. In other words, ask yourself whether it is plausible that events occurred in the manner alleged.
2. Motive to lie (based on the existence of a bias, interest or other motive) – this refers to whether a party has a motive to be untruthful.
3. Corroboration – this refers to whether a direct or indirect witness corroborates some or all of the allegations or response to allegations.
4. Extent a witness was able to perceive, recollect or communicate about the matter – this refers to whether the witness could reasonably perceive the information reported (in terms of where they were, what else was happening, etc.)
5. History of honesty/dishonesty. Although investigations are not meant to make character judgments about the parties (whether they are a “good person”), if an individual is known to have been dishonest, this can weigh against his/her credibility.
6. Habit/consistency – this refers to allegations of a behavior that someone is known to do on a regular basis (such as hugging all female employees in greeting).
7. Inconsistent statements – this refers to one individual giving statements that are inconsistent in a way that is not easily explained.
8. Manner of testimony – such as hesitations of speech and indirect answers (especially when the witness has given direct answers to foundational questions.)
9. Demeanor – experts caution against using demeanor evidence as most people cannot effectively evaluate truthfulness from an individual’s demeanor. Demeanor can be used as a credibility factor, but investigators should apply it with caution and understand the pitfalls of relying on demeanor when making a finding. To the extent possible, your conclusions should be based on an analysis of the objective evidence.

BURDEN OF PROOF

Investigators should make findings based on a “preponderance of the evidence” standard. This is the standard that civil courts use in discrimination and harassment cases. This standard is also called “more likely than not” – the investigator is making a finding that it more likely than not that the conduct alleged occurred, or more likely than not that it did not occur. Some workplace investigators make the mistake of applying a higher burden of proof, such as a “clear and convincing” standard or a “beyond a reasonable doubt” standard. Beyond a reasonable doubt is the standard used in criminal law, where a defendant is considered innocent until proven guilty and the consequence of guilt is a loss of freedom. Applying such a standard in a workplace investigation creates an unrealistic expectation about the level of proof needed to make a decision. Even a “clear and convincing” standard is a higher standard than should be expected since it is a higher standard than a civil court would use to determine liability. Some people describe a preponderance of the evidence standard as “fifty percent plus a feather.”

DO NOT REACH LEGAL CONCLUSIONS

It is considered a recommended practice for investigators to reach factual conclusions, **not** legal conclusions. Sometimes, internal investigators will also reach a conclusion regarding whether behavior did or did not violate a company policy. Note that violating a workplace policy is a different standard than violating the law, which is one reason that investigators should not make legal findings. This means that even if the allegation includes concerns about, for example, unwanted touching, an investigator should only reach findings about the facts and should not reach a conclusion about whether there was unlawful (or lawful) conduct.

Conclusions should state, for example:

Mr. Jones says his boss (Mr. Foster) made numerous sexually explicit jokes during meetings, which Mr. Foster denied. Witness interviews confirm Mr. Jones's allegations. Three witnesses recall hearing the jokes at meetings on several occasions. Therefore, a preponderance of the evidence supports a conclusion that Mr. Foster did tell sexually explicit jokes at meetings.

Some investigators (typically internal investigators) are also expected to decide whether a policy was violated. External investigators are usually not asked to make this determination since the employer is often in a better position to interpret its own rules. In the above example, if the investigator were to make a policy violation determination the findings would also include:

It is further found that Mr. Foster violated the company's anti-harassment policy which prohibits telling sexually-explicit jokes in the workplace.

In the event the investigation does not uncover evidence to support the allegations, the conclusion should state that fact, such as:

Mr. Jones's allegations against Mr. Foster are not supported by a preponderance of the evidence. This is because no witness recalls hearing the jokes described by Mr. Jones, even though they were present for the meetings in question. These witnesses appeared credible. They provided consistent information and appeared to have no bias for or against either party.

DOCUMENTATION

Investigators should carefully and objectively document witness interviews, the findings made and the steps taken to investigate the matter. Investigators have different methods of documenting interviews, including taking notes (handwritten or on a computer), drafting statements for witnesses to sign, obtaining witness statements (written by the witness), or audio recording. There are pros and cons to each method and any can be acceptable so long as the information gathered is reliable and thoroughly documented and the documentation is not altered. It is also advisable to be consistent in the way you decide to document your interviews (unless there is a good reason to change your usual practice). It is considered a recommended

practice to retain all documentation. Some investigators type up handwritten notes so they are legible. However, the handwritten notes should also be retained.

SPECIAL ISSUES

What to do if the target of harassment asks the employer not to do anything.

It is rarely appropriate for an employer to fail to take steps to look into a complaint simply because an employee asks the employer to keep the complaint confidential or says that he/she will “solve the problem” with no involvement by the company. Indeed, this is one of the primary reasons why employers should not promise “complete” confidentiality. If the complaint involves relatively minor allegations and the complainant wants to handle the situation him/herself, the complainant can be coached as to how to do so, however the employer should follow up and assure this has occurred and the harassment has stopped. If the allegations are more serious the employer will need to know if they occurred so that appropriate action can be taken. In those cases it is not acceptable to have the complainant handle the matter alone.

Investigating Anonymous Complaints

Anonymous complaints should be investigated in the same manner as those with a complainant who identifies him/herself. The method will depend on the details provided in the anonymous complaint. If the complaint is sufficiently detailed the investigation may be able to proceed in the same manner as any other complaint. If the information is more general, the employer may need to do an environmental assessment* or survey to try to determine where there may be issues. However, the fact that the complaint is anonymous is not a reason to ignore the complaint.

* An environmental assessment is a process of finding out what is taking place in the workplace without focusing on a specific complaint or individual. For example, it might mean interviewing all the employees in a work group about how they interact, if they have experienced or witnessed any behavior that has made them uncomfortable, etc.

Retaliation

Complainants and/or those who cooperate in an investigation must be protected from retaliation. Employers should tell complainants and witnesses that retaliation violates the law and their policies, should counsel all parties and witnesses not to retaliate, and should be alert to signs of retaliation. Retaliation can take many forms. In addition to the obvious, such as terminations or demotions, retaliation could take the form of changes in assignments, failing to communicate, being ostracized or the subject of gossip, etc.

Retaliation can occur at any time, not only right after an incident is reported or an investigation is started. It is good practice to check back with a complainant after an investigation is completed to ensure that the employee is not experiencing retaliation, no matter whether the allegations were determined to be correct.

IMPLEMENTING EFFECTIVE REMEDIAL MEASURES

The FEHC regulations make it clear that an employer must take appropriate remedial steps when there is proof of *misconduct* – the behavior does not need to rise to the level of a policy violation or the law to warrant a remedy. Remember, an employer’s legal obligation is to take reasonable steps to **prevent and correct** unlawful behavior. In order to meet this obligation, an employer should:

- Stop behavior before it rises to the level of unlawful conduct, which is why steps should be taken even when the behavior is not yet serious enough to violate the law;
- Impose remedial action commensurate with the level of misconduct and that discourages or eliminates recurrence; and
- Look at what the company has done in the past in similar situations, to avoid claims of unfair (possibly discriminatory) remedial measures.

Remedial measures can include training, verbal counseling, one-on-one counseling/executive training, “last chance” agreements, demotions, salary reductions, rescinding of a bonus, terminations, or anything else that will put a stop to wrongful behavior.