



PREVENTING DISCRIMINATION, HARASSMENT, BULLYING & RETALIATION

AC TRANSIT BOARD OF DIRECTORS
JANUARY 15, 2021

AGENDA

- Your Role in Protecting the District
- What Conduct is Prohibited
- Understanding Sexual Harassment
- Gender Identity and Expression
- Costs and Consequences
- No Retaliation
- Beyond Harassment
- Prompt, Appropriate Corrective Action

BOARD POLICIES

AC Transit has adopted policies and regulations to further its commitment to prohibiting unlawful employment discrimination, sexual and other forms of harassment, retaliation, and bullying in Board Policies 201, 213 and Administrative Regulation 213A.

These policies apply to all employees, as well as to Board Directors and Officers.

THE BOARD'S ROLE

- Ensuring that the District has in place policies and practices that comply with the law.
- Holding management accountable for compliance with Board policies and practices, including:
 - ❖ Creating a workplace culture where bullying, abusive, and unlawful conduct is not tolerated.
 - ❖ Creating safe space for employees to air their grievances.
 - ❖ Promptly investigating good faith complaints of bullying, harassment, discrimination, and retaliation.
- Holding those who violate District policies accountable.
- Recognizing potentially unlawful conduct and taking action.

TYPES OF UNACCEPTABLE BEHAVIOR

- **Rude Behavior**
 - Not reciprocating a greeting or courtesy.
 - Interrupting.
 - Responding in angry or sarcastic manner.
- **Bullying/Abusive Conduct**
 - Threatening behavior/spreading false information.
 - Belittling, undermining or humiliating others.
- **Unlawful Discrimination/Harassment**
 - Treating an employee differently because of a protected characteristic.
- **Retaliation**
 - Taking an unjustified employment action against an employee who made a good faith complaint or participated in an investigation.



WHAT ARE PROTECTED CHARACTERISTICS?

Personal traits that are defined by both California and Federal laws.

Federal

- Sex (including pregnancy, childbirth and related medical conditions)
- Race and Color
- National Origin
- Religion
- Age (40 and over)
- Genetic Information
- Disability (physical and mental)
- Sexual Orientation

California

- All Federally protected characteristics and:
- Medical conditions related to pregnancy, childbirth or breastfeeding.
- Ancestry
- Gender, gender identity and gender expression
- Marital status
- Military or veteran status
- Certain other medical conditions (cancer, nervous system disorders)

WHAT IS HARASSMENT?

Inappropriate behavior in the workplace does not have to be openly hostile or malicious to amount to harassment. Sometimes the damaging conduct can take the form of assumptions, stereotypes, jokes, rudeness, shunning, and other kinds of casual mistreatment.

VERBAL

Spoken or written words, such as derogatory insults or sexual or offensive language.

VISUAL

Offensive images shown in the workplace or shared on devices (phones, tablets and computers) or social media.

PHYSICAL

Unwelcome touching, physical assault, or putting obstacles in the way of a disabled employee.

UNINTENDED CONSEQUENCES

As a Board, you have an active interest in supporting the prevention of workplace bullying, harassment, discrimination, and retaliation because the damage resulting from that conduct may be severe and long-lasting. The consequences can include:

- Poor morale and low productivity;
- Absenteeism and excessive leaves of absence;
- High turnover and training costs;
- Loss of valued employees and high performers;
- High litigation costs.

Recognizing Mistreatment

Who has been subject to **unlawful discrimination or harassment**?

- A company rejected Mariana as an applicant because her family is from Syria.
- Connor was demoted for a violation of the anti-bullying policy.
- Alice was moved to a backroom job so that customers would not have to see her prosthetic hand.
- A coworker shares a racially stereotypical joke. Everyone laughs.
- Leilani wasn't hired for a job because she couldn't speak a language that was necessary for the position.



DIFFERENCE BETWEEN DISCRIMINATION AND HARASSMENT

- Employment discrimination typically occurs when an employer makes an **employment decision** (such as hiring, transferring, suspending, laying off, promoting, rewarding, or disciplining) based on a legally protected characteristic.
- Workplace harassment typically is employee conduct toward each other based on a legally protected characteristic. This includes sexual harassment, which I will discuss in more detail.

TWO KINDS OF HARASSMENT

- **Quid pro quo**, or "this for that" sexual harassment.
- **Hostile environment**, which can also be based on categories other than sex.

QUID PRO QUO

Authority – It's important to note that only a person who has the power to affect the terms and conditions of someone's employment can commit quid pro quo harassment. However, job titles alone do not determine who is considered a "supervisor" under the law.

Advances With Conditions– Quid pro quo harassment typically occurs when a supervisor or manager makes an "unwelcome" romantic or sexual advance along with a condition of a tangible job benefit or repercussion (get a raise if you do this or get punished if you don't do this).

Not Just Opposite Sex – The sexual advances for quid pro quo harassment are not dependent on sex or gender. Whether between members of the opposite sex or the same sex, the same principles apply.



QUID PRO QUO UNDER THE LAW

- Under federal law, quid pro quo harassment can occur only if a supervisor or manager **actually takes a tangible job action** because of the employee's refusal to accommodate the supervisor's advances.
- Under the broader California standard, the manager or supervisor only needs to **infer or threaten** that the job actions will occur based on the sexual advance. There is no requirement for the actions to actually take place

The Performance Review

Elias has been having difficulties with his manager, Rachel. On several occasions Rachel has invited him to dinners and other after-hours events. Elias has politely declined each invitation. Recently, Rachel told him he would get a low rating on his performance review if he continues to refuse to go out with her. Even so, Elias continues to reject her advances. When he sees his next performance review, he finds he has a satisfactory rating, despite Rachel's suggested threat.

Is this an example of quid pro quo harassment?



HOSTILE ENVIRONMENT HARASSMENT

Unwelcome conduct based on any of the protected characteristics that is so **severe or pervasive** that it changes an employee's working conditions and/or interferes with their work performance.

Whether conduct creates a hostile work environment is determined from the standpoint of a **reasonable person** viewing the situation from **the victim's perspective**—that is, sharing the victim's protected characteristics— considering all the circumstances and the social context.

“UNWELCOME”

- Simply put, sexual advances are considered unwelcome when **the person on the receiving end of the conduct considers them unwelcome.**
- **Unwelcome *≠ involuntary*.** An employee may voluntarily submit to a supervisor's sexual advances in the sense that the supervisor did not physically force the employee to engage in sex. But even if "voluntary" in that sense, the relationship could still amount to sexual harassment if the employee did not welcome the behavior and engaged in it under a threat of a negative employment action.

“SEVERE OR PERVASIVE”

Severity from Single Incident – A single, extreme incident, such as forcible physical contact or very threatening or humiliating conduct could be sufficiently “severe.” But some courts have found that less outrageous conduct can qualify as “severe” under some circumstances.

Becoming Pervasive – While a single non-severe incident may not amount to legally prohibited harassment, when these incidents occur repeatedly or frequently (or the environment is one where inappropriate conduct generally occurs), multiple non-severe incidents can be considered pervasive.

Ultimately, the courts look at multiple factors to determine whether workplace conduct is considered severe or pervasive, including:

- The frequency and/or severity of the conduct;
- Whether physically threatening or humiliating or merely an offensive utterance;
- Whether the conduct interferes with work performance.

The Lunch

Eric and Michael work at the TEC as trainers. They decide to go to El Taquito for lunch on Cinco de Mayo. After a lengthy festive lunch, Michael leans over and gives Eric a peck on the cheek. Eric is taken aback but doesn't say anything to Michael.

After returning to the TEC, Eric reports the incident to their manager, Ralph. Eric asks Ralph not to tell anyone, and says he just wanted to give Ralph a head's up in case something like that happens again. Ralph, true to his word, does not share Eric's report with anyone. Instead, Ralph fires both Eric and Michael, citing their late return from lunch.

- Identify the potential legal issues related to Eric, Michael and Ralph's conduct.
- How should the District have handled this situation?



SEXUAL FAVORITISM

- Treating an employee more favorably because of their relationship with a supervisor or a Board member may provide a cause of action for other employees who do not receive the same favorable treatment.
- That means that an employee can maintain a cause of action for hostile work environment even if no tangible employment actions have been taken against that employee.

OTHER SOURCES OF HARASSMENT

Hostile work environment harassment claim is not limited to conduct by supervisors or managers.

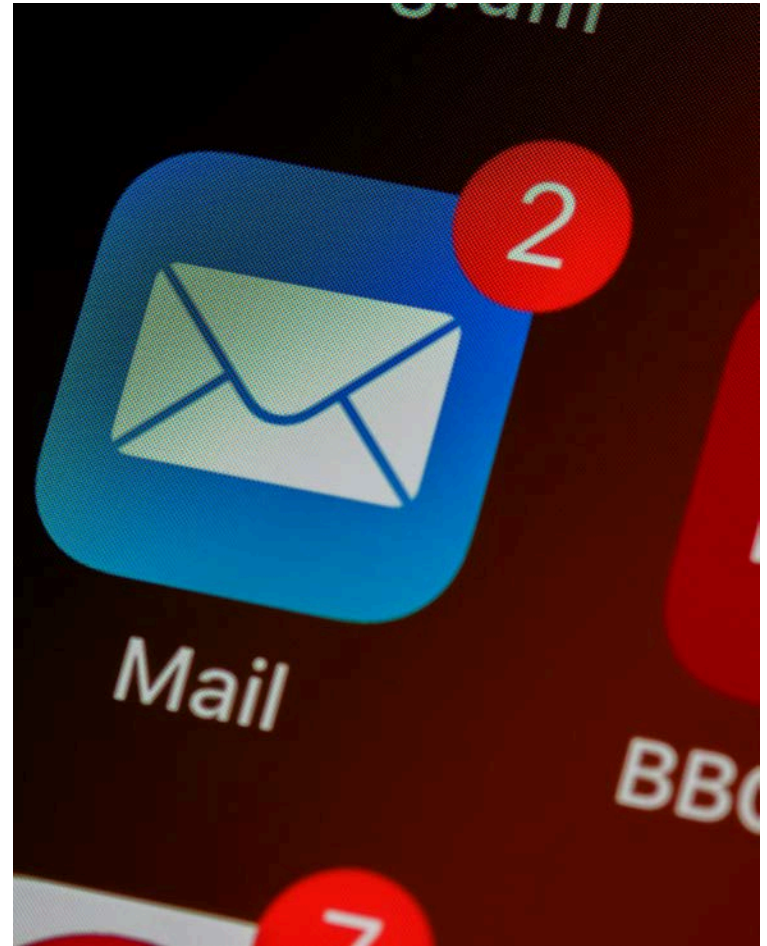
- Conduct between coworkers can create a hostile environment and is actionable.
- Employees who are not targets of inappropriate conduct are protected by the law. For example, if coworkers are making demeaning comments about women, they may be creating a hostile work environment even though their comments are not directed at anyone in particular.



Employers are also required to protect employees from harassment by nonemployees who have access to the employer's premises, such as vendors, customers, consultants, contractors, and volunteers.

Images in Emails

In his spare time at work, John regularly checks his personal email and social media accounts on his smartphone. He often receives messages and postings from friends with images that are pornographic or sexually explicit, and which other employees could find offensive. John views the images at work but doesn't share them with coworkers. He deletes the images or shuts down the messages shortly after viewing them.



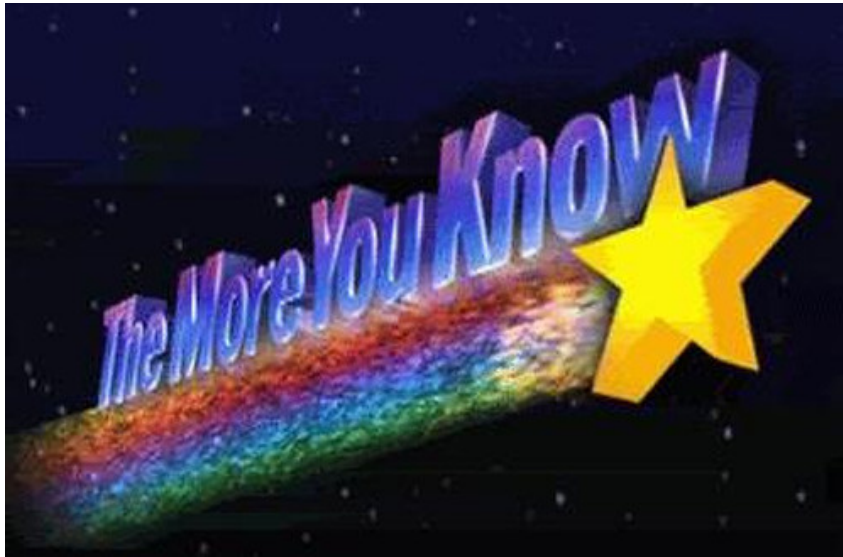
What do you think?

Which of the following statements most accurately describes the situation:

- Since the employee has not shown or forwarded the explicit images to coworkers who don't want them, there's no danger of harassment.
- If other coworkers accidentally view the sexual images on his computer or in email, it could begin to create a hostile environment.
- Simply having sexually explicit images in the email system creates a hostile environment in the company.



BUILDING AWARENESS



California law prohibits discrimination and harassment based not only on sex, but also on gender – and specifically **gender identity** or **gender expression**.

You should be aware of how these terms are understood, as well as their impact on employees in the workplace.

DEFINITIONS

Gender identity means a person's identification as male, female, a gender different from the person's assigned sex at birth, or transgender.

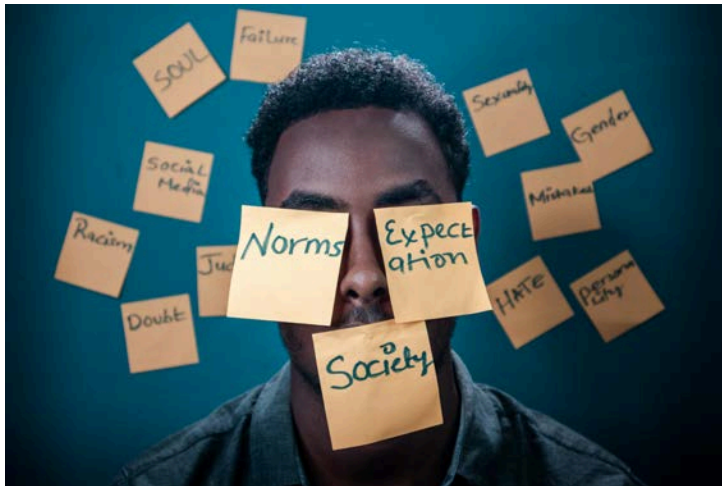
- For example, a person may identify as male or female regardless of their physical characteristics.

Gender expression means a person's gender-related appearance or behavior.

- Gender expression may be shown by the choices a person makes for their clothing, hairstyle, makeup, mannerisms, or style of speech.
- A person's gender expression may reflect traditional expectations based on their assigned sex at birth, or it may vary.



NAMES AND PRONOUNS



In California, if an employee requests to be identified with a preferred gender, name, and/or pronoun (including gender-neutral pronouns), the employer should honor that preference. An employer may use an employee's specified gender or legal name (as shown in a government-issued identification document) only if legally necessary.



IN TRANSITION

In California, it is unlawful to discriminate against or harass an individual who is transitioning, has transitioned, or is perceived to be transitioning their gender.

PERSONAL APPEARANCE

A specific protection in California allows employees to present their appearance (clothing, hairstyle, and so on) consistently with their gender identity or gender expression. Employers, however, can require reasonable workplace dress and grooming standards if they're evenly enforced.

LIMITS ON INQUIRIES

It's generally unlawful for employers and other covered entities to inquire about, or require documentation or proof of, an individual's sex, gender, gender identity, or gender expression as a condition of employment. But the employee may initiate communication with the employer about gender, gender identity, or gender expression in connection with working conditions.

The Right Treatment

Which of the following examples demonstrate proper conduct by the employer:

- When Chun asks to be referred to as “she” the company updates its contact information accordingly.
- Though Maya keeps her appearance professional, her manager tells her to “dress more like a woman if you want to work here.”
- Mateo’s employer requires employees to submit a driver’s license or birth certificate to verify their gender for company records.
- The HR department follows standard procedures to process Bob’s request for maternity leave.

DAMAGES RECOVERABLE IN HARASSMENT, DISCRIMINATION AND RETALIATION CASES

- Injunctive Relief
 - Training
 - Development of changes in policies/procedures
- Economic Damages
 - Lost wages
 - Medical expenses
 - Job search expenses
- Non Economic Damages
 - Emotional distress
 - Loss of enjoyment of life
- Punitive damages – against individuals

RETALIATION IS PROHIBITED

The law and District policies prohibit retaliation against any employee who in good faith objects to violations of the law in the workplace or who participates in the investigation of potentially unlawful conduct.

What is protected?

- Reporting harassment to a manager, HR or the EEO unit.
- Speaking up about harassing conduct in the workplace.
- Filing or threatening to file a discrimination charge with an enforcement agency.
- Refusing to obey an order reasonably believed to violate the law.
- Participating in investigations of prohibited conduct – either by coming forward or by responding to requests for information.

EXAMPLES OF RETALIATION



Employment Conditions – Unjustified bad performance review, demotion, termination, or getting others to change the employee’s work conditions.



Exclusion or Isolation – Excluding an employee from regular meetings or off-site events that are business related.



Harassing or Bullying Conduct– Name-calling, spreading rumors, unwelcome pranks, or the “silent treatment”.



Actions Against Third Parties – Hostile actions taken against people close to the employee, such as targeting a relative for firing or demotion or subjecting the relative to harassing or bullying conduct.

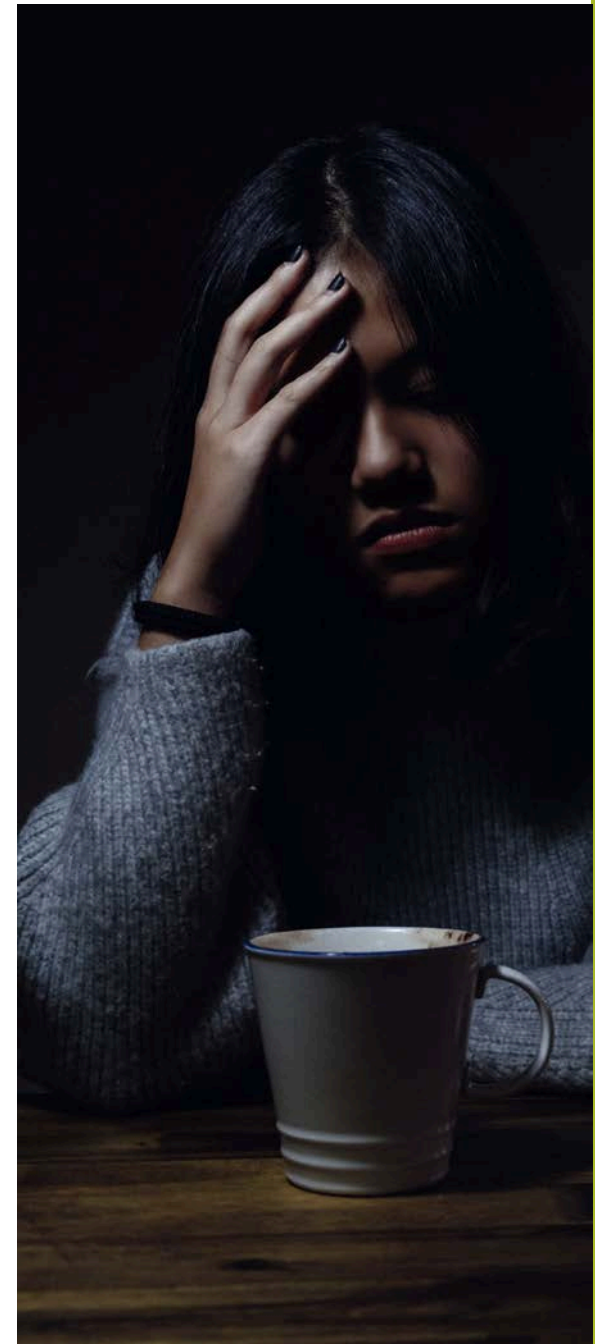
A Proposition

- Sara is the Deputy Director of a state agency. She approaches Nancy, an office technician, and says, "Hi Nancy. I've seen you at the gym. You seem to have a great time in Zumba! And so sexy! Nancy, I'd love to take you to Tahoe this weekend. Just the two of us." Nancy is stunned and intimidated by the attention. She says, "Well Sara, I'm flattered, but I'm not interested." Sara smiles wanly and says, "Well, I had to ask. You are just so sexy. But I get it. I'll leave you alone."
- Sara does not proposition or engage in any unwelcome conduct toward Nancy again but Nancy, who feels uncomfortable, reports Sara's advance to her supervisor, Fred. Nancy does not know that Sara and Fred are college pals and that they regularly socialize outside of work.
- Three months later, despite receiving excellent performance reviews for the past 10 years and not doing anything differently, Fred gives Nancy an improvement needed performance evaluation and puts her on a probationary status.



What is Going on Here

- Sexual Harassment?
 - Unwelcome?
 - Quid pro quo?
 - Hostile work environment?
 - Severe or pervasive?
- Off duty conduct?
- Retaliation?



BEYOND HARASSMENT

Along with inappropriate behavior that leads to harassment and discrimination, other types of inappropriate workplace conduct can have severe consequences for individuals and for the agency.

Let's consider Karl's workgroup.

Tough Boss

Karl likes to say he'll work with any type of person as long as they produce. And his group is certainly diverse. But it's a terrible place to work.

Nearly every day, Karl can be heard screaming at his team members, insulting or belittling them, and threatening to fire them for any small mistake. He regularly goes into a rage with his finger in someone's face, sometimes shoving them against a wall.

His behavior takes a toll on employees. They look withdrawn, stressed out, demoralized and humiliated. Not surprisingly, the turnover in the department is very high.

What's Wrong Here?

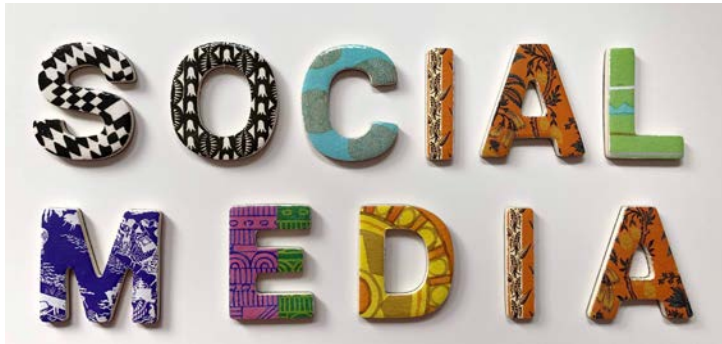
- A. Karl's actions are a form of discrimination even though no group is targeted.
- B. Karl's is only holding his team accountable, and if people don't like it, they can go work somewhere else.
- C. Karl is practicing a type of harassment based on protected characteristics.
- D. Karl's actions constitute an inappropriate workplace conduct, and he should be disciplined.

RECOGNIZING ABUSIVE CONDUCT



Abusive conduct is malicious behavior (by a supervisor or employee) that a reasonable person would find hostile, offensive, and unrelated to the employer's legitimate business interests. It may include:

- Repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets.
- Verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating.
- Gratuitous sabotage or undermining of a person's work performance.



Social media and other technologies have opened many new possibilities for connections between employees, companies, and their customers. But they have also created new avenues for inappropriate behavior, including:

Virtual Harassment – Deceitful use of social media connections such as “friending” a colleague then posting offensive messages or pictures.

Text Harassment – Inappropriate or insulting messages through texting apps.

Sexting – Sending images, videos or texts of a sexual nature to coworkers.

Cyberstalking – Following and harassing a coworker on various social media sites and blogs.

Trolling – Posting extreme comments anonymously, with the intent of angering the target.

Abusive Conduct – Bullying and intimidating, regardless of any protected categories.

WHEN AN EMPLOYEE REPORTS TO YOU

Employees sometimes fail to utilize the company's resources for reporting illegal or inappropriate conduct and may go directly to the Board of Directors. What should you do if that happens?

Set the Tone – Take in the information and refrain from passing judgment or voicing your opinion or taking sides. Thank the employee for raising the concern.

Explain the Process – After hearing the employee's report, tell the employee what will happen:

- You (the Board member) will notify HR or EEO of the complaint.
- HR or EEO will decide how the issue will be handled, which may include an impartial and thorough investigation by HR, EEO, or Operations.
- If the complaint is substantiated, the District will take a remedial action.
- The employee will be notified of the result of the investigation.

WHEN AN EMPLOYEE REPORTS TO YOU

- **Discuss Confidentiality** – Assure the employee that the District will keep the matter confidential to the extent reasonably possible, but that disclosures may have to be made, on a need-to-know basis, in connection with any investigation. Complaints cannot be kept entirely confidential.
- **No Retaliation** – Assure the employee that the District does not tolerate retaliation for good faith reporting of concerns. Remind the employee to contact the EEO Officer immediately if they believe they are being retaliated against for making a complaint.
- **Take Prompt Action** – Do not put off relaying the information. It is imperative that the District address serious issues promptly.



WRAP-UP AND QUESTIONS