

# Discrimination and Harassment

**1.1.1**

## PURPOSE

To reinforce the City of San Jose's commitment to equal employment opportunity and a work environment free of discrimination and harassment, including sexual harassment.

## SCOPE OF APPLICATION

This policy applies to all City officers, employees, unpaid interns, volunteers, contractors, vendors, suppliers, members of the public and other persons who participate in City programs and services.

## SUMMARY

This policy is divided into the following sections:

- General Policy
- Discrimination and Harassment
- Sexual Harassment
- Consensual Sexual or Romantic Relationships
- Responsibilities (including responsibilities of all employees and supervisors)
- Complaint Procedures—General Information (including options of reporting)
- Complaint Procedures

**For questions regarding this policy or to discuss a particular situation, please contact the City Manager's Office of Employee Relations at 535-8150 or via email at [employee.relations@sanjoseca.gov](mailto:employee.relations@sanjoseca.gov).**

## GENERAL POLICY

**It is the policy of the City of San Jose to promote and maintain a work environment free of illegal discrimination and harassment in employment.**

**The City of San Jose, as a public employer and a provider of services, WILL NOT TOLERATE NOR CONDONE DISCRIMINATION OR HARASSMENT from any employee, regardless of employment status. All City employees are responsible for maintaining a work environment free from discrimination and harassment as defined below and will be held fully accountable for complying with this policy and for taking appropriate measures to ensure that such conduct does not occur.**

**An employee, unpaid intern, volunteer or contractor who believes that he or she has been the victim of discrimination or harassment should immediately report the alleged harassment or discrimination as described under "Complaint Procedures" below. Any City employee, unpaid intern, volunteer or contractor who believes that he or she has witnessed or has knowledge of any harassment or discrimination in the workplace is strongly encouraged to report the acts or occurrences.**

**City employees who violate this policy are subject to disciplinary action up to and including termination from City service. Supervisors/managers who know or should**

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have known of discrimination or harassment and fail to report such conduct and fail to take immediate corrective action are also subject to disciplinary action up to and including termination from City service. Contractors, members of the public or other persons who participate in City programs and services who violate this policy are subject to appropriate sanctions.

**PROTECTION AGAINST RETALIATION**

Retaliation or reprisals against witnesses or employees who in good faith file harassment or discrimination complaints or provide information in an investigation will not be tolerated. However, intentionally making a false report or providing false information is cause for discipline.

**DISCRIMINATION AND HARASSMENT**

Under this policy, “**Discrimination**” includes, but is not limited to:

1. Any practice, process or action in the workplace which works against equality of opportunity and against the ability of each person to be employed and to advance on the basis of merit without regard to the following protected categories/status:
  - Race
  - Color
  - Religion (Religious Creed)
  - National Origin
  - Ancestry
  - Age (40 and above)
  - Sex
    - Pregnancy, childbirth, breastfeeding and/or related medical condition
  - Disability (Physical and/or Mental)
  - Marital Status
  - Medical Condition (Cancer/genetic characteristics)
  - Gender, Gender Identity, and Gender Expression
  - Military Status and Veteran Status
  - Genetic Information
  - Sexual Orientation
2. Basing an employment decision affecting a job applicant or employee (e.g., decision to hire, promote, transfer, terminate, etc.) on one's protected status; (e.g., race, color, religion, sex, etc.).
3. Treating an applicant or employee differently with regard to any aspect of employment because of his or her protected status.
4. Taking adverse employment action (i.e., demotion, transfer, discipline, termination) against an employee based on the employee opposing discrimination and/or harassment in the workplace, assisting, supporting, or associating with a member of a protected category/status who complains about discrimination and/or harassment, or assisting in an investigation of discrimination and/or harassment.

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Under this policy, "**Harassment**" is defined by the existence of the following elements:

1. Conduct that is based on a protected category/status;
2. Conduct that is unwelcome;
3. Workplace harm that:
  - Creates a hostile work environment; or
  - Results from a tangible employment action (quid pro quo)

Examples of actions that may lead to workplace harassment complaints based on a Hostile Work Environment and which are prohibited include, but are not limited to, the following:

- **Visual Harassment**, such as posters, photographs, letters, notes, email, cartoons, or drawings related to the person's protected category/status (including using City computer systems related to such materials).
- **Verbal Harassment**, such as epithets, derogatory comments/statements, vulgar, racist or other discriminatory jokes, or slurs based upon a person's protected category/status.
- **Physical Harassment**, such as assault, blocking or impeding access or other physical interference, sabotaging work or imposing demeaning work tasks based upon a person's protected category/status.

Even if conduct does not constitute a hostile work environment, it may still be misconduct that is cause for discipline.

**SEXUAL HARASSMENT**

"**Sexual Harassment**" is a form of workplace harassment as described above and is defined to include, but is not limited to:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, a supervisor in another area, a manager, a co-worker, or a non-employee like a vendor or member of the public.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or termination of the victim.

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- The harasser's conduct must be unwelcome.

Determining what constitutes sexual harassment depends upon the specific facts and context.

Sexual harassment:

- May be subtle and indirect or blatant and overt.
- May consist of repeated actions or may arise from single incident.
- **“Hostile Work Environment”** cases are a type of Sexual Harassment that can result from various forms of conduct, including, but not limited to the following:
- **Visual Harassment:** leering/staring, making sexual gestures, displaying of sexually suggestive or pornographic objects, pictures, magazines, cartoons, posters, letters, notes, emails, inappropriate gifts.
- **Verbal Harassment:** making or using derogatory comments, epithets, slurs and jokes. Comments about body parts or physical appearance, innuendo, unwanted sexual advances, unfulfilled threats of employment benefits/detriments in exchange for sexual favors, pressure for dates, discussion of a sexual nature, questioning a person’s sexual practice or history, sexually degrading words used to describe an individual.
- **Physical conduct:** touching, assault, impeding or blocking movements.

**“Quid Pro Quo (‘This for that’) Harassment”** cases are another type of Sexual Harassment:

“Quid Pro Quo” Harassment can occur when submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual, such as a promotion, raise, hiring, or performance appraisals.

This kind of Sexual Harassment can only be perpetrated by a supervisor, manager or other person who has the authority to affect the employee’s terms and conditions of employment.

### Examples

Examples of actions that may lead to sexual harassment complaints and which must be avoided include, but are not limited to, those listed below:

- Unwanted sexual advances or pressure for dates or sexual favors
- Making implicit or explicit offers of employment benefits in exchange for sexual favors
- Making implicit or explicit threats of retaliation for negative responses to sexual advances
- Leering, sexual looks or sexual gestures with hands or through body movements
- Unwanted touching, including hugging, kissing, patting or stroking
- Pinching, grabbing, assaulting, impeding or blocking movements
- Sexually suggestive objects or pictures, cartoons or posters in the workplace or on computer systems (including email and the internet)
- Graphic verbal commentaries about an individual’s body
- Sexually degrading words used to describe an individual, including inappropriate sex-oriented comments about appearance, including dress or physical features
- Lewd propositioning
- Unwanted written communications, telephone calls, or personal gifts

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- Sexual teasing, jokes, remarks or questions
- Referring to an adult as a “girl”, “hunk”, “doll”, “babe”, or “honey” or whistling at someone
- Sexual innuendoes or stories
- Asking about sexual fantasies, preferences or history
- Questions about sexual life
- Sexual comments about a person’s clothing, anatomy or looks
- Telling lies or spreading rumors about a person’s personal sex life
- Giving massages, touching a person’s clothing, hair or body

Even if conduct does not constitute Sexual Harassment, it may still be misconduct that is cause for discipline.

### INAPPROPRIATE MATERIALS IN THE WORKPLACE

The City of San Jose will not tolerate nor condone City employees who view, display, print, send, download or distribute content that contains or depicts scantily clad individuals, nudity, or sexually explicit material.

City employees who view, display, print, send, download or distribute such content or depictions are **subject to disciplinary action up to and including termination from City service**, regardless of whether or not another employee raises a concern with the material. Further, any such content or depictions that could have criminal implications will be immediately reported to the City of San Jose’s Police Department.

In addition, employees who access content that contains or depicts scantily clad individuals, nudity, or sexually explicit material using the City’s email or internet systems may also be in violation of other City policies, including, but not limited to, the [City’s Use of Email, Internet Services, and Other Electronic Media Policy](#) and the Personal Use of City Equipment Policy.

There may be City business related reasons for accessing materials such as those listed here. If you have any questions on these, please contact the Office of Employee Relations.

### CONSENSUAL SEXUAL OR ROMANTIC RELATIONSHIPS

There are special risks in any sexual or romantic relationship between individuals in inherently unequal positions, and parties in such a relationship assume those risks. Such unequal positions include an employee and a supervisor/manager who is in a position of authority over the employee. This can include direct reporting relationships or indirect reporting relationships where the supervisor/manager is in a higher level position within the same chain of command as the employee.

Because of the potential for conflicts of interest, exploitation, favoritism, and bias, such relationships may undermine the real or perceived integrity of the supervision and evaluation provided. They may be less consensual than the individual in the higher level position believes. The relationship is likely to be perceived in different ways by each of the parties to it, especially in retrospect.

In addition, such relationships may affect others in the work environment. Relationships in which one party is in a position to review/evaluate the work or influence the career of the other may provide grounds for complaint by third parties when that relationship gives undue access

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or advantage, restricts opportunities, or creates a perception of these problems. Furthermore, circumstances may change, and conduct that was previously welcome may become unwelcome. Even when both parties have consented at the outset to a romantic involvement, this past consent does not remove grounds for a charge based upon subsequent unwelcome conduct.

Where such a relationship exists, the person in the higher level position will bear the primary burden of accountability, and must ensure that he or she does not exercise any supervisory or evaluative function (or does not remain in a position where they can influence the supervisory or evaluative function) related to the other person in the relationship. The person in the higher level position must also notify his or her supervisor and Department Director so that they can evaluate the adequacy of alternative supervisory arrangements to be put in place. The Department Director or designee must consult the Office of Employee Relations.

As stated above, the responsibility to make the notifications and the responsibility to ensure that alternative supervisory arrangements are put into place rests with the person in the higher level position. Failure to comply with these requirements is a violation of this policy, and therefore cause for discipline.

**RESPONSIBILITIES****I. Employees, Unpaid Interns, Volunteers, and Contractors**

All employees, unpaid interns, volunteers, and contractors shall be responsible for:

1. Maintaining a work environment free of discrimination and harassment, complying with the Policy, and taking appropriate measures to ensure that such conduct does not occur.
2. Reporting complaints of discrimination or harassment to a supervisor, Department Director or Office of Employee Relations immediately.
3. Cooperating fully with all investigations of discrimination and harassment and implementation of remedial measures.
4. Refraining from retaliating against any employee who participates in an investigation or opposes discriminatory practices.

**II. Supervisors/Managers**

Supervisors/Managers shall be responsible for:

1. Contacting the Department Director and the Office of Employee Relations immediately upon receiving a complaint or when aware of situation involving potential violations of this policy.

**Supervisors/Managers who know or should have known of discrimination or harassment and fail to report such conduct and fail to take immediate corrective action are also subject to disciplinary action up to and including termination from City service.**

**Discrimination and Harassment****1.1.1****III. Department Directors**

Department Directors shall be responsible for:

1. Assisting the Director of Employee Relations by disseminating this Policy to department employees and ensuring that the workplace remains free of discrimination and harassment.
2. Contacting the Office of Employee Relations immediately upon receiving a complaint from an employee or notification that a complaint has been filed with the EEOC or DFEH, or when aware of situation involving potential violations of this policy. Coordinating and cooperating with the Director of Employee Relations in resolving complaints involving employees in their respective departments; and when discrimination and/or harassment has occurred:
  - Taking prompt and appropriate remedial action.
  - Taking reasonable steps to protect the complainant from further discrimination/ harassment.
  - Taking reasonable steps to protect the complainant from retaliation as a result of communicating the complaint.
  - Taking action to remedy the effects of discrimination/harassment.

**IV. Director of Employee Relations**

The Director of Employee Relations shall be responsible for:

1. Ensuring that this Policy is disseminated to all employees.
2. Providing training and assistance to Department Directors, supervisors, and employees in preventing and addressing discrimination and harassment.
3. Investigating, resolving and, when appropriate, making recommendations for corrective actions of complaints.
4. Forwarding a Determination Letter to complainant and person charged.
5. Responding to complaints filed with the EEOC or DFEH.

**COMPLAINTS—GENERAL INFORMATION**

A report of discrimination or harassment can be made verbally or in writing, but the employee will be asked to communicate all known facts and information about the acts or occurrences so that an investigation can be conducted.

Allegations of discrimination or harassment will be promptly and objectively investigated. The investigation and findings will be based upon the totality of circumstances and each situation will be evaluated on a case-by-case basis. Where discrimination or harassment has occurred, prompt and effective remedial action commensurate with the severity of the offense will be taken in accordance with existing City discipline procedures.

**Discrimination and Harassment****1.1.1****Confidentiality**

Anonymous inquiries can be made regarding this policy in order to assist employees who believe that they may be victims of harassment or discrimination in determining available options. Anonymous complaints can be made by phone at 535-8150 (by using a blocked number) or via email ([employee.relations@sanjoseca.gov](mailto:employee.relations@sanjoseca.gov)) using an anonymous personal email account sent from a non-City computer.

The City of San Jose recognizes the sensitivity of discrimination and harassment complaints and respects the confidentiality and privacy of the individual reporting or accused of harassment or discrimination or providing information in connection to a complaint of harassment or discrimination to the extent reasonably or legally possible. For example, information related to a complaint may need to be disclosed in responding to a complaint made to an outside governmental agency such as the California Department of Fair Employment and Housing (DFEH) or the Federal Equal Employment Opportunity Commission (EEOC). In addition, there are circumstances, such as if disciplinary action is taken, when details of the investigation, including the identity of the complainant and witnesses may be disclosed. Concerns regarding confidentiality can be directed to the Office of Employee Relations.

**Options to Report**

Complaint procedures are described in detail under "Complaint Procedure" below. The options to file complaints of discrimination or harassment which involve City employees include filing the complaint with:

- A supervisor
- A Department Director
- The Office of Employee Relations
- The Equal Employment Opportunity Commission (EEOC)
- The Department of Fair Employment and Housing (DFEH)

If an employee is uncomfortable filing a complaint with a supervisor, the complaint can be made to the Department Director or directly to the Office of Employee Relations. Employees have the right to file a complaint with an outside agency (EEOC or DFEH). However, a violation of this policy may exist even when there is no violation of the law.

If a complaint is filed with a department, or if a department receives notification that a complaint has been filed with, the department shall immediately notify the Office of Employee Relations. The decision as to whether an investigation will be conducted by the department or the Office of Employee Relations shall be decided by the Director of Employee Relations after consultation with the Department Director.

**Complaints Involving Council Office or Council Appointees**

Complaints which involve Council Offices may be made to the Councilmember or the City Attorney. Complaints which involve Council Appointees (City Attorney, City Auditor, Independent Police Auditor, Redevelopment Agency Director, City Manager or City Clerk) may be made to the Mayor. Complaints received by the Councilmember, the City Attorney or the Mayor may receive technical assistance, guidance or advice from the Director of Employee Relations, as requested.

**Discrimination and Harassment****1.1.1****Complaints Involving Contractors, Vendors, Suppliers or Members of the Public**

Complaints of discrimination or harassment raised by City employees against employees, agents or representatives of contractors, vendors, members of the public or suppliers doing business with the City shall be promptly reported to the Office of Employee Relations.

Complaints of discrimination or harassment raised by employees, agents or representatives of contractors, vendors, members of the public or suppliers doing business with the City against City employees shall be promptly reported to the Office of Employee Relations.

Firms whose employees discriminate against or who sexually harass City employees in the course of doing business with the City may be subject to termination of contract, suspension or debarment from doing business with the City; or to other measures as the City Administration and the City Attorney may deem appropriate.

**COMPLAINT PROCEDURES****I. Filing a Complaint**

Employees who believe they have been discriminated against or harassed are to immediately report the act or occurrence, in writing or verbally, to a supervisor, Department Director or Office of Employee Relations. Any supervisor who receives a complaint of discrimination or harassment or who becomes aware of a situation involving potential violations of this policy shall notify the Department Director and the Office of Employee Relations. Any Department Director who receives a discrimination/harassment complaint from an employee or notification that a complaint has been filed with the EEOC or DFEH shall notify the Director of Employee Relations as soon as possible after receiving the complaint.

**II. Investigation and Resolution**

After reviewing the discrimination or harassment complaint, the Director of Employee Relations shall determine if an investigation is necessary to resolve the issues of the complaint and, if so, authorize and supervise the investigation of the complaint.

The Director of Employee Relations will not proceed with the investigation of a complaint if the complaint contains no assertion that the alleged acts occurred based on one or more of the protected categories. However, complaints of alleged misconduct which do not allege harassment or discrimination on the bases covered by the scope of this procedure may be investigated by the Department Director or the Office of Employee Relations at the discretion of the Director of Employee Relations.

When the investigation is completed, the Director of Employee Relations will determine if there is sufficient evidence to substantiate a violation of this Policy or if any other misconduct has occurred, and if remedial action is necessary to resolve the issues of the complaint. The complainant, alleged harasser, and Department Director will be notified of the Director's determination.

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| Complainant   | 1. File discrimination/harassment complaint immediately.<br><br>At the discretion of the complainant, complaints may be filed with a supervisor, the Department Director or Director of Employee Relations.  |
| Supervisor  | 2. Contact the Department Director and the Office of Employee Relations immediately upon receiving a complaint or when aware of situation involving potential violations of this policy.   |
| Department Director   | 3. Contact the Office of Employee Relations immediately upon receiving a complaint from an employee or notification that a complaint has been filed with the EEOC or DFEH.   |
| Council Officer or Council Appointee                                | 4. Contact the Office of Employee Relations immediately upon receiving a complaint from an employee or notification that a complaint has been filed with the EEOC or DFEH in order to receive advice and assistance.   |
| Department Director or Director of Employee Relations (or designee) | 5. Discuss with complainant and note details of allegations of discrimination/harassment, such as: <ul style="list-style-type: none"> <li>a. Date, time and place of incident.</li> <li>b. Nature of the incident.</li> <li>c. Person or persons against whom allegations are made.</li> <li>d. Witnesses.</li> <li>e. Preferred remedy.</li> <li>f. Other information relevant to the charge and investigation.</li> <li>g. Coordinate complaint with the Director of Employee Relations from point of filing until complaint is resolved.</li> </ul> |
| Department Director or Director of Employee Relations               | 6. Department Director and Director of Employee Relations shall immediately advise the other regardless of where the complaint is filed. The Director of Employee Relations will determine who will assume lead role in resolving the complaint. Maintain coordination until the complaint is resolved.  |
| Department Director or Director of Employee Relations               | 7. Determine type and nature of the complaint. If not based on discrimination/harassment, determine appropriate action, if any. If based on discrimination or harassment: <ul style="list-style-type: none"> <li>a. Develop a plan for investigating the complaint.</li> <li>b. Interview witnesses, if any.</li> <li>c. Interview former and current supervisors and co-workers where appropriate to substantiate claims or allegations.</li> </ul>   |

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- d. Review personnel files.
  - e. Review data collected and other relevant reports and documents.
- Department Director or Director of Employee Relations 8. Determine factual findings. Prepare a written report, including a summary of the investigation, findings and whether the allegations are substantiated or not.
- a. Forward copies of the report to Director of Employee Relations if the investigation was conducted by the Department.
  - b. If misconduct is substantiated, determine if disciplinary action is required.
  - c. Forward letter of determination to complainant and person charged.
  - d. If allegations are not substantiated, proceed to Step 10.
- Department Director or Director of Employee Relations 9. Coordinate implementation of corrective/disciplinary action with City Attorney’s Office, Director of Employee Relations and/or other appropriate officials.
- 10. Implement corrective/disciplinary action.
  - 11. Close case.
- Complainant 12. If dissatisfied with final determination, consider contacting the Department of Fair Employment and Housing (DFEH), the Equal Employment Opportunity Commission (EEOC), or a private attorney.

Employees remain free to pursue complaints of discrimination or harassment with two outside agencies: the State of California Department of Fair Employment and Housing or the United States Equal Employment Opportunity Commission, whether or not complainants choose to use the City of San Jose's complaint procedure. Time limits for filing complaints with State and Federal compliance agencies vary and those agencies should be contacted directly for specific information. The addresses and telephone numbers (as of the revision date of this procedure) are:

Department of Fair Employment and Housing  
 2570 North 1<sup>st</sup> Street, Suite 480  
 San Jose, California 95131  
 Phone: (408) 325-0344 or (800) 700-2320

Equal Employment Opportunity Commission  
 San Jose Office  
 96 North Third Street, Suite 200  
 San Jose, California 95112  
 Phone: (408) 291-7352

Approved:

/s/ Jennifer Schembri  
 Director of Employee Relations

December 13, 2018  
 Date

Approved for posting:

/s/ Jennifer Maguire  
 Assistant City Manager

December 13, 2018  
 Date