



Discrimination and Harassment Training & Internal Investigations; Best Practices for Avoiding Claims

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Discrimination & Harassment Training

- What is Discrimination?
- What is Harassment?
 - Is it “just” sexual harassment?
- Why should you be concerned?
- What conduct or action is prohibited?



Discrimination & Harassment Training

- Why is it important to prevent discrimination and harassment?
- What are your responsibilities as supervisors, managers, and/or owners in handling complaints and assisting in investigations?



What is Discrimination?

- Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace and has been interpreted to prevent harassment.
- Title VII provides that it “shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.



What is Harassment?

- That didn't say Harassment? Why not?
- In 1976, sexual harassment was first recognized as a form of sexual discrimination.
- It was not until 1986 that the US Supreme Court confirmed that Title VII's prohibition of discrimination included sexual harassment.




What is Harassment?

- However, despite the Supreme Court's position in 1986, sexual harassment did not become an employment buzz word until 1991 and the confirmation hearings of Clarence Thomas.



What is Harassment?

- Title VII prohibits discrimination and harassment of an individual based on:
 - Race,
 - Color,
 - Sex,
 - Religion, &/or
 - National Origin.



What is Discrimination/Harassment?

- The Age Discrimination in Employment Act (ADEA) prohibits discrimination/harassment of employees who are 40 or older on the basis of age.
- The Americans with Disabilities Act prohibits discrimination/harassment based on disability.




What about retaliation?

- All of the “anti-discrimination” statutes enforced by the EEOC prohibit retaliation for complaining of discrimination and/or harassment or participating in complaint proceedings.




What is Harassment?

- In summary, in the employment and legal context, harassment can be defined as conduct or actions, based on race, religion, sex, national origin, age, disability, military membership or veteran status, severe or pervasive enough to create a hostile, abusive or intimidating work environment for a reasonable person.




Why should I be concerned with Harassment?

- The EEOC takes the position that training for *all* types of harassment is critical, if not required, in raising a defense and avoiding punitive damages in harassment lawsuits.




Why should I be concerned with Discrimination and Harassment?

- In Fiscal Year 2008 the EEOC documented \$47,400,000 in monetary “benefits”, not including “benefits” obtained through litigation!
- This \$47,400,000 was only for sexual harassment and does NOT include other types of discrimination/harassment.



Why should I be concerned with Harassment?

- The total amount of monetary “benefits” collected through the EEOC in 2008 for claims of discrimination/harassment was \$74,800,000!
- Title VII does not provide for individual liability for harassment or discrimination;
HOWEVER,



Why should I be concerned with Discrimination/Harassment?

- Individuals who discriminate/harass may be personally liable under various state laws and/or personal injury principles:
 - assault and battery;
 - infliction of emotional distress;
 - Intentional Interference with Employment;
 - Defamation;
 - False Imprisonment;
 - etc.



What conduct is prohibited?

- Unwelcome verbal or physical conduct based on a person's race, color, religion, sex or gender, national origin, age (40 and over), and disability (mental or physical).
- Severe, pervasive and persistent conduct that unreasonably interferes with an employee's work performance or creates an intimidating, hostile or offensive work environment.



What conduct is prohibited?

- An occurrence where an employee's status or benefits are directly affected by the harassing conduct of a manager or person of authority.
- Adverse employment actions (retaliation) against employees who complained of harassment or discrimination or who participate in a complaint procedure.



Preventing Discrimination & Harassment

- Consult your Employee Handbook.
 - What is your EEO Policy Statement on Discrimination/Harassment?
 - What are the policies and procedures for reporting a claim of discrimination &/or harassment?
 - Why is it important to have a policy?



Harassment

- There are basically two types of harassment:
 - “Quid Pro Quo” harassment; and,
 - Hostile Work Environment.



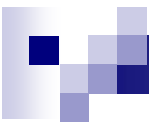
Harassment

- "Quid pro quo" harassment occurs where submission to harassment is used as the basis for employment decisions. Something for something.
- Employee benefits such as raises, promotions, better working hours, etc., are directly linked to compliance with sexual advances or other harassment.
- Therefore, only someone in a supervisory capacity (with the authority to grant such benefits) can engage in quid pro quo harassment.



Harassment

- "Hostile work environment" occurs where the harassment creates an offensive and unpleasant working environment.
- Hostile work environment can be created by anyone in the work environment: supervisors, other employees, vendors, and/or customers.
- Hostile environment harassment often consists of verbiage of a sexual nature, unwelcome sexual materials, or even unwelcome physical contact as a regular part of the work environment.
- Cartoons or posters of a sexual nature, vulgar or lewd comments or jokes, or unwanted touching or fondling.

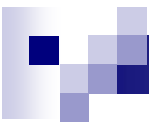


Liability Standards for an Employer based on supervisor harassment

- Vicarious Liability.

- Employers are **automatically** liable for sexual harassment when the employee can demonstrate that he or she suffered a “tangible employment action” because of a supervisor’s harassing conduct, regardless of whether the actions fell into the quid pro quo or hostile environment category.

- If an employee is terminated, demoted to a lower paying or less prestigious position, suffers a reduction in pay, has a change in benefits, or receives a substantial change in job responsibilities or some other tangible employment action, as a result of the harassment, the employer is automatically liable.



Liability Standards for an Employer based on supervisor harassment

- Vicarious liability with Defense.
 - If a harassed employee did not suffer a tangible employment action because of the harassment, you will be allowed to assert an affirmative defense to defeat the claim. To succeed with this defense, you must prove that : (1) you exercised reasonable care to prevent and promptly correct the harassment, and (2) the employee unreasonably failed to report the harassment or otherwise avoid harm.



Liability Standards for an Employer based on supervisor harassment

- Known or Should Have Known About the Harassment.
 - When a co-worker harasses another employee, or a customer or vendor harasses one of your employees, you will be liable for harassment if you knew or should have known that the harassment was occurring and you took no action to stop it.
 - That means that once an employee reports the harassment to you, or you notice anything that might be classified as harassment, you must take swift action to stop the harassment and prevent it from occurring.



Defenses on Discrimination/Harassment Claims

- If the discrimination/harassment does not result in a tangible employment action, the employer may still be liable unless it proves that:
 - The employer exercised reasonable care to prevent and promptly correct any harassment; and,
 - the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided to the employee or to avoid the harm otherwise.



Defenses on Discrimination/Harassment Claims

- For you to be able to assert the employee's inaction as a defense, the employer must first show that it had a strong harassment prevention and complaint policy in place; AND,
- That the employees were adequately educated about that policy.



Defenses on Discrimination/Harassment Claims

- An effective discrimination/harassment policy should be distributed to all employees and should have the following key elements:
 - A condemnation of discrimination/harassment. Make a mission-statement type declaration at the beginning of your policy condemning harassment and stating your commitment to eradicating it in your workplace. State that your company has a policy of promoting equal opportunities to all people without discrimination because of race, color, religion, sex, age, national origin, disability, or any other legally protected characteristic.



Defenses on Discrimination/Harassment Claims

- An effective discrimination/harassment policy should be distributed to all employees and should have the following key elements:
 - Anti-retaliation statement. Provide assurances to all employees that they will not be retaliated against if they report harassment or provide information in support of a harassment complaint. The EEOC has stated that a harassment policy and complaint procedure will not be found effective if it does not have an anti-retaliation provision.



Defenses on Harassment Claims

- Key elements continued:
 - Investigation. Indicate that all reports of harassment will be promptly and thoroughly investigated and prompt remedial action will be taken should the company conclude that harassment has taken place. Assure employees that confidentiality will be maintained to the extent possible.
 - Disciplinary policy. Include a statement that offenders will be subject to appropriate discipline, up to and including termination.



Defenses on Discrimination/Harassment Claims

- A clear explanation of harassing conduct. Employers must make sure your employees understand the policy and prohibited conduct. Explain what conduct will be considered offensive and give several concrete examples of various inappropriate behaviors – not just sexually inappropriate behaviors. Examples of inappropriate behavior:
 - derogatory comments about an individual's membership in a protected group - for example, calling someone "an old bag", "stump",
 - visual messages that are degrading to or reflect negatively on protected groups - for example, cartoon that depict religious figures in compromising situations.
 - jokes that have the purpose or effect of stereotyping, demeaning, or making fun of any protected group.
 - slurs that describe a protected group. Nicknames that relate to a person's membership in any protected group
 - verbal or non-verbal innuendo that related to or reflects negatively on any protected group - for example, mimicking a disabled employee's walk.



Defenses on Discrimination/Harassment Claims

- Reporting procedure. Encourage employees who feel victimized by discrimination/harassment to report the offensive conduct before it becomes severe or pervasive. Include a list of names or positions to whom complaints can be made. This list should make it clear that employees who are harassed by their supervisors have alternative reporting options.
- Reporting requirements. Make it abundantly clear that all employees and supervisors are required to report any offensive conduct they experience or witness to upper management. This applies even if the harassment is taking place in another department or the harasser is someone outside the company. It is also necessary to report alleged harassment even if the employee never actually complained or didn't follow formal complaint procedures. It is especially important that supervisors be required to report harassment, because once they know of harassment, the company is deemed to have knowledge of it and must take appropriate measures to remedy the situation.



Investigating Discrimination/Harassment Claims



Areas of Review

- I. Why?
- II. When?
- III. Investigating Claims.
- IV. Documentation of Investigation.
- V. What next?

For Every 10,000 Lawsuits, Few Losses, but High Cost

The maneuvering companies engage in to avoid wrongful-termination lawsuits is out of proportion to the risk of actually losing in court. One big reason: the high cost of litigating claims, even the ones that end up with the company winning.

Out of 10,000 employment suits	Stage of lawsuit	Cumulative cost for a company to defend a single lawsuit
FILING		
7,000	Settle (most settlements are for nuisance value)	\$10,000
SUMMARY JUDGMENT		
2,400	Get resolved by summary judgment and other pretrial rulings	\$100,000
START OF TRIAL		
600	Go to trial	\$175,000
END OF TRIAL		
186	Trials are won by plaintiffs	\$250,000*
APPEAL		
13**	Plaintiff victories survive appeal	\$300,000

Sources: Cornell Law School; Hofstra Labor & Employment Law Journal; BW reporting

*Assumes a five-day trial

**Out of 22 trial losses typically appealed by companies



Investigating Claims

- **Determining Preliminary Details & Documentation**
 1. What happened?
 2. Who is/are the accused?
 3. Who is/are the complainant(s)?
 4. Where did the incident take place?
 5. When is the complainant's work affected?
 6. How is the complainant's work affected?



Determining Preliminary Details & Documentation

7. Who are the witnesses?
8. Is the incident isolated or part of a recurring issue?
9. Who are the supervisors?
10. How the complainant has been affected (review personnel files of complainant, accused and witnesses)?
11. Review the Employee Handbook.
12. Is there any written documentation or recordings of the alleged incident?



Choosing the Right Investigator and/or Investigative Team

- a. Has a neutral, unbiased, and objective point of view;
- b. Is capable and properly trained;
- c. Familiar with the Employee Handbook;
- d. Understands the issues under investigation;
- e. Has the respect and backing of employees;



Choosing the Right Investigator and/or Investigative Team (Cont'd)

- f. Has the respect and backing of management;
- g. Ability to properly ask difficult questions;
- h. Ability to properly ask sensitive questions;
- i. Able to earn the confidence of individuals in order to obtain honest and thorough answers;
and,
- j. Ability to conduct thorough investigation
and provide thorough report.



Interview Preparation

1. Review the personnel files of the complainant, the alleged accused, and witnesses;
2. Review all documents and notes of the supervisor who took the complaint;
3. Determine the order of interviews;
4. Make outline of interview questions;
5. Select location for interviews; and,
6. Select a management witness to participate in the



Interview with Complainant

- a. GOAL - Initial interview should determine all basic facts: who, when, where, why, what and how;
1. when and where incident(s) occurred;
 2. what precisely was said or done by both parties;
 3. whether there were any witnesses;
 4. the effects of the incident; and,
 5. whether there are any documents containing information about the alleged incident.



Interview with Complainant (continued)

- b. Advise the complainant of the company positions:**
1. Verbalize the Employee Handbook statements on harassment and discrimination;
 2. Emphasize that the company takes reports of harassment/discrimination seriously and will thoroughly investigate the claim;
 3. Confirm confidentiality will be observed to the extent practical and that complainant should not discuss allegations with any other employees;



Interview with Complainant (continued)

4. That retaliation or harassment for making a report of misconduct is forbidden by the company;
5. Any perceived retaliation or further incidents of misconduct or harassment should be reported immediately; and,
6. Advise that should the investigation confirm inappropriate conduct, the company will take appropriate corrective action.



Interview with Complainant (continued)

- c. Thoroughly discuss each incident, including date, time, place, and the exact nature of conduct (in writing; review verbally);
- d. Note complainant's response to each incident;
- e. Identify all witnesses to the alleged incident;
- f. Identify any other person(s) who may claim to have been harassed;
- g. Identify any and all documents that constitutes or records the harassment;



Interview with Complainant (continued)

- h. Identify all persons the complainant has discussed the incident with;
- i. Document complainant's level of cooperativeness;
- j. Identify reason for delay, if any, in reporting the alleged harassment;
- k. Determine what interim action has been taken or needs to be taken while the investigation is pending;
- l. Provide complainant with record of interview upon request;
- m. Reaffirm the company's commitment to discrimination free workplace;
- n. Immediately prepare summary; and,
- o. Have complainant review summary and sign.



Interview with Accused

a. Advise accused:

1. Identify the objections of the meeting - allegations of workplace conduct;
2. Confirm that no conclusions have been reached;
3. Purpose of investigation is to gather accurate information;
4. This is the accused opportunity to discuss in detail his/her story;
5. Full, truthful cooperation is expected of everyone;
6. Accused is not to interfere with the investigation or talk with other employees about the allegations or the subject matter of the complaint; and,
7. Review and confirm company's policy on harassment/discrimination and that retaliation is strictly



Interview with Accused (continued)

b. Interview

1. Identify each allegation;
2. Obtain a denial, admission, and complete response as to each allegation;
3. Explore any working and personal relationship between complainant and accused; and,



Interview with Accused (continued)

c. Post Interview

1. Prepare summary; and,
2. Review summary with accused and have summary signed.



Witness Interviews

- A. Explain objectives of the interview – to thoroughly investigate a complaint
- B. Review the Employee Handbook statements on harassment and discrimination;
- C. Emphasize that the company takes reports of harassment/discrimination seriously and will thoroughly investigate the claim;
- D. Confirm confidentiality will be observed to the extent practical and that complainant should not discuss the interview with any other employees;



Witness Interviews

- E. Assert the complete and honest responses are expected of everyone;
- F. Confirm the company will not tolerate retaliation for participating in the investigation;
- G. Witness has a right and duty to report any perceived retaliation; and,
- H. Company has a duty to thoroughly investigate all complaints.



Witness Interviews

A. Interview

1. Avoid providing unnecessary information to the witness;
2. Ask open ended questions;
3. Specific detail on incident and locations;
4. Determine what is personally known and what is hearsay;
5. Identify all witness(es) to the alleged incident;
6. Have witness write down exactly what they saw.
Never tell a witness “this is off the record”.



Witness Interviews

B. Post Interview

1. Prepare summary; and,
2. Review summary with accused and have summary signed.



IV. Documentation of Investigation



Investigation Documentation

- A. Prepare chronology of events and alleged incident;
- B. Identify all persons interviewed;
- C. Attach all relevant documents, statements, and other evidence;
- D. Summarize the allegations and responses;



Investigation Documentation (cont'd)

- E. Outline discrepancies/differences;
- F. Have notes and summaries signed by investigator/team;
- G. Summary of findings regarding each allegation; and,
- H. Overall conclusions.