

DISCRIMINATION AND HARASSMENT TRAINING

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Recognizing that federal and state laws require employers to make a "good faith effort"¹ to promote prevention of harassment and discrimination, as well as to take remedial corrective action, employers must properly train employees regarding harassment and discrimination issues. The purpose of the information contained in this document is to discuss why it is crucial for companies to deliver timely and effective training and what constitutes effective training which will have a positive impact on the workplace. Armed with this information, employers can effectively meet their legal obligations to comply with anti-harassment and discrimination laws by training employees and can create a good work environment.

Reasons to Train Employees

There are many reasons why an employer needs to train employees. First, the courts and the Equal Employment Opportunity Commission² ("EEOC") say you should train. Significantly, courts view proper employment training as an essential part of an employer's duty to comply with the employment laws that prohibit harassment and discrimination. Second, training is the most effective means of educating employees about workplace policies, rules and complaint procedures. Third, under certain circumstances, training helps employers avoid liability by providing an affirmative defense to a claim of harassment alleged to have been perpetrated by a manager or supervisor. Finally, providing effective training to all employees makes a favorable impact on employees and creates a workplace environment free from harassment and discrimination.

¹ "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms" and the "purposes underlying Title VII are similarly advanced where employers are encouraged to adopt anti-discrimination policies and to educate their personnel on Title VII's prohibitions." *Kolstad v. American Dental Ass'n*, 119 S.Ct. 2188, 2129 (1999).

² The Equal Employment Opportunities Commission ("EEOC") is the federal agency that enforces the following laws: Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin; Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination; Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older; Title I of the Americans with Disabilities Act of 1990 (ADA), which prohibits employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments; Section 501 of the Rehabilitation Act of 1973, which prohibits discrimination against qualified individuals with disabilities who work in the federal government; and Civil Rights Act of 1991, which provides monetary damages in cases of intentional employment discrimination. The EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies.



Background

We have known for quite some time that it generally is necessary for employers to establish, communicate and distribute, and enforce anti-harassment policies and complaint procedures. As the Supreme Court stated in 1998, "Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms." *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257, 2270 (1998). While the Court noted that this "is not necessary in every instance as a matter of law," failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment. The majority of employers have taken the Supreme Court's emphasis seriously and now have in place anti-harassment policies.

The EEOC and several courts around the country have indicated that employers may risk stiff penalties and lose a defense to a harassment or discrimination claim unless the employer provides harassment and discrimination avoidance training to its employees and managers. For example, in 1999 the United States Supreme Court³ resolved a debate in the lower courts as to what type of conduct is sufficient to impose punitive damages for discriminatory conduct. In doing so, the Court stated that employers who make good faith efforts to comply with federal anti-discrimination laws may avoid punitive damages. Most significantly, the court determined that an employer will not be held "vicariously liable [for punitive damages] for discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII." *Kolstad*, 119 S.Ct. at 2129 (quotation omitted). The Court clearly sent a message to employers to "educate themselves and their employees on Title VII's [the federal discrimination and harassment law's] prohibitions." *Id.*

It is not enough, however, for an employer to only have an anti-harassment and discrimination policy. Indeed, it is well established that an employer's duty to exercise reasonable care includes training employees on anti-harassment and discrimination issues. Courts have made it clear that employers must train not only about sexual harassment and discrimination, but on all types of workplace harassment and discrimination. A 1999 Tenth Circuit case emphasized that an employer's "good-faith efforts" means more than simply issuing a policy against discrimination. In *EEOC v. WalMart Stores, Inc.*,⁴ the court held that the employer's company-wide policy against discrimination and special anti-discrimination handbook were insufficient to preclude a punitive damages award where the company did not train its managers about discrimination and its anti-discrimination handbook was not widely disseminated. The courts are sending clear messages that employers should seriously consider the need to conduct training to avoid liability, and more significantly, prevent discriminatory conduct before it happens.

Manager and Supervisor Training

In addition to training all employees, employers must train managers and supervisors how to model appropriate, respectful behavior, supervise employees and recognize inappropriate behavior to avoid harassment and discrimination, respond immediately to conduct that could be harassing or discriminatory and appropriately respond to complaints of improper conduct. The EEOC has advised that an "employer should ensure that its supervisors and managers understand

³ *Kolstad v. American Dental Association*, 119 S.Ct. 2118 (1999).

⁴ *EEOC v. WalMart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999).

their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result.”⁵ As the Supreme Court stated, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance." *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2291 (1998).

According to the 1999 EEOC Guidelines, manager and supervisor training “should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.” Because this information and the actions required of supervisors and managers are complex, managers and supervisors require effective training on the substantive material, and not simply basic information given in a brief video, bulletin or "sit in a seat" type of training.

Effective training also provides employers with an affirmative defense against harassment claims and minimizes the risk of punitive damages. In *Ellerth* and *Faragher*, the Supreme Court ruled that employers can be "vicariously liable" for harassment by supervisors. However, if the harassment did not result in a tangible job action, such as discharge, demotion or undesirable reassignment, the employer can raise an affirmative defense that it exercised "reasonable care" to prevent and correct the harassment, and that the employee unreasonably failed to use its complaint procedure.⁶

In the alternative, an employer’s failure to provide training for managers and supervisors will not only limit the company’s ability to use the affirmative defense, but will also increase the company’s risk of punitive damages. As one court stated, “leaving a manager in ignorance . . . of the basic features of [employment] laws is an ‘extraordinary mistake’ for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference.” *Mathis v. Phillips Chevrolet, Inc.*, 269 F.3d 771 (7th Cir. 2001). If an employer has not properly trained its managers, then a jury could infer "reckless indifference" and award punitive damages.

Quality of Training

Since the 1998 *Ellerth* and *Faragher* cases, companies are aware that training – in addition to implementing and disseminating an anti-harassment and discrimination policies – is required under the law. However, courts' concerns have since evolved beyond whether training is conducted, and have focused on how and in what manner the training is conducted in order to be considered appropriate and effective in preventing harassment and discrimination. Recently,

⁵ EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999).

⁶ The Court adopted the following holding in both *Ellerth* and *Faragher*:

"An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. . . . The defense necessarily comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

Ellerth, 118 S.Ct. at 2270.

courts have analyzed the quality of an employer's training in order to establish the *Ellerth* and *Faragher* defense. In its analysis of training quality, the courts have examined elements, such as the frequency and recency of the training, whether the accused harasser actually received training, and the length and quality of the training.

Training Issues

1. Harassment training not conducted at regular intervals, with no refresher sessions for employees who have received training: Even when an employer provides training, it may not be enough to escape summary judgment. *See Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796 (Ark. 2003) (denying summary judgment where a question of material fact existed as to the promptness and adequacy of the employee training session because it occurred over a year after the harassment began and was reported).
2. Failure to document supervisors' participation in training: Even if an employer contends that it provided training for all managers, it must be able to demonstrate who actually attended the training. *See Soto v. John Morrell & Co.*, 285 F.Supp.2d 1146, 1165 (N.D. Iowa 2003) (denying employer's motion for judgment as a matter of law that company supervisors were trained in regard to sexual harassment because it was ambiguous who attended the training sessions and whether sexual harassment training was actually provided to company supervisors).
3. Training too short: Some courts have suggested that brief training sessions will not be sufficient to comply with the law. A Missouri court granted injunctive relief, requiring the defendant company to revamp its orientation program for all new employees to include two hours of training on sexual harassment. The two hours of sexual harassment training was to be provided by an outside contractor or a "qualified trainer" employed by defendant. In addition, defendant was ordered to also give two hours of sexual harassment training to all employees who have received less than two hours of sexual harassment in the last twelve months. Lastly, the defendant was required to provide two-hours of training on sexual harassment to all of its employees each year for three years. *Huffman and EEOC v. New Prime, Inc.*, 2003 WL 24009005, 3 (W.D. Mo. 2003). *See also Wagner v. Dillard Dep't Stores*, 85 Fair Empl. Prac. Cas. 295 (M.D.N.C. 2000) (holding employer's posting on a bulletin board and providing a brief training video were insufficient to comply with Title VII requirements).
4. Timely training: Some courts suggest that the training must have occurred during the relevant time period at issue. *Green v. Coach, Inc.*, 218 F.Supp. 2d 404 (S.D.N.Y. 2002). If training occurred more than a year after the alleged harassment began, then the training may not be adequate. *See Diaz v. Swift-Eckrich, Inc.*, 318 F.3d 796 (Ark. 2003).
5. Unqualified trainers may create liability or produce unfavorable discoverable evidence: Notes taken by a diversity trainer regarding managers' racial and gender bias may later be used as evidence of discrimination. *See Stender v. Lucky Stores*, 803 F.Supp. 259 (N.D. Cal. 1992). Other cases have been brought by participants for discriminatory comments made by trainers.

6. Training insufficient to avoid punitive damages where company managers and executives act contrary to policy and training guidelines: Even where a company has an anti-harassment and discrimination policy and conducts extensive training, evidence that the managers and executives engage in discriminatory conduct is sufficient to submit the issue of punitive damages to the jury. *See Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431 (4th Cir. 2000); *see also EEOC v. WalMart Stores, Inc.*, 187 F.3d 1241 (10th Cir. 1999); *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000) (holding evidence was sufficient to award punitive damages notwithstanding the fact that employer had written sexual harassment policy and policy of encouraging employees with concerns to make a complaint because employer minimized the complaints and performed cursory investigation).

Mandatory Training

Some states have now adopted regulations requiring employers to provide harassment training for all employees and additional training specific to managers and supervisors. For example, California recently enacted legislation that requires employers with fifty or more employees to provide at least two hours of sexual harassment training and education to all supervisors. (Cal. Gov. Code § 12950.1 (2005)). Once every two years, a two-hour session on the prevention and correction of sexual harassment must be provided. *Id.* Further, the training must be effective and interactive.

Other states also require harassment training. Connecticut requires employers with fifty or more employees to provide two hours of harassment training to all supervisory employees within six months of the assumption of a supervisory position. (Conn. Gen. Stat. § 46a-54(15)(B)). Similarly, Maine requires sexual harassment training for all companies that have fifteen or more employees within one year of the commencement of employment. In addition training for managers and supervisors must include information regarding their specific responsibilities to take "immediate and appropriate corrective action" in responding to complaints.

While Minnesota has not adopted specific regulations requiring harassment training, in light of the recent enactments in other states and the recent case law, it is prudent that all employers should be properly training employees, managers and supervisors. More significantly, it is clear that the training must be effective. Below are recommendations for training that is effective. As we have seen, and as courts have observed, interactive training will satisfy an employer's legal obligation, but more importantly it constitutes training that works.

What Makes Training "Work"?

Definition of "work": – training that educates, in a manner that makes a "dent", and has a positive affect on the workplace.

Training that works includes:

1. Training that appeals to all three learning styles.
2. Training that promotes participants talking with a facilitator and with each other about the subject at hand.

3. Training that has a purpose that makes sense to the participants.
4. Training in which the participants understand the *reasons* for the training and the policies and in which these reasons matter to the participants.
5. Training that enlightens – teaches a skill set that the participant didn't have and/or provides a perspective that the participant hadn't considered or, better yet, both.
6. Training that is, at least in part, not tell-directed, but rather "aha" directed; learning that comes from within the participant and is a revelation to the participant.
7. Training that uses humor, but is not over the line and does not hurt anyone's feelings.
8. Training that really covers the materials in depth, rather than just glossing over items, so that the training is comprehensive and can be reported as such.
9. Training that seems relevant ("rings true") to the participants' world, including their work experiences.
10. Training that complies with particular legal requirements (i.e., Calif. AB1825).
11. Training that doesn't merge markedly different audiences in the same session.