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Training, Intervention, and Response - Keys to Avoiding and Managing Discrimination and Harassment Claims

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Human resource professionals and employment lawyers have advised employers for years to adopt anti-discrimination and anti-harassment policies and undertake serious training efforts to reduce the likelihood and severity of such claims. In recent years, courts and state legislatures have reinforced the value of that advice.

In some states, training supervisors on sexual harassment isn't just a good idea: it's the law. As of January 1, 2006, California employers of more than 50 employees must provide at least two hours of interactive training to all supervisors every two years. Connecticut has had a similar statute since 1993.

Courts have increasingly demonstrated the practical value of training programs, as well as the risks of not having them. From the U.S. Supreme Court on down, courts have held that an employer can defend itself effectively against some types of discrimination and harassment claims if it can demonstrate that it: has a policy against harassment and discrimination; communicates that policy to its workforce and trains its supervisors on the administration of that policy; and enforces that policy with real sanctions when violations occur. Those same courts have also shown that employers that have a policy in name only, fail to educate the workforce about it, or don't respond seriously to allegations of harassment or discrimination (even invalid ones) run a serious risk not just of claims for back pay and attorney's fees, but punitive damages awards as well.

The good news is two-fold. First, effective training really can prevent claims by teaching supervisors how to respond to problem situations and manage them effectively. Second, when a claim does occur, a solid records of serious efforts to train employees and to respond effectively to complaints can go a long way to reduce an employer's exposure.

The bad news likewise has two components. There is no easy, cheap, pain-free "magic bullet" to make employees and supervisors sensitive, caring, non-discriminatory, and non-harassing. And a training program isn't likely to be effective if it isn't built into the culture of the workplace and reinforced periodically.

Two recent cases help illustrate these points. In one, a federal appeals court held that failure to educate managers on the basic features was such an "extraordinary mistake" that it justified a jury's award of punitive damages. *EEOC v. Board of Regents of the University of Wisconsin System*, 288 F. 3d 296 (7 Cir. 2002).

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Another federal appeals court *reversed* an award of \$210,000 in punitive damages in 2003, finding that the employer’s equal opportunity, grievance, and non-retaliation policies demonstrated good faith efforts to prevent discrimination – even though they had not been fully successful in doing so. *Bryant v. Aiken Regional Medical Centers, Inc.*, 333 F. 3d 536 (4 Cir. 2003).

The message is clear: having a policy that has teeth, training a workforce (and particularly supervisors) about that policy, and responding seriously to complaints, can have tangible benefits for an employer. Some of those benefits are the claims that never occur because employees know what is expected of them and don’t violate company policy and state and federal law. Other benefits occur in the form of claims that are resolved early and inexpensively because they are handled through an internal grievance process that produces results.

Even when employees “lawyer up” and go outside the employer’s process with their complaints, an employer is in a far better position to defend against such claims if it can show that the behavior complained about is prohibited by a company policy that is well known and strictly enforced.

But simply “buying the book”, showing a video, or hiring a “talking head” may not be enough. The best and most effective programs are those developed with legal input and review as to accuracy, effectiveness, and compliance.

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