

TRAINING DESIGN, FLIP CHARTS AS EVIDENCE, AND A \$90 MILLION JUDGMENT

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If you are an experienced facilitator of adult learning events, you are no doubt familiar with flip charts, white boards and other writing surfaces, like the one depicted to the right. These aids to learning are so frequently used that it is difficult to imagine how misuse of such a commonplace instructional tool could become part of a complicated discrimination lawsuit. In this instance, the training design and use of a flip chart for a group exercise became evidence in a court trial. Notes made by participants in their instructional materials were also subject to review by the court.



A settlement of a massive sex discrimination class action suit against Lucky Stores in California for more than \$90-million clearly demonstrates the importance of strategic cooperation between training and development programs and human resource management. The settlement was based upon a 1992 decision rendered in the U.S. District Court for the Northern District of California (*Stender v. Lucky Stores Inc.*, 1992).

Case Facts

In August of 1988, the plaintiffs, Nancy Stender and five other women, filed a complaint on behalf of themselves and as a class of female, black and Hispanic past, present and future employees of Lucky Stores. They alleged discrimination based upon sex, race and national origin. The lawsuit was brought under Title VII of the 1964 Civil Rights Act and the California Fair Employment and Housing Act.

The *Lucky Stores* lawsuit is best described as a three stage-process. The first stage consisted of extensive pre-trial discovery and more than ten weeks of fact and expert testimony during the trial. The second stage was a series of hearings regarding the liability for back pay and the consideration of alternative methods for calculating such damages. The third stage consisted of arguments and negotiations by opposing counsel and the agreement to a settlement approved by the federal district court.

The key finding by the court was that decisions made by Lucky Stores on hiring, initial placement, training and promotion were not based on objective standards, and that training and promotion were based on nonexistent criteria, and were left to the sole discretion of individual store managers. The following circumstances are also noteworthy:

- The store managers and assistant store managers were not instructed about standards applicable to hiring or for making promotional decisions. There was no documentation of decisions about who to hire, train or promote, or about why certain people were selected and not others.
- There was no documentation showing which employees received training or requested additional hours of training.
- There were no job descriptions to provide guidance in evaluating whom to hire, promote and train.
- Management consistently failed to follow its own established posting policies.

The federal district court found that the absence of personnel policies requiring decision makers to collect accurate information about applicants and employees, apply written selection criteria, and be accountable for their decisions, increases the likelihood that gender stereotypes will influence their decision. The court also found a lack of clear and objective guidelines on placement, promotion, and training elevated the potential for abuse by discrimination to a level sufficient to deduce the intent necessary for a finding of direct and intentional discrimination, i.e., disparate treatment.

Further intent of disparate treatment was concluded from two previous class action settlements by Lucky Stores for sex discrimination in the early 1980s. An affirmative action policy established in 1983 required the human resources manager to make recommendations for the lawful recruitment and selection of employees, the preparation of formal job descriptions, and the need for more equal representation of women in departments that offered employees better opportunities for advancement. Information from the corporate office determined an awareness of the low percentage of women in management, and that based upon the *affirmative action* policy, the company needed to re-emphasize the importance of compliance.

In addition to evidence of discriminatory intent, the plaintiffs' attorneys established, through expert testimony, statistical evidence sufficient to establish an inference of intentional discrimination. Expert testimony established gross statistical disparities in the initial placement of men and women, and statistically significant shortfalls in the promotion of women, the movement of women from part-time to full-time positions and the allocation of additional hours to women.

The plaintiffs also established disparate impact which is different from disparate treatment. In disparate impact, proof of intent is not required because personnel practices may be neutral or appear fair on their face, but are discriminatory in practice. In *Lucky Stores*, the district court cited court precedent that leaving decision-making power to the sole discretion of lower level supervisors whose conscious and unconscious prejudices are unchecked by objective, published criteria can satisfy the causal requirement of a disparate impact claim. The plaintiffs established conclusively that management at Lucky Stores did not consistently follow the policies.

One of the most important facets of this case involves punitive damages. The district court ruled that the plaintiffs had sufficiently established their claim for punitive damages, as provided for in the Civil Rights Act of 1991. The court based its conclusion on Lucky Stores' prior knowledge of the sufficient problems with the under-representation of women in managerial positions and its repeated failure to implement appropriate recommendations. The court also relied on evidence of the discriminatory attitudes of some of the store managers and the company's abandonment of two affirmative action programs, despite continued evidence of gross gender imbalance. This finding of reckless indifference by the court allowed the plaintiffs to pursue punitive damages pursuant to the Civil Rights Act of 1991.

Instructional Materials as Evidence

During the trial, evidence was submitted that included instructional materials from an in-house diversity training program for all store managers. One of the exercises required the managers to list various stereotypes that they had heard about women and minorities in the workplace. As is typical in the pretrial discovery process, participant notes, instructional materials, including flip charts, were made available to attorneys representing the plaintiffs. Lucky Stores strongly objected to providing these documents to the plaintiff. Included in these materials were notes and flip charts that explicitly illustrated the flagrant stereotypical comments.

Attorneys representing Lucky Stores claimed that these materials were privileged as part of the work product developed under the scope of services provided by Lucky Store attorneys. The court disagreed holding that attorney-client privilege did not apply as the meetings were held "not for the purpose of 'facilitating the provision

of professional services to a client,' but rather for training managers" (Eyers, 1998, p. 113). Eyers (1998) comments further that

The court relied on the notes as evidence that Lucky's managers harbored discriminatory attitudes toward women. The judge found that the comments were not just portrayals of social stereotypes, but reflections of what many Lucky managers firmly believed. Thus, the court concluded that the notes constituted evidence of discriminatory attitudes and stereotyping of women by Lucky's managers. (p.113)

The financial settlement was the third stage of the Lucky Stores lawsuit. The settlement agreement, which was approved in January 1994, provided monetary relief and attorney's fees to the plaintiffs and to the class of women who alleged discrimination, and establishes detailed guidelines and procedures to correct prior violations of the antidiscrimination laws and to ensure equal employment opportunities for women in the future.

Implications for Instructional Designers and HRD Professionals

The critical lessons to be learned from Lucky Stores' experience is that senior management in all organizational contexts must be accountable for compliance with the anti-discrimination laws, and that this responsibility involves a series of distinct responsibilities and obligations. The special case for training supervisors and managers in EEO and other regulatory requirements must not be ignored (Sample, 1995a).

Those who are responsible for analyzing, designing, developing, implementing and evaluating learning programs must understand that instructional materials are subject to scrutiny throughout the civil trial process. Pretrial discovery is designed to provide meaningful information to opposing attorneys so that the case may move as expeditiously as possible to resolution.

Instructional materials may be subject to review during the pre-trial discovery phase of litigation. In the Lucky Stores case, copies of participant handouts and other printed materials were examined for notes made by participants in the margins during training. Notes and scribbles were reviewed for content that would evidence of discrimination by the participant managers. In addition to review of instructional materials, the actual flipcharts for some of the management training programs had been saved by the instructional staff. Attorneys for the plaintiffs reviewed these saved flipcharts for discriminatory content that could be used as evidence during the trial (Sample, 2007).

Given the context of the *Lucky Stores* lawsuit, the following obligations of management are minimally required:

- Formulating and disseminating clear, concrete and comprehensive personnel policies and procedures.
- Ensuring through appropriate training and education that business owners, senior managers, supervisors, and employees understand their responsibilities with respect to EEO laws.
- Monitoring these personnel policies and procedures to guarantee that they are being consistently and properly followed.
- Establish policies regarding the development and retention of flip charts, notes, and any other documentation of participants' comments.

- Always produce materials subject to disclosure in pretrial discovery. This may include a variety of work development products, such as media and content, participant learning objectives, group exercises, assessment tools, and evaluation guidelines.
- It is reasonable to archive instructor guides, participant materials, course objectives and documentation of course attendance, preferably with original signatures if the program was delivered face-to-face. Training programs designed specifically to meet regulatory requirements should be archived.

The problems of Lucky Stores appeared to derive precisely from the failure by management to articulate and circulate distinct standards and guidelines, and from the freedom of local store managers and assistant managers to make discretionary and subjective decisions, often with disastrous consequences. Consequences not only include negative publicity in the media, but also loss of customers and market share. One of the worst consequences could be court-ordered supervision and monitoring of the human resource management function.

In the *Lucky Stores* context, there were indications of potentially deep-seated employment problems. It is insufficient for a company to deal with personnel issues on a superficial basis. Grievances and complaints may appear to be dealt with, and yet the infrastructure of the human resource system may in fact be symptomatic of broader improprieties. Senior management, corporate counsel, human resource managers, risk management specialists, and HRD professionals must continue to forge strong internal strategic partnerships as a preventative tool against the threat of employee litigation (Sample, 1995).

For additional information regarding these and related issues, see Sample, J. (2007). *Avoiding legal liability for adult educators, human resource developers, and instructional designers*. Malabar, FL: Krieger Publishing, pp. 135-160.

Citations and references from this newsletter are available from Sample (2007).

This information should not be construed as legal advice or as pertaining to specific factual situations. Always consult competent legal counsel regarding important employment law questions.

Have any thoughts, comments or feedback? Drop Dr. Sample an email at John@sampleandassociates.org.