DEVELOPING CREDIBLE AND DEFENSIBLE HARASSMENT PREVENTION TRAINING

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This Sample & Associates LLC Newsletter identifies eight recommendations specific to harassment prevention training. Note that the requirements are consistent with relevant court decisions, especially *Faragher, Ellereth*, and *Kolstad*,** and are fundamental to the recommendations.

1. Harassment prevention begins with selection and promotion. Effective employee selection remains the most cost-effective solution for ensuring competence and reducing the likelihood of long-term conduct and discipline problems. Effective selection also reduces long term training and development costs associated with core job skills and attitudes. Note the “implied” requirement for training managers and others to comply with EEOC, ADA and other employment law statutes related to recruitment, selection, and placement. Human resource specialists charged with the responsibility of hiring employees, or approving the hiring practices by managers, must be aware negligent hiring when selecting employees.

Under a legal theory of negligent hiring, an employer may be liable where an employee or other third party is harmed by another employee. Hiring an employee who later harms or harasses a third party puts the employer at risk for negligent hiring if the harm was foreseeable. The cause of action arises when the employer knew or should have known through reasonable investigation prior to hiring that the applicant was unsuitable. Examples include former employees who were violent at work, evidenced harassing behaviors and attitudes, stalked or demonstrated signs of hatred toward members protected by state or federal law. Promoting a suspected or known harasser to higher level positions of authority as a way of avoiding a confrontation or discipline is contrary to Title VII of the Civil Rights Act.

2. Harassment prevention training must be predicated upon a credible and disseminated anti-harassment policy. Given the *Faragher* and *Ellereth* decisions, Jenero & Galligano (2003) strongly advocate that every “employer should prepare, implement and disseminate comprehensive policies against discrimination in any form, including harassment, retaliation and whistleblowing. If the policies are not communicated to the employees, they will be viewed as ineffective, or worse, as evidence of employer knowledge of its discrimination obligations, which the company elected not to enforce” (p. 120). Given that harassment is a foreseeable possibility, not having a policy is as bad as failing to communicate an existing policy to employees.

Harassment prevention training should not only specify applicable statutes, but also must include a copy of relevant HR policies from the employer that:

(1) prohibit illegal employment practices;

(2) state the organization’s method for communicating policies (posting policies, mandatory training for employees and managers, etc.);

(3) provide several avenues for making complaints of harassment (other than the employees direct supervisor);

(4) establish sanctions for behavior inconsistent with policies, including progressive discipline and possible termination;

(5) state guidelines for investigating complaints; and
(6) provide for internal review and an appeal mechanism for ensuring due diligence, compliance and fairness for both the complaining employee and the individual accused of harassment.

Simply restating a statute as the organization’s policy will be insufficient! Large organizations, especially those that consist of merged businesses with varying sets of HR policies, should consider (1) streamlining HR policies, including antiharassment policies, for conformity across the business units, or (2) customize training to include relevant HR policies for the different business units.

3. Harassment prevention training should be based on needs assessment and performance analysis tailored to the industry and organization’s workplace environment. According to Paskoff (2006), “it is vital that participants view training as one element of an overarching initiative. For it to be truly effective and credible, training cannot be delivered in a vacuum with no connection to the broader goals of the organization” (p. 228). Littler & Mendelson (2005) suggested an audit approach to needs assessment that includes the following:

- Identify applicable laws that require training set forth in federal, state and local statutes, regulations and ordinances including laws that are specific to the industry, and applicable case law.
- Identify the level of training needed by executives, HR professionals, managers, and nonsupervisory employees.
- Identify “hidden or implied” training requirements, such as skills training, workplace-harassment training, workplace-violence training, and occupational safety and health training.
- Identify industry practices regarding the provision of additional training.
- Audit claims and litigation experience in the areas of workers’ compensation, EEO, OSHA, all forms of harassment, wrongful discipline, wrongful discharge, negligent hiring, training and supervision, and workplace violence.
- Survey supervisors and employees to determine areas in which they believe training is required (p.912).

4. Harassment training meets the “good faith effort” test promulgated in Kolstad and as required by Title VII. Compensatory and punitive damages may be recovered under the Civil Rights Act of 1991 if the complaining party establishes that the employer “engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights” of an employee (Title VII, 42 USC § 1981a (b) (1). Under the Supreme Court’s ruling in Kolstad v. American Dental Association (1998), an employer may raise and affirmative defense to avoid or limit punitive damages by demonstrating a good faith effort. Proof of such an effort consists of adopting antidiscrimination policies, and communicating these policies to managers and employees, including progressive discipline when necessary.

Subsequent case law has clarified the adequacy of the employer’s “good faith” effort to avoid punitive damages. In Greene v. Coach, Inc., (2002), an employer provided an antidiscrimination policy in the employee handbook, along with supplemental literature to employees regarding the importance of nondiscrimination, and an affidavit from the HR director “attesting to its good faith efforts to comply with antidiscrimination laws” (p. 414). This employer provided four training programs over the four-year period and maintained records of attendance. Lacking in evidence was proof that the alleged harassing managers were aware of the policy or that they attended any training during the time is which the harassment had occurred. The court concluded that the “dearth of antidiscrimination training at the time period in issue” (p. 415) could lead to a conclusion that no “good faith efforts” had been made at the time of the alleged harassment.
The outcome was different for the employer in *Dobrich v. General Dynamics Corp.*, (2000). In a fact situation like Greene, the employer was shielded from punitive damages for the following reasons:

- General Dynamics’s antidiscrimination policies included written employee complaint procedures.
- The work site in question was staffed by an HR office with EEO specialists.
- New employees underwent an orientation program, part of which included a review of antidiscrimination policies and outlining complaint procedures.
- Memoranda were posted on bulletin boards and sent to employees on a regular basis.
- All supervisors received four hours of training related to General Dynamics’s antidiscrimination policies.

5. Harassment prevention training should be designed, implemented, and evaluated systematically. Select a standard instructional systems design (ISD) model to design the training program. Use task analysis information to focus the design, development, implementation and evaluation of the training program to the specific context and needs of the organization. The structural rigor of a well-executed ISD approach ensures logical linkages across the phases of the instructional design process.

Avoid a “one-size-fits all” or “cookie-cutter” approach to designing training. Design training to fit the context of the employer and the industry. Give serious thought to the goals, scope and approach in designing training. The choice of goals will influence the scope and approach of the program. Goals decide the direction of the training effort, scope determines the breadth of the effort, and approach represents the type of program selected.

Goals may focus on one or more of the following: (1) prevention of litigation, including knowledge about laws and policies impacting employees; (2) awareness of the impact of discrimination on productivity and interpersonal relationships; and (3) changing behaviors, values, and beliefs of those most likely to harass others. Harassment prevention training’s is to shield the employer from the ravages of discrimination related litigation, especially from punitive damages. This singular purpose narrows the scope and approach. Such programs need not necessarily be time consuming (half-day and one day designs are common) to meet minimum requirements as defined by EEOC (1999), Faragher, Ellereth and Kolstad. These programs must meet strict guidelines for program content, accuracy of information, instructor expertise, and documentation of attendance by employees.

Distance-learning approaches are showing a lot of promise for a number of management topics, including harassment prevention and safety training. Well-designed eLearning programs will leverage multimedia (streaming, audio, video and animation), provide users with opportunities to collaborate interactively with the course material, each other and the instructor. Quizzes and testing can be designed for mastery learning, meaning that users recycle through difficult content until they demonstrate competence. Well designed elearning is as effective as face-to-face teaching, becomes very cost effective when economies of scale are considered, and provides “any-time, any-place” opportunities for learning. Travel costs are reduced for the leaner at a distance compared to participants who travel to off-site training locations. Managers and account executives maximize billable hours by scheduling learning around clients’ needs and expectations.

Designing an evaluation process for any type of harassment prevention program must be carefully considered. Information from program evaluations is subject to pretrial discovery. If true-false or multiple-choice tests are used to assess knowledge and if a pass-fail score is established, then be prepared to remediate and document anyone who fails the end-of-course test (Johnson, 2004). Opportunities for open-ended comments on evaluation forms are problematic, especially if highly negative comments are made about the instructor, the training program...
or conflicts with other participants. Such comments are subject to legal discovery and could be interpreted out of context.

6. Harassment prevention training should be provided to all employees that covers all forms of legally defined harassment - race, religion, ethnicity, national origin, disability, age, sex (gender and sexual orientation), as well as retaliation, whistle blowing, and hate and stalking crimes. It is a mistake to design a harassment prevention program around a single legal issue, such as sexual harassment. According to Johnson (2004) “of the 109,472 harassment lawsuits that were filed with the EEOC during the 1990s, 33 percent were sex-based, 14 percent were national-origin based, and 43 percent were race based” (p. 125). There is consensus among federal appellate courts since Farragher and Ellereth that the liability standards developed for sexual harassment cases applies to all types of harassment. Be sure to check current state and municipal ordinances for each state for which the employer has resident employees. For example, in Florida, the Florida Human Relations Act (FS 760) includes marital status as a protected category and there is no upper or lower age limit on age discrimination.

According to EEOC guidelines, employers should “provide training to all employees to ensure they understand their rights and responsibilities” (EEOC, 1999). Mixing managers and employees in the same training program is ill-advised. The challenge for instructional designers and trainers is to ensure that the program content informs both groups without encouraging employees to initiate lawsuits. Each group requires a separate and distinct focus.

Instruction for employees should avoid emotionally charged terminology such as “lawsuits,” “claimants,” “suing,” “litigation,” and “damages,” all of which provide the wrong focus for the employee and may unnecessarily encourage lawsuits. Focus the attention of the employee on conduct expectations, the duty to report harassment and the mechanism by which the reporting should occur should be the essence of instruction. Avoid opportunities for employees to use the content of the training as a means of encouraging or instigating litigation.

7. Harassment prevention training should be documented with follow-up audits. Document harassment prevention training by following these simple guidelines. Maintain a complete master copy of all training materials and handouts, including instructional objectives, a transfer-of-learning plan, and resume of instructors that list areas of expertise and credentials, and master copies of any materials used to evaluate the effectiveness of the training.

For each training session, require participants to sign an attendance form that includes the name of the instructor, dates, times and location of instruction; if training occurs on multiple days, have participants sign for each day. The instructor should note in writing the names of participants who miss any part of the training. Archive these attendance forms in a safe and secure location, being mindful that original signatures, not copies of attendance forms with signatures, are preferred as evidence of attendance. “Keeping inadequate training records could turn out to be substantially more expensive than the cost of good training” (Littler & Mendelson, 2005, p. 919), and some jurisdictions will presume that undocumented training never occurred, even if it did.

Consider having each participant sign a form at the end of the training certifying that (1) he or she understands the content of the harassment training program, (2) agrees to abide by the principles set forth in the program, and (3) acknowledges receipt and acceptance of any workplace policies that are part of the program.

As part of the audit process, ensure that participants remember the core knowledge from the training program. Devise ways of keeping the message alive with managers and employees. Use newsletters, employer websites, brown-bag lunches, and periodic refresher training to “do the right thing” by focusing on fairness and equity in the workplace. “More and more frequently, employees are being deposed and asked about a company’s [harassment prevention] training program. Often, even though they attended, they did not remember anything about the training’ (McLaughlin & Merchasin, 2001, p. 5).
8. Harassment prevention training should rely on qualified instructors with expertise in facilitation. Competent human resource professionals, trainers with special expertise in harassment prevention training, and employment law attorneys are all possibilities as trainers. A team approach is recommended in which an attorney explains the statutory rights and obligations of employees and the employer’s HR representative explains and answers questions regarding the organization’s anti-harassment policies. Depending on the design of the program, a third member of the team could be someone with training in adult education, psychology, anthropology or sociology who could facilitate role-plays and discussion groups.

Do not make promises of “What is said here stays here.” Such promises are unenforceable as many managers are (or should be) under a policy obligation to report any instances of known harassment. Comments during training are not only reportable under many HR policies, but are discoverable as part of the pretrial process.

Trainers in harassment prevention programs should be very knowledgeable about the law of discrimination. In *Cadena v. Pacesetter* (2000), the defendant argued that training provided by the employer should be considered “a good faith effort” that should preclude any finding to support punitive damages. The manager responsible for sexual harassment training testified that she discussed the topic of harassment at meetings with her coworkers monthly. This manager stated in her pretrial deposition that a “male supervisor would not commit sexual harassment if he either exposed his genitalia to a female subordinate or grabbed her breasts, so long as he apologized after the incident. Based on [the manager’s] admitted ignorance about sexual harassment, a jury could reasonably infer that [the defendant employer] failed to make a good faith effort to adequately educate its managers and employees about its nondiscrimination policy and Title VII” (pp. 13-14).

Trainers should avoid the use of “legalese” and references to outdated Latin maxims such as “quid pro quo.” Language of this nature only serves to confuse the employees. Employers should focus on what employees most need to know: what is and isn’t harassment, how to report it and how to maintain a retaliation-free workplace” (p. 4).

Trainers and participants are cautioned against drawing legal conclusions during a anti-harassment program. If the trainer says, ‘This conduct is sexual harassment’ – he or she is drawing a legal conclusion that could compromise future legal defenses”. It is better to describe such conduct as “inappropriate and not consistent with HR policy” rather than label a hypothetical example as harassment. Employees who pose such questions could be the employer’s next plaintiff. Finally, trainers who are not attorneys must avoid giving legal advice, lest they be accused of practicing law without a license.

Abridged and updated from the following sources:


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Have any comments, thoughts or feedback? Contact Dr. Sample at john@sampleandassociates.org.