

Training Employees On Employment Issues: Has It Become Mandatory For All Employers?

Presented By:

Robert M. Williams, Jr.

Email: rwilliams@bakerdonelson.com

165 Madison Avenue
Suite 2000
Memphis, Tennessee 38103

Agenda

1. Reasons why you should train your employees
2. Items that should be included in the training



State-Mandated Training

- Some states, including California, Maine, Connecticut, and New Jersey have their own requirements for mandatory sexual harassment training.
- Numerous additional states' courts have issued guidance making training virtually mandatory under those states' laws.
- Failure to train in those states can subject employers to even more liability beyond federal statutes.

Is it Mandatory?

- Tennessee, Mississippi and most of the states do not require training and no automatic penalty for failure to conduct training, but considering the benefits and the downside of failure to do training, many employment lawyers consider it now to be virtually mandatory.

Excuses for Not Training

- Not productive work
- My CEO thinks it's stupid
- Nobody attends the meetings
- Some owners, CEO's and Managers are clueless
- Too expensive

Why Train Your Employees

1. Prevents claims from originating in the first place particularly in areas of sexual and racial harassment. Employees sometimes forget that they are in the workplace not at home, at a bar or on the playground.

Why Train Your Employees (continued)

2. Assist in defending harassment claims
 - Best insurance is an effective anti-harassment policy
 - Must be effective and employees must be aware of it

EEOC Enforcement Guidelines

- “The employer should provide training to all employees to ensure they understand their rights and responsibilities concerning workplace harassment” - Employment Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (6/18/99).



Why Train Your Employees

3. Defense to punitive damages and claims

Kolstad vs. American Dental Ass'n, 527 U.S. 526 (1999).

Limiting Liability: the Kolstad Defense

- Proper training can give employers an important defense in harassment cases, known as the Kolstad defense (from the Supreme Court case which created it).
- Kolstad allows an employer to avoid an award of punitive damages (the \$2.7 million dollar type of award) even if sexual harassment is proven, and even if a compensatory damage award is made.
- In order to take advantage of this defense, an employer needs to show that it engaged in “good faith efforts to implement an anti-discrimination policy.”

Limiting Liability: the Kolstad Defense (continued)

- Generally, employers qualify for the Kolstad defense by adopting a comprehensive anti-harassment policy, and providing adequate harassment training for at least every management level employee.
- Some courts, like the Seventh Circuit Court of Appeals in EEOC v. IHOP of Racine, have found that pre-canned, un-customized training such as generic videotaped training does not qualify for the Kolstad good-faith effort defense.
- In that case, the employer was subjected to only \$5000 in compensatory damages, but \$100,000 in punitive damages for its failure to adequately train its employees.
- Policies alone and pre-canned video training are not enough

Importance of Training

4. Plaintiff's lawyers are making this an issue in employment cases:
- If they can't prove discrimination, they will try to prove that you do not train your employees and therefore do not care about such issues
 - Plaintiff's lawyers are trying to create a new cause of action based on lack of training



Potential Lawsuit

77. Defendant failed to establish adequate policies against gender based discrimination, racial discrimination, and violations of the ADAAA; failed to implement such policies consistently; failed to clearly communicate such policies on a routine basis to its agents and employees; and failed to train and enforce its own policies to the detriment of Plaintiff and other female employees.
78. Defendant failed to educate and train managers, supervisors, and employees on gender based discrimination and racial discrimination in the workplace or on how to prevent violations of the ADAAA in the workplace.

Importance of Training

5. It's the right thing to do: Employees are one of your most important assets.
 - It's very expensive to replace employees.

Why Train Your Employees

6. Failure to do so increases the chances of punitive damages



Don't let your answer be....

“No, we do not.”

Employers pay the price for no adequate training

- *Bains v. ARCO Prods. Co.*, 405 F.3d 764 (9th Cir., 2005). Plaintiffs were originally awarded \$1 million in compensatory damages and \$5 million in punitive damages for failing to train on harassment.
- *Swinton v. Potomac Corporation.*, 270 F.3d 794 (9th Cir., 2001). Lack of manager training justified a punitive damage award of \$1 million in a single plaintiff case. Having a policy alone is not sufficient.
- *Godinet v. Management and Training Corp.*, 2003 C10 16 (USCA 10, 2003). Punitive damage award based in large part on failure to train.

7. Failure to train can lead to testimony like this...

Q. Does Clueless Industries have a policy that prohibits disability discrimination?

A. I'm trying to think what the policy would be. I know we have a handbook that deals with it, but I've never sat down and read the handbook so –

Q. So sitting here today, you don't know whether Clueless has a policy that prohibits disability discrimination?

[COUNSEL:] Object to the form.

A. I can't quote it, no.

Q. (BY COUNSEL:) I know you say you can't quote it. Is there a policy that prohibits disability discrimination?

A. I can't say that. I don't know.

Failure to train can lead to testimony like this...

Q. You have seen the Clueless Employee Handbook, haven't you?

A. Yes, I have.

Q. Are you aware that there's an EEO policy that's in there that prohibits discrimination?

A. I have never sat down and completely read that.

Q. I understand, but you do know if there's an EEO policy of any sort that's in there?

A. No, I do not know.

Q. Have you as a Manager of Clueless Industries received training on a Harassment and Discrimination policy?

A. Not that I can recall.

8. Can Lead to Results like this...

2.7 million dollar verdict in the
Northern District of Alabama

Items to be Included in Training

- What is discrimination?
- What does it cover?



Items to be Included in Training (continued)

- What type of acts constitute harassment
- The Company absolutely prohibits any forms of discrimination or harassment and how to report harassment
- Discuss your policy and how to report claims

Items to be Included in Training (continued)

The Company prohibits retaliation against anyone who complains of discrimination or harassment.



Items to be Included in Training (continued)

- **GINA**
 - Its applications in all workplaces
 - What managers should and should not be doing

Items to be Included in Training (continued)

- **The ADA**
 - How managers should respond to a request for accommodation
 - The expanded concept of disability
 - How to avoid employees feeling that they have been subject to retaliation

The FMLA

- Overview
- How to recognize a request for FMLA leave