

Employment Law Management Training -- Mandatory?

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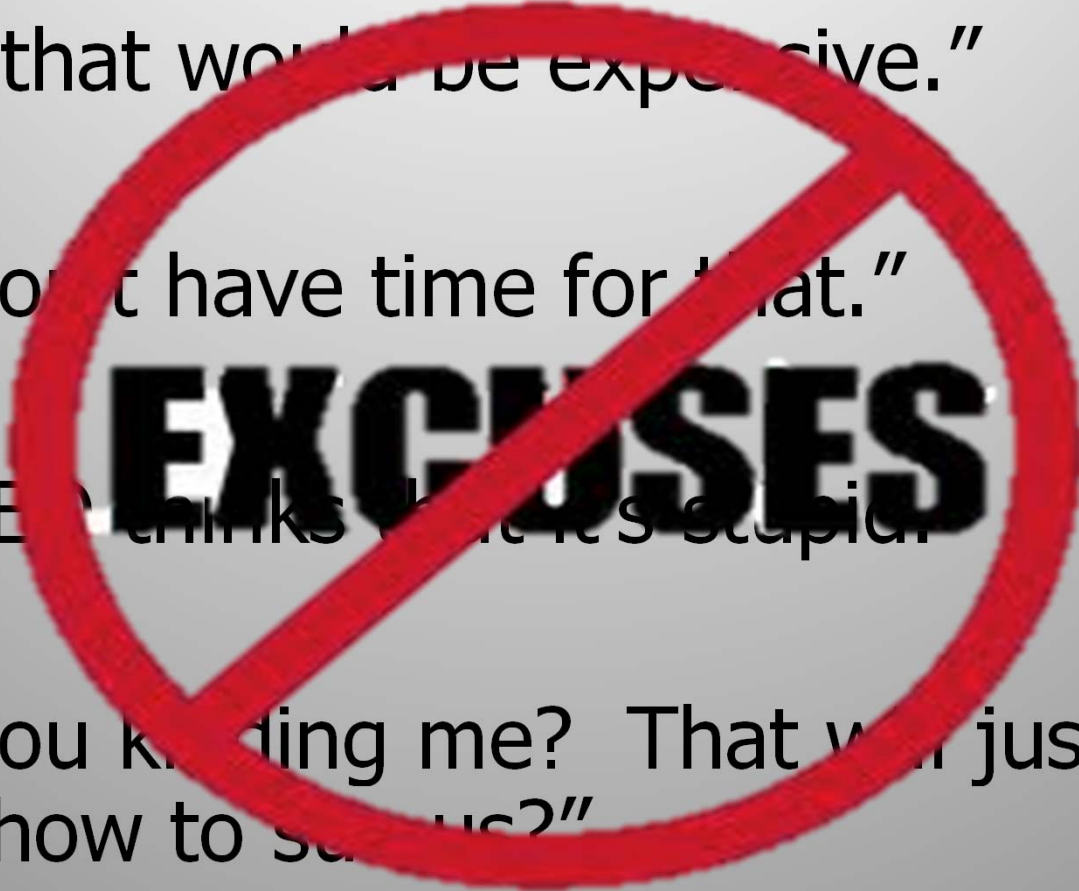
Management Training?



Excuses for Not Training

- “Gee, that would be expensive.”
- “We don’t have time for that.”
- “My CEO thinks that’s stupid.”
- “Are you kidding me? That will just teach them how to screw us?”

EXCUSES



Why Train?



- It's required by EEOC guidelines.
- It's required by State law.
- It's required to establish the affirmative defense to harassment.
- It's required to defeat a claim for punitive damages.

It's Required By The EEOC

“The employer should provide training to all employees to ensure they understand their rights and responsibilities concerning workplace harassment.”

EEOC Employment Guidance: *Vicarious Liability for Unlawful Harassment by Supervisors* (6/18/99)

EEOC EXPANDS TRAINING REQUIREMENTS

“Describe all the training given to managers and supervisors during the relevant period related to (a) equal employment opportunity; (b) the Americans With Disabilities Act, as amended; (c) requests for accommodations; and (d) retaliation for engaging in protected EEOC activity.”

EEOC EXPANDS TRAINING REQUIREMENTS

“Your answer should include a description of the training, e.g., whether it was in person or computer-based, the date and place of the training, the name of the individual(s) who conducted the training, those who attended the training, and the subjects covered during the training.”

It's Required By State Law

- California, Maine, Connecticut, and New Jersey have mandatory sexual harassment training laws.
- Numerous states' courts have issued guidance making training virtually mandatory under those states' laws.

***“NEW JERSEY SUPREME COURT
MAKES ANTI-HARASSMENT
TRAINING MANDATORY FOR
SUPERVISORS AND MANAGERS”***

N.J. Five Factor Test

Anti-harassment training, which must be mandatory for supervisors and managers, and must be available to all employees of the organization.

**It's Required to
Establish
Affirmative Defense
To A Harassment
Claim**



Affirmative Defense

1. That the employer exercised reasonable care to prevent and correct promptly any unlawful harassing behavior; and
1. That the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Bishop v. Woodbury Clinical Laboratory (M.D. Tenn. 2010)

- No evidence the employer provided training on the sexual harassment policy and reporting obligations.
- The employer could not demonstrate it exercised reasonable care to prevent and promptly correct any sexually harassing behavior.
- No affirmative defense allowed.

It's Required to Defeat A Claim For Punitive Damages



Limiting Liability: the Kolstad Defense

Kolstad allows an employer to avoid punitive damages even if harassment is proven, and even if a compensatory damage award is made.

The Kolstad Defense

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.”



What proof is required?

The existence of an anti-harassment policy “is not sufficient in and of itself to insulate an employer from a punitive damages award.” *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858-59 (7th Cir. 2001).

What proof is required?

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.

U. S. SUPREME COURT

“The purposes underlying Title VII are similarly advanced when employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII’s prohibitions.”

Kolstad v. Am. Dental Ass’n, 527 U.S., 526 (1999)

MANAGEMENT TRAINING NOW REQUIRED BY COURTS

“Thus, the extent to which an employer has adopted antidiscrimination policies and educated its employees about the requirements of the ADA is important in deciding whether it is insulated from vicarious punitive liability.”

EEOC v. Wal-Mart Stores, Inc., 187 F. 3d 1241 (10th Cir. 1999)

MANAGEMENT TRAINING NOW REQUIRED BY COURTS

“Wal-Mart certainly had a written policy against discrimination, but that alone is not enough. Our review of the record leaves us unconvinced that Wal-Mart made a good faith effort to educate its employees about the ADA’s prohibitions.”

EEOC v. Wal-Mart Stores, Inc., 187 F. 3d 1241 (10th Cir. 1999)

MANAGEMENT TRAINING NOW REQUIRED BY COURTS

“Leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an “extraordinary mistake” for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference.”

Judge Diane P. Wood, *Mathis v. Phillips Chevrolet, Inc.*
(7th Cir. 10/15/01)

MANAGEMENT TRAINING NOW REQUIRED BY COURTS

Employer “never adopted any anti-discrimination policy, nor did it provide any training whatsoever on the subject of discrimination.”

“ placement of EEOC poster...in dispatch trailer simply does not constitute a good faith effort to forestall potential discrimination.”

Case remanded for a new trial on punitive damages.

Anderson v. G.D.C., Inc., 281 F. 3d 452 (4th Cir. Feb. 25, 2002).

Quality of Training Counts

- Seventh Circuit Court of Appeals in *EEOC v. IHOP of Racine* (1/9/12), found pre-canned, un-customized training such as generic videotaped training does not qualify for the *Kolstad* good-faith effort defense
- Employer assessed \$5000 in compensatory damages, but \$100,000 in punitive damages for its failure to adequately train its employees.

“This training consisted of showing all new hires a sexual harassment videotape, handing them a copy of the sexual harassment policy, and asking them to read and sign it.”



“[A]lthough management was required to take sexual harassment training, the evidence at trial suggested that the training was inadequate.”



What is sufficient to avoid punitive damages?

- Issuance and communication of EEO policy company-wide;
- Training of employees in a “carefully developed” classroom program that included interactive group exercises;
- Voluntarily monitoring departmental demographics to help spot any issues of discrimination.

What is sufficient to avoid punitive damages?

- Requiring classroom training of employees on numerous occasions, including:
 - new orientation training;
 - follow-up training several weeks into employment;
 - new supervisor orientation;
 - diversity training that included harassment;

What is sufficient to avoid punitive damages?

- maintaining harassment-free workplace training for all managers and employees; similar training was provided three times in five years;
- an eight-hour diversity training program for managers;
- classroom training for all employees on two different occasions over five years

Employers pay the price

- *Bains v. ARCO Prods. Co.* \$5 million in punitive damages for failing to train on harassment.
- *Swinton v. Potomac Corporation.* Lack of manager training justified a punitive damage award of \$1 million.
- *Godinet v. Management and Training Corp.* Punitive damage award based in large part on failure to train.

Potential Lawsuit

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.

Questions and Answers

Q. Mr. Anderson, does your company have a Human Resources Director?

A. The Chief Operating Officer and I handle those functions.

Q. Mr. Anderson, does your company train its employees on employment issues such as discrimination and harassment?

A. Well, we have an employee handbook.

Q. I didn't ask you if you had an employee handbook Mr. Anderson, do you need me to repeat the question?

A. Yes, please do.

Q. Mr. Anderson, does your company train its employees on employment issues?

A. Well, we have monthly and sometimes weekly safety training classes.

Q. And in those meetings, you talk about issues such as employee safety, proper lifting techniques, correct?

A. Yes, that's what we talk about in those.

Questions and Answers

Q. But you do not normally talk about the companies policies and procedures dealing with discrimination or harassment in those, do you?

A. No.

Q. And, in fact, those are done by your Safety Coordinator and your Foremen, correct?

A. Yes, that's correct.

Q. Well, let me get back to my original question then Mr. Anderson. Does your company provide training on issues of discrimination and harassment?

A. Well, I guess not.

Q. You don't guess that you don't, you know that you don't, don't you Mr. Anderson? It is true that your company does not do any training of its employees on issues of discrimination and harassment.

A. No, we do not.

Don't let your answer be

“Um, no, we do not.”

A group of four business professionals (two women and two men) are standing behind a large, red-bordered warning sign. The sign is positioned in the center of the frame, partially obscuring the people. The background is a plain, light-colored wall. The sign has a red border and a white center. The word 'WARNING' is written in large, bold, white capital letters at the top of the sign. Below it, the text 'DO NOT USE THIS EQUIPMENT WITHOUT PROPER TRAINING' is written in bold, black capital letters.

WARNING

**DO NOT
USE THIS
EQUIPMENT
WITHOUT
PROPER
TRAINING**

Training Your Investigators

In *EEOC v. Smokin' Joe's Tobacco Shop, Inc.* the court noted the individual who investigated the Plaintiff's complaint had no special training regarding sexual harassment investigations. Therefore, the employer's attempt to escape liability was denied.

Elements of Effective Management Training

- Qualified trainer
- Interactive training process
- Case studies, roles plays, and quizzes that require managers to spot potential employment law issues and decide on a proper course of action
- Time for questions by managers

Subjects to Cover in Management Training

- Basics of unlawful discrimination/harassment
- The scope of the ADAAA and the reasonable accommodation problem solving process
- Prohibition of retaliation for making complaints, participating in investigations, or exercising a legal right
- Importance of good documentation in personnel actions
- How to respond to complaints/concerns by employees

Subjects to Cover in Employee Training

- Wage & Hour Issues, Breaks, Special State Laws
- Unacceptable conduct (harassment, discrimination, retaliation, working off the clock etc.)
- How to raise a concern
- Encouragement for raising concerns internally
- No retaliation for raising concerns, participating in investigations, or exercising legal rights
- Expectations for proper conduct

What Questions Do You Have?

