Discrimination and Harassment Prevention: “Why Treat People Right”

Current Trends in HR: Top 10 Management Challenges

Mary Ann Saenz-Thompson, SPHR
Human Resource Consultant

maryanns@county.org

512-478-8753
Discuss discrimination and harassment prevention in the workplace

Discuss the top employment-related trends we see
What Laws Matter?

• Legal Requirements
  − Title VII of the Civil Rights Act of 1964
  − Age Discrimination in Employment Act of 1967 – ADEA
  − American’s with Disabilities Act Amendments Act – 2008
  − Pregnancy Discrimination Act
  − Genetic Information Non-Discrimination Act - 2008
What is harassment?

Title VII

- Title VII prohibits discrimination in employment based on race, color, religion, sex, and national origin
  
  Don’t forget pregnancy, age, disability or genetic information

- The courts have interpreted discrimination based on sex to include sexual harassment
2014 EEOC Charges in Texas

- Retaliation (all) - 46.1%
- Retaliation (Title VII) - 39.0%
- Race - 36.3%
- Sex - 31.9%
- Disability - 26.4%
- Age - 23.5%
- National Origin - 13.6%
- Color - 4.1%
- Religion - 3.7%
- Equal Pay Act - 1.3%
- GINA - 0.2%
2014 EEOC Charges
Why Should You Care?

- Risk of discipline up to and including termination
- Personal embarrassment or loss of reputation
- Harm to employee morale, productivity and the county’s public image

Employer and Personal Liability May Exist
Vicarious Liability Standard

Vicarious Liability is a legal doctrine which was established in the Supreme Court Cases of:

Faragher v. City of Boca Raton (1998)
and
Vicarious Liability Standard

Employers are subject to liability on the basis of their supervisors' tangible actions (usually inflicts economic harm)

- Tangible Actions Are:
  - Hiring
  - Promotion or Failure to Promote
  - Demotion
  - Undesirable Reassignment
  - Significant Change in Benefits
  - Compensation
  - Work Assignments
Vicarious Liability Standard

- Employers should prevent harassment and limit the harm caused by harassment
- Employees should be encouraged to avoid harassment and report harassment immediately
- Question of liability exists only after a determination of unlawful harassment occurred

*Retaliation can occur after the complaint*
What is a Supervisor to EEOC?

- Individual who has direct authority to undertake or recommend tangible employment decisions affecting the employee; OR
- Individual who has authority to direct the employee’s daily work activities.
- EEOC has also stated vicarious liability may exist if “Chains of Command are Unclear” in the workplace
What is Sexual Harassment?

- Conduct of a sexual nature in the workplace
- Includes any *unwelcome*:
  - Sexual advances
  - Requests for sexual favors
  - Verbal and physical conduct of a sexual nature
  - Display of sexually explicit or suggestive materials
Who Can Commit Harassment?

- Supervisors
- Subordinates
- Co-workers
- Clients or Customers
- Same-Sex
Who Can Experience Harassment?

• Direct targets of harassment
• Bystanders or witnesses to harassment
Specific Forms of Harassment

**Quid Pro Quo**

*Something for Something*

- Usually occurs within the context of a supervisor-employee relationship
When is an employer liable?

Quid Pro Quo

Liability is automatic when tangible action occurs
Specific Forms of Harassment

Hostile Work Environment

- Considerations:
  - How frequent is the conduct?
  - How severe is the conduct?
  - Is the conduct physically threatening, humiliating or merely an offensive utterance?
  - Does the conduct unreasonably interfere with an individual’s work performance?
When is an employer liable?

Hostile Work Environment is Ongoing and Pervasive

- Supervisors
- Employees
- Customers-Vendors
What Isn’t Unlawful Harassment?

• The stray remark
• The overly sensitive employee
  "Use the reasonable person standard"
• Consensual relationships
Affirmative Defense

Employer must prove that it:

- Had a policy in place and trained employees on how to report
- Conducted a timely and thorough investigation
- Made decisions based on factual information
- Took appropriate corrective action
- Followed up to ensure behavior is not repeated
Polices Make A Difference!

Elements of a good policy:

- Assurance of no retaliation
- Clear explanation of prohibited conduct
- Complaint process that assures accessibility, confidentiality to extent possible, quick and thorough investigation
- Immediate corrective action when harassment has occurred
Polices Make A Difference!

• Absence of Policies
• Outdated Policies
• Inconsistently followed Policies

= Risk of Substantial Damages in Litigation
Discovering Workplace Problems...

What if an employee says:

“I’ll take care of this myself. Please don’t do anything about this.”

“I don’t want you to get involved.”

Is this ok?
Discovering Workplace Problems...

Your Response:

“I know this is hard and you want to keep it quiet...but I have an obligation to do something about it. That’s the only way we can improve the situation.”
Discovering Workplace Problems...

Once an Elected Official or Supervisor knows of a problem =

The County/Employer Knows!

ACTION IS REQUIRED
Sexual and General Harassment Policy—EEOC Guidelines

Definition and Zero Tolerance

Clear explanation of prohibited conduct

Complaint Process---

• 2 routes to report

Investigation Statement

Impartial Investigation
Benefits of an Investigation

- Figure out what happened
- Deal with employee problems early
- Enforce our policy
- Encourage reporting
- Avoid or counter bad publicity
- Protect yourself and the county from lawsuits.
Considerations

• Frequency of the conduct

• Severity of the conduct

• Physically threatening, humiliating or an offensive utterance?

• Interference of the individual’s work performance
Investigation! OH NO!!!

Have effective investigative process to include:

- Interviews of complainant, accused and witnesses
- Look for facts
- Take intermediate actions to assure no further harassment
- Reach a determination
- Take proper corrective action as required
What to do if it’s one person’s word against another’s?

EEOC says the employer will have to weigh each parties credibility.

Factors to consider are:

- **Inherent Plausibility**: Is the testimony believable at face value?
- **Demeanor**: Did the person seem to be telling the truth?
- **Motive to Falsify**: Is there a reason to lie?
- **Corroboration**: Is there a witness?
- **Past Record**: Is there a history of similar behavior?
Early Intervention

Communicate concerns and focus on the situation

• Do not make it personal
• Be specific about behavior or environment
• Tell the individual it is unwelcome
• Encourage commitment to make a change
• Consult your manager or HR if it doesn’t change
In Event of Complaint

Report unwelcome harassment to management

All reports must be documented
  • There is no “Off-The-Record”

Management will investigate all complaints

Corrective action will be taken to stop illegal harassment –
  • may include discipline or termination

Have closure with complainant and alleged source of harassment

Document thoroughly and keep confidential
Retaliation – Don’t Do It!

Retaliation means treating someone differently because:

- They oppose an action at work they believe is unlawful or discriminatory
- They file a complaint – Harassment, Wage, Workers’ Comp, Discrimination
- Participate as a witness regarding a complaint

*Remember...Retaliation lawsuits can outlive the original complaint...even if the original complaint did not violate the law!*
What Now?

• Can we still compliment people at work?
• Can we still have fun at work?
How to Stay Out of Trouble

• Email
• Internet Use
• Pictures
• Posters
• Practical Jokes
• Horseplay
How to Stay Out of Trouble

• Love at work
• Leering
• Swearing
• Profanity
• Pet names
What do you think?

“Hey, everyone acts this way!”

“What’s the big deal?”

“Who cares anyway? This is normal stuff.”
Eyes of the beholder..

One’s perception is their truth.
If in Doubt…

Ask yourself…

Is my behavior always appropriate at work? Would I be ok with my family watching a video of my behavior while I am at work? If the answer is no…

change your behavior immediately!
Current Trends in HR:

*Top 10 Management Challenges*
I don’t want to be tied down to job descriptions for my employees.
But Wait..

Job Descriptions form the foundation for many important processes:

- Job postings
- Recruitment and selection
- Setting performance expectations
- Determining essential functions and physical standards prior to employee having a disability under the ADAAA
I can ask applicants anything I want to know.
But Wait..
Interview questions must be job related. Stay clear of questions that reveal:

- Gender
- Race
- Religion
- Age
- Disability
- Ethnic Background
- Marital Status
- Military Status
- Arrest Records
- Sexual Preference
I don’t like to write anything down about my employees.
But Wait..

Documentation of issues is important to win unemployment and employment lawsuits.

For documentation to stand on it’s own you need:

- It to be written in a timely manner
- Factual
- Signatures
- Consequences of failure to comply
# 7

I heard about “at-will”, and I can fire everybody with no consequences.
But Wait..

You cannot fire employees for an illegal reason:

- protected status under federal, state, or local laws or statutes
- exercising legal rights
- Constitutional rights – political affiliation, etc.
- Whistleblower

...don’t forget unemployment!
Who needs FMLA?
I just give employees time off when they need it...unless they take too much.
But Wait.. 

Family Medical Leave Act is a federal law and must be complied with.

Do gather enough detailed information to determine if absence qualifies and provide employee with proper paper work.

Don’t ignore employee statements about medical conditions.

Do reinstate the employee to their job.
I make all our employees “salaried” because I care and it’s easier to do payroll.
But Wait..

The Fair Labor Standards Act dictates how we pay employees.

Hourly employees must be paid $7.25/hour up to 40 hours.

Overtime/Comp time must be paid after 40 hours worked.

Timesheets are critical.
I don’t keep too many records on employees. I am concerned about their privacy.
But Wait..

There is often confusion among employers concerning the legal requirements for recordkeeping and retention of employee files and other employment-related records based on federal and state requirements.

Types: Selection, hiring, employment, I-9, Workers’ Compensation, Tax Records, Payroll, FMLA, Employee’s Benefit Records
# 3

I have to follow all the leave policies, no exceptions allowed.
But Wait..

If you have any employee with a disability, you may have to look to granting additional leave time as a reasonable accommodation under the ADAAA.

Not recommended: Strict neutral absence or termination policies, automatic termination when 12 weeks of the FMLA are over or any other policy that does not include a reasonable accommodation for disabilities.
# 2

I love that my employees are so comfortable with each other, have laid back behaviors, and tell the best “jokes”.
But Wait..

Employees have protection from “hostile environments” in the workplace. The EEOC will be happy to come and investigate.

- Don’t allow inappropriate behavior
- Be wary of off-color jokes, a pattern of put-downs, threats based on any protected status.
- Have a policy in place.
- Tell employees how and where to immediately report harassment.
# 1

I like our policy manual to be vague--it helps me with flexibility.
But Wait..

Remember: with no written, consistently applied policies, you’re only as good as your worst supervisor or worst employee.

A well written employee policy manual is an important defense in employment litigation.

Practice is policy – your written policy needs to reflect your practice.
I can’t afford to train our supervisors. Plus, I don’t want them to know more than I do!
But Wait..

You may know all the employment laws, however, it is usually your first level supervisors that handle your employees. Training all supervisors is an important step in assuring compliance with all federal, state and local employment laws. It’s smart business to train them all!

Elected officials and management can be directly liable for not training or providing training for supervisors.
Helpful Links

EEOC  
www.eeoc.gov

EEOC Guidance (ADAAA)  
http://www.eeoc.gov/policy/docs/accommodati
on.html

DOL Regulations  
http://www.dol.gov/dol/cfr/Title_29/Chapter_V.
h tm

Job Accommodation Network  
http://askjan.org/

JAN Technical Assistance Guide  
http://askjan.org/links/adataml.html

Texas Association of Counties  
www.county.org

Posters  
http://www.dol.gov/compliance/topics/posters.h
tm

Texas Workforce Commission  
http://www.twc.state.tx.us/

FMLA Forms  
http://www.dol.gov/whd/fmla/
Unemployment
Northwest & Panhandle
• Michele Arseneau
• Cell: 512-461-1667
• Email: michelea@county.org

Northeast
• Diana Cecil
• Cell: 512-924-6360
• Email: dianac@county.org

Southeast
• Mary Ann Saenz-Thompson
• Cell: 512-921-9056
• Email: maryanns@county.org

Southwest
• Rollie Ford
• Cell: 512-680-1994
• Email: rollief@county.org

Customer Service
• Elizabeth Sutherland
• Email: elizabeths@county.org
• 1-800-456-5974
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