Workplace Harassment Prevention Training

Reid Bowman, Esq.

General Counsel of NAVEX Global

Over 30 years of HR and labor & employment law experience, primarily working with multi-state employers.

Designs strategic ethics, wage & hour, discrimination prevention, and employment law compliance programs.
Linda M. Jackson, Esq.

Linda Jackson is a shareholder of Littler Mendelson, Washington, D.C. office.

Substantial employment discrimination trial and appellate experience representing a broad range of employers.

Agenda

The increasing need for Workplace Harassment prevention training

Overview of Federal and State law

Trends and developments

Best practices for preventing Workplace Harassment
Some perspective

The increasing need for Workplace Harassment prevention training

Charge Filings Continue at Record Highs

- Latest EEOC charge stats from FY 2011: 99,947 charges, the most in the EEOC’s History!
- Retaliation is still #1 most common basis for charges
- Follows two prior years of record charges (FY 2010: 99,922; FY 2009: 93,277.)
- EEOC recovered over $455.6M for victims of discrimination in FY 2011, $51M+ more than in FY 2010.
Harassment is NOT just Sex Harassment

- Last year saw 11,364 sexual harassment charges filed with the EEOC and state & local FEP agencies, but
- The total number of charges filed alleging any kind of harassment were **30,512**
- Meaning that only ~1/3 of harassment charges are based on alleged sexual harassment!

EEOC: A New Breed

More aggressive posture
- Mandatory public press releases for settlements
- Refusal to allow early ‘no fault’ settlements in some cases
- Requiring injunctive relief with follow-up powers
- EEOC’s draft 5 year Strategic Plan proposes to refocus efforts to combat harassment
Harassment a worldwide issue

One in 10 employees surveyed in 22 countries around the world indicate that they’ve been intentionally physically assaulted out of anger on the job by a co-worker or manager during a workday.

Another 9% say they’ve been harassed on the job for sex by a senior person simply because they work for them and not because they want a true relationship.
**U.S. Law**

The increasing need for Workplace Harassment prevention training

**U.S. Federal Law: Title VII (1964)**

- Faragher and Ellerth (1998)
- Economic and Environmental Harassment
- Workplace Harassment vs. Sexual Harassment
- The Affirmative Defense
  - Policy
  - Education
- Train everyone periodically
U.S. Supreme Court Decision

Kolstad (1999)

Workplace discrimination training (not just sexual harassment)

Punitive damage defense

Good faith efforts to educate all managers on basic anti-discrimination principles, (Title VII)

Policies alone are not enough

EEOC

1999 EEOC ENFORCEMENT GUIDELINES

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

Source: Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (6/18/99)
State Law

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State laws: ME ('91) and CT ('93)

Maine requirements:
- Businesses with **15+ employees**
- Conduct sexual harassment training for **all new employees**
- Within **one year** of employment commencement
State laws: ME ('91) and CT ('93)

Connecticut requirements:
50+ employees
2 hours of sexual harassment training;
To all supervisory employees;
Within six months of the assumption of a supervisory position.

A Brief Recap of AB 1825

California requirements:
Employers who do business in California, and who have more than 50 employees
Provide 2 hours of high quality, “interactive” harassment training to all supervisors.
First training deadline was December 31, 2005.
I'm finalizing my 2013 re-training planning.

What does AB 1825 mean to me?

2013 Re-training Mandate

- Training must be repeated every two years, making 2013 a re-train year for most organizations.
- Newly hired or promoted supervisors must be trained within six months of the assumption of a supervisory position.
Survey Question:
If your organization is currently training on WPH in more than one state, does your organization:

A. Train everyone consistently
B. Train differently depending on what state the learner works in

Trends and Latest Developments
The increasing need for Workplace Harassment prevention training
Courts continue to hold employers accountable

**EEOC v. Management Hospitality of Racine, Inc. (7th Cir. 2012)**

- **Key facts:**
  - While new employees received harassment prevention training, managers received no training when promoted.
  - Harassment prevention policy discussed in training, but not made available afterwards.
  - Significant evidence of workplace harassment, manager awareness of the harassment, and complete failure to do anything about it.

Court upheld compensatory AND punitive damage award against the employer.

Court found company did not engage in good faith efforts to educate managerial staff about sexual harassment in the workplace.
August 3, 2012 letter from EEOC’s Buffalo, NY Field Office warned that an employer’s policy prohibiting employees from discussing an ongoing internal harassment investigation may violate Title VII.

Must also consider *Banner Medical Center* NLRB decision (358 NLRB 93 (2012)), finding that a blanket rule prohibiting employees from discussing an ongoing investigation violated the NLRA.
What to Do?

- Review your investigation policies
- Before requiring confidentiality during an investigation, analyze factors impacting the need for confidentiality including:
  - Whether a witness needs protection
  - Is evidence in danger of being destroyed?
  - Is there risk of testimony being fabricated?
  - Is there a need to prevent a cover up?

Retaliation Takes Center Stage

- Supreme Court made it easier for employees to claim retaliation in January 2009 Crawford decision.
- January 2011: Supreme Court again broadened coverage of retaliation claims to include claims based on someone else’s protected activity (here, a fiancé.) Thompson v. North American Stainless, LP, 131 s. Ct. 863 (2011).
- Managers often don’t understand retaliation!
On the Horizon

Supreme Court will hear oral arguments on Nov 26, 2012 to address the issue of who is a “supervisor” for purposes of employer liability for workplace harassment.

Vance v. Ball State University

Key question:

Will the Faragher and Ellerth decision imposing liability for supervisor’s harassment apply to an employee who only directs and oversees the victim’s daily work, but doesn’t have the authority to hire, fire, demote, or discipline the employee?
Best Practices

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Survey Question:
If your organization provides harassment prevention training, how is training delivered?

A. Online
B. Live
C. A combination of online and live
D. I don’t know
BEST PRACTICE #1: Sexual Harassment Prevention is NOT enough

BEST PRACTICE #2: Focus on retaliation

Not a throw-away topic at end of training; must be a key focus.

Make sure your policy emphasizes no tolerance for unlawful retaliation, and that no unlawful retaliation will occur for those raising issues or participating in investigation.

Extra emphasis on this topic in manager training.
BEST PRACTICE #3: Curriculum mapping

What is curriculum mapping?
Consider Diversity & Inclusion training, and/or EEO-focused training in years you are not doing harassment prevention training.
Make sure new managers are trained promptly after becoming managers!

BEST PRACTICE #4: Don’t forget overseas employees!
Don’t simply roll out a U.S. centric training course overseas
Anchor the training with a great policy
Be conscious of Works Councils
BEST PRACTICE #5: Update your training!

- Social media like Facebook
- iPads & mobile media devices
- Harassment & free speech
- Muslim discrimination
- Transgender issues
- Teen/young worker dilemmas
- Bullying/violence

Need to know more?

If your organization may be interested in purchasing NAVEX Global’s online training solutions, and you would like a NAVEX Global Sales Executive to follow up with you, check “YES” in the POLL area.
Source material

- Charge filings continue at record highs:
  - [http://eeoc.gov/eeoc/newsroom/release/1-24-12a.cfm](http://eeoc.gov/eeoc/newsroom/release/1-24-12a.cfm)

- No longer just sexual harassment:

- New breed of enforcement:
  - [http://www1.eeoc.gov/eeoc/plan/sep_public_draft.cfm?renderforprint=1](http://www1.eeoc.gov/eeoc/plan/sep_public_draft.cfm?renderforprint=1)

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Source material

- EEOC – New breed of enforcement:
  - The Reuters/IPSOS Poll on Assault and Harassment in the Workplace (August 2010)

- Holding employers accountable
  - [http://www.workplaceclassaction.com/EEOC-IHOP.pdf](http://www.workplaceclassaction.com/EEOC-IHOP.pdf)

- Retaliation takes center stage
Thank you!

Interested in our solutions?
info@navexglobal.com
www.navexglobal.com
877.358.4621

Additional substantive questions?
ljackson@littler.com
rbowman@navexglobal.com