

Preventing Harassment and Discrimination— What Every Human Resources Professional Should Know

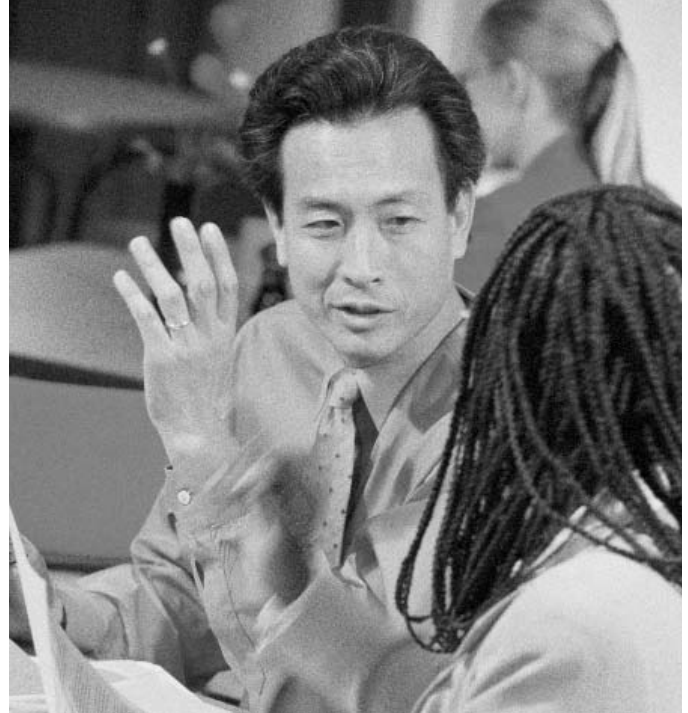


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Create a Professional Work Environment

Everyone has the right to work in a professional environment. Creating a work environment where unprofessional behavior is not tolerated takes time and a concerted effort. The burden of preventing unprofessional conduct, especially harassment and discrimination, falls squarely on the shoulders of employers. In fact, creating a professional workplace free of discrimination and harassment may be one of the most important things a human resources professional can do.

The presence of discrimination or harassment can be disastrous. Babies "R" Us, a major New York consulting firm, and Dial soap provide examples of why it's critical to train every employee to comply with the law.

- In the February, 2003 Babies "R" Us case, Andres Vasquez of Paterson, N.J. was awarded \$205,000 after claiming he was the target of unwelcome and derogatory comments, as well as behavior that mocked him because he did not conform to societal stereotypes of how a male should appear or behave. Mr. Vasquez alleged he had no reasonable alternative but to resign because the company's managers were not willing to prevent the behavior from continuing. In addition to the payment, the Equal Employment Opportunity Commission ("EEOC") (the federal agency charged with enforcing the federal discrimination and harassment laws) required that the company conduct comprehensive training to prevent this type of behavior from recurring.
- In February, 2003, New York-based airline consulting firm Simat, Helliesen & Eichner (SH&E) and Reed Telepublishing reached a Consent Decree with the EEOC to pay four female employees and their counsel \$2.3 million based on claims that the company president sexually harassed secretaries. The EEOC alleged that SH&E and Reed failed to take prompt and appropriate action to end the sexual harassment. SH&E and Reed must also conduct intensive sexual harassment training for their managers and their employees.
- The Dial Corporation currently faces a sexual harassment case where female victims at Dial's Aurora soap facility claim that the work environment was sexually charged in a way that was offensive and demeaning to women. In August, 2001, several women testified that they were subjected to physically-invasive behavior, to male co-workers exposing themselves, to repeated comments and conduct of a sexual nature, and to open displays of sexually offensive materials in the workplace. Regardless of the outcome, Dial has a high profile public relations problem to manage for the foreseeable future.

These cases demonstrate how important it is for every company to do everything reasonably possible to comply with discrimination and harassment laws. Establishing appropriate policies and conducting compliance training programs greatly can reduce a company's chances of facing a lawsuit. To begin, one must clearly understand the laws.

Understand The Laws

There are a number of important Federal Statutes that define employment practices. These include the Civil Rights Act (and in particular Title VII of this Act), the Americans with Disabilities Act, and the Age Discrimination in Employment Act. The EEOC is responsible for enforcing these laws, and others, in respect of discrimination in the following areas of employment:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements;
- recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, and disability leave; or
- other terms and conditions of employment.

Discriminatory practices under these laws also include:

- harassment on the basis of race, color, religion, sex, national origin, physical or mental disability, or age;
- retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
- employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; and

- denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

Employers are required to post notices (in both English and Spanish) in the workplace advising all employees of their rights under the laws the EEOC enforces, along with their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading. Many states and municipalities also have enacted protections against discrimination and harassment based on additional characteristics, such as sexual orientation, status as a parent, marital status and political affiliation. A local EEOC District Office can clarify relevant local laws.¹

What does this mean to HR professionals? They must take a leadership role to ensure all employees are informed and obey these laws. This is not trivial, and the consequences and costs of noncompliance are significant.

Know The Costs

- In 1996, Texaco's discrimination lawsuit cost the company \$176 million, a major hit to their stock, plus a consumer boycott of the company led by civil rights leaders.
- An organization that experiences discrimination or harassment in the workplace is exposed to enormous costs. As employment attorneys Bello and Melo state, measurable costs include loss of productivity, absenteeism, lost time and resources, lost business partners, legal liability, and years of litigation expenses.² Compensatory damages for non-compliance range from \$50,000 to \$300,000, depending on the size of the company, and punitive and/or emotional distress damages can be considerably higher. Back pay, reinstatement, and retroactive seniority are available for all types of discrimination. Costs that have a major impact but are hard to measure include lost confidence in management, and a negative impact on cohesion, morale, individual performance, and creativity. Consequences are long lasting, too. As the Dial Corporation case shows, bad press can damage a company's reputation long before the case is settled.

It's also important to remember the victims of this conduct. The victim faces professional costs: potential loss of employment, a damaged reputation, possible retaliation, reluctance to show up for work, and a decline in performance and attitude. Personal consequences for a victim include: a disruption of one's personal life, lack of concentration, fear, humiliation, efforts to avoid the situation, and other psychological issues.³

All parties involved face the reality of years of being subjected to the legal process, plus related litigation and costs. It is important to understand that the EEOC uses a number of methods to reach resolutions, including litigation, settlements, mediation, and conciliation. From October 1996 through September 2001, the EEOC obtained \$409.7 million in remedial relief solely through litigation, with average monetary benefits per lawsuit resolved of \$263,945. However, many of these lawsuits never make it to court. For the 1,692 settlements in sexual harassment lawsuits which did not go to court in 2002, \$52.8 million in monetary benefits were paid.⁴ Large, class-action harassment suits filed by the EEOC are also on the rise. The pharmaceutical company Astra paid \$10 million to settle a large harassment claim in 1998, and Mitsubishi settled a similar claim in 1998 for \$34 million. Regardless of size, all companies are exposed to this potential problem.

Consider the Odds

HR professionals who think, "My organization is not like these companies. The odds of this happening here are next to nothing." should think again. The odds are real. The EEOC tracks the numbers in terms of resolutions and filings-both are on the rise.

The Commission resolved 95,222 private sector charge filings in FY 2002-up 6% from the previous year. By using the varied means it has for resolving charges (litigation, settlements, mediation, and conciliation), the EEOC recovered a record total of \$310.5 million in monetary benefits for charging parties in 2002. One out of every five charges filed with the agency resulted in a "merit resolution" with a favorable outcome for the charging party. The industries that generated the most charge activity include retail, food services, and manufacturing.

Of the 84,442 charge filings in FY 2002, the biggest increases from the prior year were in allegations of religious discrimination (up 21%), age bias (14.5%), and national origin discrimination (up 13%). The total charge filings breakdown as follows :⁵

- 29,910 alleged race discrimination (up 3.5% from FY 2001)
- 25,536 alleged sex/gender discrimination (up 1.6% from FY 2001)
- 22,768 alleged retaliation (up 2% from FY 2001)
- 19,921 alleged age discrimination (up 14.5% from FY 2001).
- 15,964 alleged disability discrimination (down 3% from FY 2001)
- 9,046 alleged national origin discrimination (up 13% from FY 2001)
- 2,572 alleged religious discrimination (up 21% from FY 2001)
- 1,256 alleged Equal Pay Act violations (unchanged from FY 2001)

As these statistics indicate, this type of conduct is widespread-it can happen anywhere.

HR departments face the responsibility of preventing this type of situation from impacting their organization and workers alike. The first step to prevention is to clearly understand what harassment and discrimination are in the workplace.

Recognize Problem Behavior

It's important to learn how harassment and discrimination are commonly defined. Both types of conduct take many forms. The key elements of any form of harassment are that it is: unwelcome, based on a personal or group characteristic (e.g., gender, disability, religion, etc.), offensive, intimidating, and severe or pervasive conduct. Note that the focus in most situations will be what is offensive in the "eyes of the beholder", so long as a reasonable person would view the conduct as offensive.

Harassment often occurs when there is a disparity of authority and power. It doesn't have to be intentional, or directed at a particular individual. For example, a comment directed to one person could be offensive to another person and thus still be illegal.⁶

Sexual harassment is a gender-neutral form of sex discrimination that includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Sexual harassment is present when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile or offensive work environment. Men can harass women, women can harass men, men can harass men, and women can harass women. All are equally unacceptable in the workplace. Harassment is potentially unlawful by anyone who is associated with the organization; (e.g., supervisors, non-supervisors, customers, vendors, contractors, etc.) Unlawful sexual harassment may occur without economic injury to or discharge of the victim.⁷

There are two common forms of sexual harassment:

1. Quid Pro Quo, or the exchange of a favor for a favor. Examples include:
 - a. Demanding or requesting sexual favors in exchange for an employment opportunity
 - b. Demanding or requesting sexual favors as a condition of employment or as a condition of a particular aspect of employment
2. Hostile Work Environment
 - a. Conduct of a sexual nature that affects someone's ability to do his/her job or that someone finds offensive, intimidating, or hostile; and
 - b. Harassment sufficiently severe or pervasive to create an abusive environment; and
 - c. Conduct must be unwelcome⁸

Discrimination on the basis of race and color as well as national origin, sex, or religion is also illegal. It is unlawful to discriminate against any employee or applicant for employment because of his/her race or color in regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. Title VII

also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups. Title VII prohibits both intentional discrimination and neutral job policies that disproportionately exclude minorities and that are not job related.

Equal employment opportunity cannot be denied because of marriage to or association with an individual of a different race; membership in or association with ethnic-based organizations or groups; or attendance or participation in schools or places of worship generally associated with certain minority groups.

Harassment on the basis of race and/or color also violates Title VII. Ethnic slurs, racial "jokes," offensive or derogatory comments, or other verbal or physical conduct based on an individual's race or color constitutes unlawful harassment if the conduct creates an intimidating, hostile, or offensive working environment, or interferes with the individual's work performance.⁹

Build An Effective Harassment Prevention Program

The EEOC states that prevention is the key to successfully adopting a code of conduct that does not tolerate harassment and discrimination. There are six steps a company must follow to meet the EEOC's guidelines.

1. Establish clear expectations in writing for all employees by adopting a company policy that states expected standards of conduct. (Refer to the Appendix for a guide to developing a company policy.)
 - a. Upon hiring, new employees should be asked to review and acknowledge the policy as a condition of employment.
 - b. Existing employees should be sent a copy and be required to acknowledge receipt of it.
 - c. The policy should be redistributed to all employees periodically.
 - d. Managers must be especially well informed of the policy, as they may be asked to explain it to employees in their charge, help disseminate information, and ultimately, to enforce it. Managers can be held personally liable either for the conduct itself, or for failure to act to eliminate the conduct.
2. Define what constitutes harassment and declare that it will not be tolerated. Refer to the section above on recognizing problem behavior.
3. Establish a complaint procedure, so victims are encouraged to come forward. This must be specific, explaining whom an employee should contact, and what to expect in terms of investigation and resolution of the complaint. The company should designate at least two people in the organization (preferably one male and one female) to be the recipient of complaints, and these people should receive special training on how to address and respond to such complaints.
4. Train and educate to modify employee behavior. Employees and managers must be informed of what type of behavior constitutes harassment or discrimination, what the company's policy is, and how to file a complaint. There are a number of training options to consider, including Web-based compliance training programs. These make training easy to distribute and use, especially for companies that have employees in multiple locations. Some programs even feature automatic reminder systems that alert employees who need to complete training, a big plus for companies with training deadlines.
5. Promptly investigate every complaint thoroughly. Delays of even a few days could result in the victim suffering additional harm and a finding by the EEOC or a court that the employer unreasonably delayed beginning the investigation.
6. Take immediate and appropriate corrective action, including appropriate disciplinary action if it is determined that unlawful harassment occurred. Do whatever is necessary to end the harassment and prevent the misconduct from recurring.¹⁰

Each step is extremely important, as this example illustrates:

- In *Miller vs. Woodharbor*, although the company adopted an anti-harassment policy, Woodharbor failed to ensure that its supervisors received and understood it. In the court's January 2000 judgment in favor of the employee, it made note of the company's failure to provide training on the policy, as well as clarification of the responsibilities for reporting harassment.

Know Your Responsibilities

It is everyone's responsibility to create a positive work environment. Here are some guidelines for everyone to follow:

- Do not operate on assumptions-get to know co-workers as individuals.

- Communicate openly and honestly about differences.
- Learn about different cultures and backgrounds.
- Do not tolerate inappropriate jokes or comments-always consider the other person's perspective.
- Do not talk of sex on the job.
- Never use jokes, words, phrases, and gestures with sexual, religious, racial, gender or disability-laden connotations.
- Practice common sense, courtesy and respect.
- Management should set a positive example for others.

A company and its managers must exercise reasonable care to prevent sexual harassment or any other unprofessional or unethical behavior from occurring, promptly correct it, and remedy the situation if harassment does occur. An employer may be responsible for harassment by one employee against another if management acquiesced in or condoned the behavior. An employer can also be held responsible for acts of discrimination or harassment by the supervisors who work there, regardless of whether the most senior organization executive knows about it. The only way that an employer can have an effective defense against such liability is to have an effective non-harassment policy in place that offers a real, accessible avenue of complaint for employees.¹¹

Managers must recognize behavior that has the potential to be discriminatory or harassing, and immediately inform the appropriate management staff. Managers must treat all employees in a fair manner, understand and consistently implement policies, and cooperate fully with management in attempting to resolve discrimination or harassment inquiries and complaints.

Employees should behave professionally at all times, following the code of conduct set forth by the company. Should discrimination or harassment take place, an employee must take steps to address the problem immediately. Should inappropriate conduct occur, the victim should directly inform the harasser that the conduct is unwelcome and that it must stop. The victim should use any employer complaint mechanism or grievance system available as soon as possible. Should an employee fail to use the procedures an employer has in place, it may be difficult to support a case for harassment, as the following example illustrates:

- In June, 1999 in *Shaw vs. Autozone*, the judge decided in favor of Autozone, citing that the company did exercise reasonable care to prevent and promptly correct harassing behavior, and that the employee failed to take advantage of the company's preventive or corrective procedures.

HR professionals have important responsibilities with regard to implementing an effective prevention program. They must disseminate information pertaining to company policies, enforce them, and facilitate the process when a complaint arises. Employers can be held responsible for discrimination or harassment by outsiders, contractors, visitors or employees of other companies, particularly where the discriminatory acts or harassment are known by management and are not promptly addressed. Because HR professionals may be privy to this information, it is essential that appropriate action is taken quickly, or both the company and the HR professional can be held responsible. While strict confidentiality cannot be guaranteed, HR professionals also should ensure that information regarding the investigation be shared on a "need to know" basis only.

Take a Solid Position

There's no question-it's far better to prevent employment discrimination from occurring in the workplace than to face remedying the consequences of it. A human resources professional who ignores the need for a comprehensive, preventive anti-harassment and discrimination program ignores the real possibility of long-term damage to the organization. Hidden workplace harassment problems that do not surface for months or years can result in long-term negative impact on organizational performance. When an organization presents strong, clear messages that articulate a solid position on this issue, and then supports it with training and follow through, it greatly increases its chances of achieving the goal of creating a professional, harassment-free workplace.

Tips for Developing a Non-Discrimination Policy

A clear, detailed non-discrimination policy is the foundation for an effective prevention program. It should:¹²

1. Provide a clear definition of sexual harassment and discrimination.
2. State the organization's intention to eradicate any form of this conduct.
3. Provide a comprehensive list of categories of prohibited conduct by any of the organization's employees. List and include examples of at least the following four categories of conduct:
 - a. Physical assaults or other physical conduct of a sexual nature, including unwanted touching;
 - b. Unwanted sexual advances, propositions or other comments;
 - c. Sexual displays or publications anywhere within the workplace; and
 - d. Taking retaliatory action against an employee for discussing or making a sexual harassment complaint.
4. Provide a clear chain of communication for employees to use to report a complaint of harassment or discrimination.
5. Clearly specify the responsibilities of all employees, giving particular attention to managers and members of the HR department to minimize the incidence of harassment.
6. Clearly state what action will be taken by the organization if a determination of workplace harassment is made after a thorough investigation.
7. Provide a clear, separately stated commitment to periodic management education and employee awareness programs that emphasize the organization's concern for the seriousness of the issue.
8. Some states also require companies to provide the name, address, and telephone number of local government agencies (such as the EEOC) responsible for enforcing discrimination and harassment laws.

Each state has its own requirements, so every company should consult with an employment attorney to develop a policy that is appropriate and valid in the state(s) where it operates.

[The information provided in this paper should not be viewed as the rendering of legal advice. New laws and court decisions affect the matters reflected herein constantly. Consultation with legal counsel should be sought when dealing with any matter that may involve state or federal employment laws.]

About Sage Software

Sage Software offers leading business management products and services that give 1.7 million small and mid-sized customers in North America the insight for success throughout the life of their business. Its parent company, The Sage Group plc (London: SGE.L), supports three million customers worldwide and has revenue of \$815 million. For more than 25 years, Sage Software has delivered easy-to-use, scalable and customizable applications through its portfolio of leading brands, including Abra, ACT!, CPASoftware, FAS, MAS 90, MIP, Peachtree and SalesLogix, among many others.

About Abra LearningAction

Abra LearningAction is a hosted eLearning solution that enables companies to efficiently provide sexual harassment and diversity courses remotely, without the need for expensive trainers and travel costs. Developed by legal and educational experts Abra LearningAction courses cover a variety of topics, including workforce harassment and discrimination, the Family Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), privacy in the workplace, and insider trading.

Appendix

¹ From www.EEOC.GOV.

² Bello, Kenneth M., and Melo, Claudia M. Do Reasonable People Act Reasonably? Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. October 1998.

³ Ibid.

⁴ WWW.EEOC.GOV

⁵ Ibid.

⁶ Bello and Melo, p. 31

⁷ WWW.EEOC.GOV

⁸ Bello and Melo, p. 30

⁹ Ibid.

¹⁰ Casellas, Gilbert F., and Hill, Irene L. Sexual Harassment: Prevention and Avoiding Liability, Fall 1998 SHRM Legal Report, November 1998.

¹¹ Bello and Melo, p. 40

¹² Bresler, Samuel J. Minimizing Workplace Sexual Harassment: A Preventive Strategy, SPHR, March 1993.

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