

DISCRIMINATION, HARASSMENT, AND RETALIATION

AWARENESS AND PREVENTION

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First....Why Is This Important?

- **Why are you having to spend two hours of your busy workday listening to this presentation?**
 - State and federal employment laws affect virtually every aspect of your day-to-day business.
 - Complying with these laws is crucial to maintaining positive employee relations in the workplace.
 - Ignoring these laws could expose you to liability down the road.

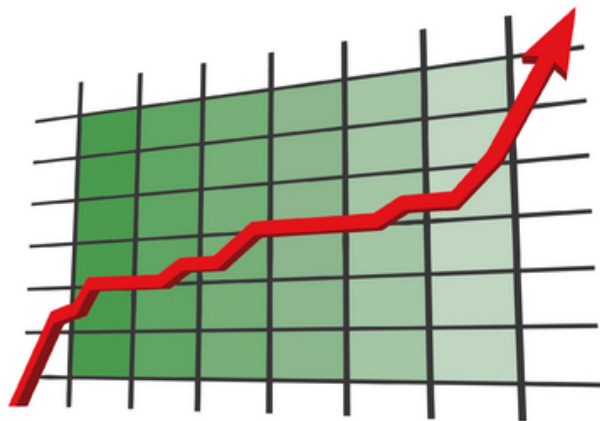
A Few Introductory Thoughts

- The average cost to defend an employment-related claim is about \$75,000
 - Today, we will discuss how to avoid, or at least minimize, the costs of these claims.
- Take employment-related claims seriously and let everyone in the organization know that you consider it serious business.
- Educate yourself: Know what you legally can and cannot do.
- **If there is a question: ASK before you ACT!**

Agenda for Today

- Trends and statistics relating to EEOC charges
- Laws prohibiting discrimination, harassment, and retaliation
- Methods of preventing discrimination, harassment, and retaliation in the workplace, including dos and don'ts of hiring and firing





TRENDS AND STATISTICS RELATING TO EEOC CHARGES

Costs Involved in Responding to Claims: EEOC Charge Statistics

	2010	2011	2012	2013
Charges Filed	99,922	99,947	99,412	93,727
Monetary Benefits (in millions)	\$319.4	\$364.7	\$365.4	\$372.1

Costs of Claims Are Rising

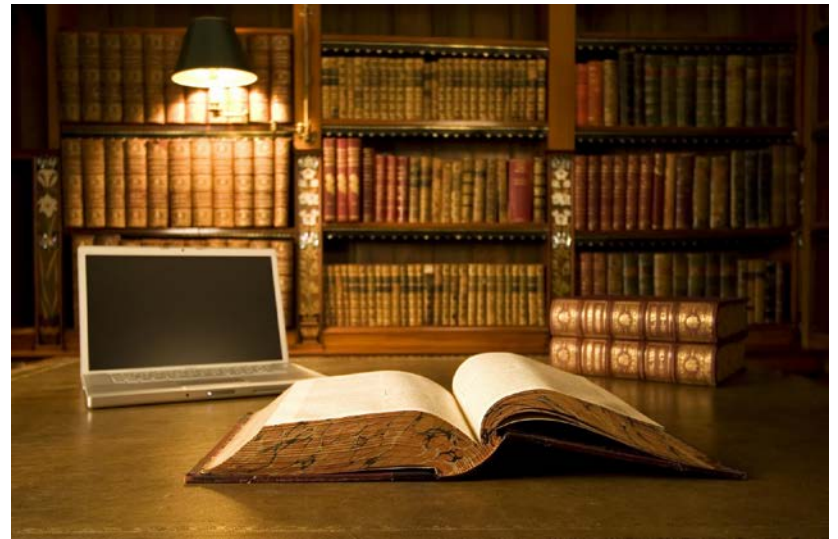
- The number of EEOC charges decreased by nearly 5,700 from 2012 to 2013.
- **However, the monetary relief obtained by claimants through the EEOC increased by nearly \$7 million over that same time period!**
- These types of claims are becoming increasingly expensive for employers.

More EEOC Statistics

- 2013 statistics by type of claim:

Type of Claim	Number of Charges	Percentage of all Charges
Retaliation (all statutes)	38,539	41.1%
Race discrimination	33,068	35.3%
Sex discrimination (including sexual harassment and pregnancy)	27,687	29.5%
Disability discrimination	25,957	27.7%

LAWS PROHIBITING DISCRIMINATION, HARASSMENT, AND RETALIATION



Relevant Laws

- Primary employment laws prohibiting discrimination, harassment, and retaliation:
 - Title VII of the Civil Rights Act of 1964
 - Texas Commission on Human Rights Act
 - Age Discrimination in Employment Act (ADEA)
 - Americans with Disabilities Act (ADA)
 - Family and Medical Leave Act (FMLA)
 - Fair Labor Standards Act (FLSA)

Relevant Laws

- Title VII prohibits employment discrimination on the basis of:
 - Race
 - Color
 - Religion
 - National origin
 - Gender
- Other laws prohibit employment discrimination on the basis of:
 - Disability
 - Age
 - Pregnancy
 - Genetic information

Discrimination

- Title VII prohibits both disparate treatment and disparate impact discrimination.

Disparate Treatment Discrimination

- Disparate treatment:

- Intentional discrimination based upon a protected characteristic.
- *Example:* Testing the reading ability of one race of applicants/ employees but not testing the reading ability of another.

- May be proved by:

- Direct evidence of bias, such as discriminatory statements; or
- Indirect evidence that the employer's stated reason for the adverse employment action is untrue, and that the real reason is the employee's protected characteristic (referred to as "pretext").

Disparate Impact Discrimination

- Disparate impact:
 - A facially neutral selection procedure that has the effect of disproportionately excluding members of a protected class.
 - *Example:* Requiring all applicants to pass the same physical agility test, but the test disproportionately screens out women.
- Disparate impact cases are typically failure-to-hire cases and usually involve a statistical analysis.

Disparate Impact Discrimination

- **Key issues in a disparate impact case:**
 - Can the employer show that the selection procedure is job-related and consistent with business necessity? If so....
 - Can the person challenging the selection procedure demonstrate that there is a less discriminatory alternative available?

What Does Discrimination Look Like?

- **Discrimination can take the form of any of the following, if related to a person's race, color, religion, national origin, gender, disability, age, pregnancy, or genetic information:**
 - Verbal: offensive, stereotyped or demeaning remarks
 - Visual: offensive or demeaning gestures
 - Written: offense, demeaning, or off-color e-mails or written correspondence
 - Actions: firing, disciplining, refusing to hire, refusing to assign to the field, removing from the field, or taking any other adverse employment action against an employee

Workplace Harassment

- Most harassment training tends to focus on sexual harassment, but understand that workplace harassment can take many different forms.
 - Race, color, religion, sex (including pregnancy), national origin, age, disability, genetic information, etc.
- Same general principles apply.

Definition of Sexual Harassment

- Sexual harassment is unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that affects an individual's employment, unreasonably interferes with his/her work performance, or creates an intimidating, hostile, or offensive work environment.



What Is Sexual Harassment?

- **In simple terms, sexual harassment is unwanted sexual attention. It includes any *unwelcomed*:**
 - Physical contact;
 - Sexual remarks about a person's appearance/presentation;
 - Sexual questions, jokes, anecdotes, or stories; including email or internet material;
 - Sexually explicit materials in the workplace that have no work-related purpose.

Types of Sexual Harassment

- Quid Pro Quo (Latin for "this for that" or "something for something")
- Hostile work environment

Quid Pro Quo Harassment Defined

- Discriminatory behavior by a supervisor that compels an employee to elect between acceding to sexual demands and forfeiting job benefits, continued employment or promotion, or otherwise suffering tangible job detriments.

Elements of a Quid Pro Quo Claim

- Employee is subjected to unwelcome sexual advances or requests for sexual favors by a supervisory employee;
- Harassment is based on sex or gender;
- Employee's submission to the unwelcome advances is an express or implied condition for receiving job benefits; OR the employee's refusal to submit to the sexual demands results in a tangible job detriment.

Example: Sally Smith is denied a promotion after rejecting her supervisor's sexual advances.

Hostile Work Environment Defined



- A sexually hostile work environment exists when unwelcome sexual advances, requests for sexual favors, sexually abusive or vulgar language, or other verbal, visual, or physical conduct unreasonably interfere with an individual's work performance or create an intimidating, hostile, or offensive work environment.

Elements of Hostile Work Environment Claim

- Employee subjected to unwelcome sexual harassment based upon sex or gender;
- Harassment was sufficiently severe or pervasive to affect a term, condition, or privilege of employment; and
- Employer knew or should have known of the harassment and failed to take remedial action.

Additional Considerations

- To state a claim, an individual must prove the conduct was *unwelcome*.
- In addition to speech and/or conduct, protections also extend to explicit or suggestive items displayed in the workplace.

Example: John Doe repeatedly places pornographic photos in Sally Smith's desk.

What Is "Severe and Pervasive" Conduct?

- **Must be objectively and subjectively offensive.**
 - The conduct must be offensive to a reasonable person; AND
 - The person complaining must actually find the conduct hostile and offensive.

- **Courts distinguish between boorish and offensive conduct versus that which is so severe and pervasive that it destroys the opportunity to succeed in the workplace.**
 - Mere offensive utterances are not actionable.

Totality of the Circumstances Test

- **In determining whether circumstances of work environment rise to the level of actionable sexual harassment, courts consider the totality of the circumstances:**
 - Frequency and severity;
 - Whether the conduct was physically threatening or humiliating, and whether it was obvious to others;
 - The victim's ability to avoid it; and
 - The degree to which the conduct unreasonably interfered with an employee's work performance.

When is the Employer Liable for Hostile Work Environment?

- **If the harasser is a supervisor with authority over the victim → vicarious liability.**
 - But affirmative defense may apply.
- **If the harasser is a coworker → employer is liable if it knew or should have known of the harassment and failed to take appropriate action.**
 - Notice may be actual or constructive.



Legal Defense

- **The law provides an employer a specific defense to hostile work environment claims. This defense is available if:**
 - No tangible adverse action was taken against the plaintiff (*i.e.*, discharge, demotion);
 - Employer exercised reasonable care to prevent and promptly correct the harassing behavior (*i.e.*, harassment policies demonstrate reasonable care to prevent such behavior); and
 - Employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to otherwise avoid the harm (*i.e.*, failure to report).

Retaliation



- Retaliation occurs when an employer takes an adverse action against a covered individual because they engaged in a protected activity.

"Covered Individual"

- Covered individual →
 - An individual who has opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability; OR
 - An individual with a close association to someone who has engaged in a protected activity (*i.e.*, the spouse of an employee who participated in employment discrimination litigation).

"Protected Activity"

- Protected Activity →
 - Opposition to a practice that the employee believed to be unlawful discrimination.
- Opposition = informing employer of belief that employer is engaging in prohibited discrimination
- Opposition is protected as long as it is based upon a "reasonable, good-faith belief" that the complained-of practice violates Title VII.

"Protected Activity"

- **Examples of protected activity:**
 - Complaining about alleged discrimination against oneself or others
 - Threatening to file a charge of discrimination
 - Filing a charge of discrimination
 - Acting as a witness to or participating in a charge or investigation of discrimination
 - Picketing in opposition to discrimination
 - Refusing to obey an order reasonably believed to be discriminatory
 - Requesting an accommodation based on disability or religion

"Protected Activity"

- **The following are NOT protected activities:**
 - Actions that interfere with job performance so as to render the employee ineffective
 - Unlawful activities such as acts or threats of violence

"Adverse Action"

- Adverse action →
 - An action likely to deter a reasonable employee from exercising protected rights under Title VII or state law.
- Sometimes, whether an act constitutes an "adverse action" depends on the circumstances. . . .

"Adverse Action"

- **Clear examples of adverse employment actions:**
 - ✓ Termination
 - ✓ Demotion
 - ✓ Decrease in salary
 - ✓ Less desirable job assignments
 - ✓ Increased workload
 - ✓ Failure to promote
 - ✓ Refusal of overtime
 - ✓ Diminished responsibilities
 - ✓ Negative performance evaluation

"Adverse Action"

- **Less clear examples:**
 - ✓ Late paycheck
 - ✓ Schedule change
 - ✓ Isolated comments
- **This is where circumstances can matter.**
 - A schedule change may not matter to a married employee with no children, but it could matter significantly to a single employee with children.

"Adverse Action"

- Note: Employees are NOT excused from continuing to perform their job duties or following company policy simply because they have opposed alleged discrimination or filed an EEOC charge!
- But, you must exercise caution when taking any adverse employment action against such an employee, and make sure that you've fully analyzed and documented your reason for the action.

Elements of a Retaliation Claim

- Employee engaged in protected activity;
- Employee suffered a materially adverse employment action; and
- There was a causal link between the two.

Elements of a Retaliation Claim

- What type of causal link is required?
 - Employee need NOT show that her protected activity was the sole reason for the adverse employment action.
 - Instead, employee must show that but for her protected activity, she would not have been subjected to the adverse action.
- Key factors are: (1) timing of the protected activity and the adverse action; (2) employer's reason for the adverse action; and (3) how the employer treats similarly situated employees.

**METHODS OF
PREVENTING
DISCRIMINATION,
HARASSMENT, AND
RETALIATION**



Duties of the Employer

- **What are an employer's duties when it suspects illegal workplace conduct?**
 - Employer has a duty to "respond appropriately." This means, respond in a way designed to ensure that the harm does not occur again.
- **When does an employer's duty arise?**
 - When an employer "learns" about the misconduct – *i.e.*, when a supervisory employee has a reasonable suspicion that the misconduct has occurred.

Supervisors' and Managers' Duties

- Display appropriate conduct at all times.
- Support and communicate employer's policies to employees.
- Observe and control work environment.
- Immediately report every complaint and instance of inappropriate conduct to HR.
- Conduct a diligent and thorough investigation as directed by HR.
- NEVER retaliate!
- If there is a question: ASK before you ACT!

Tips for the Hiring Process

- Risk areas for interviewing:
 - Age
 - Citizenship / National Origin
 - Marital Status
 - Pregnancy
 - Disabilities
 - Health Concerns
 - Religious Affiliations
 - Race

Tips for the Hiring Process

- When preparing for an interview.....
 - Identify and write down the attributes of your ideal candidate, and tailor questions around those attributes.
 - Prepare a list of essential job functions and ensure you explore competency/experience in all of those areas.
 - **Try to ask only open ended questions . . . You'll be surprised by how much you learn from an applicant's response!**

Improper Interview Questions

- Where were you born?
- What is your native language?
- Are you married?
- Do you have children?
- Do you plan to get pregnant?
- How old are you?
- How was your Christmas?
- Do you have a disability or chronic illness?
- Do you smoke, use alcohol, or use drugs?
- Are you in the National Guard?

Improper Interview Questions

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"We are not a sexist employer, so we ask all employees exactly the same questions. Now, 'What happens if you become pregnant?'"

Proper Interview Questions

- If you stayed with your current company, what would be your next move?
- What makes you stand out from others?
- What is your greatest accomplishment?
- What is your greatest weakness?
- What are your future goals?
- How do you deal with conflict?

Proper Interview Questions

- Can you fulfill _____ physical task?
- What circumstances bring you here today?
- What type of work environment do you prefer?
- What tools or habits do you use to keep organized?
- Are there any days or times you are not available?
- In what ways do you raise the bar for yourself and others around you?
- What unique experience or qualifications separate you from other candidates?

Other Potential Pitfalls in Hiring

- **Job postings/advertisements**
 - Avoid listing job qualifications that categorically disqualify groups of people.
- **Discussing other applicants**
 - Avoid discussing credentials and backgrounds of other applicants being considered during the interview process.
- **Applicant rejection**
 - Limit explanations to generalized statements. Stay away from sensitive terms such as "overqualified" or other terms that could be misconstrued to reference or implicate protected categories.

Tips for the Termination Process

- Things you're trying to avoid:

- Discrimination
- Retaliation
- Defamation
- IIED



- To avoid these things, you must think ahead and make smart decisions leading up to termination....

Document, Document, Document!

- **Three reasons for documenting discipline**
 - 1) May cause an unsatisfactory employee to improve and thus avoid termination
 - 2) Establishes a record of fairness
 - 3) If termination becomes necessary, it will be evidence that the reason was real and not a pretext
- **RESULT** → Decreased chance of litigation and attorneys' fees, increased profit and morale

Document, Document, Document!

- **In a perfect world, documentation should contain:**
 - Notice of employee's shortcomings and realistic time period to correct them (cite to handbook if applicable)
 - Intermediate disciplinary steps such as transfer, suspension, or probation
 - Specific warning of the disciplinary action to be taken, "up to and including termination," if employee fails to improve
 - Place for employee to sign, acknowledging receipt/review

Document, Document, Document!

- *At a minimum*, you should do the following:
 - Write a brief statement of the event/problem
 - Abbreviations/shorthand are ok
 - E-mail it to yourself, another manager, or send a quick note to the employee's personnel file
 - Raise issue with the employee, and document that you did so
 - Make sure it's timely (don't send weeks later)
 - It becomes a timeline showing how often you have to deal with the issue/problem

Document, Document, Document!

- Example of quick/easy documentation:

"J. Smith tardy this morning. Shift began at 9:00; arrived at 9:30. Third tardiness this month. I addressed with J. Smith this afternoon; he acknowledged it was a violation of company policy and promised to improve."

Document, Document, Document!

- **BUT.....Think before you write!!**
 - Written communications about a problem employee can be subject to discovery in a future lawsuit
 - Bringing lawyers into the conversation, where appropriate, may help
 - At a minimum, make sure written communications are objective and not sarcastic
 - Don't editorialize, explain or conclude – just DOCUMENT!

Pre-Termination

- **BEFORE terminating an employee, make sure you're well-prepared.**
 - Contact HR (every time!)
 - Review personnel file
 - Check past practices and company policy
 - ❖ Was the relevant policy communicated to employee?
 - ❖ Be consistent!
 - Warning signs:
 - ❖ No documentation
 - ❖ Good work record
 - ❖ In a protected class
 - Call employment counsel if you're unsure!

The Termination Meeting

- **In the termination meeting:**
 - Have another manager/supervisor present, so it doesn't become a "he said/she said" situation
 - State reasons clearly
 - Be truthful, direct, and decisive
 - Avoid arguing
 - Don't apologize
 - Be courteous

Other Potential Pitfalls in Firing

- **Relying solely on a supervisor's assessment or recommendation**
 - Conduct your own, independent investigation in the event of alleged employee misconduct
- **Inconsistency**
 - Always apply rules/policies in a consistent manner
 - Don't play favorites
- **Firing before doing homework/consulting with HR**
 - Call HR EVERY TIME you're considering firing someone!

Conclusion

- Issues related to discrimination, harassment, and retaliation are common in the workplace and becoming a significant point of litigation.
- First line of defense – well-written policies and procedures for handling these matters from the initial complaint, to the investigation, to corrective action if necessary.
- Second line of defense – well-trained and knowledgeable leaders and managers to implement and enforce the policies and procedures.
- Third line of defense – relationship with legal counsel with the skill, knowledge and expertise to advise and address issues as they arise.

Thank You!

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