

Harassment and Discrimination Prevention Training: What the Law Requires¹

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[Leaving employees] in ignorance of the basic features of the discrimination laws is an extraordinary mistake for a company to make, and such an extraordinary mistake amounts to reckless indifference.

*Mathis v. Phillips Chevrolet, Inc.*³

Overview

For years, many employers have periodically trained their employees on how to prevent sexual harassment and other forms of workplace discrimination. Employers viewed the training as beneficial to promote a positive workplace, but did not necessarily view the training as an absolute requirement. However, since the US Supreme Court issued three landmark rulings in 1998 and 1999, harassment and discrimination prevention training is no longer a luxury. Instead, the Supreme Court, lower federal and state courts, and federal and state guidelines have made it clear that employers should periodically provide this training to each employee.

Part I of this article examines how employers who fail to provide harassment and discrimination prevention training may:

- A. Expose themselves to punitive damages
- B. Lose their ability to raise a defense to harassment lawsuits
- C. Contradict federal guidelines established by the EEOC
- D. Contradict state laws and guidelines

Part II examines the return on investment of providing harassment and discrimination prevention training. As discussed in further detail in this section, the number of harassment and discrimination cases filed per year between 1990 and 2000 tripled. At the same time, the cost of resolving a single claim—which includes verdict or settlement costs, attorneys' fees, and the cost of employee time responding to the claim—routinely costs an employer hundreds of thousands of dollars. Given that research indicates that effective harassment and discrimination prevention training greatly reduces the number of internal complaints and external legal claims and reduces employee turnover, the savings realized by providing prevention training far outweigh its costs.

1 This article was presented to the Chicago Bar Association's Labor and Employment Law Section by Michael Johnson on May 5, 2003. Copyright © 2003, Brightline Compliance, LLC

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3 269 F.3d 771 (7th Cir. 2001)

Part III addresses legal issues related to the content and delivery of harassment and discrimination prevention training. Specifically, Part III examines cases and guidelines that have indicated that prevention training should:

- A. Cover not just sexual harassment but all types of illegal harassment
- B. Be provided for all employees, not just supervisors, shortly after they are hired
- C. Be provided periodically
- D. Be legally accurate and provided by an expert in harassment and discrimination law
- E. Be of substantial length and effective
- F. Not have a post-test that allows participants to fail
- G. Not constitute evidence of harassment or discrimination itself

I. Consequences of Failing to Provide Harassment and Discrimination Prevention Training

A. Failure to train exposes employer to liability for punitive damages

In the 1999 case *Kolstad v. American Dental Association*,⁴ the Supreme Court impressed upon employers the necessity of training employees on harassment and discrimination prevention. In this case, the Court addressed when an employer would be liable under Title VII, the primary federal law prohibiting workplace harassment and discrimination, for punitive damages. Punitive damages are designed to “first, punish a wrongdoer for misconduct, and second, to warn others against doing the same in the future.”⁵

Unfortunately for employers, the Court set a relatively low standard for imposing punitive damages, ruling that the plaintiff does not have to show that the conduct was “egregious” or “outrageous” but only that the employer had acted with “malice or reckless indifference” to the employee’s rights. Fortunately for proactive employers, however, the court ruled that employers may avoid punitive damages for harassment and discrimination cases if the employer can show that it has made “good faith efforts” to prevent harassment and discrimination. In defining what would be considered “good faith efforts,” the Court stated:

The purposes underlying Title VII are ...advanced where employers are encouraged to adopt antidiscrimination policies and *to educate* their personnel on Title VII’s prohibitions. (emphasis added).

Subsequent lower court decisions have clarified that employers cannot simply rely on the existence of policies against harassment and discrimination to avoid punitive damages. In *Bruso v. United Airlines*, the Seventh Circuit Court of Appeals succinctly summarized the law on this point when it stated:

4 527 U.S. 526 (1999)

5 Reed v. Cracker Barrel Old Country Store, 171 F. Supp. 2d 741 (M.D. Tenn. 2001)

Every court to have addressed this issue thus far has concluded that ... the implementation of a written or formal antidiscrimination policy ... is not sufficient in and of itself to insulate an employer from a punitive damages award.⁶

Numerous courts have held that to avoid punitive damages employers must provide training to their employees on harassment and discrimination prevention. For example, in *EEOC v. Wal-Mart Stores, Inc.*,⁷ a jury levied punitive damages against Wal-Mart after finding that it had failed to reasonably accommodate a hearing-impaired employee by not providing him an interpreter for a mandatory training session. In considering Wal-Mart's appeal of the punitive damage award, the Tenth Circuit Court of Appeals stated that "the extent to which an employer has adopted antidiscrimination policies *and educated its employees* about the requirements of [the discrimination laws] is important in deciding whether it is insulated from vicarious punitive liability." (emphasis added). While Wal-Mart maintained an antidiscrimination policy and even had an ADA handbook for supervisors, the court upheld the award of punitive damages, noting that Wal-Mart had not trained either the hearing-impaired employee's supervisor or his personnel manager on the employment discrimination laws. The court concluded that "the evidence demonstrates a broad failure on the part of Wal-Mart to educate its employees, especially its supervisors, on the requirements of the ADA, and to prevent discrimination in the workplace."

Similarly, in *Swinton v. Potomac Corporation*,⁸ the Ninth Circuit Court of Appeals affirmed a punitive damage award of \$1 million in a racial harassment case. The court began its opinion with the following sentence: "This case should serve as a reminder to employers of their obligation to keep their workplaces free of discriminatory harassment." The court pointed out that, while the company had an anti-harassment policy, it chose to not sufficiently educate its employees on the policy and the importance of avoiding racial harassment in the workplace. Thus, it could not "now be heard to protest" the imposition of punitive damages.

Likewise, in *Anderson v. GDC, Inc.*,⁹ the Fourth Circuit ruled that punitive damages were appropriate in a sexual harassment case where an employer failed to adopt any harassment or discrimination policy or conduct any training on those subjects. Similarly, in *Hanley v. Doctors Hospital of Shreveport*,¹⁰ the court upheld a jury's award of punitive damages in a sexual harassment/retaliation case, noting that—while the employer had handed out its sexual harassment policy to employees when hired—it had not provided "training to employees regarding sexual harassment issues."

6 239 F.3d 848 (7th Cir. 2001)

7 187 F.3d 1241 (10th Cir. 1999)

8 270 F.3d 794 (9th Cir. 2001)

9 281 F.3d 452 (4th Cir. 2002)

10 821 So. 2d 508, (Louisiana Court of Appeal, 2nd Cir. 2002). *See also*, *Romana v. U-HAUL International*, 233 F.3d 655 (1st. Cir. 2000) (punitive damages award affirmed in sex discrimination case, where court holds that a "defendant must also show that efforts have been made to implement its antidiscrimination policy through education of its employees and active enforcement of its mandate.")

Indeed, just having harassment and discrimination policies without training can actually hurt an employer's chances in court. For example, in an attempt to avoid liquidated damages in an age discrimination case, a car dealership pointed out that it had a policy against discrimination and that it printed anti-discrimination language on its application. (Courts may award victims of age discrimination liquidated damages, which are assessed using a standard similar to the one used in awarding punitive damages.) The Seventh Circuit Court of Appeals, however, concluded that having the anti-discrimination language printed on the application was "more harmful to [the company] than helpful, because the jury could easily have concluded that printing this statement on the application but then making no effort to train hiring managers about the [age discrimination law] shows that [the company] knew what the law required but was indifferent to whether its managers followed the law." *Mathis v. Phillips Chevrolet, Inc.*¹¹

B. Employers who fail to provide prevention training may forfeit the ability to raise a defense to harassment claims

1. 1998 Supreme Court decisions

In 1998, the US Supreme Court decided two cases that gave employers a strong incentive to provide their employees harassment prevention training—the training could help them escape liability in harassment cases, even if the harassment actually happened. In two companion cases—*Faragher v. City of Boca Raton*¹² and *Burlington Industries, Inc. v. Ellerth*¹³—the Court addressed the question of when an employer would be liable for harassment committed by a supervisor. Unfortunately for employers, the Court ruled that employers are presumed to be automatically liable for harassment committed by a supervisor. Fortunately for proactive employers, the Court ruled that—assuming the supervisory harassment did not culminate in an adverse employment action—an employer can avoid liability for "hostile environment" harassment if it can prove that: (1) the employer took reasonable care to "prevent and correct promptly" any harassing behavior; and (2) the harassment victim unreasonably failed to complain. (emphasis added).

2. Lower courts clarify that the duty to prevent harassment requires employee training

Subsequent lower court decisions have made it clear that, in order to raise an affirmative defense to harassment claims, employers may not rely simply on having an anti-harassment policy but also must provide their employees harassment prevention training. For example, in *Miller v. Woodharbor Molding & Millworks, Inc.*,¹⁴ the court held that the employer could not raise an affirmative defense to a sexual harassment lawsuit because, while the employer maintained an anti-harassment policy, it failed to train its

11 269 F.3d 771 (7th Cir. 2001)

12 524 U.S. 775 (1998)

13 524 U.S. 742 (1998)

14 80 F. Supp. 2d 1026 (N.D. Iowa 2000)

supervisors on the anti-harassment policy and complaint procedure. Similarly, in *Hill v. The Children's Village*,¹⁵ the court denied the employer's motion for summary judgment in a harassment case, noting that the non-profit employer had failed to train its supervisors "to even recognize sexual harassment when they saw it."

C. Failure to train contradicts EEOC Guidelines

The Equal Employment Opportunity Commission (EEOC) is the primary federal agency charged with investigating and suing employers for violating the workplace harassment and discrimination laws and for advising employers how to avoid violating these laws. After the Supreme Court handed down its landmark decisions in 1998 and 1999 and lower federal courts also ruled on this topic, the EEOC published new guidelines that explicitly informed employers of the necessity of harassment prevention training. According to the EEOC guidelines, if feasible:

the employer should provide training to *all employees* to ensure they understand their rights and responsibilities [relating to workplace harassment]....An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedures. *Periodic training can help achieve that result.*¹⁶

D. Failure to train may contradict state laws relating to harassment prevention training

While federal law provides a minimum level of compliance that employers must meet, several states have enacted harassment and discrimination laws that provide additional rights and remedies to employees. For example, many state laws provide higher caps—or no caps—on the damages that plaintiffs in harassment and discrimination suits may recover. In addition, several states have specifically enacted legislation or regulations that explicitly require or "encourage" some or all employers to provide harassment prevention training. Those states include California, Connecticut, Colorado, Illinois, Maine, Massachusetts, Tennessee, Texas, Utah, and Vermont.¹⁷

Even in states where there is no explicit statutory requirement for harassment prevention training, state courts are interpreting their state laws as making the training essential. For example, in the 2002 case *Gaines v. Bellino*,¹⁸ the New Jersey Supreme Court held that, in judging whether an employer has been negligent in preventing workplace harassment, state courts should consider whether the employer made anti-harassment training available to all employees in its organization. The court stated that an employer that provides anti-harassment training helps demonstrate the employer's "unequivocal commitment from the top" to preventing harassment.

15 196 F. Supp. 2d 389 (S.D.N.Y. 2002)

16 EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002, June 18, 1999. (emphasis added)

17 To receive a list of the specific training requirements for each of these and other states, email your request to the author at mjohnson@brightlinecompliance.com.

18 173 N.J. 301 (2002)

II. Return on Investment of Harassment and Discrimination Prevention Training

In tough economic times, employers often look to reduce their training expenses. However, as discussed above, employers who seek to cut costs by avoiding or delaying harassment and discrimination prevention training run a huge risk—they may be unable to defend themselves in a subsequent lawsuit. Nevertheless, in deciding whether to implement harassment or discrimination prevention training, an employer must determine whether the potential future savings resulting from the training will exceed the current expenditures necessary to implement a program today. As described below, research demonstrates that harassment and discrimination prevention training programs are a worthwhile investment.

A. Number of Harassment and Discrimination Claims Rising Dramatically

According to a Justice Department study, the number of employment discrimination and harassment cases filed per year tripled between 1990 and 2000 as new legislation gave employees expanded legal protections and the ability to recover compensatory and punitive damages. As a result, employment law cases currently represent thirty percent of all civil litigation in the United States.¹⁹ To make matters worse, when the economy slows and more employees are laid off, the number of harassment and discrimination lawsuits increases.²⁰ Consequently, it's precisely at the time that employers think of skimping on (or altogether ignoring) training that exposure to harassment and discrimination claims is at its highest.

B. Costs of Harassment and Discrimination Claims

The cost of verdicts and settlements resolving harassment and discrimination claims is high. According to Jury Verdict Research, the average verdict in a sexual harassment lawsuit is \$250,000.²¹ What's more, with the availability of punitive damages and the threat of class action cases, many employers have paid exorbitant amounts to resolve harassment and discrimination cases. For example, in the past several years, Mitsubishi paid \$34 million, Texaco paid \$176 million, Coca-Cola paid \$192.5 million, and the U.S. Information Agency (Voice of America) paid \$508 million to settle harassment and discrimination lawsuits against them. These large verdicts and settlements are not just confined to a few large companies. Between January 2000 and June 2001, there were 62 jury verdicts and settlements in excess of \$2 million in harassment and discrimination cases.²²

An employer defending a harassment or discrimination claim, of course, faces not only the cost of the verdict or settlement but also the cost of attorney fees and employee time

19 Jonathen H. Kurens, "Employee Lawsuits: Law firms are breeding grounds for harassment, discrimination, and other claims," *Legal Times* (Nov. 18, 2002)

20 John J. Donahue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 66 *S. Cal. L. Rev.* 709, 711 (1993)

21 HR Comply, "The Liability Problem and Punitive Damages," *Newsletter Abstract*, June 20, 2001

22 "Bias Insurance is Harder to Get, More Costly." Linda Bean, *DiversityInc Media*, Nov./Dec. 2002

spent dealing with the claim. According to one national employment law firm, to defend a single employment law claim, an organization on average faces the following costs:

- Attorney fees if the case goes to trial \$250,000
- Attorney fees if the case settles prior to trial \$95,000
- Range of settlement costs or jury awards \$150,000 to \$250,000+
- Manager time expended in the claim process 40 hrs.
- Employee time expended in claim process 40 hrs.
- Employee time spent investigating the claim 60 hrs.
- Employee time spent preparing for trial 60 hrs.²³

In addition to these costs, harassment and discrimination claims can:

- Substantially disrupts business operations
- Lead to a negative workplace atmosphere that undermines collegiality and productivity
- Lead to higher employee turnover
- Present adverse media attention that can damage an employer's reputation and business relationships

C. Return on Investment for Prevention Training

Employers that provide prevention training can effectively reduce the litigation and non-litigation costs associated with harassment and discrimination claims. As discussed above, employers that periodically train each employee on harassment and discrimination prevention can often escape liability or, at the least, avoid punitive damages when these lawsuits arise.

Of course, the real goal, and the real savings, from prevention training come not from simply limiting employers' liability if sued, but from preventing discrimination and harassment from happening in the first place. Research supports the intuitive notion that training reduces the number of internal and external claims. For example, after implementing an employment law training program, the State of Washington enjoyed a 37% decrease in employment law related claims, which saved the state an estimated \$2 million per year.²⁴ Similarly, a healthcare company conducted a formal return on investment analysis of the effectiveness of its sexual harassment prevention training program. The company found that during the year following implementation of a harassment prevention training program, the number of internal complaints of harassment fell 36% and the number of litigated claims fell 41%. Significantly, the total monetary costs of legal fees and settlement expenses fell by approximately 49%, saving the company over \$800,000 in a single year. The company also found that employee turnover as a result of sexual harassment decreased. Specifically, the company found that

23 ELT and Littler Mendelson, Compliance Training Brings Superior ROI to Organizations, April 11, 2002

24 John J. Donahue & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 66 S. Cal. L. Rev. 709, 711 (1993)

the percentage of employees who indicated in their exit interview that sexual harassment was part of the reason for their departure decreased from 11% to 3% in the year following the implementation of the prevention program.²⁵

Recognizing the litigation cost savings from harassment and discrimination prevention training, Employment Practices Liability Insurance carriers often offer a discount on premiums to employers who provide their employees such training.

III. The Delivery of Harassment and Discrimination Prevention Training

A. Should cover not just sexual harassment but all types of illegal harassment

There is consensus among federal appellate courts that the liability standards developed for sexual harassment cases apply to all types of harassment. *Spriggs v. Diamond Auto Glass*²⁶

It's not just about sexual harassment anymore! After the Supreme Court's landmark decisions in the 1998 *Faragher* and *Ellerth* cases, federal court decisions and EEOC Guidelines have made clear that the same liability standards that apply to sexual harassment claims apply equally to claims of retaliation and harassment based on race,²⁷ national origin,²⁸ age,²⁹ disability,³⁰ and other legally protected characteristics.³¹ Given these legal developments, employers must ensure that harassment prevention training covers not just sexual harassment but all types of unlawful harassment and retaliation.

Simply training on sexual harassment will not protect you from other types of harassment or retaliation claims. For example, in *Reed v. Cracker Barrel Old Country Store*,³² the jury found that the plaintiff had proved her case of sexual harassment but that the employer was not liable for the harassment because it had made reasonable efforts to prevent harassment, including providing harassment prevention training. The jury, however, found that the employer had retaliated against the plaintiff and awarded punitive damages for the retaliation. The employer argued that its training and other efforts to prevent sexual harassment should also protect it from punitive damages against retaliation. The court disagreed. According to the court,

25 Dianne Hill & Jack Phillips, Preventing Sexual Harassment (chapter from the book, "Measuring Return on Investment")

26 242 F.3d 179 (4th Cir. 2001)

27 *Allen v. Michigan Dept. of Corrections*, 153 F.3d 405 (6th Cir. 1999)

28 *Gotfryd v. Book Covers, Inc.*, 1999 U.S. Dist. LEXIS 235 (D. Ill. 1999)

29 *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151 (8th Cir. 1999)

30 *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681 (8th Cir. 1998)

31 EEOC, Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002, June 18, 1999

32 171 F. Supp. 2d 741 (M.D. Tenn. 2001)

Title VII clearly prohibits more than sexual harassment...[and] punitive damages are also available under Title VII for more than just sexual harassment...[An employer's] *good-faith compliance must relate to the specific claim* being raised under Title VII. (emphasis added).

The court ruled that because the employer's harassment policy and training did not specifically address retaliation, the employer had not demonstrated a good faith effort to prevent and correct retaliation, and therefore upheld the punitive damages award.

Similarly, in *Williams v. Multnomah Educ. Serv. District*,³³ an employee, who knew about the company's sexual harassment complaint procedure, sued the company for racial harassment. The court found that the employer had an effective policy for handling sexual harassment claims but that it had not properly educated its workforce on the specific procedures for filing racial harassment and discrimination complaints. The court held that the employer could not rely on its effective and well-disseminated sexual harassment policy to establish the affirmative defense for the employee's racial harassment claim.

While sexual harassment lawsuits tend to grab the headlines, employers' risk of harassment lawsuits based on other protected characteristics is actually greater. Of the 109,472 harassment charges that were filed with the EEOC during the 1990s, 33% were sex-based, 14% were national-origin-based, and 43% were race-based. Employers can expect harassment charges based on age to increase as the "baby boomers" age. In addition, since September 11, 2001, the number of religious and national origin harassment and discrimination claims filed with the EEOC has increased dramatically. The EEOC reports that between October 1, 2001 and September 30, 2002, allegations of religious bias were up 21%, age bias were up 14.5%, and national origin bias were up 13% over the previous year.

B. Should be provided for all employees, not just supervisors, shortly after they are hired

EEOC guidelines indicate that, if feasible, employers periodically "should provide training to *all employees* to ensure they understand their rights and responsibilities" relating to workplace harassment.³⁴ Employers should train employees as soon as they are hired so that a new employee is not harassed, and does not harass another employee, before receiving harassment prevention training.

Employers who fail to provide harassment prevention training may be unable to raise the second part of the affirmative defense to a harassment lawsuit—that the employee unreasonably failed to utilize the employer's harassment reporting policy. If the victimized employee—supervisor or non-supervisor—has not received harassment prevention training, the employee may argue that he or she was not aware of or did not

33 1999 U.S. Dist. LEXIS 9113 (Oregon 1999)

34 EEOC, Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002, June 18, 1999 (emphasis added)

properly understand the policy. For example, in *Harrison v. Eddy Potash, Inc.*,³⁵ the employer argued that it should be able to assert an affirmative defense to an employee's sexual harassment claims, noting that it had sent its supervisors a copy of the company's harassment policy and instructed each supervisor to post the policy, hold meetings on the policy with their respective employees, and read the policy to them. The Tenth Circuit Court of Appeals, however, upheld a jury's decision that the employer had not taken reasonable steps to prevent harassment in the workplace. The court noted that the employer had never provided employees actual training on sexual harassment and that the employer had not informed the harassment victim of its policy against harassment when she was hired.

Even in cases where the non-supervisory victim of harassment is aware of the employer's harassment policy and complaint procedure, employers may be found liable if they have not trained all employees. For example, in *Yaccarino v. U.S. Postmaster General*, the Equal Employment Opportunity Commission (EEOC) reviewed an administrative law judge's decision denying the Post Office's affirmative defense to liability from a manager's sexual harassment. Although the Post Office had a sexual harassment policy and complaint procedure that the victim knew about, the EEOC nevertheless held that the Post Office had failed to establish an affirmative defense because it could show no evidence "that training was provided by the agency to supervisors *and employees* to prevent harassment."³⁶ Similarly, in *Gaines v. Bellino*,³⁷ the New Jersey Supreme Court indicated that in assessing the effectiveness of an employer's harassment prevention efforts, one factor to consider is whether a harassment prevention training program had been made available to all employees.

C. Should be provided periodically

Harassment and discrimination prevention training should not be simply a one-time event. EEOC guidelines indicate that employees should receive periodic training on the topic. Courts' interpretations of the laws continually change, and employees need to be kept up-to-date and refreshed on this topic. Periodic training can help employers raise an affirmative defense and avoid punitive damages. For example, in *Fuller v. Caterpillar, Inc.*,³⁸ the court held that Caterpillar could avoid liability and punitive damages in a harassment case because it had made good faith efforts to prevent harassment. The court noted that during a two-year period, the company had twice provided harassment prevention training.

35 248 F.3d 1014 (10th. Cir. 2001)

36 EEOC 170-AO-8812X (Sep. 6, 2001) (emphasis added). Employment discrimination complaints in the federal government are handled by the agency involved. If the individual who filed the complaint does not agree with the agency's decision, he or she can file an appeal with the EEOC.

37 173 N.J. 301 (2002)

38 124 F. Supp. 2d 610 (N.D. Ill. 2000)

D. Trainer must be expert in harassment and discrimination law and training must be legally accurate

Years ago, many employers thought of harassment prevention training in the same way it thought of other basic employee training: Any good trainer could provide adequate training on the topic. Courts, however, have now made clear that employers must ensure that the person(s) who provide prevention training must:

- Completely understand the complex body of harassment and discrimination laws
- Keep up-to-date with new cases that constantly change the interpretations of these laws

Why is this so important? Any effective harassment prevention training is interactive and encourages participants to explore the nuances of workplace harassment and discrimination. Participants will ask challenging and complex questions. The trainer must be able to give practical and legally accurate responses. An employer's worst nightmare is a trainer who gives legally inaccurate advice during training.

If you are sued for harassment, the plaintiff's attorney will seek discovery on the quality and content of the training. The trainer's qualifications to provide this training must be bullet-proof, and the trainer must be prepared to be deposed in any lawsuit that arises.

In *Cadena v. Pacesetter Corp.*,³⁹ the employer appealed a jury's award of \$300,000 in punitive damages in a sexual harassment case by arguing that it had provided harassment prevention training. However, the Tenth Circuit Court of Appeals upheld the award in part because the employer could not show that its harassment prevention trainer was qualified to provide the training. When questioned during her deposition, the trainer incorrectly answered questions about what types of conduct could be considered sexual harassment. The court ruled that given the

[trainer's] ignorance about sexual harassment, a jury could reasonably infer that Pacesetter failed to make good faith efforts to adequately educate employees about its non-discrimination policy and Title VII.

As reported in an article in the *National Law Journal*, in harassment lawsuits

Plaintiff's attorneys and the EEOC have begun to question employers aggressively as to how much money is spent on training, the expertise of the trainers, the curriculum, and employee response to the training. Thus, as training programs have become increasingly important, the *quality of these programs has developed into the newest battlefield in the employment litigation wars.*⁴⁰

39 224 F.3d 1203 (10th Cir. 2000)

40 Ellen McLaughlin and Carol Merchasin, "Training becomes important step to avoid liability," *National Law Journal*, January 29, 2001 (emphasis added)

E. Training should be of a substantial length and effective

Some employers incorrectly believe that providing any harassment or discrimination prevention training—regardless of the quality or length of the training—will be sufficient to protect them in a lawsuit. As a result, some companies try to cut corners on training by showing videos, having line managers do the training, or having a 30-minute segment on harassment and discrimination prevention as part of employee orientation or in combination with other employee training.

Not just any training will do. Instead, employers must show that their harassment prevention training is substantial, and that employees understand their responsibilities. For example, in *Wagner v. Dillard Dept. Stores*,⁴¹ the court upheld a \$150,000 punitive damages award in a pregnancy discrimination case because the employer's efforts to educate managers about discrimination was limited to posting the policy on a bulletin board and showing employees a ten-minute video with handouts.

Similarly, in *Baty v. Willamette Inc.*,⁴² the employer appealed a \$360,000 award to a female employee who endured sexual comments from co-workers and supervisors. The company argued that once it received the victim's complaint, it conducted an investigation and provided training at the plant. The regional personnel manager conducted two 45-minute sexual harassment training sessions, one for management and one for non-management employees, in which he showed a video and discussed harassment law. In affirming the judgment in favor of the employee, the court of appeals stated that "the jury could reasonably have concluded that the small amount of training given the employees was inadequate in light of the severity of the problem."

Not only must the training be of substantial length, it must be effective. In *Madison v. IBP, Inc.*,⁴³ the employer was sued because managers had ignored complaints or sexual and racial harassment. In trying to avoid punitive damages, the employer argued that it had provided a two-hour program on the legal aspects of supervision, a portion of which covered harassment. The Eighth Circuit Court of Appeals, however, held that these actions were not sufficient to avoid punitive damages, given that the managers did not actually follow the procedures in the corporation's anti-harassment policies that they were supposedly trained on.

As reported in an article in the *National Law Journal*,

More and more frequently, employees are being deposed and asked about a company's training program. Often, even though they attended, they do not remember anything about the training. ... Only if the participants remember the

41 85 Fair Empl. Prac. Cas. (BNA) 295 (M.D.N.C. 2000)

42 172 F.3d 1232 (10th Cir. 1999)

43 257 F.3d 780 (8th Cir. 2001)

training will it have any beneficial effect—from either a legal or training perspective.⁴⁴

Accordingly, employers should not just provide “check-the-box” training but should ensure that the training is substantial and effective.

F. Training should not have a post-test that allows participants to fail

Some employers wisely want to be able to prove not only that they trained each employee on harassment, but that each employee understood the material. Therefore, at the end of the training, they require employees to take a pass-fail test. These tests, however, can create major legal headaches. At what level do you set the pass rate? If an employee fails the test, what do you do? Do you train him again? What if two months later he harasses a co-worker? Have you just given the plaintiff’s attorney evidence that you knew that the employee did not understand the harassment laws or your policy but you did nothing?

To avoid these complications, if harassment prevention training is given in person, no test should be given. An online harassment prevention program, however, could allow an employer to ensure that each employee understands the topic but not allow an employee to fail a test. (The online program can keep giving the employee feedback and new questions until the employee demonstrates understanding of the material.)

G. Training should not constitute evidence of harassment or discrimination itself

A cruel irony for some employers that have provided harassment or discrimination prevention training is that the training itself, or the conduct of participants during the training, has sometimes been used as evidence against the employer in a subsequent lawsuit. As a result, employers need to ensure that the trainer is cognizant of the types of training methodologies that are legally risky.

For example, some trainers encourage participants to explore and express their internal or societal biases and prejudices. This seems like a good training technique—but the expressions of these biases can come back to haunt the employer in a future lawsuit. In *Stender v. Lucky Stores, Inc.*,⁴⁵ the company hired an attorney to provide training to its managers on sexual harassment and sex discrimination in promotions. The trainer asked the participants to volunteer a stereotype that they had heard in the workplace about women. Notes from the training recorded comments from managers such as that “women do not want to work late shifts, that men do not want to compete with women or have a woman as their boss, that a woman's income is a second income in a household, that men resent the promotion of women, that black women are aggressive, that women who are promoted frequently step down, and that women do not have the drive to get ahead.”

44 “Training becomes important step to avoid liability,” Ellen McLaughlin and Carol Merchasin, *National Law Journal*, January 29, 2001

45 803 F. Supp. 259 (N.D. Cal. 1992)

In a class action lawsuit filed against the company by several female employees, the plaintiffs sought discovery of these notes. Despite the company's objections that the notes were protected by the attorney-client privilege and that disclosing the notes would discourage open and frank discussions in future EEO trainings, the court ordered the company to disclose the notes. The court also concluded that the comments were not just portrayals of social stereotypes, but reflections of what many of the employer's managers believed. Thus, the court ruled that the notes constituted "evidence of discriminatory attitudes and stereotyping of women" by the company's managers. After the court's ruling, the company settled the lawsuit for approximately \$107 million.⁴⁶

Participants' conduct during the training can also lead to lawsuits. For example, in *Moller v. Dept. of Social Services*,⁴⁷ an employee alleged that she was treated unfairly during training because the trainer ignored racial remarks made by other participants. Similarly, in *Caggiano v. Fontoura*,⁴⁸ a female officer claimed that she was harassed based on her sex and sexual orientation. To prove her claim, she noted that during a sexual harassment training session, the Sheriff walked into the classroom and said, "Remember, guys, 'harass' is one word, ha, ha, ha."

IV. Conclusion

Employers may no longer view harassment and discrimination prevention training as a luxury. The Supreme Court, lower federal and state courts, and federal and state guidelines have made clear that this training is essential. Employers who fail to provide harassment and discrimination prevention training may expose themselves to punitive damages, lose their ability to raise a defense to harassment lawsuits, and contradict federal and state guidelines.

The number of harassment and discrimination claims filed per year tripled between 1990 and 2000 and the cost of resolving a single claim routinely costs employers hundreds of thousands of dollars. Accordingly, prudent employers provide harassment and prevention training not only to avoid liability when sued but to avoid the occurrence of harassment and discrimination in the first place. Given that research indicates that effective harassment and discrimination prevention training greatly reduces the number of internal complaints and external legal claims and reduces employee turnover, the savings realized by providing prevention training far outweigh its costs.

Accordingly, it appears that in the context of workplace harassment and discrimination, an ounce of prevention is indeed worth a pound of cure.

46 Francine D. Blau and Lawrence M. Kahn, *Gender Differences in Pay*, (2000)

47 1995 WL 464903 (N.D. Cal. 1995)

48 2002 N.J. Super. LEXIS 367, (App. Div. 2002)