



AB1825 Train The Trainer Talking Points

Atlanta · Baltimore · Boston · Charlotte · Chicago · Cleveland · Columbia · Columbus · Dallas · Denver · Fort Lauderdale · Gulfport · Houston · Irvine
Kansas City · Las Vegas · Los Angeles · Louisville · Memphis · New England · New Jersey · New Orleans · New York · Orlando · Philadelphia
fisherphillips.com Phoenix · Portland · San Antonio · San Diego · San Francisco · Tampa · Washington, DC



Talking Points

fisherphillips.com

- We begin the substantive discussion by explaining the difference between general horseplay, which is not unlawful, and legally prohibited harassment, which is based on protected categories
- Consider discussing company policy against even non-protected category horseplay

Prohibited Harassment Defined

- What makes harassment unlawful?
 - Conduct based on a _____ category
- Consider segue into next section by noting that they need to know the protected categories in order to apply the rules

- This begins a lengthy discussion covering every category
- With race, explain that race may be unknown and there still could be harassment (e.g., color)
- Discuss concept of people of same race offending each other with criticism of home countries as an example of national origin harassment versus race harassment

Protected Categories

- Race/Color
- National Origin
- Ancestry
- Citizenship Status
- With citizenship status, discuss importance of not treating citizens differently than non-citizens, and you might note the hiring issues which are discussed later in the program



- Discuss transgender and gender stereotyping laws
 - Sex change issues
 - Femininity and masculinity issues
- Mention homosexual and heterosexual status as prohibited bases for harassment
- Mention maternity leave criticism as common issue with pregnancy

Protected Categories

- Sex/Gender
- Sexual Orientation
- Pregnancy



- Explain possible differences between federal and state law regarding age discrimination

Protected Categories

- Age



- Discuss reasonable accommodation requirement
- Explain undue hardship concept with examples
 - New chair likely is reasonable; shadow worker is not
 - Time off for religious holidays generally reasonable; permanent schedule changes must be viewed on a case-by-case basis

Protected Categories

- Religion
- Disability
- Medical Condition

- Explain overlap between disability and medical condition

fisherphillips.com



- Emphasize immense breadth of whistleblower protections
- Protection covers any "good faith complaint" of unlawful conduct, even in error
- Common subjects of complaints include employment practices, public health, employee safety, accounting practices, and customer fraud

Protected Categories

- Whistleblower

- Complaints may be internal or external under many laws
- Explain presumption of retaliation during months immediately following complaint

fisherphillips.com

Protected Categories

- Military service

- Primary issue here is leave rights under USERRA
- Be sure to include in your discussion the issue of time off for reservists and similar part-time military personnel

Hostile Working Environment

- Discuss technical requirements of a legal claim of harassment, with plan to de-emphasize technical requirements on following slides as you transition to zero tolerance discussion
 - Technically, the legal standard is difficult to meet, but practically the standard may not be as protective as it sounds
- Most harassment cases involve claims of *hostile working environment*, which is:
 - Unwelcome behavior;
 - Offensive to the reasonable man or woman;
 - Severe or pervasive; and
 - Alters working conditions to create an abusive working environment.

- This slide and the following True/False question emphasize zero tolerance for any conduct related to a protected category
- Emphasize impossibility of applying technical legal standard on a day-to-day basis
- Depending on your audience, you might mention legal costs of defending unprofessional conduct that might not technically meet the definition of unlawful harassment

Hostile Working Environment

- Due to the challenges associated with disproving harassment claims, most employers have a *zero tolerance policy*

- This is a chance to prove that they have a reason to be personally concerned about the topic
- You can startle them a bit with the personal liability, but do not overstate it
 - They only have personal liability for their own conduct
- Discuss employees' personal liability to emphasize supervisor responsibility for education

Who Is Liable for Sexual Harassment?

- You (supervisors) are personally liable
- _____ are liable
- _____ are liable
- This might be a good place to discuss strict liability versus liability based on notice, if you intend to address that topic

- Discuss the company's liability for third-party harassment
- Discuss both scenarios: third-party victim and third-party harasser
- Explain that third-party liability is generally based on notice, and that witnessing the behavior is a form of notice, in addition to complaints

Non-Employees

- Liability even extends to acts either by or against non-employees
 - Like who?

- A discussion of remedies is required by the law
- Remedies are the rewards a successful plaintiff may receive in litigation

Remedies

Remedies are what the winner may receive in a lawsuit for harassment:

1. Lost wages (past and future)
2. Reinstatement
3. Emotional distress
4. Punitive damages
5. Attorneys' fees
6. Court orders (e.g., transfers, training, etc.)

- Answer: respond to the complaint
- The purpose here is to generate discussion regarding the “off the record” discussion
- Use upcoming legal points slide to emphasize that there is no such thing as an “off the record” discussion
- Discuss strategies for handling these discussions

Hypothetical

- An employee named Jerry, who you have known for a number of years, tells you that his co-worker, Cassie, is making sexual advances towards him and he finds it uncomfortable
 - You offer to speak with Cassie, and Jerry responds by insisting that this is a private matter and demands that you do nothing to respond
 - What should you do?
- Discuss liability for failing to investigate a complaint or other situations of which the supervisor is aware

- Answer: Jerry has the right to go over your head, and you cannot criticize him for doing it
- Use this slide, and the following legal points slide, to emphasize the fact that there is no “chain of command” for harassment complaints

Hypothetical

- Suppose Jerry, the employee who complained to you about Cassie, never came to you, but instead went over your head and talked to your boss about the problem?
- What if anything should you say to Jerry about coming to you first on such matters?

- Discuss the concept of retaliation in general, and give specific examples
 - E.g., employee complains and is no longer considered for promotion
 - E.g., employee complains and the supervisor no longer says “hello” to employee like s/he would to anyone else

Responding To Complaints

- Retaliation is forbidden by law
 - An employee who reports harassment or discrimination may not be retaliated against in any fashion
 - Any employee may not be questioned or criticized for bypassing the “chain of command” when reporting harassment

- Emphasize importance of following HR or other protocols for investigations
- Review this process even if HR normally conducts investigations
- Explain in detail why the harasser usually is put on leave
- Explain remedial action standard: take action reasonably necessary to prevent future harassment

Responding To Complaints

- Investigations of complaints vary, but they tend to include the following:
 - Document the Complaint
 - Consider possible leave(s) of absence
 - Document accounts of witnesses
 - Get the alleged harasser’s story
 - Take action to prevent future conduct
 - Communicate action taken

- Explain importance of telling victims who wish to resign that they should consider waiting until investigation is completed
- Offer to put employees such as this on a paid leave until investigation is completed
- Discuss importance of documentation

Hypothetical

- Jerry, the employee who complained to you about Cassie, comes into your office very upset
- He indicates that he is uncomfortable with the investigation of Cassie and he fears retaliation
- He indicates that he has decided to quit
- What should you do?

- An in-house training should include a review of the policy
- Three of the most important topics are listed in the slide
- Be sure to emphasize the reporting procedures

Company Policy

- [INSERT DISCUSSION OF COMPANY NO HARASSMENT POLICY]
 - [EXAMPLES OF PROHIBITED CONDUCT]
 - [COMPLAINTS DIRECT TO _____]
 - [NON-RETALIATION PROVISION]

Defining Discrimination

- You may have already done so by now, but this is an opportunity to explain the difference between harassment and discrimination
 - Harassment generally involves offensive conduct that is not job related, while discrimination generally relates to personnel actions
 - Of course, there are more technically accurate ways to explain the differences, but this is a good lay person's definition
- What is Employment Discrimination?
 - Treating someone differently with respect to a personnel action based on a _____.

Defining Discrimination

- The point here is to get them thinking about the reality that any personnel action could be viewed as discriminatory
 - At-will employment may come up here, which is discussed later in the program; discuss it here if you wish
 - At-will status may allow them to take personnel actions without cause, however, they may not be based on discriminatory motives
- What are some examples of personnel actions that an employee might claim are related to discrimination?

- Discuss importance of not writing on a job application
- You may also wish to mention importance of not taking notes regarding extraneous factors that are not related to hiring decision

Hiring Issues

True or False?

You should never take notes regarding your interview with an applicant.

False

- Be sure to explain the exception for consumer reports
- Explain the importance of not giving someone a reason to debate the decision

Hiring Issues

True or False?

When you decide not to hire someone, you do not need to give them the reason you decided to hire someone else.

True

- Explain that technically the answer here may be true due to at-will employment, however, practically, we need a documented legitimate business reason for termination in order to defend discrimination claims
- Discuss problem of looking disingenuous when the reasons were not documented at the time of termination

Documentation Issues

True or False?

You do not need to give a reason for terminating an at-will employee.

False

- Discuss difficulty of using verbal counseling to defend employment claims due to credibility challenges
- Perhaps discuss your company's policies and procedures regarding when an employee should be written-up before termination

Documentation Issues

True or False?

A write-up for performance is not necessary if the manager has verbally counseled the employee.

False

- Explain problem of supervisor who documents one reason, which later turns out to be problematic, and then tries to use other reasons which were not documented at the time
- A good example here is solely using "tardiness" when the employee has other performance issues that may be less vulnerable to discrimination claims

Documentation Issues

True or False?

When documenting discipline or a termination, you should not list every single reason you have for taking action, in order to avoid the appearance of being heavy handed.

False

The Sadface File

Employee: Susie Sadface, Salesperson
Demo's: Female, 41, Nigerian
DOH: January 19, 2005
Sales Nos: Last 6 Mos: 3, 3.5, 5, 4, 6.5, 3
Other: One of two female salespeople; fails to follow sales procedures; customer complaints; frequently late for work; no prior discipline

- The goal with the discussion of this hypo is to get the supervisors thinking about the appearance of discrimination when they discipline or terminate without considering comparative performance and the lack of documentation
- On this question we are looking for them to point out possible protected categories

Sadface File Analysis

- What would her lawsuit look like?
 - If she is terminated now, what legal claims might she attempt to claim?

- On this question, we want the supervisors to identify the issue of consistency and the need to compare this employee to similarly situated employees
- E.g., you cannot write-up Susie for low sales without knowing the sales numbers for her peers

Sadface Discipline

- If you were to write-up Susie, what would you list as the reasons for the write-up, and what discrimination concerns should you have before using each of the reasons?
 - Low sales?
 - Late for work?
 - Fails to follow procedures?
 - Customer complaints?

- This is an opportunity to discuss company policies and procedures regarding the way discipline is delivered
- Discuss importance of employee signatures on write-ups and methods of handling those who refuse to sign
- Discuss other practical issues, such as meeting with employee in private and avoiding heated arguments

Sadface Discipline

- What process would you follow when giving her the write-up?

AB1825 Train The Trainer Talking Points