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FEATURE

Stemming the Tide of Rising Harassment Litigation: Is Training the Answer?

The United States is awash in an unprecedented number of workplace harassment cases. Harassment charges filed with the Equal Employment Opportunity Commission (EEOC) during the 1980s totaled 19,434. During the 1990s, total EEOC harassment charges totaled 109,472—more than a five-fold increase.[1]

Traditionally, workplace harassment cases were confined to matters of sexual harassment.[2] No longer. Today's plaintiffs couch their claims in terms of sex, race, national origin, disability, religion, and age-based harassment.

Discrimination claims filed with the EEOC increased 10 percent during the 1990s. By contrast, the total number of harassment claims filed with the EEOC increased 215 percent, moving from 6,510 in 1990 to 14,019 in 1999.[3]

Race-Based Harassment Claims

Race-based harassment claims filed with the EEOC increased from 3,272 in 1990 to 6,249 in 1999.[4] The number of people-of-color in the workforce grew over the decade, which could have led to a corresponding rise in racial clashes. Yet racial harassment charges have jumped by nearly 100 percent since 1990, while minority employment grew by 36 percent. What's more, most racial harassment charges involve multiple victims, so each year the cases add up to tens of thousands of workers—mostly blacks, but also Hispanics and Asians.[5] Since 1990, the number of minorities filing charges of retaliation with the EEOC after they complained about racial mistreatment has also doubled, to 20,000 a year.[6]

National Origin-Based Harassment Claims

National origin-based harassment claims filed with the EEOC increased from 1,152 in 1990 to 2,089 in 1999.[7] According to the 2000 U.S. Census, the foreign-born population in the United States is 28.4 million—up almost 200 percent from 1970. Of all foreign-born persons, 67 percent are in the workforce.[8] While it is possible that immigration restrictions growing out of the war on terrorism could limit immigration to the U.S. and hence the number of claims, two factors seem likely to fuel the continued growth of national origin-based harassment claims. First, the U.S. will continue to need foreign-born workers to sustain economic growth and fill job vacancies created by the retiring of the Baby Boom generation. Second, stronger ties between new immigrants and American labor unions may embolden workers to be more forthright in asserting their legal rights.

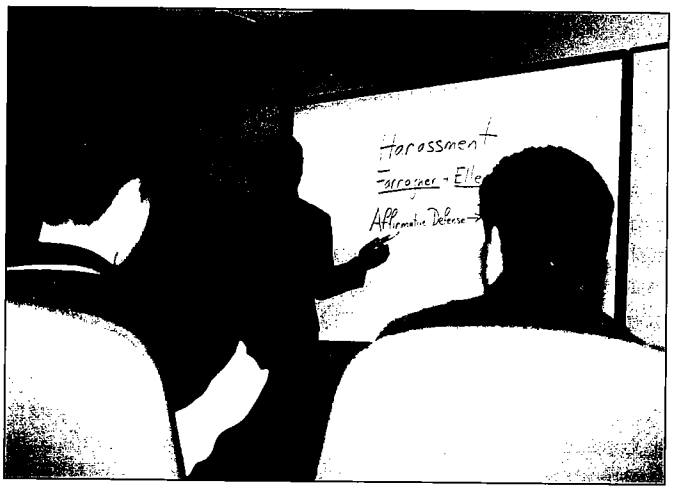
Disability-Based Harassment Claims

Disability-based harassment is now the fourth most frequent claim behind racial harassment, sexual harassment, and claims for harassment based on national origin, according to figures from the EEOC. Some 2,400 such claims are now filed annually with the EEOC.[9]

Whether disability-based harassment claims will grow is uncertain. Despite recent progress, only 29 percent of people who are disabled and of working age are employed, compared with 79 percent of those who are not disabled, according to a recent survey.[10]

For that very reason, many disabled employees facing harassment do not sue for fear of losing their jobs. They may depend on their employer for health insurance or worry about their ability to find another position.[11]

Disabled workers who elect to sue for discrimination under the Americans With Disabilities Act (ADA) have faced tough sledding. According to research by Ruth Colker, a law professor at Ohio State University, employers prevailed in more than 93 percent of cases reaching the trial court level from 1992 through mid-1998 and 84 percent of the time on appeal. The Supreme Court's decision in *Toyota v. Williams*, will make it even harder for workers to establish that they are legally disabled.[12]



At the same time, however, there is some evidence that disability-based harassment suits are finding a more favorable reception than ADA claims in federal courts. The plaintiff in *Lanni v. New Jersey Department of Environmental Protection* won a six-figure settlement in 2001. Two other disability-based harassment cases that were appealed in federal courts last year were also affirmed.[13]

Religious Harassment Claims

The Society for Human Resource Management (SHRM) recently partnered with the Tanenbaum Center for Interreligious Understanding to survey its membership on the issue of the impact of religion in the workplace. According to human resource professionals, religion in the workplace doesn't cause major problems. Most (89 percent) of the respondents said that they haven't seen a change in the number of religious bias reports. Fully 95 percent said that there had not been a religious discrimination or harassment claim filed against their organization in the past five years.[14]

While human resource professionals did not report an increase in religious discrimination claims from 1995 to 2000, the EEOC saw a 24 percent increase in religion-based discrimination charges during that same five-year period. During the 1990s, religious harassment charges filed with the EEOC increased 40 percent.[15]

Such claims can be expected to continue to rise because the U.S. labor force is becoming more diverse in terms of religion. This diversity is due in part to current immigration trends. The percentage of predominantly Christian immigrants from Europe decreased dramatically between 1970 and 2000. At the same time, the percentage of immigrants from Latin America, Asia, and the Middle East grew. Many of these newcomers bring religious practices little known in U.S. workplace culture.[16]

SHRM survey respondents confirmed that religious diversity in the workplace is on the rise. More than one-third (36 percent) said that there are more religions represented in their workforce than five years ago. The number of requests for religious accommodation is also on the rise. Twenty percent of respondents reported an increase in requests over the past five years.[17]

In 1999, the Tanenbaum Center conducted the first national survey on the issue "Religious Bias in the Workplace" (675 workers in 47 states, most of whom were members of minority religions, completed the survey). The survey found that two-thirds of the workers surveyed had seen examples of religious bias in their workplace. Of those reporting religious discrimination or harassment at work, 50 percent said that their performance was adversely affected and fully 45 percent considered changing jobs.[18]

Training as Liability Prevention

The U.S. Supreme Court pushed employment law training to the forefront of liability prevention in 1998 when it decided the *Farragher* and *Ellerth* cases.[19] These two sexual harassment cases focused not on what constituted sexual harassment, but on who was responsible for it, under what circumstances, and why.

The Supreme Court held that an employer is strictly liable under Title VII for any gender- based harassment by a supervisor that results in a tangible job detriment. If a tangible job detriment does not occur, the employer is still strictly liable. However, under those circumstances the employer can raise an affirmative defense if (1) it used "reasonable care" to prevent and correct any harassment, and (2) the employee "unreasonably" failed to complain.[20]

By recognizing that employers have a greater opportunity and incentive to screen, train, and monitor employees' performance, the Court indicated that employer liability can

stem, in part, from their failure to adequately train supervisors.[21] The Supreme Court sent a clear message: the failure to adequately train supervisors regarding all appropriate aspects of sexual harassment creates Title VII liability and may deprive the employer of a new affirmative legal defense.

The requirement to train was made even more explicit by the EEOC's 1999 guidelines on establishing an affirmative defense. The commission stated:

> The employer should provide training to all employees to ensure that they understand their rights and responsibilities [under the laws prohibiting 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....
>
> The employer should ensure that the individual who conducts the invest-igation [regarding harassment] ... be well trained in the skills that are required for interviewing witnesses and evaluating credibility.[22]

Simply put, having a written policy against discrimination is not enough.

Recent federal court decisions and EEOC regulations have applied *Farragher* and *Ellerth* to harassment claims based on nearly every category protected by federal anti-discrimination law.[23]

The good news for employers is that their training efforts have begun to pay off. More employers are winning harassment cases at the pre-jury stage because they have distributed anti-harassment policies and trained their employees on unlawful harassment prevention.[24] The case law also illuminates what happens to employers who do not train. Some employers with anti-harassment policies have been unsuccessful in raising the affirmative defense because a lack of training left their policies ineffectively communicated to supervisors or employees.[25]

Punitive Damages for Failure to Train

In 1999, the U.S. Supreme Court raised the stakes for employers that violate Title VII and made EEO training more important than ever by re-defining the standard for awarding punitive damages in such cases.[26] The Supreme Court issued its decision in two equally important parts. In part one, the Court held that individuals who are successful in an employment discrimination suit might also collect punitive damages if they show the manager intentionally discriminated or acted with "malice or reckless indifference" to the employees' rights. In part two, the Court ruled that even if individuals satisfy the criteria described above, they may not be able to collect punitive damages from the employer if the manager's actions "are contrary to the employer's good faith efforts to comply with Title VII."[27]

How can an employer meet this good faith standard? While the Court did not elaborate, its stated intent to encourage "employers to adopt anti-discrimination policies and to educate their personnel on prohibitions" against workplace discrimination provides some guidance. Simply put, having a written policy against discrimination is not enough.[28] However, employers that have a policy and that train their employees, particularly supervisors and managers, about the dos and don'ts of federal discrimination law have already begun to avoid punitive damages in post-*Kolstad* litigation.[29]

These cases suggest that employers must take proper precautions when outsourcing sensitive training programs or when using internal trainers to conduct sexual harassment or diversity training sessions.

Employers Get the Message

By all accounts, employers are getting the message loud and clear. Five of the 30 most frequently offered training programs by employers in 2001 were employment-law related, according to an employer survey by *Training Magazine*. These programs included sexual harassment training, hiring and interviewing skills, outplacement and retirement practices, performance appraisals, and diversity training. Fully 91 percent of employers surveyed offer sexual harassment training and 75 percent offer diversity training programs, aimed in part at eliminating unwanted discrimination and harassment claims.[30]

According to the Society of Human Resource Managers, fully 97 percent of private employers surveyed in 1999 had policies prohibiting sexual harassment, 62 percent provided sexual harassment training, and 57 percent of those made it mandatory for all employees. Based on the results of a 2001 survey by SHRM, fully 66 percent of Fortune 1000 employers offer diversity training programs and many more had plans to introduce them. Further, 68 percent of SHRM survey responders believe that diversity training programs helped to create a competitive advantage for their company by decreasing unwanted legal complaints and litigation.[31]

Not Out of the Woods Yet

Is employment-law training the antidote, the *magic bullet* for preventing unwanted harassment lawsuits? Well, it depends.

As indicated by the cases cited above, the use of training in conjunction with anti-harassment policies has helped employers to establish the new affirmative defense and avoid punitive damages. Other cases, however, suggest that the training event itself can become an additional source of employer liability.

Providing a new affirmative defense against harassment suits created a new hurdle for plaintiffs' attorneys to overcome in order to provide a recovery for their clients. Given this new barrier, it makes sense that plaintiffs' counsel would try to attack it by arguing that the training was inferior, ineffective, or defective or itself the cause of an independent harm. Those are precisely the kinds of cases that are now beginning to emerge.

In most cases in which the training event itself was alleged to have created liability, it has been the actions of the trainers that have proven to be problematic. For example, in some cases, anti-discrimination trainers themselves were found to have engaged in discriminatory behavior during training.[32] In other cases, comments made by the trainer in the context of a dramatically enacted case-study roleplay became the subject of litigation.[33] Even trainer inaction in the face of intemperate comments by others can give rise to litigation.[34]

In *Stender v. Lucky Stores*, the most famous case affecting the training industry to date, notes taken by an outside diversity consultant during a management diversity training session were later held to be discoverable and used as the basis for employer liability in a class-action gender discrimination case where the notes showed that supervisors expressed discriminatory views during the session.[35]

Finally, several cases have been filed in recent years in which employees contended that training programs violated their right to privacy and freedom of religion.[36]

These cases suggest that employers must take proper precautions when outsourcing sensitive training programs or when using internal trainers to conduct sexual harassment or diversity training sessions. In-house legal counsel or outside counsel should review prospective training materials for accuracy and meet and brief classroom trainers as to the legal perils of their craft. Better yet would be to have specially trained attorney-trainers conduct such sessions. Some national and local law firms have now formally entered the employment-law training market with the intention of pursuing precisely that objective.

Despite the occasional case in which the training event itself gives rise to litigation, it is clear that more sophisticated training techniques such as e-learning can offer both employers and defense counsel new ways of defending against unwanted harassment claims.

In most training classes today, the only real outcome demanded of participants is sitting through the course. Given emerging case law trends, that may not be sufficient in the future. In contrast, computer or Web-based training requires that each learner perform certain tasks in order to complete the training program. Employees, and particularly managers and supervisors, can thus be required to demonstrate not just that they attended the class but what they learned. This is critical, as studies have consistently shown that people remember only 10 percent of what they hear as compared with 20 percent of what they see, 40 percent of what they see and hear, and 70 percent of what they see, hear, and do.

E-learning programs delivered over the Internet or through a company's Intranet could provide individual participants with a unique, personalized access code to access the training program. Participants may be asked to take both a pretest and a posttest to demonstrate their mastery of the material. Participants who fail to demonstrate mastery of the material could be required to re-take the course and pass the test before being given credit for course completion. Once the participant has completed the program, an e-mail message would be sent to the human resources department in order to create a permanent record of the accomplished training.

Assuming that Web-based harassment programs are designed correctly, defense counsel should have a treasure trove of relevant electronic evidence to defend against unwanted claims. Such evidence could show, for example, that employees were informed of their legal obligation to make internal complaints within their company prior to pursuing independent legal action. It could also retrieve, with pinpoint accuracy, the exact responses that managers and supervisors made to questions about potentially offensive or illegal conduct, complaint-handling obligations, or companies' legal obligation to take immediate, appropriate corrective action once harassment claims have been verified.

Thus, while well-constructed training programs may not completely eliminate the risk of harassment or discrimination lawsuits, it seems clear that, in tandem with other measures, they can substantially mitigate the likelihood that such suits will be successful.

ENDNOTES FOR HARASSMENT LITIGATION ON PAGE 29