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Teaching Organizational Leaders: Application of Title VII of the Civil Rights Act of 1964 to Hiring Practices and Harassment Prevention in New Orleans

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Teaching Organizational Leaders:
Application of Title VII of the Civil Rights Act of 1964
to Hiring Practices and Harassment Prevention in New Orleans

A Thesis

Submitted to the Graduate Faculty of the
University of New Orleans
in partial fulfillment of the
requirements for the degree of

Master of Arts
in
English
Concentration in Professional Writing

by

Angela Glaviano

B.A. Southeastern Louisiana University, 2003

December 2017

Organizational Leaders' Manual

Hiring Practices

Harassment Prevention

TABLE OF CONTENTS

INTRODUCTION TO TRAINING.....3

History of the Law.....3

How to Read this Manual.....4

Employee Training.....5

Protected Classes.....7

Race.....7

Color.....7

Religion.....7

 Discretion and Accommodations.....8

National Origin.....8

 Recommended Action.....9

Sex Discrimination.....9

HIRING PRACTICES.....11

Legal Liability: Title VII Law.....11

Court Case.....12

Proactive Solutions for Today.....14

 Recommended Action.....14

Applications and Interviews.....15

 Recommended Action.....16

Internal Transfers and Promotions.....17

Social Responsibility.....19

 Recommended Action.....20

Implementation and Interview Guidance.....	21
Recommended Action.....	25
HARASSMENT PREVENTION.....	27
Legal Liability: Title VII Law.....	27
Defining Harassment Discrimination.....	27
Third-Party Harassment.....	28
Recommended Actions.....	28
Retaliation.....	29
Recommended Action.....	30
Hostile Work Environment.....	31
Microaggressions.....	32
Recommended Action.....	32
Court Case.....	34
Proactive Solutions for Today.....	34
Recommended Action.....	35
Implementation: Investigation Steps.....	36
Exit Interviews.....	39
Recommended Action.....	39
INDEX.....	45
WORKS CITED.....	48
VITA.....	49

PREFACE TO THESIS

My maternal grandfather was a police officer, a civil servant who enforced the law on the streets of New Orleans during Desegregation and the Civil Rights Movement. He never had the opportunity to complete his education and attend college like he wanted, because he left school during fourth grade to work and help support his thirteen siblings. He told me to always work hard and go to school for as long as I can and to always treat all people with respect. He taught me the value of social justice and equality. My paternal grandfather argued with his father daily to attend school; his father refused to awaken him and his four brothers for school each morning, hoping they would oversleep and then be left with no choice but to work in the family grocery store. My grandfather eventually studied English at Louisiana State University and became a technical editor for the Corps of Engineers, only after serving his country in World War II. He told me often to find purpose in each day. Both of my grandfathers taught me to respect all people.

The Civil Rights Act of 1964 outlawed discrimination in America, and Title VII of this Act regulates equality as it pertains to employment. Title VII is a provision of the Civil Rights Act which states:

“This law makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex. This law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably

accommodate applicants' and employees' sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer's business." (eoc.gov)

Organizations that employ fifteen or more employees are subject to the regulations of Title VII.

The purpose of Title VII's protections is to bring equality to the workforce by legally requiring employers to consider only objective, job-related criteria when making employment decisions. Human resources professionals are those who are responsible to an organization for employment law compliance. There is a spectrum of philosophies held by human resources professionals. Students study business and employment law for many different reasons and then enter the human resources field serving many different agenda, ranging from utilization of human capital to social advocacy in the workplace. A professional would likely not enter this field without some sense of ethical interest and social responsibility, but some professionals feel an obligation to Corporate America, whereas others feel a sense of responsibility to the individual worker. As is the case with many other issues, there are people who fall throughout the spectrum, without declared sole loyalty to either Corporate America or to individual workers.

I have chosen human resource management as the subject of my thesis and my field of study and work, because I believe that this role offers the opportunity to advocate for those who cannot defend themselves in the workplace and to have an impact on an entire organization's ethical standards. I also believe that social justice can and must be served through the avenue of the law. The law must be interpreted, and educated advocates must interpret employment law for the good of workers; otherwise, people who have not been educated of their legal rights are exploited. Though I am analytically and legally minded, I believe that legal compliance is an avenue through which I have the opportunity and the responsibility to advocate for justice in the

workplace, specifically justice that pertains to equal treatment of all people, regardless of race, color, religion, gender, and national origin. By advocating for the individual employee, I protect the organization from litigation; my goal is to advocate for workers and at the same time raise the ethical standard of the organization. By protecting each employee, I am fulfilling my obligation to protect the company from litigation. When employees believe that they are working in a fair and safe work environment, they are less likely to seek outside legal counsel; workers will trust that they can resolve problems internally through their direct supervisors. Workers and their managers are both protected through my HR work.

INTRODUCTION TO TRAINING

Our daily purpose is to proactively maintain a fair work environment. We must try to stay objective and make a daily effort to look at each person for the skills he or she can perform and the credentials on his or her résumé. We must try not to have a bad day. A bad day is a liability. If any one of us happens to have a bad day and fails to make time for employees who are part of the same protected class repeatedly and then offers ample time to those outside of that protected class, then we put the organization at a major legal liability—even if this is unintentional. In order to be fair to each worker, it is necessary to make decisions based upon each worker's skill set and work performance and remain objective.

History of the Law

Though President John F. Kennedy was instrumental in the Civil Rights Act, he was assassinated in November of 1963 before the law was put into action. President Lyndon B. Johnson signed the Civil Rights Act in 1964, and the Act has since outlawed discrimination and segregation that is based upon defined protected criteria in all public establishments and federally funded programs. Title VII of the Civil Rights Act prohibits employment discrimination on the basis of race, color, religion, sex, and national origin (Guerin, Federal Employment Laws 364). Title VII was amended in 1978 to include pregnancy as a defined protected class. Title VII protects employees who work for employers with fifteen or more employees, any government agency, employment agencies, labor organizations, and joint labor/management committees (Guerin, Federal Employment Laws 364). The Equal Employment Opportunity Commission (EEOC) enforces Title VII.

A clear understanding of our rights under Title VII of the Civil Rights Act must be more accessible to all people, and both workers and top management must understand and adhere to employee rights. It is necessary for human resources professionals to empower management with practical procedures for daily use so that companies will apply Title VII and enforce fair workplace practices. Title VII applies to all aspects of employment, including the employment application process, benefits enrollment, employee conflict resolution, and training and development; this training guide focuses on how the federal law applies to hiring practices and harassment prevention and how HR will guide managers to maintain compliance within their departments and ensure consistency across the organization.

How to Read this Manual

This text is intended as a guide for management training. All department managers will participate in hiring practice and harassment prevention training each year during the third quarter, before we begin the busy season. The managers' training will be divided into two sessions, one hiring practices and one for harassment prevention, and will be organized as a round-table discussion.

The manual will be accessible for reference in the same electronic file where we archive the job descriptions and employee handbook. Please know that managers can and should contact HR anytime with questions about the information included in this text.

As you hire for your department, use the headings and the index to search for answers to your specific questions, such as what characteristics are legally protected from discrimination. When you reference this text after you have been through an initial training, please call HR to confirm your understanding of the information. This text is meant to guide you to manage your

department more confidently, but please remember to consult HR as you encounter issues and questions that are new to your department to ensure that you are implementing legally sound practices.

Employee Training

In much the same way, we must offer equal opportunity for success to each employee so that each employee has equal opportunity to progress in his or her career. This means that training courses and on-the-job training should be equally available to all employees within an organization as business reasonably allows. We must be aware to constantly and consistently offer training opportunities to all workers for the future possibility that a position is vacated; at that time, employees will have equal opportunity to decide to post (apply) internally for the promotion. Each employee who asks for training in a new skill must be provided that training, if the employee meets the criteria outlined in our company policy. Our policy states that all employees who are interested in applying for a new position will be considered if they have not been counseled for discipline during the past year; if any such qualified employee asks for training, then the managers should conduct the training on the job as business allows or arrange for the requesting employee to train with a coworker who has already acquired appropriate skills and training ability. Furthermore, if an employee requires an *accommodation* in order to continue to work in his or position or be considered for a promotion, then an organization must either offer the accommodation or document why the requested accommodation would cause the business undue hardship. “An accommodation may include a change to the work environment or to the way in which a job is usually performed” (shrm.org). Because this change to the job requires analysis, we have been proactive. We have analyzed our jobs so that when employees

ask for temporary or permanent accommodations, we are ready with answers, as is the best practice: “The accommodation process involves a systematic and in-depth review of the job requirements and the limitations or performance problems the employee’s disability creates” (shrm.org). An employee might request an accommodation because of a variety of reasons, such as for a religious obligation to honor a holiday. (Employees can also request accommodations for documented physical or mental disability, but this will be a topic for a later training on the Americans with Disabilities Act of 1990. Until that training, please refer all requests for medical accommodations to HR.)

Because employees must have equal opportunity for advancement, we need to be aware to train each employee to obtain new skills in case a position is vacated and employees decide to post internally for a promotion. Title VII requires employers to offer equal opportunities to all workers.

Race, color, religion, national origin, and sex are protected classes under Title VII. A protected class is “[a] group specifically protected by Title VII” (Guerin, Federal Employment Laws 365). When a class is protected, all demographics under that class are protected. For example, because sex is protected under Title VII, both men and women are protected from sex discrimination. This means that all people are a part of one or more protected classes. These classes are defined under the law as protected classes because these are historically reasons for which people have been oppressed in the United States. Title VII and all of the Civil Rights Act are meant to protect all people. It is important to understand each of these protected classes.

Protected Classes

Race

Employers cannot discriminate against a person because of race and, additionally, employers cannot discriminate against persons based on characteristics that are associated with specific races, such as skin color, hair texture, or facial or physical features.

Color

Color is defined as a separate protected class in order to legally prevent employers from discriminating based on skin color within one race. In other words, an employer cannot show favor to a darker or lighter skinned person over another, even if the two persons are of the same race.

Religion

Employees are not only protected against employment discrimination based upon religion, but they must also receive accommodations for religious beliefs. For example, an employer cannot discriminate during any employment decision because a person is Muslim, Jewish, or Christian. Furthermore, an employer must make allowances for employees' religious practices, such as Saturdays off to observe the Sabbath or modifying the dress code to allow for religious garments.

This can become complicated when considering the business needs and the general requests of the entire staff. These allowances and legal requirements are considered accommodations.

Discretion and Accommodations: The employer is permitted to use discretion when granting these accommodations; if doing so would cause undue hardship to the business, then an employer can deny a request. An undue hardship is a burden incurred by the business that is logistically significant or fiscally significant to the maintenance of the business. For example, if a restaurant's busiest day is Saturday, then said employer is not required to permit an employee to take off every Saturday for the Sabbath. Working on Saturdays would be considered an essential job function, thus releasing the employer from the obligation to accommodate the employee in this case. An essential job function is a duty that a person absolutely must be able to perform in order to maintain the job; the essential job functions define the purpose of the job. (These terms—"accommodation," "essential job function," and "undue hardship"—are also used as they relate to the Americans with Disabilities Act (ADA) of 1990 when making a determination as to whether or not an employer legally owes a job function accommodation to a disabled employee.)

National Origin

National origin is a protected class under Title VII. This means that employers cannot discriminate against persons based upon birthplace, ancestry, culture, marriage, or membership in or association with an ethnic cultural organization (eoc.gov). Employers cannot discriminate against a person for "attendance or participation in schools, churches, temples, or mosques that are generally associated with a specific ethnic group or a name that is associated with a specific ethnic group" (Guerin, Federal Employment Laws 373). National origin discrimination includes decisions based upon a person's language, so employers cannot base decisions upon a person's native language, English language proficiency, or accent. The exception to this is if English communication skills are an essential job function, and the lack of English proficiency would

affect the person's ability to perform the job. (Discrimination based upon national origin is also prohibited by the federal Immigration Reform and Control Act.)

An example of communication skills as an essential job function can be found in the job description for restaurant server. The servers must speak clearly so that the guests can hear their speech easily in a sometimes noisy restaurant, so it is reasonable that we require restaurant server applicants to speak at a very high standard; this high standard includes grammar skills and clear diction, therefore we can and have declined applicants due to poor diction, for example.

Recommended Action: If you decline an applicant based upon verbal English language proficiency, be sure that the job requires verbal communication skills in English. If you decline an applicant based upon written English communication skills, be sure that the job requires the ability to write proficiently in English. Once the applicant is declined, HR will document the reason for declining (as is done for every declined applicant) and note the essential job requirements with the decline reason. We track declined applicants in case a declined applicant ever pursues litigation based upon alleged illegal discrimination. If we maintain careful records, we can quickly demonstrate to an attorney or to the EEOC that we have diligently worked to hire employees based upon job qualifications and that we considered the work qualifications of those we declined before we made each hiring decision.

Sex Discrimination

All persons are protected from sex discrimination under Title VII. This includes discrimination based upon pregnancy and conformity to gender stereotypes (eoc.gov).

Protection from gender stereotype discrimination means that a gym cannot refuse to hire a male personal trainer because he is not masculine enough, for example. Somewhat conversely, employers are permitted to separate their dress code requirements by gender, as long as the standards are parallel; this means that if women are expected to dress conservatively, then the men must also meet the same conservative attire requirement. Though Title VII does not address discrimination on the basis of sexual orientation or gender identity specifically, the Equal Employment Opportunity Commission (EEOC) has determined that both of these fall under the category of sex discrimination; the EEOC is the agency responsible for enforcing Title VII compliance. Some states have written additional laws that offer specific protection against sexual orientation and gender identity discrimination.

HIRING PRACTICES

Legal Liability: Title VII Law

Many organizations face hiring problems. Managers often make hiring decisions based on their “gut feeling” and make job offers to the people they “like.” Making decisions that are not connected to the job description and documented as such is against Title VII. Managers sometimes put organizations at risk for litigation when making unfounded hiring decisions. When managers ask the wrong questions, or even when they ask the right questions in the wrong way, the organization is at risk. When managers fail to hire the most qualified applicant based upon the job description and requirements, the organization is liable for labor law litigation. If managers make decisions that repeatedly show a discriminatory impact on a group of people, this could appear to be illegal discrimination; this negative impact on one group of people that is not founded on a work-related criterion is called “disparate impact.” The Equal Employment Opportunity Commission recognized disparate impact—or the appearance of illegal discrimination when hiring criteria are used to reject a protected class—after several decisions were made by lower courts in the late 1960s and early 1970s (eoc.gov). The Commission explains these early court decisions: “For example, an early Commission decision concluded that a sixth-grade education requirement for a labor position was discriminatory because it had a disproportionate impact on black workers and was not shown to be necessary to do the job” (eoc.gov). This case and others resulted in favor of the plaintiff (the complaining employee), because it can be difficult to prove that discrimination is not intentional when many people of the same race, sex, or other protected class are declined for an opportunity and the hiring criteria are not relevant.

If we use hiring criteria that repeatedly eliminate one group of people, the criteria have an adverse or disparate impact on one class of people. Disparate impact is “[a] type of unlawful discrimination that occurs when a seemingly neutral policy disproportionately affects members of a *protected class*” [italics in original] (Guerin, *Federal Employment Laws* 365). The court case that set precedent for disparate impact in the workplace was *Griggs v. Duke Power Company*.

Court Case

The case that set precedent for hiring discrimination was *Griggs v. Duke Power Company* of 1971. This case demonstrated that discrimination is not always deliberate or even observable (Winterfield 81). *Adverse impact* is a form of discrimination that occurs when a policy or practice has a statistically significant negative impact on members of a protected class. The illegality of adverse impact still applies even when all employees or applicants are held to the same standard. *Griggs v. Duke Power Company* offers a clear example of adverse impact where the standard was the same for all employees, but members of a protected class were negatively impacted. Duke Power Company required that employees held a high school diploma and a specific score on an intelligence test in order to work a job where neither a high school education nor the required level of intelligence were necessary to perform the essential job functions (oyez.org).

Duke Power Company was racially segregated prior to the Civil Rights Act of 1964, and there was a significant pay differential between the departments where whites and blacks worked. A pivotal fact in this case was that white men without high school diplomas were working the jobs that required these hiring criteria of high school diploma and an intelligence test score to the date that the case went to court. Warren E. Burger was the Chief Justice of the

Supreme Court who heard the case, and Jack Greenburg was the prosecuting attorney who represented the plaintiff, Willie Griggs and twelve other African-American employees of Duke Power Company (Burger 501).

“Ultimately, the Supreme Court adopted the Commission’s position in the landmark decision, *Griggs v. Duke Power Co.* (1971)... In that case, the Court invalidated an employer’s requirement that applicants have a high school diploma and/or pass aptitude tests for hire and transfer into more desirable departments where prior to the enactment of Title VII the company had restricted blacks to labor positions. Specifically, the Court stated:

‘The Act proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [blacks] [brackets in original] cannot be shown to be related to job performance, the practice is prohibited . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.’

This basic definition of discrimination, further elaborated in later court decisions, paved the way for the EEOC to challenge many seemingly neutral employment practices that operated to restrict the advancement of minorities and women” (eoc.gov). The burden of proof lies with the employer to show that the requirement in question is job-related (*Winterfield* 81). The employer must prove that the application requirement is necessary testing for an employee to demonstrate competency in the role and to perform the essential job functions.

Jack Greenburg argued that the test that was required did not have proven predictive validity: “But if the tests that[‘re] used or the educational requirement that’s used screens out

members of a race or of a group protected by the statute and does not predict who can do the job or does not have predictive validity...then it cannot be justified merely on the basis of good faith” (oyez.org).

The test was not a *valid* assessment as a predictor of job success. It was just cutting out minorities for no good reason. “Validity establishes and demonstrates a clear relationship between performance on the selection procedure and performance on the job” (Winterfield 62). Without the validity, the test was just a tool for discrimination, and Duke Power Company was found guilty of disparate impact and racial discrimination. This case set precedent that all pre-employment assessments must meet the validity assessment; they must actually predict job success. Any test for a job, whether an interview or another assessment, must be based on job analysis, must provide evidence about job-related skills, and must be systematically connected to a specific job in order to be considered valid (Winterfield 62). This is why we conduct an analysis on each job; we are proactive so that we have proof of validity on the front end of the process; this is the proactive and therefore the preferred approach.

Proactive Solutions for Today

Equal treatment starts with an organization’s values, and this is reflected in the recruiting practices. Each job must be advertised where all people in the workforce, or at least a diverse population of people, will likely view the advertisement and have an opportunity to respond to the posting.

Recommended Action: We must spend relatively equal time recruiting from job fairs from each racial and gender demographic; if we attend a job fair where the applicant base is predominately Euro-American, then we must also attend job

fairs that hold a likely participation of—meaning the fair advertises to—racially diverse applicants. The University of New Orleans (UNO) “all majors job fair” is an example of a racially diverse job fair. The jobs must be posted and the company must offer opportunities for potential candidates to submit résumés at websites and locations where people of all demographics would likely seek employment.

Applications and Interviews

Employers are legally obligated to consider equal treatment of all people and especially avoid adverse impact against defined protected classes during each step of the recruiting and hiring process. The EEOC mandates that organizations are obligated to avoid adverse impact when “reviewing applications or resumes (i.e., by not eliminating candidates on the basis of a “foreign” last name), when interviewing candidates (i.e., by asking only job-related questions), when testing job applicants (i.e., by treating all candidates the same and ensuring that tests are not unfairly weighted against any group of people), and when considering employees for promotions, transfers, or any other employment-related benefit or condition” (eoc.gov). Hiring decisions must be based upon skills that are required to perform the job, and *hiring* includes external recruitment, training, and internal promotions. If a job does not require a high level of English grammar skills, then an applicant cannot be declined based upon his or her verbal communication skills. If a job does not require any writing at all, then we cannot decline an applicant for poor written communication skills. If we would decline an applicant based upon written communication skills for a job that does not require an employee to write, then we would be liable for a case of adverse impact, meaning that a person of a protected class is potentially

negatively affected during the hiring process for something that is not projected to relate to work performance in that particular job.

When interviewing, we must take care to ask questions that only relate to the job description to which the candidate is applying. This means avoiding asking questions related directly or even indirectly to race, gender, age, religion, sexual orientation, disability or other sensitive topics (shrm.org). This means avoiding questions about the background of the candidate's name, when the candidate graduated high school or college, or specifically asking if he or she has taken any time off due to illness, such as disability leaves. We cannot ask questions about marital status or child care arrangements.

Recommended Action: You may need to be certain that an applicant's knowledge in his or field is up to date, which is valid and reasonable. Ask how they stay updated in the field of study and ask how recently they have researched or studied recent findings in the relevant field. In this case, an applicant might state when he or she graduated and obtained certifications, and this is acceptable under these circumstances because both your question and the applicant's response are relevant to the job.

In order to maintain information that is related to the work, managers may ask questions to obtain the information that they need, as long as the questions do not encourage the candidate to offer sensitive information. We can ask questions such as:

- Will you be able to follow the attendance policy and work the schedule for this position?
- In what part of town do you desire to work?
- Can you perform the essential job functions, either with a reasonable accommodation or without any accommodation at all? (After an applicant is hired, we can ask if he or she

needs an accommodation to complete the job and what that specific accommodation will be; it is a slight difference in wording, but the difference is asking “yes” or “no” before we make a hiring decision versus asking for medical details while we are making that hiring decision. Under the Americans with Disabilities Act of 1990, we cannot ask what the accommodations would need to be or ask about the applicants medical details prior to the extension of an offer; if we violate this, it would be or appear that we are using the applicant’s medical history adversely against him or her.) See HR if an applicant reveals medical details during the application process; it is best to handle accommodations and the disclosure of medical information on an individual case basis.

Internal Transfers and Promotions

These selection criteria apply to both external recruiting practices as well as internal promotion decisions. When recruiting and selecting employees for promotion or hiring externally, managers must follow a process to ensure that each candidate selected for hire is chosen because he or she meets valid job qualifications. Internal applicants must interview and demonstrate that they meet the minimum requirements for the jobs to which they are applying in order to be transferred or promoted.

This process starts with job analyses, and so each job has been through an analysis, in which you have taken part. We went through this process of evaluating each job description and the application processes so that we are certain that the hiring and promotion criteria are job relevant. We may go through this process again as our business needs change. This means that if we conduct another analysis in the future, department heads will work with HR to gather information about the jobs in the organization; this information “should describe the tasks or

activities, the results (products or services), the equipment, material, and individuals and the environment (working conditions, hazards, work schedule, etc.) that characterize the job” (Gatewood 18). We can use this information for more than just hiring decisions; managers can optimize compensation plans, training, performance appraisals, and the career development of each employee (Gatewood 18). For the purpose of hiring, job analysis information serves a dual purpose. First, the organization is enabled to accurately advertise the job description to potential applicants and discuss the job qualifications with applicants who work through the interview process. Second, the job analysis results provide the baseline information for the remainder of the applicant assessment process.

After we have analyzed each job description and the testing criteria, then we can identify relevant job performance dimensions. There must be ways to measure which job applicants will be successful in the job; these ways of measurement should be valid predictors of success. This can be difficult to determine for jobs that do not yield tangible products; it is also difficult to determine valid predictors of success for jobs that are interdependent, because it is difficult to determine how much any one individual should contribute or has contributed to the business’ bottom line (Gatewood 19-20). A supervisor’s judgment of performance can contribute to the results of the job performance measures. The result of this analysis should be that more than one criterion is critical to job performance, and these criteria are then used to identify worker characteristics (Gatewood 20).

We should then use the results of the job analysis and the job performance information in order to identify the knowledge, skills, and abilities (KSAs) that a worker will need to perform each job successfully. The KSAs are the criteria upon which managers will base hiring decisions and performance appraisal ratings. These KSAs are also used to create assessment devices.

We use a variety of assessment devices to make hiring decisions, but we could start to use more. These assessment instruments can include application blanks, reference checks, the selection interview, *mental and special abilities* tests, *personality assessment inventories*, and simulation and performance measures (Gatewood 20). Mental and special abilities tests are tests that assess a person's ability in a particular skill as opposed to assessing general aptitude. Personality assessment inventories assess, score, and interpret a person's personality and some companies use this information to determine a job applicant's likelihood of success in specific roles based upon statistical analysis and correlational data. We need to consider some of these assessments (not all of them at the same time) as options to add to the hiring process as we add to staff and open jobs, but only choose those that are relevant to each job. This is something that HR will present to each department separately and we will decide on together.

Social Responsibility

But following the law is not enough—not anymore and not in New Orleans. We all need to do more. This means hiring people who need jobs and want to work. This means recognizing that equal opportunity does not only mean giving the same chance to each person, but it sometimes means attempting to make even the playing field. Companies must recruit by finding the people in all parts of the city who do not know how to find their way from poverty to the workforce.

How can this be done? How do we as corporate managers recruit the unemployed, underemployed, and high-risk youth, whose potential is untapped? And why would we want to make this effort? We have open jobs, so if we partner with educational programs that prepare high-risk youth (those statistically likely to live a life of poverty and crime) for the workforce,

there is opportunity for us as well as the applicants. Organizations such as Café Reconcile, Covenant House, and Liberty’s Kitchen prepare high-risk New Orleanians for the workforce. When private companies connect with these nonprofits that aid high-risk youth, both the companies and the youth benefit. Companies tap into new talent and youth realize their knowledge, skills, and abilities. Once youth understand their potential and how to channel that potential into a career, these individuals are on their way to living more passionately and with dignity; when people learn how to support their families through work, the long-term effect is a reduction in the crime rate.

I have had the opportunity to work as a volunteer with Liberty’s Kitchen. Their youth participants express that working through the educational program and then interviewing for a job was a revealing experience. Prior to entering the program, participants stated that it seemed that the only way of life was to be “on the streets” and “watching people get shot.” After several weeks of working with Liberty’s Kitchen and finding employment, participants told me that they had never understood that they could go out into the city and find real work and get a regular paycheck. This concept of earning one’s own living is unknown to so many in our city, because these many living in poverty have never witnessed career success in their own homes. We must be socially responsible and seek to recruit the at-risk youth. As companies reach deep into all neighborhoods, we get closer to equal employment opportunities for all people, which is the goal of the Civil Rights Movement—there is still progress to be made.

Recommended Action: We are still working toward a partnership with Café Reconcile, Covenant House, or Liberty’s Kitchen. Until then, we can look for affiliations with these organizations on résumés and applications. You are not required to do this, but you are strongly encouraged to offer higher consideration

to those who have participated in these programs for our food and beverage positions on the job-related basis that these programs teach hospitality skills. This means that, all other skills being equal, we could hire an applicant who has worked through one of these programs before hiring another applicant. We are also likely to benefit from working with these program participants, because after they complete their hospitality education they receive job and life skills assistance by staying connected with the non-profits.

Implementation: Interview Guidance

Interview Question Guidance: This table shows interview subject matter that tends to lead to litigation versus acceptable questions that will help you obtain the job relevant information you are likely seeking. You can obtain information in the below-listed subject areas as long as you ask the question in such a way that the applicant would not perceive that the organization was attempting to discriminate against an applicant or employee on the basis of protected class.

<u>Subject</u>	<u>Recommended</u>	<u>Risk</u>	<u>Explanation</u>
Name	What is your name?	What is your maiden name? What is the origin of your name?	Questions about an applicant’s name cannot explicitly ask or imply an attempt to determine marital status or ethnic background.

<u>Subject</u>	<u>Recommended</u>	<u>Risk</u>	<u>Explanation</u>
Age	Are you at least 18 years of age?	How old are you?	It is valid to ask if an applicant is 18 or older, because the employment laws and working condition requirements are different for minors. An employer may want to know in advance for the application process or may choose to only hire 18 or older. Beyond that, an employer would not need to know an applicant's age and should not ask, so as to avoid violation of the Age Discrimination in Employment Act (ADEA) of 1967, an amendment to the Civil Rights Act.
Race, Ethnicity, and Physical Characteristics	Do you speak or write in any other languages besides English?	What is your first language?	It is acceptable to ask for language skills if this skill would contribute to the job function; however, it is not necessary to know an applicant's mother tongue, so it would be perceived as an attempt to determine ethnicity to ask an applicant to disclose "first language."
Religion	Are you able to work the required scheduled shifts for the job?	Do you need to take time off on the weekends to attend church?	If there is a business necessity, then a company can ask if an applicant is able to meet scheduling requirements, but even at that the interviewer must ask the question in such a way that the applicant is certain that the information is sought for business necessity, hence stating "scheduled shifts...job."
Gender, Marital Status, and Family	If you are a minor, provide this authorization signed by your legal guardian.	What is your marital status? Do you prefer to be addressed as Miss, Mrs., or Ms.?	It may be a violation of Title VII to ask about marital status, because it could be perceived as an attempt to determine age or it could be a form of gender discrimination. It is acceptable to ask minors to provide authorizations signed by their legal guardians, just as it is illegal in Louisiana to test for drug use or run police background checks on minors without a guardian's authorization.

<u>Subject</u>	<u>Recommended</u>	<u>Risk</u>	<u>Explanation</u>
Physical or Mental Health	Can you perform the essential job functions, either with a reasonable accommodation or without any accommodation at all?	Do you have physical or mental impairments?	Job descriptions should be divided into essential and nonessential job functions so that employers can determine if an applicant with a disability can be hired, possibly with the offer of a reasonable accommodation. If an applicant or employee requests an accommodation for a nonessential job function, then the employer cannot decline the applicant based on the disability, because the function in question is not essential. If the applicant requests an accommodation based upon an essential job function, then the employer must go through due diligence to attempt to accommodate the applicant or document why it would not be reasonable to accommodate the applicant. Remember to refrain from asking about specific disabilities or accommodations during the application process.
Citizenship	If hired, can you provide proof of employment eligibility in the United States?	What is your citizenship status?	Employers must ask for the legal bare minimum documentation and only after the applicant has accepted the job offer. Asking for citizenship status during the application process is likely to appear as national origin discrimination. The employer only needs to know that an employee is legally authorized for employment in the United States.

<u>Subject</u>	<u>Recommended</u>	<u>Risk</u>	<u>Explanation</u>
Military Service	What specific educational or work experience did you obtain while serving in the military that you think will transfer to the job to which you have applied?	When were you in the military and what type of discharge did you receive?	Unfavorable discharges occur more frequently for African-Americans than other races, so to hold unfavorable discharges against job applicants could have an adverse impact specifically against African-Americans. That noted, it is not illegal to ask about the details of military discharge, but if we do this, it should be done with caution: the work in the military about which you are asking should relate to the job to which the applicant has applied. Also, the EEOC advises against using military discharge history as the only reason for declining an applicant (eoc.org). In other words, we can ask and use the information if it is directly relevant, but please consult with HR on this to be sure that the information is relevant and to be sure than we are not repeatedly declining African-Americans, specifically, for military discharge history.
Arrest and Conviction Records	Have you ever been convicted of a felony or misdemeanor, other than minor traffic violations?	When have you been arrested?	While an employer can ask an applicant about prior convictions, it is not always legal to ask about arrests, as arrests are not proof of guilt because the case may still be open or the arrest may have led to no charge. Beyond this, federal courts have held that an applicant ought not be denied employment for a conviction unless the employer can explain how the conviction is related to the job to which the applicant has applied.
Hobbies, Clubs, and Organizations	Do you participate in any hobbies or clubs that are related to the job to which you have applied?	What do you do in your spare time? To what clubs or organizations are you affiliated?	This question must be certain to relate to the job, because club associations could cause an applicant to reveal racial, ethnic, and religious affiliations. The employer must be clear to demonstrate that the pursuit is for work related information.

<u>Subject</u>	<u>Recommended</u>	<u>Risk</u>	<u>Explanation</u>
Education	Do you have a high school diploma? Do you have a college degree?	In what years did you graduate high school and college?	Courts on federal and state levels have determined that educational requirements are discriminatory, unless the job requires a specific skill that must be acquired in an educational program. Before asking an applicant about his/her educational background, be certain that the job to which the person has applied requires or can be benefited by education. Minorities typically hold lower levels of education, so requiring credentials that are not necessary could have an adverse impact on a racial minority, thus being racially discriminatory. Additionally, asking the year during which an applicant graduated from school is likely to be found as a violation of the Age Discrimination in Employment Act of 1967.

(Gatewood 416-420)

The synopsis of the above information is to phrase the questions so that the applicant clearly understands that you are seeking to assess his or her job-related skill set. Furthermore, you must be certain that the skills you are assessing contribute to the job functions. This can become complicated if the applicant chooses to disclose unsolicited information. If an applicant or employee volunteers sensitive information, it is important to remain objective in response and quickly tell the employee that you are not requesting the sensitive or personal details; get back to the job-related details. Some of you have mentioned that you think that it is acceptable to allow the employee to “open the door” to personal information and then get further into a personal conversation; this is not true. Keep to work-related information.

Recommended Action: It is a dangerous misconception that the conversation is safe from litigation just because the applicant or employee was the first to start the

personal talk; you need to redirect the conversation back to professional experience and credentials in order to be truly safe from litigation.

Remember to think about why you are asking each interview question, and that will help you ask it in work-related terms.

HARASSMENT PREVENTION

Legal Liability: Title VII Law

Harassment constitutes “[u]nwelcome comments or conduct based on a protected characteristic that an employee must put up with in order to keep the job or that is severe or pervasive enough to create a work environment that is hostile, intimidating, or offensive” (Guerin, *Federal Employment Laws* 365). Protected characteristics are those that related to a person’s protected class; for example, because sex is a protected class, a man cannot harass a woman because she does not seem feminine enough—this would be harassment based upon a protected characteristic. Many actions can be defined as harassment, if the recipient or a by-standing employee finds an action offensive. Harassment might manifest itself in slurs, jokes, remarks based upon a protected characteristic, or derogatorily offensive pictures that offend a protected class (Guerin, *Federal Employment Laws* 370). Harassment may escalate to intimidation, hostile demeanor, threats, or physical violence (Guerin, *Federal Employment Laws* 370).

Defining Harassment Discrimination

Our company meets the requirements for Title VII compliance and therefore must provide a workplace free from discrimination and harassment. This starts with the hiring practices and continues with harassment prevention. Employers must take immediate action when discrimination takes place; discrimination may be committed by an “employee, customer, vendor, manager, or supervisor” (Guerin, *Federal Employment Laws* 374). In cases of harassment, we are liable for anyone who is defined as legally within our control (eoc.gov).

Third-Party Harassment

When the discrimination is committed by someone who is not employed by the company but the action occurs during work time or on work property, the act is defined as third-party harassment, and the employer is still liable. An example of third-party harassment is the restaurant server who is subjected to racially or sexually derogatory remarks made by guests while they are dining.

Recommended Action: The restaurant manager or owner must take action to protect the server, even if this means asking the guest to leave the property. The risk of not taking action is harassment litigation for hostile work environment.

If you ask a third party to leave the property after an incident of harassment of hostility, you are not required to document the action against the third party, because we are not responsible for that third party, but leave a note in the offended employee's file.

Recommended Action: Document in a brief narrative what happened to the employee, as we are responsible for the safety of our workers. Also note that management took immediate action by cutting ties with the offender, and name that third party. This narrative could be kept in the victimized employee's file in case he or she references the incident at a later date.

Sexual harassment, though not the only kind of harassment, is what many people think of when they hear the term *harassment*. Sexual harassment is “[a]ny unwelcome sexual advance or conduct on the job that the employee must put up with in order to keep the job or that is severe and pervasive enough to create an intimidating, hostile, or offensive working environment” (Guerin, *Federal Employment Laws* 365). “Quid pro quo” means *this for that* in Latin and “refers to a type of sexual harassment in which a supervisor demands sexual favors from a subordinate

in exchange for a promotion, positive performance evaluation, or another job benefit” (Guerin, *Federal Employment Laws* 365). Quid pro quo harassment may also occur “when a supervisor threatens an adverse employment action (such as termination or demotion) if the subordinate does not comply with a sexual demand” (Guerin, *Federal Employment Laws* 365). When management receives a claim of sexual harassment from an employee, you must act immediately. It is important to understand what constitutes sexual harassment so that you as managers will know, of course, how to treat your employees, but also when to make an immediate report to HR to when one employee has allegedly harassed another employee.

Retaliation

Retaliation is prohibited by Title VII and is enforced by the EEOC: “Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws” (eoc.gov). We must take caution to avoid perceived retaliation, because any action “harmful enough to deter a reasonable worker from asserting his or her rights qualifies as illegal retaliation” (Guerin, *Federal Employment Laws* 371). In the event that HR determines that a manager has retaliated against an employee, then it is in all employees’ and the company’s best interest for that manager to meet with HR for a documented conference.

This would mean that you as the manager could receive documented disciplinary action if HR determines that you acted against an employee for making a report of harassment or other discrimination. We want to avoid this by helping you understand how to manage employees

post-claim, because if the act of retaliation is severe, such as the manager intentionally assigning more hazardous work to the employee who filed the complaint, then the manager ought to be suspended or even terminated; we of course want to avoid an incident getting to this point, but we do need to discuss it during this training so you can protect yourselves, your staff, and the company. The best way to manage employees after a claim is to listen and respond objectively, which is always the best way; it just becomes all the more important after a claim is filed.

Recommended Action: Think before disciplining (writing up) the employee who filed the complaint by asking yourselves the following questions:

1. Did the employee fail to perform a function that is printed on his or her job description?
2. Have I disciplined other employees for failing to perform this same or a similar function?
3. When disciplining other employees, did I take the same level of action (warning vs. write-up).

Cases of harassment in the workplace are an opportunity to ensure fair treatment of all people. Harassment may be of a sexual nature, but it may extend to other types of offensive speech or actions. The Equal Employment Opportunity Commission defines harassment as:

“unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive” (eeoc.gov).

Hostile Work Environment

Hostile work environment is a form of harassment, but it is very different from quid pro quo harassment and occurs much more frequently. “Hostile work environment occurs when unwelcome sexual conduct unreasonably interferes with an individual’s job performance or creates a hostile, intimidating, or offensive work environment” (Winterfield 90). It can be difficult to identify hostile work environment, so it is important to remember how to define harassment. For behavior to be classified as harassment it must meet two requirements: it must be both unwelcome and pervasive. This means that the alleged offender has knowledge that his or her behavior is unwelcome and he or she repeats the behavior. Behavior may be words or actions. This means that most one-time interactions that are not repeated will not result in harassment litigation—unless the words or actions are egregious (something obviously offensive, such as unwelcome touching of a private body part). However, if words or actions are repeated after the alleged offender is asked to stop, then the behavior becomes defined as harassment, even if the behavior is not directed to one specific individual. In other words, a person might overhear comments and find the conversations offensive, and ask the speakers to stop, and they must stop if they want to avoid disciplinary action.

The content of the harassment might be sexual in nature, but it does not need to be in order to be defined as harassment; what defines the problem is the hostility toward a protected class. Since 1964, Title VII has been amended to include other protected classes. The fastest-growing form of harassment is age-related comments that are offensive (shrm.org). There are an increasing number of harassment claims on the grounds of all forms of discrimination; in fact, “half of all harassment claims involve sexual harassment, while the other half involve racial, religious and disability harassment” (shrm.org).

Microaggressions

Our anti-harassment policies should also include awareness and prohibition of discriminatory jokes and *microaggressions*. A microaggression is an indirect, unintentional discriminatory statement (shrm.org). We need to address these statements as well as jokes. It is best to document a verbal warning or further disciplinary action, if applicable, for microaggressions and jokes, because harassment has less to do with the intention of the accused than it does with the perception of the offended employee. An example of a microaggression might be the use of the term “lame” as derogatory slang; this might be offensive to the physically disabled. Managers need to be aware of the perspectives of all people when listening to employee conversations. This will take effort and diligent awareness for all of us.

Recommended Action: These microaggressions may just result in a verbal warning, but we still document the conversation; send it to HR for filing in case we need to refer to it after a more severe complaint. But the goal of a warning is to make employees aware of the offense so that it never happens again. Much of the time, microaggressions can be solved with our training efforts. Teach employees to speak to one another professionally and only refer to one another by actual names, for example, to avoid derogatory nicknames.

It is also important for all employees to remember that the risk of harassment has potentially occurred when anyone determines that words or actions are offensive, whether the offended party is involved in the exchange or not; if an employee complains to a manager that behavior in his or her department is offensive, then that manager must either stop the behavior or report the issue to a manager who can stop the offensive behavior. If a manager fails to act, then the company has failed to act; if the offensive behavior can be classified as discriminatory

toward a protected class, such as against a person's sex, race, or religion, then the company could be liable for harassment (eoc.gov).

Harassment may be defined as a one-time occurrence of an action that is blatantly offensive, or an action that would be obviously offensive to the general public, such as indecent exposure or touching of a sexual nature. Other types of harassment may be only offensive to the alleged victim, but the alleged offender can and should still be questioned; this means a meeting with HR, and if we determine that harassment has occurred, then there needs to be a consequence at work, otherwise we may be liable to legal charges. These less obvious cases typically become defined as harassment when the offended employee informs the alleged offender that the conversation or behavior is offensive, and the offender continues with that same or similar conversation or behavior. We all must advise employees to maintain professional content in their conversations at work and to be aware if another employee might be offended by a conversation in the workplace. Claims of harassment are not always about intention; they can sometimes be about the perception of the person who is offended, and we want to minimize the risk of offending people in the workplace.

To maintain a fair workplace environment and also avoid litigation, organizational leaders must proactively avoid harassment but also train leaders so they can confidently manage a harassment claim effectively; there needs to be communication between managers and HR so that they manage disciplinary issues before they become harassment. In the event of potential or certain harassment, we should communicate and handle the situation quickly, respectfully, and professionally. The impact of an ignored harassment case can be deeply grave, and the reasons for employees failing to report a case vary. Employees are sometimes afraid of retaliation, even though retaliation from the offender or the employer is illegal. It is important that an organization

have a non-retaliation policy in order to clarify to employees that all filings of harassment will be taken seriously and that the rights of all people in the organization will be protected during and after a complaint is heard.

Court Case

The first case of harassment that went to the Supreme Court was Meritor Savings Bank v. Vinson in 1986. This was the case that set precedent for harassment as a violation of the Civil Rights Act. Mechelle Vinson was terminated from her job at Meritor Savings Bank, and sued Meritor Savings Bank, charging that Sidney Taylor had coerced her into having sexual relations with him; Taylor was Vice President of the bank, and therefore in a position to control Vinson's employment. Earlier cases had only considered ethnic, racial, and religious discrimination as violations of Title VII, but the Supreme Court ruled that, because sexual harassment is mistreatment based upon a person's gender, it is a violation of the law under the Civil Rights Act (Covington 220).

Proactive Solutions for Today

We must take steps to prevent discrimination but also know how to manage a discrimination claim from an employee. Employees must know their rights and the procedure for filing an internal claim of discrimination with management. If there is a potential case of harassment or other form of discrimination, employees must know what to do; otherwise the poor treatment might continue and it is possible that a victim of the treatment will seek legal counsel outside of the organization. We want to avoid this and resolve issues internally, because we want our employees to know that they can trust us to resolve their grievances and because we

certainly do not want the publicity of the litigation for treating people poorly. It will become difficult to hire the good people if we lose the reputation of being good people ourselves; we need to earn that trust and reputation each day in how we treat our people. We must also know the procedure for receiving a claim from an employee.

Employee conflict resolution and progressive discipline are parts of our work that can impact civil rights in the workplace. It is illegal for managers to target an employee, meaning that one employee cannot be disciplined more harshly than the others in an effort to terminate his or her tenure with an organization.

Recommended Action: It is in our organization's favor to document all progressive disciplinary actions in a brief, simple document that lists the date, employees involved, observable facts in chronological order, and management response (employee disciplinary action). Remember to write just the facts without opinion, bias, or emotion, because these written records could become part of a court case. It is important to document employee corrective actions, record and maintain the file, and communicate the disciplinary action to the employee.

Our purpose is not only to avoid litigation but also to set the employee up for future career success; however, if there is an event in which an employee must be terminated because it is the most just or safe option, then documentation should demonstrate all steps that were taken to warn the offending employee. These documents must be written objectively, as if they will one day be read during a legal deposition, because the reality is that one day one of these documents may be read in court.

We have a procedure prepared so that we are ready to conduct an investigation as soon as an employee makes a claim of discrimination, especially if that discrimination is compounded by

alleged harassment. The best proactive approach to prevent litigation is careful responses to claims, so this training will offer suggestions for best practices after an employee files an internal claim with the company.

It is important to consider the advantages of encouraging bystander reporting. It is important to include a reminder in the harassment policy that bystanders have the right and even sometimes the responsibility (if the harassment is severe and obvious) to report harassment to management or directly to HR (shrm.org). If our policy and our culture do not welcome harassment reporting, “then it is likely to continue unabated, creating harm for the targeted employee, and wider organizational ills, too” (shrm.org). We need to be sure that our people know we are always ready to listen so that we solve issues before they become more dangerous problems. We want a safe environment for everyone, and ideally we want to solve our own problems without employees feeling like they need to seek legal counsel.

Implementation: Investigation Steps

After management becomes aware of harassment in the workplace, it is important to take action immediately, and this might mean either a conversation with the alleged offender and alleged victim, or a larger scope investigation. Just as important as the immediacy of the investigation is the diligence of following a detailed procedure; it is best to break this procedure into small steps that are manageable in order to minimize risk for errors or omissions in the process.

You need to report harassment claims to HR immediately so that we can decide how serious the infraction is in order to determine how invasive the investigation needs to be. Managers will likely be involved in the investigation; you may be asked to determine who will

be interviewed or asked to sit in the interviews, depending on circumstances of the harassment. If an employee reports a manager as a party to the harassment, then that manager will not be a part of the initial interviews, but will absolutely be given an opportunity to be interviewed individually, which means an opportunity to speak with HR and explain what happened and why. In any case, all parties are given an opportunity to speak with HR so that everyone is equally heard. Often harassment claims will warrant the most thorough investigation possible. It is a best practice to ask questions when an employee brings a complaint to management, because even the simplest disputes or policy violations could be hiding major harassment. To determine the level of severity of a complaint, but not delve too far into minor issues, start every response to a complaint by asking who was involved, what was said, when and where the dispute occurred, and most importantly, why did the issue start and if it has ever happened prior to the current complaint. When we document the answers to these questions in a simple narrative or question-and-answer format, it will guide us in determining if the case needs to be resolved on the spot, or there needs to be a deeper investigation, to include witness interviews. The documentation will also provide a history in case there is a pattern of behavior between two employees that human resources determines is hostile or harassment because it is repeated.

In the case of a claim of serious sexual harassment, it will likely be necessary to take immediate action; this may mean requiring the alleged offending employee to leave the property until the investigation can be completed or asking both the alleged offending employee and complainant to leave for the purposes of safety. When asking employees to leave the property, it is important to clearly communicate that management is not taking disciplinary action but a safety precaution, and it is best to pay the employees for the time off so that neither party can claim retaliation.

When a worker files a claim of retaliation, it means that the company can be charged with taking action against a worker for speaking up about harassment or another form of discrimination. If the claim goes to court, it is in an employer's best interest to quickly resolve an issue when the employer has sent workers off property for safety reasons, in an effort to demonstrate that the employer is making the issue a priority and want to work with the employees and address concerns. The investigation process works through several steps.

Planning an investigation means choosing the investigator and determining what information you are seeking. An investigator is usually a human resources professional, so that you have someone we have documented that the interviews were conducted by someone who is “experienced, impartial (and perceived as impartial by the employees involved), and capable of acting—and if necessary, testifying—professionally about the investigation” (Guerin, *Workplace Investigations* 8). This means that reports of harassment need to be brought to HR immediately, and all managers (everyone here) should be trained on how to receive a complaint of harassment and how to proceed thereafter, even if that simply means to report directly to human resources.

Managers also need to know what defines a report of complaint; a manager might learn about harassment through rumor or casual conversation, but this is enough to obligate a manager to begin the reporting process, because once a manager has knowledge of the alleged harassment, then the company has knowledge and is therefore liable. (Guerin, *Workplace Investigations* 37). Even this unofficial knowledge has left companies liable, on the stance that some employees are afraid to make an official complaint. The EEOC clarifies employer liability:

“The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages. If the supervisor's harassment results in a hostile work

environment, the employer can avoid liability only if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer” (eeoc.gov).

Simple knowledge of harassment (just like simple knowledge of corporate theft), no matter how a company obtains the knowledge, can leave the company liable.

Exit Interviews

As we work to obtain information from exiting employees, it is important to carefully manage the information we gather.

Recommended Action: Some employees may ask to meet with you before they resign or they may meet with HR. Regardless, we all need to be sure to listen and respond respectfully; this means responding to exiting employees with appreciation for taking the time to offer feedback and assurance that we are continuing to work toward improvement.

Managers also need to understand that it is important to respond to information obtained during HR exit interviews; if an employee first quits on the premise of having found a job more closely related to his or her field of study, but then mentions in an exit interview that the atmosphere felt uncomfortable because of a coworker’s dialogue or behavior, then we should be especially aware of the alleged activity in that exiting employee’s department. The behavior that drove away one employee may be actually hostile and, if so, is potentially (and very likely) continuing after the employee has left, targeting other current employees.

The investigatory interviews can become their own complex process. We will keep the process and the interviews simple and sensible, and focus on gathering the facts. We must be careful to find the balance between including all potential witnesses in the investigation, without involving so many people who are obviously uninvolved so that confidentiality is not unnecessarily breached. This is the step where the most significant information is usually gathered to resolve the harassment claim. Focus on the answers to the questions. We will be sure to interview the person accused of harassment and the employee who claimed to be a victim of harassment; the initial interview of these two ought to be separate in order to avoid further confrontation during the investigation and also to protect confidentiality of both parties. Also interview anyone who may be a witness, and be clear that it is company policy that the information discussed during a harassment investigation is confidential and employees are not to talk about the investigation outside of the interview with human resources. During all interviews, we need to keep the questions open-ended (Guerin, *Workplace Investigations* 9). Asking open questions serves two purposes: the investigator obtains the maximum amount of information and, more importantly, the investigator cannot later be accused of influencing the employees under question. Below are examples of the same questions asked either with an implied answer or objectively and openly.

Question With an Implied Answer	Open-ended Question
Don't you think he has done this to other people in the office as well?	Are you aware that his behavior has offended anyone else at the office?
Isn't she usually touching people inappropriately?	Have you observed her touching anyone inappropriately?

Documentation is always important, but the details become especially important during a harassment investigation. HR reviews personnel files to determine if there has been a workplace history of harassment; this is why it is so important that you document disciplinary actions and

employee conferences as they occur, with all objective facts. HR also reviews “emails, personal notes, performance reviews, and other documents to figure out what really happened” (Guerin, *Workplace Investigations* 9). This matters to all of us, because often the managers claim that an employee has exhibited a behavior repeatedly, but the manager has failed to document the infraction. Also, every disciplinary action needs to be documented, dated, and filed so that it becomes relevant in the case of an alleged larger infraction, such as a harassment claim. The HR document search will include policies, emails and other correspondence, performance evaluations, work samples, written warnings and other disciplinary records, guest comments, attendance records and timecards, work schedules, productivity reports, and previous investigatory reports (Guerin, *Workplace Investigations* 92). This means that you as managers need to write with discretion. Before sending any email, think that it might become a part of an investigation, because all writing can be subject to investigation. When you document a disciplinary action, always remain objective, and write observable facts. Please note the following checklist of documentation that might become a part of an investigation.

Investigatory Documents	
<input type="checkbox"/>	Company policies
<input type="checkbox"/>	Emails
<input type="checkbox"/>	Postings to company bulletin boards (electronic or corkboard)
<input type="checkbox"/>	Correspondence
<input type="checkbox"/>	Performance evaluations and work samples
<input type="checkbox"/>	Written warnings and other disciplinary records
<input type="checkbox"/>	Customer complaints or comments
<input type="checkbox"/>	Commendations
<input type="checkbox"/>	Documents signed by the employees involved (such as hiring agreements)
<input type="checkbox"/>	Attendance records (for regular work hours, required meetings, or training sessions)
<input type="checkbox"/>	Payroll records, work schedules, and time cards or other records showing hours worked
<input type="checkbox"/>	Inventory records, purchase orders, and expense reports
<input type="checkbox"/>	Computer records (of Internet sites visited, productivity, and so on)
<input type="checkbox"/>	Cash register receipts and sales receipts
<input type="checkbox"/>	Productivity reports (such as records of sales completed, deadlines met, or projects)

(Guerin, additional resources CD ROM)

Once the investigation is complete, we take action, and all managers must enforce the action. If the conclusion from the investigation is that an employee or third party has committed an act of harassment, we must take disciplinary action against the offending party in order to protect the victim and all other employees from further harm and also protect the company from legal liability for the offending party's actions (Guerin, *Workplace Investigations* 9). If there is no evidence of harassment and all avenues of potential evidence have been exhausted, then HR must meet with the accused offender and the complaining party separately; afterward, HR will meet with the department managers of the involved parties so that everyone knows how we are proceeding forward. These meetings are important because often we need to stay vigilant about possible future offenses; sometimes we reassign employees to new departments in order to help the complaining employee feel safer. Whatever the final result, meetings are important so that the communication is open and everyone understands what we are doing and why. It is important to convey that the investigation was completed in full diligence and to report that we did not find any evidence that harassment occurred. This is different than proof that there was no harassment committed; in other words, we will likely never prove that there was no harassment committed, but we can prove that we completed a diligent investigation and there is no reasonable evidence to prove that harassment did in fact occur. We need to be careful not to claim that harassment absolutely did not occur, as we can never prove that it did not happen—we are not a court of law and cannot make such a claim. We can only prove that we attempted to get to the bottom of the complaint with reasonable diligence.

Following this due diligence, we must make it clear to both parties that harassment is not tolerated and that communication for complaints is encouraged and even required. It is advisable to reiterate to both parties, regardless of the result of the investigation, that the company does not

tolerate retaliation for harassment claims or other complaints of discrimination. Communication skills during the closure of an investigation are specific to the results, but there are some general guidelines that help keep the company protected: 1) It is best to limit communication with only those employees with whom you must interview in order to get the facts (Guerin, *Workplace Investigations* 116). 2) It is also important to speak carefully, choosing objective and unemotional language in both communications with employees and in the written documentation. 3) Keep to the facts.

As with the interviews, the broader scope and full content of the investigation must be documented. HR must write a report that includes all steps that were taken and why (Guerin, *Workplace Investigations* 10). This documentation, which should be filed with the records from the interviews, will help protect the company if an employee files suit against the company. Furthermore, the documentation will provide a clear history of conduct infractions in case another internal complaint is filed against the same employee.

Checklist: Ten Steps to a Successful Investigation

- 1. Decide whether to investigate.
- 2. Take immediate action, if necessary.
- 3. Choose an investigator.
- 4. Plan the investigation.
- 5. Conduct interviews.
- 6. Gather documents and other evidence.
- 7. Evaluate the evidence.
- 8. Take action.
- 9. Document the investigation.
- 10. Follow up.

(Guerin, additional resources CD ROM)

Effective work hiring and managing of our people impacts society. Ideally, when people are hired fairly, the unemployment rate is reflective of who truly cannot find suitable work,

because there is not any work available to meet the skill set of those unemployed. When all people have a fair opportunity to work in jobs where they are likely to be promoted and reach their potential, then their families thrive, their children attend school, and the crime rate is lower. The Civil Rights Movement in America has more to achieve; but when people, *all people*, are working and thriving, we move closer to equal opportunity in America.

INDEX

Accommodation.....	5-8,16-17, 23
Adverse Impact.....	12, 15, 24-25
Advertisement.....	14
Business Necessity.....	13, 22
Claim.....	29-31, 33-38, 40-43
Discipline.....	5, 30, 35
Employee Conflict Resolution.....	4, 35
Targeting.....	39
Discretion.....	8, 41
Discrimination.....	3-4, 6-14,22-23, 25, 27-29, 31, 34-35, 38, 43
Pregnancy.....	3, 9, 30
Sex Discrimination and Dress Code.....	7, 10
Sex Discrimination and Gender Identity.....	10
Sex Discrimination and Gender Stereotypes.....	9-10
Sex Discrimination and Sexual Orientation.....	10, 16
Disparate Impact.....	11-12, 14
Documentation.....	5-6, 9, 11, 23, 28-29, 32, 35, 37-38, 40-41, 43
Essential Job Function.....	8-9, 12-13, 16, 23
Harassment.....	4, 27-34, 36-43
Bystander Reporting.....	27, 36
Hostile Work Environment.....	28, 31, 38-39
Prevention.....	4, 7, 27, 34, 36, 39

Quid Pro Quo.....	28-29, 31
Sexual Harassment.....	28-29, 31, 34, 37
Third-Party Harassment.....	28
Hiring.....	4, 9, 11-12, 15-19, 21, 27, 41, 43
Internal Postings.....	5-6, 14-15, 30, 41
Interviews.....	14-22, 26, 37-40, 43
Exit.....	39
Open-Ended Questions.....	40
Investigations.....	29, 35-38, 40-43
Job Analysis.....	14, 18
Job Fairs.....	14-15
Job Function.....	8-9, 12-13, 16, 22-23, 25
Job-Related.....	13-15, 21, 25
Knowledge, Skills, and Abilities (KSAs).....	18
Liability.....	3, 11, 27, 38-39, 42
Microaggressions.....	32
Policy.....	5, 12, 16, 34, 36-37, 40
Predictive Validity.....	13-14
Promotions.....	5-6, 15, 17, 29
Protected Class.....	3-4, 6-9, 11-12, 14-15, 21, 27, 31, 33-34, 43
Color.....	3, 6-7, 30
National Origin.....	3, 6, 8-9, 23, 30
Race.....	3, 6-7, 11, 14, 16, 22, 24, 30, 33

Religion.....	3, 6-7, 16, 22, 30, 33
Recruiting.....	15, 17, 19-20
Retaliation.....	29-30, 33-34, 37-38, 43
Tests.....	12-15, 18-19, 22, 29, 31, 38
Training for Employees.....	5-6, 15
Undue Hardship.....	5, 8
Valid Assessment.....	14

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