

AVOID COSTLY LAWSUITS FOR SEX DISCRIMINATION

by Phillip M. Perry

Here we go again: Just when it seemed employers were getting sex-based discrimination under control, three high profile news stories have moved the issue back onto the front burner.

Look at these recent cases:

! Wal-Mart is hit with the largest workplace-bias lawsuit in U. S. history, in an action that pits 1.6 million women against the world's most successful retailer.

! Boeing Co., the nation's second largest jet maker, agrees to a \$72.5 million settlement with 29,000 past and current female employees.

! Morgan Stanley, one of Wall Street's most respected firms, settles a sex discrimination suit with a \$54 million commitment to as many as 340 women who had worked in a division of its investment bank

Maybe those lawsuits target huge corporations, but smaller businesses need to be concerned, too. "The laws of virtually every state prohibit sex discrimination at businesses with more than a few employees," says James J. McDonald Jr., managing partner of the Irvine, Calif., office of the employment law firm of Fisher & Phillips. "California law, for example, covers organizations with five or more workers. If a manager makes a decision to not promote a woman based on some misguided assumption, the smaller employer can be just as liable for sex discrimination as a larger one."

Getting hit with a discrimination case is costly. Even when a suit is without merit, an employer pays hefty fees to defense attorneys. The average cost to settle an employment law claim exceeds \$300,000 (not including internal costs to organization, such as lost manager time), according to Littler Mendelson, the nation's largest employment law firm.

Your risk increases

Your own business is at increased risk of getting sued, as these high profile cases spark copy-cat litigation across the country. Now is a prudent time to take a fresh look at your own vulnerability.

How can you spot potential problems? To find out we spoke with James J. Oh, a partner in Littler Mendelson's Chicago office. "Employers need to remember three S's," he advises. "The first is 'sexist remarks.' Don't say them. The second is 'stereotypes'— don't rely on them. And the third is 'statistics'— examine them."

When you look at cases involving systemic claims of sex discrimination, those are three areas of evidence upon which plaintiffs rely. Many times, plaintiffs' attorneys will use anecdotal evidence of sexist remarks and stereotyping to bolster a case built on a bedrock of statistics.

Good policies

Job #1: Establish policies that prohibit gender bias in employment practices. "Every company should have an equal opportunity policy stating that employment decisions are not based on such factors as sex or race or age, but rather on merit and qualifications," says Oh. "Then it becomes a question of implementing your policies, enforcing them, and auditing your statistics on a regular basis to ensure you are not discriminating intentionally or otherwise."

Employers should make all hiring, firing and promotion decisions without regard to gender or sexual preference. Your employment manual should also state no discrimination will be practiced when making decisions in the areas of training, educational opportunities, and workplace perks.

Base all hiring decisions on objective criteria. Don't assume that individuals of one gender are better at some task than those of another. Some jobs require the ability to lift and carry heavy loads. Can such jobs be filled only by men? The answer is no. Anyone who has the strength to do the job should be hired for such positions, regardless of gender.

"Job interviewers must avoid any comments that reflect a gender bias," says McDonald. Examples include "this is not a job that's suited for a woman" or "who is going to take care of your kids if you travel a great deal in this job?" Such comments are becoming more and more common as evidence in litigation, he adds.

It all boils down to avoiding stereotyping people. "The law requires that everyone be treated as an individual, and you must not rely on generalities about gender," says Allan G. King, a partner in Littler's Dallas office. Suppose, for example, a woman with children applies for a position which requires travel. Don't automatically assume she is tied to her home. Instead, inquire if she is free to travel, an activity which is required by the duties of the position.

Your written policy should also provide opportunities for individuals to file complaints if they feel they have been discriminated against. And provide multiple avenues for reporting grievances. An individual uncomfortable with reporting directly to his or her supervisor— who may be, after all, the perpetrator of the discrimination— should feel free to approach the company's human resources director or top legal officer.

A recent Supreme Court ruling reinforces the importance of multiple reporting pathways in cases of sexual harassment, activity which is illegal because it is a form of gender bias (see sidebar, "Supreme Court Clarifies Rules.")

Finally, your policy should state that there will be no retaliation against any individual who files a complaint.

Train people

Saying's one thing; doing's another. The greatest policy document in the world won't help much if few people know about it, or if people who know about it ignore it. Every company has to make sure that training programs are conducted and documented for a possible legal defense down the road.

"Training is very important for two reasons," says King. "First, from a purely legal standpoint it can provide a defense. It helps defeat liability to show you disapproved of the kind of conduct you are accused of, and were training employees on what to do and what not to do.

"Second, it heads off problems by educating people about workplace issues they may not be aware of." Managers need to be trained not only in correct employment practices, but also in the subtler areas of how to recognize their own unconscious motivations and how to avoid interacting in ways that can be offensive to other people.

Training is for individuals in non-management positions, too, says King. "An important legal defense is that you show employees have been trained about how to report problems. Individuals must know what actions to take if they see or experience discrimination."

How are we doing?

Training is not a one-time thing-- it's an ongoing commitment. It's easy for people to forget all of the good things they have learned and fall back into bad habits of thinking. Is this happening at your business?

Find out by examining your personnel statistics. Attorney Oh suggests starting with a lateral view to see if women are segregated

into certain departments. This can be bad if some departments are more highly compensated than others.

Then, continues Oh, look at the company as a pyramid to see if women are segregated into lower layers. In many organizations the base of the operational pyramid consists of hourly, clerical and blue collar workers. A higher layer consists of administration and technical positions, then low and middle level management positions, and finally at the top of the pyramid are the high level executives. The population of protected worker categories may tend to decline as you go up that pyramid. Then look at pay scales: Are men and women doing the same work being compensated the same?

“Looking at the company in this way can help identify clusters of protected workers and anticipate their use as evidence by plaintiffs,” says Oh.

If you have an imbalance in your workforce, is that a death knell in terms of litigation? Not necessarily, says Oh. “In some cases, there are legitimate reasons why statistics end up looking as they do. For example, there may be self-selection in terms of the numbers of job applications coming in from the outside. But statistical imbalance is something you should be aware of and analyze so that innocently created situations cannot be used against you.”

Prudent employers will take a hard look at any such imbalance, legitimate or not, and initiate procedures that bring about, if at all possible, greater gender balance in all areas of their companies.

Looking ahead

The high profile cases cited at the beginning of this article should remind everyone of the need for vigilance in assessing the presence of sex-based discrimination. It’s easy to

let things slide. When employers turn a blind eye to internal procedural systems which keep women from advancing, the result can be an invisible glass ceiling to advancement, supported by a male-dominated, close knit network, the members of which help one another up the ladder of success.

Remember that today’s bias cases are likely to be built upon a bedrock of statistics and reinforced with anecdotal evidence. Take a fresh look at your operations to insure that investigators have little such evidence to find. Doing the right thing now will avoid heavy costs down the road.

Sidebars

Get More Information

The Manager’s Guide to Preventing a Hostile Work Environment, Wanda Dobrich. How to recognize and address inappropriate or insensitive behavioral problems in the workplace, before they lead to high-cost lawsuits. New York: McGraw-Hill Trade, 2002. \$21.95.

Step Forward: Sexual Harassment in the Workplace, by Susan L. Webb. What sexual harassment is and what each manager, supervisor and employee should do about it. Shoreline, Wash: Pacific Resource Development Group, 1997. (800)-767--3062. Or www.shadesofgray.com.

American Bar Association Guide to Workplace Law, by Barbara J. Fick. A guide to laws that affect the workplace, from hiring to firing to retiring. New York: Random House Reference, 1997. \$14.00.

Additional Sidebars

Supreme Court Clarifies Rules

A recent Supreme Court decision is both good news and bad news for employers. On June 14, 2004 the court ruled that an employer may defend against constructive discharge by showing the employee failed to use available procedures for reporting sexual harassment. (In the area of sex-based discrimination, the term “constructive discharge” refers to a workplace condition in which the incidence of sexual harassment has become so intolerable that an employee is forced to quit. Employers are held liable for constructive discharge because it is a form of sex discrimination.)

On the downside, however, such a defense is not available if the employer engaged in an “official act” such as a demotion or a reduction in pay that contributed to the intolerable work environment.

For employers, the decision highlights anew the importance of proper conduct in two areas. First, employers must provide multiple avenues of reporting for employees who feel they have experienced discrimination. An individual uncomfortable with approaching an immediate supervisor should be able to approach a human resources executive or company legal officer.

Second, employers must renew their efforts to train managers to avoid incidents of sexual harassment, and to avoid making personnel decisions based on gender bias.

More info: Visit the Supreme Court web site at <http://www.supremecourtus.gov/>. Click on “Recent Decisions,” then on “Pennsylvania State Police v. Suders.”

Break the Glass Ceiling

If the “good old boys” club is alive and well, it should be quickly disbanded. It’s an unacceptable practice and companies that still have it are headed for trouble.

Typically in companies with such systems, men hold the top level positions. Even when women manage to break into middle management, wages and perks do not equal those of men. Such organizations are subject to the full weight of the law when plaintiffs air their grievances in the courtroom.

The way to circumvent this is to establish good policies, communicate them well by adequate training, and keep a close eye on your company’s statistics.

Train Your Staff

Staff training is of paramount importance in avoiding charges of sex-based discrimination. One resource is the Online Workplace Compliance Training Series from Employment Law Learning Technologies. Your employees can take courses on avoiding sex-based discrimination and other employment law topics over the Internet. Content is supplied by Littler-Mendelson, the nation’s largest employment law firm.

Prices vary, but a typical set-up charge is \$1,000 for your custom-designed portal website, and around \$30 per employee per year for the courses, refresher versions of which are produced regularly. More information: www.elt-inc.com.