

## Legal Awareness Training in Your Workplace: What's Required?

Harmon & Davies, P.C.  
September 11, 2008

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### EEOC CHARGES RISE 9% IN 2007

Discrimination Charges Highest in Five Years,  
Agency Obtains \$345 Million for Victims

**SNAPSHOT OF DISCRIMINATION CHARGES FILED  
WITH THE EEOC NATIONWIDE**

Basis of Charge Filing	FY 2007	FY 2006	Percentage Increase/Historical Comparison
RACE	35,510	27,239	Up 29% to highest level since FY 1974
RETALIATION	24,463	21,555	Up 13% to record high level, 602% since FY 1992
SEX/GENDER	24,026	23,247	Up 7% to highest level since FY 2002
AGE	19,103	16,540	Up 15% to highest level since FY 2002
DISABILITY	17,734	15,575	Up 14% to highest level since FY 1999
NATIONAL ORIGIN	9,369	8,327	Up 12%, above 9,000 for second time ever
RELIGION	7,680	7,541	Up 13% to record high level, double since FY 1992
<b>TOTAL CHARGES</b>	<b>82,792</b>	<b>75,768</b>	Up 9%, largest annual increase since FY 1993

NOTE: Individuals may allege multiple types of discrimination in a single case.

In 2007, retaliation was the second highest charge category (behind race) for the first time, surpassing sex-based charges.

Source: www.eeoc.gov (March 5, 2008)

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## Retaliation - Statistics

- EEOC reported that Retaliation charges rose 18% to record high in 2007.
- Second highest to Race.




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## Retaliation

- Laws prohibit retaliation against those who oppose any type of unlawful practice or who file complaints of discrimination with an employer, with the EEOC, or other appropriate agencies.
- The legal protection applies even if the associate's complaint is without merit.

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## Retaliation

### Burlington Northern v. White (U.S. Supreme Court 2006)

- Anti-retaliation provision does **NOT** confine the actions and harms it forbids to those that are related to employment or occur at the workplace.
- Covers employer actions that would have been materially adverse to a reasonable employee or applicant
  - must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

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## Retaliation

### CBOCS West Inc. v. Humphries (U.S. Supreme Court 2008)

- Humphries sued Cracker Barrel restaurants for race discrimination and retaliation under Title VII and Section 1981
- Question: does Section 1981 support a retaliation claim?
- Court held that such claims are implicitly covered by Section 1981 by 7 to 2 vote (Justices Thomas and Scalia dissenting)

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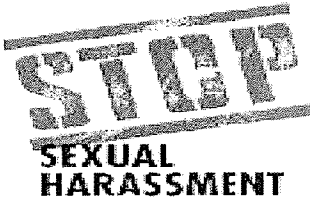
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## Harassment - 2007 Statistics

- EEOC received 12,510 charges of sexual harassment (4% increase from 2006)
- 16% of those charges were filed by males
- Highest levels since 2002



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## States that Mandate Discrimination and Harassment Training

- California
- Colorado
- Connecticut
- Florida
- Illinois
- Iowa
- Maine
- Massachusetts
- Michigan
- Nevada
- Rhode Island
- Tennessee
- Texas
- Utah
- Vermont



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## Examples of Damages Recoverable in Lawsuits Involving Employment Discrimination

- **Title VII:** Reinstatement, hiring or promotion with backpay, front pay, fringe benefits, attorneys' fees, costs, expert witness fees, compensatory and punitive damages
- **ADA:** Reasonable accommodations, reinstatement, hiring or promotions with back pay, front pay, restored benefits, attorneys' fees and costs, expert witness fees, compensatory and punitive damages
- **ADEA:** Backpay, front pay, fringe benefits, liquidated damages for willful violations, attorneys' fees
- **FLSA:** Unpaid wages & overtime, civil and criminal penalties, liquidated damages, retroactive pay

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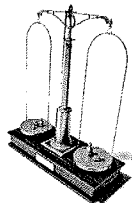
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“An ounce of prevention is worth a pound of cure.”

– Ben Franklin



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### Training is an Affirmative Defense

- Under Faragher/Ellerth (US SCt 1998), an employer must prove:
  - It exercised reasonable care to prevent and promptly correct any harassing behavior; and
  - The plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.
- Training is one step in preventing misconduct.
- These principles apply under other laws, too.



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### What is “Reasonable Care”?

- “Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.” Ellerth.
- Requires a Policy and Complaint Procedure.
- Training your employees so they know their rights and responsibilities shows reasonable care.

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## Who to Train

- Training requirements differ by position
  - HR Department
  - Officers and Directors
  - Managers
  - Non-Exempt Employees



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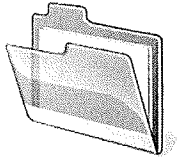
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## What is Effective Training?

- Document attendance
- Maintain documentation about the program
- Frequency
  - Turnover rates
  - Changes in the law



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## What is Effective Training?

- Expert Presenters
- Interactive
- Customized vs. Standardized
- Face-to-Face vs. Web-Based
  - Web training should include Q&A to test participants



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## Plaintiffs' attorneys attack adequacy of training



- Cost: training "on the cheap"
- Frequency: "we did training 3 years ago"
- Attendance: "half the employees were absent"
- Engagement:
  - "half the employees were sleeping"
  - on-line programs may not require active involvement
- Documentation: what was covered?
- Reputable/Expert Provider
- Optional vs. Mandatory

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## Training Topics: for HR Professionals



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|---|--|
| <ul style="list-style-type: none"> <li>■ Title VII</li> <li>■ ADA</li> <li>■ ADEA</li> <li>■ COBRA</li> <li>■ Child Labor</li> <li>■ Dislocated Workers</li> <li>■ Discipline and Termination</li> <li>■ Documentation</li> <li>■ ERISA</li> <li>■ Equal Pay Act</li> <li>■ Fair Labor Standards Act</li> <li>■ FMLA</li> <li>■ Fair Credit Reporting Act</li> <li>■ HIPAA</li> </ul> | <ul style="list-style-type: none"> <li>■ Immigration Reform and Control Act</li> <li>■ Independent Contractors</li> <li>■ Investigations</li> <li>■ Interviews and Hiring</li> <li>■ National Labor Relations Act</li> <li>■ OSHA</li> <li>■ USERRA</li> <li>■ Payroll (Internal Revenue Code)</li> <li>■ Performance Reviews and Management</li> <li>■ Personal Responsibility and Work Opportunity Reconciliation Act</li> </ul> |
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## Training Topics: for HR and Managers



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| <ul style="list-style-type: none"> <li>■ Litigation Process and Personal Liability</li> <li>■ Affirmative Action</li> <li>■ Confidentiality and Trade Secrets</li> <li>■ Computer, Internet, Email Use and Security</li> <li>■ Diversity</li> <li>■ Discrimination</li> <li>■ Disability Accommodation Process</li> <li>■ Documentation</li> <li>■ Ethics</li> <li>■ FMLA</li> </ul> | <ul style="list-style-type: none"> <li>■ Harassment and Sexual Harassment</li> <li>■ Investigations</li> <li>■ Leave Rights (FMLA, ADA, Military, etc.)</li> <li>■ Record Retention and Destruction</li> <li>■ Retaliation</li> <li>■ OSHA</li> <li>■ Union Avoidance</li> <li>■ USERRA</li> <li>■ Wage &amp; Hour (overtime, exemptions)</li> <li>■ Workplace Violence</li> </ul> |
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## Training Topics: for Employees



- Confidentiality/Trade Secrets
- Computer, Internet, Email Use and Security
- Discrimination
- Disability Accommodation Process
- FMLA
- Harassment and Sexual Harassment
- Drug Free Workplace/ Substance Abuse
- Lock-Out/Tag-Out
- Reporting Process (Complaints, Claims, Grievances)
- USERA
- Wage & Hour (time clocks, overtime, paycheck/paystub review)
- Workers Compensation Reporting

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## Training Topics: for Employees



- OSHA:  
Asbestos, Basic First Aid, Bloodborne Pathogens, CPR, Chemical Safety, Confined Spaces, Driver Safety, Electrical Safety, Emergency Response, Environmental Management, Fall Protection, Fire Safety, Forklift Safety, Hand and Power Tool Safety, Hazard Communications, Hearing Conservation, Hot and Cold Stress, Indoor Air Quality, Laboratory Safety, Ladder/Climbing Safety, Machine Guards, Personal Protective Equipment, Traffic Control

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## Resources



- EEOC
- DOL
- PENNSAFE Safety Committee Training
- Bureau of Workers Compensation Resources
- Drug Free PA
- PA Labor-Management Committees

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## Resources



- HR Consultants
- Vendors
- Software and Web-Based training and E-Learning Centers
- Colleges and Universities
- Associations and Organizations
- Training Institutes
- Attorneys

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## Training in Multiple Languages

- No mandatory EEOC requirement to train in foreign language
  - "English-Only" rules permitted only if business necessity
  - But, how effective is your training if you don't reach workers due to language?
  - Web-based or CDs may be useful




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## Training in Multiple Languages

- Posters available in multiple languages (EEO, Minimum Wage, FMLA, etc.)
  - Federal and State
- OSHA website: Compliance Assistance for Hispanic Employers and Workers
  - "OSHA en Español"




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## Questions?

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Tom Davies: tdavies@h-dlaw.com  
Laura Gallagher: lgallagher@h-dlaw.com

Thank you!

This presentation is not intended to be legal advice but should be considered general information.  
Particular questions should be directed to legal counsel. You are welcome to contact us for  
additional information or questions regarding this presentation.

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## **LEGAL AWARENESS TRAINING TOPICS AND RESOURCES**

### **For HR Professionals**

Title VII ( race, color, sex, national original, ancestry, religion)  
Americans with Disabilities Act (ADA)  
Age Discrimination in Employment Act (ADEA)  
Consolidated Omnibus Budget Reconciliation Act (COBRA)  
Child Labor  
Dislocated Workers  
Discipline and Termination  
Documentation  
Employee Retirement and Income Security Act (ERISA)  
Equal Pay Act  
Fair Labor Standards Act  
Family and Medical Leave Act (FMLA)  
Fair Credit Reporting Act (FCRA)  
Health Insurance Portability and Accountability Act (HIPAA)  
Immigration Reform and Control Act  
Independent Contractors  
Investigations  
Interviews and Hiring  
National Labor Relations Act  
Occupational Safety and Health Act (OSHA)  
Uniformed Services Employment and Reemployment Rights Act (USERRA)  
Payroll (Internal Revenue Code)  
Performance Reviews and Performance Management  
Personal Responsibility and Work Opportunity Reconciliation Act

For Government Contractors: Executive Order 11246, Affirmative Action and Office of Federal Contract Compliance Programs (OFCCP) Requirements (including Internet Applicants), Rehabilitation Act, VEVRAA, Prevailing Wage

*Plus Additional Topics Below*

## **For HR Professionals, Managers and Supervisors**

Litigation Process and Personal Liability  
Affirmative Action  
Confidentiality and Trade Secrets  
Computer, Internet, Email Use and Security  
Diversity  
Discrimination: Title VII (race, color, sex, national original, ancestry, religion, disability)  
Disability Accommodation Process  
Documentation Processes: Hiring, Performance Reviews, Discipline, Termination  
Ethics  
Family and Medical Leave Act  
Harassment and Sexual Harassment  
Investigations  
Leave Rights (FMLA, ADA, Military, etc.)  
Record Retention and Destruction  
Retaliation  
OSHA  
Union Avoidance  
Uniformed Services Employment and Reemployment Rights Act (USERRA)  
Wage & Hour (overtime, exemptions)  
Workplace Violence

## **For Your Employees**

Confidentiality/Trade Secrets  
Computer, Internet, Email Use and Security  
Discrimination: Title VII (race, color, sex, national original, ancestry, religion, ADA)  
Disability Accommodation Process  
Family and Medical Leave Act  
Harassment and Sexual Harassment  
Drug Free Workplace/Substance Abuse  
Lock-Out/Tag-Out  
OSHA: Asbestos, Basic First Aid, Bloodborne Pathogens, CPR, Chemical Safety, Confined Spaces, Driver Safety, Electrical Safety, Emergency Response, Environmental Management, Fall Protection, Fire Safety, Forklift Safety, Hand and Power Tool Safety, Hazard Communications, Hearing Conservation, Hot and Cold Stress, Indoor Air Quality, Laboratory Safety, Ladder/Climbing Safety, Machine Guards, Personal Protective Equipment, Traffic Control  
Reporting Process (Complaints, Claims, Grievances)  
Uniformed Services Employment and Reemployment Rights Act (USERRA)  
Wage & Hour (time clocks, overtime, paycheck/paystub review)  
Workers Compensation Reporting

## **Government Resources**

EEOC: <http://www.eeotraining.eeoc.gov/profile/web/index.cfm?PKwebID=0x495c398>

DOL: <http://www.dol.gov/dol/topic/training/index.htm>

PENNSAFE Safety Committee Training:  
<http://www.dli.state.pa.us/landi/cwp/view.asp?a=144&q=58635>

Bureau of Workers Compensation Resources:  
<http://www.dli.state.pa.us/landi/cwp/view.asp?a=138&q=239564>

Drug Free PA: <http://www.drugfreepa.org//business/index.asp>

PA Labor-Management Committees:  
<http://www.dli.state.pa.us/landi/cwp/view.asp?a=150&Q=67910>

## **Other Resources**

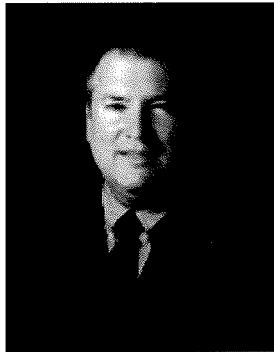
HR Consultants  
Vendors  
Software and Web-Based training and E-Learning Centers  
Colleges and Universities  
Associations and Organizations  
Training Institutes  
Attorneys

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Harry R. ("Rick") Harmon established the firm in 1978 and serves as Managing Partner of Harmon & Davies, P.C. Mr. Harmon concentrates his practice on the representation of business and management in the areas of employment and construction law. He has represented employers in various employment related matters before federal and state courts, Courts of Appeals and the United States Supreme Court. Mr. Harmon regularly conducts training programs for his clients on

compliance with federal, state and local laws and is a frequent speaker at labor and employment seminars for attorneys, personnel professionals and business leaders. Mr. Harmon's construction practice includes the representation of general contractors, trade contractors and design professionals in the resolution of disputes.

Mr. Harmon earned his Juris Doctor from Washington & Lee School of Law in 1977 and his Bachelor degree from Franklin & Marshall College in 1974.

Mr. Harmon is admitted to the Pennsylvania Bar, as well as the United States Supreme Court; the Courts of Appeals for the Third, Fifth, Seventh and Ninth Circuits; the Eastern, Middle and Western Districts of Pennsylvania; the Northern District of California; the Northern District of Mississippi; and the U.S. Federal Court of Claims. He is a member of the American Bar Association, Pennsylvania Bar Association, Lancaster County Bar Association, Bar Association for the Fifth Federal Circuit and The Ombudsman Association.

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Thomas R. Davies partnered with the firm in 1987 to form Harmon & Davies, P.C. Mr. Davies serves as a Partner in the firm's Lancaster, Pennsylvania office. He concentrates his practice on the representation of employers in labor and employment related matters. Mr. Davies has experience representing both public and private clients before federal and state courts, as well as administrative agencies, and before mediators and arbitrators in matters involving, among other

things, organizational campaigns, employment discrimination claims, and affirmative action. Mr. Davies regularly speaks on labor and employment related issues at seminars for personnel professionals, attorneys and business leaders.

Prior to partnering with Harry R. Harmon to form Harmon & Davies, P.C. in 1987, Mr. Davies served as a Trial Attorney with the National Labor Relations Board in Pittsburgh, Pennsylvania. During his twelve years with the NLRB, Mr. Davies investigated more than a thousand unfair labor practice cases, conducted more than a hundred representation elections and tried many cases to successful conclusion.

Mr. Davies earned his Juris Doctor from Duquesne University School of Law in 1981 and his Bachelor Degree from Lafayette College in 1974.

Mr. Davies is admitted to the Pennsylvania Bar, as well as the U.S. Courts of Appeals for the Third, Fifth, Seventh and Ninth Circuits, and the U.S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania. He is also a member of the Keystone, Central Pennsylvania and Eastern Pennsylvania Chapters of the Associated Builders and Contractors where he serves as Chapter Attorney and is an active participant on various committees.

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Laura Bailey Gallagher joined Harmon & Davies, P.C. in 1998 and serves as an Associate in the firm's Lancaster, Pennsylvania office. Ms. Gallagher concentrates her practice in the areas of employment, labor and business law.

Prior to joining Harmon & Davies, P.C. in 1998, Ms. Gallagher served as an intern with the Lancaster County District Attorney's Office and an associate in a general practice. Before deciding on a career in law, Ms. Gallagher worked as an account executive for an advertising agency.

Ms. Gallagher earned her Juris Doctor degree from Widener University School of Law in 1996, where she served as Administrative Law Editor for the Widener Journal of Public Law. She received her Bachelor degree from Bucknell University in 1988.

Ms. Gallagher is admitted to the Pennsylvania Bar and the United States District Court for the Eastern District of Pennsylvania. She is a member of the American Bar Association, Pennsylvania Bar Association, and Lancaster Bar Association where she is a former Co-Chairman of the Labor & Employment Section. Ms. Gallagher is also a member of the Society for Human Resource Management and the Lancaster County Association for Human Resource Management where she is Chairman of the Legislative Affairs Committee. In addition, she is a member of the Keystone Chapter of Associated Builders and Contractors, and is Chairman of the Excellence in Construction Committee. Ms. Gallagher is also a member of the Board of Trustees of the James Buchanan Foundation for the Preservation of Wheatland.

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