

Anti-Discrimination and Anti-Harassment Training

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Introduction

◆ Elizabeth

- 20+ years of practicing law
- Employment law
- Management side practice

Agenda

- ◆ Employment resources
 - ◆ Background information on employment law
 - ◆ Anti-discrimination laws and best practices
 - ◆ Anti-harassment laws and best practices
 - ◆ Retaliation
 - ◆ Confidentiality
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- ◆ Disclaimer: This is not a complete discussion of all employee-related obligations (not discussing wage and hour issues, workers' compensation issues, leave issues, accommodation issues)

Resources

Congratulations! You're an employer!



Resources

You have broad authority to hire, fire and generally run your office

- ◆ HR Director Amanda Jorgenson (608) 316-9700
- ◆ The LHRO Offers advice and services on many topics:
 - Hiring/firing
 - Performance concerns
 - Employee discipline
 - Compensation
 - Employee classification
 - Performance reviews

- ◆ <https://legis.wisconsin.gov/lhro>

Resources

Senate Policy Manual

<https://legis.wisconsin.gov/lhro/media/1127/2019-20-senate-policy-manual.pdf>

Assembly Policy Manual

<https://acc.cms.legis.wisconsin.gov/assembly-information/>

Background

- ◆ Anti-discrimination and anti-harassment laws are all rooted in the concept of “protected statuses” or “characteristics.”
 - A characteristic about a person that the law deems worthy of protection
 - Heart of the law—cannot discriminate or harass based on protected characteristics
 - Laws are concerned with motivation

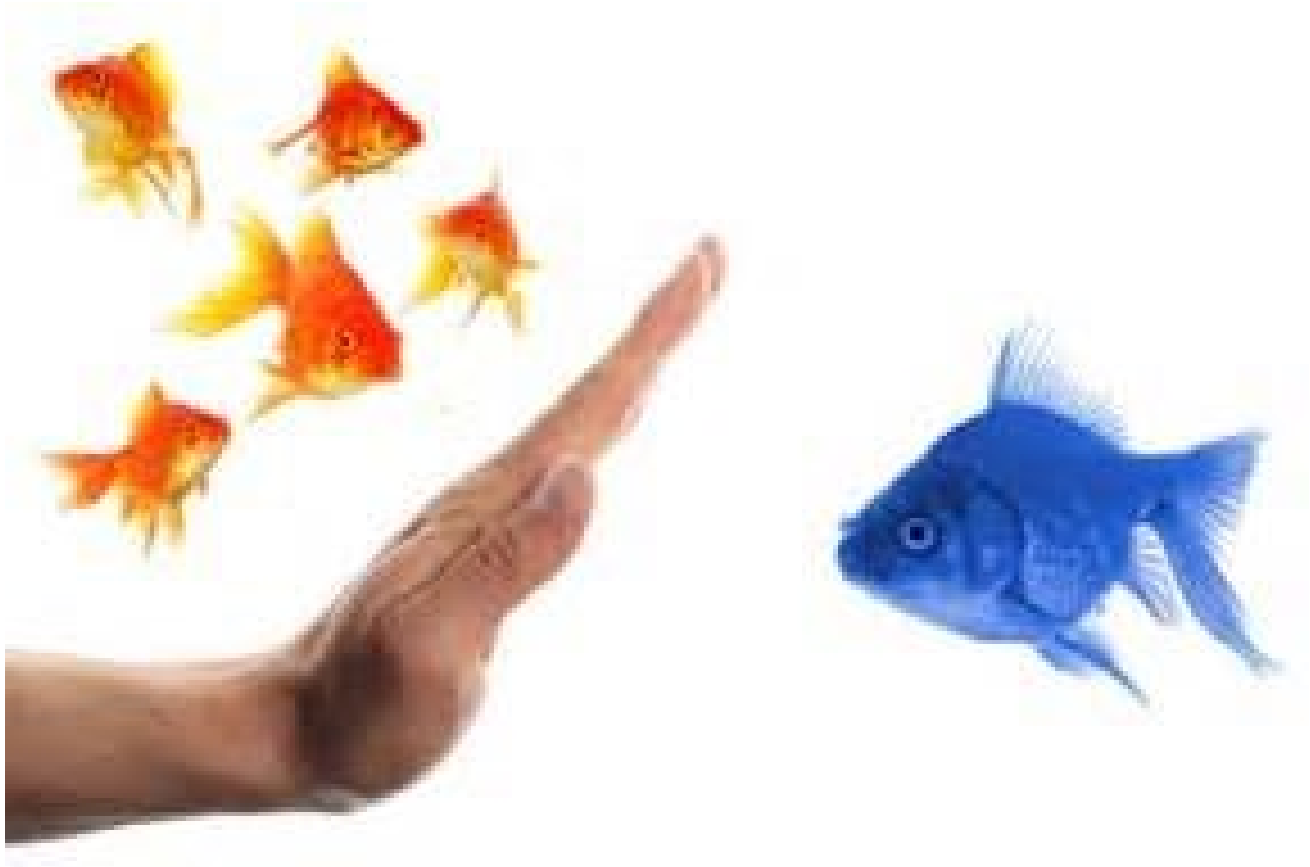
Background

- ◆ Protected characteristics under federal law
 - Race, color, creed, sex, religion, national origin or ancestry, gender identity, sexual orientation (Title VII)
 - Pregnancy (Pregnancy Discrimination Act)
 - Disability (ADA)
 - Age 40+ (ADEA)
 - Military service (USERRA)

Background

- ◆ Additional protected characteristics under Wisconsin law
 - Marital status
 - Arrest/conviction record
 - unless substantially related to the duties of the job
 - Use of a lawful product while off duty and away from work premises
 - Cigarettes, alcohol

Discrimination



Discrimination

What is discrimination?

- ◆ making an employment decision based on a protected characteristic



Discrimination

Who can commit discrimination?

- ◆ The “employer”
- ◆ Anyone with managerial authority, including supervisors

Discrimination

When can discrimination happen?

- ◆ Any employment decision
 - Hiring
 - Firing
 - Discipline
 - Annual evaluation
 - Denial of raise
 - Denial of training opportunity

Discrimination

Motivation is the key

- Why did the employer make the decision?
 - Based on a protected category?
 - (“Elizabeth is too old to do this job”)
 - Based on a legitimate characteristic?
 - (“Elizabeth doesn’t have the P.R. experience we need”)
- The law requires these decisions to be motivated by **legitimate and non-discriminatory reasons**

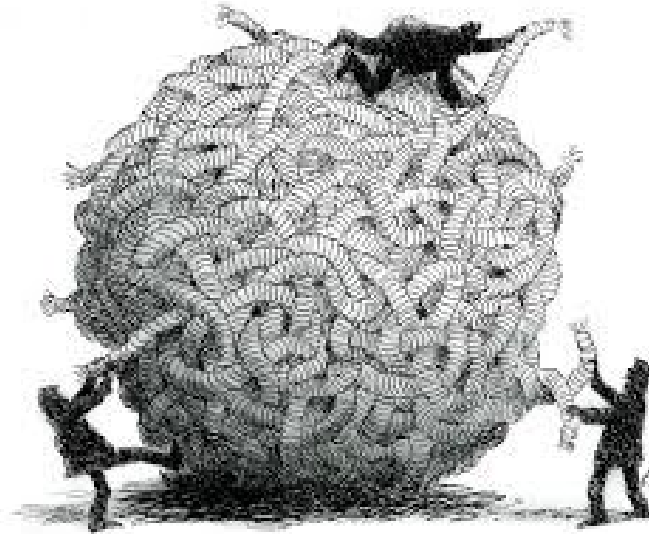
Discrimination

How & when problems arise—practical examples

- ◆ Termination—termination of any employee that has a protected characteristic and doesn't buy in to the reason for termination
- ◆ Hiring/promotion—one candidate falls into a protected category and one doesn't
- ◆ Two employees competing with one another
- ◆ Situations when loaded terms have been used

Discrimination

A special word about disability, age and arrest/conviction



These protected categories can be very tough to handle

Discrimination

Best Practices

- ◆ Set performance & behavior expectations
- ◆ Communicate expectations clearly to all employees
- ◆ Consistently enforce expectations
- ◆ Provide regular feedback about performance
 - Provide warnings before possible discipline
 - Give employees a chance to improve
- ◆ Make negative employment action predictable



Discrimination

Best Practices

- ◆ Make decisions based on performance-related criteria and communicate the reason
 - Performance
 - Behavior
 - Experience
 - Skills
 - Professional relationships
 - Education
 - Quality of application/interview
 - Professional interests/goals
 - Demonstrated work ethic
 - Attendance (except if absent due to FMLA/disability/pregnancy)



Discrimination

Best Practices

- ◆ Document your expectations and reasons for decisions
 - Written policies and procedures
 - Put performance expectations in writing
 - Provide reasons for employment decisions in writing
 - Document reasons for your decisions at the time you make them
- ◆ Keep your documentation



Discrimination

Best Practices

Avoid language that focuses on protected characteristics

- ◆ “Looking for a fresh, young staffer”
- ◆ “Too old to have the energy for this position”
- ◆ “He doesn’t have the right look for my constituents”
- ◆ “Honey,” “dear,” etc.
- ◆ “You people”



Discrimination

Why words matter—legal view

- ◆ Discrimination is all about motivation
- ◆ Can't see “motivation.”



Discrimination

Why words matter

- ◆ Language and conduct surrounding protected categories can be important evidence of motive
 - Disrespectful terms used or tolerated in the office
 - Disrespectful jokes told
 - Disrespectful references towards an employee

! A dangerous combination:

Disrespectful treatment

+

Surprising employment decision



Harassment



Harassment

Two Types of Harassment

1. Quid Pro Quo—harassment that must be tolerated as a condition of employment
 - ◆ Can be caused only by a supervisory employee
 - ◆ Often sexual in nature
 - ◆ Classic example—must submit to sexual advances to keep a job
 - ◆ Best practice: Avoid the appearance of impropriety

Harassment

Two Types of Harassment

2. Hostile Environment


Unwelcome conduct directed at an employee because of a protected characteristic where the conduct is severe or pervasive enough that a reasonable person would find the work environment to be intimidating, hostile or abusive

- Verbal--Jokes/offensive terms
- Physical—threatening, sexual or harmful touching
- Psychological—elevator eyes, glaring, offensive pictures/items, freezing one employee out

Harassment

Important concepts in Hostile Environment Harassment

- ◆ Severe
- ◆ Pervasive
- ◆ Reasonable person

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- ! There is no “line” that can be walked
 - ! Think of the line like a de-militarized zone—don’t get close

Harassment

Where can harassment occur?

- ◆ Anywhere the employee is on duty
 - Inside your office
 - Inside another Legislator's office
 - Interacting with constituents
 - Fundraising
- ◆ Anywhere your employee interacts with co-workers
 - Sports bar
 - UW football game
 - State Street
 - Social media

Harassment

Who can be a harasser?

- ◆ **Anyone** your employees interact with on the job
 - Co-worker
 - Supervisor
 - Constituent
 - Lobbyist
 - Party official
 - Another legislator

Harassment

Special concerns

- Legislators have a higher-than-average percentage of employees in their 20's
- Your employees will be at social events (alcohol)
- Your employees will have lots of time out of the office
- Party power--your employees are entry level employees in a powerful system that is bigger than your office—extra dynamics
 - May be an increased reluctance to report problems



Harassment

Most common types of harassment

- **Sexual Harassment**
- Race
- Age
- Disability

Harassment

Best practices

- ◆ Be an active staff manager
- ◆ Emphasize professionalism
- ◆ Make your conduct expectations clear
- ◆ Educate employees about the anti-harassment policy
- ◆ Open communication with employees about alcohol on the job
- ◆ Be approachable
- ◆ If you hear of a problem, act quickly.



Harassment

An employee complained.

What do I do?



Formal Complaint

- Contact Amanda at the LHRO to investigate
- Take steps to ensure harassment won't happen again and follow up
- Keep a record of the investigation and resolution

Informal Complaint

- Legislator investigates
- The LHRO will be an important resource
- Take steps to ensure harassment won't happen again and follow up
- Keep a record of the investigation and resolution

Retaliation

Retaliation

- ◆ It is unlawful to retaliate against an employee because they complained of discrimination or harassment



Retaliation

What is Retaliation?

- ◆ Taking action against an employee because they filed a complaint that would chill future complaints of unlawful action.
- ◆ Firing, discipline, refusing opportunities, denying raises, denying training, freezing the employee out, complaining about the report

Retaliation

Best Practices

How to avoid retaliation

- ◆ Keep complaint as confidential as possible
- ◆ Instruct supervisors about anti-retaliation obligations
- ◆ Check in with employee frequently
 - LHRO will check in with the employee as well
- ◆ Carefully analyze reason for any negative decision within 3-6 months after complaint



Confidentiality

Confidentiality and public records

- ◆ Confidentiality is important—very sensitive situations
- ◆ However, don't promise confidentiality
 - May need to disclose as you investigate
 - Open records laws (more in next session)
- ◆ There is a discussion of confidentiality on the Policy Manual:

“Although the confidentiality of the information received and the privacy of the individuals involved cannot be guaranteed, they will be protected to as great an extent as is legally possible. The expressed wishes of the employee regarding confidentiality will be considered in the context of our legal obligations to the extent possible.”

Conclusion

Conclusion

- ◆ Steps that avoid discrimination and harassment also create a well-functioning, effective team.
- ◆ Know and use your resources
 - Amanda Jorgenson (HR Manager for Legislature) (608) 316-9700
 - Policy Manuals
 - <https://acc.cms.legis.wisconsin.gov/assembly-information/>
 - <https://legis.wisconsin.gov/lhro/media/1127/2019-20-senate-policy-manual.pdf>