



UNIVERSITY OF HOUSTON

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Learning. Leading.

**New Employee Orientation  
Employment Discrimination Training  
(Including Sexual Harassment)**

**Presented by:  
Office of Affirmative Action/EEO  
(713) 743-8835**

<http://www.uh.edu/ogc/oa/index.html>



## TABLE OF CONTENTS

ITEM	PAGE
I. Introduction from the Texas Workforce Commission	3
II. Equal Employment Opportunity (EEO) Compliance Exercise	4
III. Federal and State EEO Laws	5-8
IV. Legal Theories for Determining Employment Discrimination	9-13
V. Processing Internal Discrimination Complaints	14-15
VI. Sexual Harassment	16-18
VII. Sexual Harassment Exercise	19

## **INTRODUCTION**

**PURPOSE:** The purpose of this training material is to comply with Chapter 21, Sec. 21.010, Texas Labor Code, which states:

- a) Each state agency shall provide to employees of the agency an employment discrimination training program that complies with this section.
- b) The training program must provide the employee with information regarding the agency's policies and procedures relating to employment discrimination involving sexual harassment.
- c) Each employee of a state agency shall attend the training program required by this section not later than the 30th day after the date the employee is hired by the agency and shall attend supplemental training every two years.
- d) The commission shall develop materials for use by state agencies in providing employment discrimination training as required by this section.
- e) Each state agency shall require an employee of the agency who attends a training program required by this section to sign a statement verifying the employee's attendance at the training program. The agency shall file the statement in the employee's personnel file.

**OBJECTIVES:** To provide employees with information regarding policies and procedures relating to employment discrimination, including employment discrimination involving sexual harassment.

- a) Each state agency may discuss their philosophy in regard to implementing their employment discrimination policies and procedures.
- b) Each state agency may discuss the agency's purpose in delivering the training;
- c) Each state agency may determine the agency's objective for the training.

## INTRODUCTORY COMPLIANCE EXERCISE

Given the various circumstances select the best answer (True, False or Maybe) that most closely complies with employment law.

- T F M 1) Some employees in your department are telling racial jokes. An employee over hears them and complains to the manager. The manager should tell the employees to stop telling racial jokes or disciplinary action will follow.
- T F M 2) A 55-year old applicant applies for a job as an assembler. Management believes that younger employees make better assemblers because their eyesight and manual dexterity are better. Therefore, the applicant's age can be considered in the hiring decision.
- T F M 3) An employee complains that two Hispanic co-workers speaking Spanish are giving him a headache. The employee also believes they were talking about the other workers. The manager should instruct the two Hispanic employees to discontinue conversing in Spanish.
- T F M 4) A woman applies for a job where good attendance is essential. She has four young children, ages 6, 3, 2, and 1. She may be rejected on the basis of projected absenteeism and asked to re-apply when her children are older.
- T F M 5) A woman buyer who has performed well at her job of five years complains that a recently hired male buyer with no previous experience has a starting salary higher than her current salary. His salary is higher and management cannot justify the difference. Her salary should be raised above his at the earliest possible opportunity and management should apologize for the mistake.
- T F M 6) A company is required by the Texas Commission on Human Rights Act and Title VII of the Civil Rights Act to hire a designated quota of women and minorities.
- T F M 7) A candidate may be asked s/he have any disabilities that would preclude him/her from doing the job.
- T F M 8) Candidates and employees, to be considered qualified, must be able to perform all of the essential job functions with or without a reasonable accommodation.
- T F M 9) It is against University of Houston policy and a violation of law, for management to discipline an employee after s/he participated in an EEO activity.

## **FEDERAL EQUAL EMPLOYMENT OPPORTUNITY LAWS**

There are federal laws that prohibit employment discrimination. These laws cover all personnel decisions that could affect the equal employment opportunities for employees or applicants for employment. These federal laws include Title VII of the Civil Rights Act of 1964, as amended; the Age discrimination in Employment Act of 1967, as amended; the Equal Pay Act of 1963; and, the Americans with Disabilities Act of 1990 (Article I).

### **TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED**

This federal law prohibits employment discrimination by public and private employers in all personnel decisions because of race, color, national origin, religion or sex.

1. **Race** – Identifiable classes of people that can be viewed as genetically separate, e.g. White, Black.
2. **Color** – The skin pigmentation of a person.
3. **National Origin** – An individual's place of birth, the place of birth of the individual's ancestors or an individual who retains the cultural characteristics and/or language of the individual's ancestor, e.g. Hispanic, Asian
4. **Religion** – A set of traditional, sincere beliefs, values, and practices based upon a God or Supreme Power.
5. **Sex** – Male and Female

The United States Equal Employment Opportunity Commission (EEOC) enforces this law.

The filing of a complaint with the EEOC is extended to 300 days after the alleged discrimination. A complainant must file with EEOC before filing a lawsuit in federal court.

If this law is violated the complainant may receive employment opportunities such as a job or lost wages denied because of discrimination as well as money damages. The amount of damages is limited based on number of employees working for the employer. No punitive damages may be awarded when the violation is by a public employer. The law also prohibits retaliation against an employee for opposing employment discrimination or a person assisting in the investigation of a complaint of employment discrimination.

## **EQUAL PAY ACT OF 1963**

This federal law prohibits employment discrimination in compensation (pay) based on sex (male/female) when the circumstances are the same.

The EEOC enforces this law.

A complainant is not required to file a complaint with the EEOC before a lawsuit may be filed.

If this law is violated the complainant may receive employment opportunities such as a job or lost wages denied because of discrimination. The complainant may also receive money damages absent a good faith effort and at the discretion of the court.

## **AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (ADEA), AS AMENDED**

This federal law prohibits employment discrimination by public and private employers in all personnel decisions because of a person's age (40 years and older).

The EEOC enforces this law.

The filing of a complaint with the EEOC is extended in Texas to 300 days after the alleged discrimination. A complainant must file with EEOC before filing a lawsuit in federal court.

If this law is violated the complainant may receive employment opportunities such as a job or lost wages denied because of discrimination as well as damages under certain circumstances. No punitive damages may be awarded for a violation under this Act.

## **AMERICANS WITH DISABILITIES ACT (ADA)**

This federal law prohibits employment discrimination by public and private employers in all personnel decisions based on a mental or physical disability.

The individual's impairment must meet the definition of a disability.

An individual with a disability is a person who:

1. Has a physical or mental impairment that substantially limits one or more major life activities;
2. Has a record of such an impairment; or
3. Is regarded as having an impairment.

The employer has an affirmative duty to make a reasonable workplace accommodation that does not constitute an undue hardship for the employer. A reasonable workplace accommodation allows the employee with the disability to perform at the same level of effectiveness and efficiency as any other qualified non-disabled employee.

The EEOC enforces this law.

The filing of a complaint with the EEOC is extended to 300 days after the alleged discrimination. A complainant must file with EEOC before filing a lawsuit in federal court.

If this law is violated the complainant may receive employment opportunities such as the job or lost wages denied because of employment discrimination as well as damages under certain circumstances. The amount of damages is limited based on the number of employees working for the employer. No punitive damages may be awarded when the violation is by a public employer.

## **STATE EQUAL EMPLOYMENT OPPORTUNITY LAW**

There is a State law that prohibits employment discrimination. This law covers all personnel decisions that could affect equal employment opportunities for employees or applicants for employment. This State law codifies existing federal laws including Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

## **TEXAS COMMISSION ON HUMAN RIGHTS (TCHR) ACT**

This State law prohibits employment discrimination by public and private employers in all personnel decisions based on a person's race, color, disability, religion, sex, national origin and age.

Texas Workforce Commission, Civil Rights Division (TWC-CRD) enforces this State law.

Within 180 days after the alleged discrimination, a complainant is required to file a complaint with the TWC-CRD. A complainant must file with TWC before filing a lawsuit in state court.

If this law is violated the complainant may receive employment opportunities such as a job or lost wages denied because of discrimination as well as damages. The amount of damages is limited based on the number of employees working for the employer. No punitive damages may be awarded when the violation is by a public employer.

This state law prohibits retaliation against an employee who opposes employment discrimination or a person who assists in the investigation of a complaint of employment discrimination.

The U.S. EEOC must defer federal jurisdiction over complainants of employment discrimination to the TWC because the TCHR Act is comparable to federal law.

# LEGAL THEORIES FOR DETERMINING EMPLOYMENT DISCRIMINATION

The United States Supreme Court established primary legal theories for determining employment discrimination, disparate treatment and disparate impact.

## Disparate Treatment Theory

Disparate treatment focuses on whether the Complainant was treated the same or differently than other like or similarly situated employees not of the Complainant's same protected class under like or similar circumstances. If such difference in treatment exists, then there may be reasonable cause to believe that illegal employment discrimination has occurred. If there is no difference in treatment, then there is no reasonable cause to believe that employment discrimination has occurred.

*An example of this theory is found in U.S. Supreme Court Case McDonnell Douglas Corp. v. Green.*

### **A summary of this case is as follows:**

- McDonnell Douglas Corporation is an aerospace and aircraft manufacturer. Percy Green, a Black man, worked for the company as a mechanic and laboratory technician. In 1964 he was laid off in the course of a reduction in the company's workforce.
- Mr. Green illegally protested against the company alleging that his layoff and the general hiring practices of the company were racially motivated.
- Approximately three weeks after Mr. Green's protest, the company publicly advertised for qualified mechanics. Mr. Green promptly applied for re-employment with the company and was rejected. Mr. Green challenged the company's refusal to rehire him by filing a formal complaint with the EEOC and subsequently filed a lawsuit in federal court.
- The U.S. Supreme Court held that Mr. Green established a prima facie case of discrimination: (1) Mr. Green belongs to a protected class; (2) the company does not dispute that Mr. Green applied and was qualified for the position of mechanic and acknowledges that Mr. Green's past work performance as a mechanic was satisfactory; (3) despite his qualifications, Mr. Green was rejected for the position; and (4) after Mr. Green's rejection the company continued to seek mechanics.
- The U.S. Supreme Court also held that the company met its burden by articulating some legitimate nondiscriminatory reason for Mr. Green's rejection because Mr. Green illegally protested his layoff by the company.

- The U.S. Supreme Court went on to say that Mr. Green must now be afforded a fair opportunity to show that the company's stated reason for Mr. Green's rejection is in fact a pretext for discrimination. Mr. Green could meet his burden by perhaps showing that white employees involved in illegal protests against the company of comparable seriousness to that of Mr. Green's protest were nevertheless retained or rehired. Other evidence that may be relevant to any showing of pretext includes facts such as the company's reaction if any, to Mr. Green's legitimate civil rights activities; and the company's general policy and practice with respect to minority employment.
- This ruling established the disparate treatment under laws prohibiting employment discrimination.

*Another example of the Disparate Treatment Theory based on comparative evidence is found in the U.S. Supreme Court Case McDonald vs. Santa Fe Trail Transportation Co.*

**A summary of this case is as follows:**

- The Santa Fe Trail Transportation Co. is in the trucking and transportation business.
- The Company had three employees whose job is to load and unload trucks.
- One of these employees is Black and two of these employees are White.
- The three employees were equally responsible for stealing sixty gallons of Antifreeze from the Company. Company officials discovered the theft and took disciplinary action against the three employees. The Company temporarily suspended and brought back to work the Black employee but fired the two White employees.
- The two White employees were subject to different disciplinary action than the Black employee (fired versus suspension) even though the circumstances were the same (theft of Company property) and all three employees were like or similarly situated (loading and unloading trucks).
- The decision by the Company officials to more severely discipline the two White employees versus the Black employee constitutes employment discrimination against the two White employees because of race, White, under the difference in treatment theory.

## **INVESTIGATIVE STAGES IN DETERMINING A VIOLATION OF EEO LAW AND BURDEN OF PROOF**

### **The Complainant Establishes a Prima Facie Case of Employment Discrimination:**

The Complainant must prove:

- 1) Member of a protected class and;
  - 2) Suffered an adverse employment action (qualified and not hired or not promoted) or employment opportunity harmed (disciplined, and/or terminated) and;
  - 3) That other similarly situated coworkers, under similar circumstances, and not members of that protected class, did not suffer the adverse action
- or
- 4) Statistical evidence of impact on complainant's protected class

### **The Respondent Articulates a Defense and Substantiates the Factual Basis for the Actions Taken**

In asserting a defense, the employer has the burden to provide factual evidence, i.e., testimony and documentation, verifying a neutral business reason for the action. This is called the burden of production. There are two categories for statutory defenses, which are referred to as substantive vs. procedural.

### **The Employer's Defense is Examined as a Pretext to Employment Discrimination**

The evidence is examined in terms of relevance and credibility. The complainant then has the burden of proof to show the employer's reason is pretextual. In other words, the defense provided is a pretext for discrimination, i.e., lied, provided false narrative or statistics.

### **Disparate Impact Theory**

Disparate impact focuses on whether or not the employer has a policy or qualification that appears to apply to everyone the same but in fact has a significantly greater impact on members of the Complainant's protected class.

If the employer **cannot** show a business necessity reason or a legitimate business objective then there may be a violation of the laws prohibiting employment discrimination. If the employer can show a business necessity reason or legitimate business objective then the Complainant will need to show that there was a less discriminatory alternative policy or qualification available to the employer.

If there is no difference in impact, then there may be no reasonable cause to believe that employment discrimination occurred.

*An example of the Disparate Impact Theory is found in U.S. Supreme Court Case Griggs v. Duke Power.*

**A summary of this case is as follows:**

- Duke Power is a company producing electrical power. Mr. Griggs was a Black male working for the company.
- Prior to 1964, Mr. Griggs attempted to transfer from the yard into the Plant where the working conditions and pay were better. Duke Power officials refused to transfer Mr. Griggs into the plant because of a policy that only White employees were employed in the plant.
- After passage of Title VII of the Civil Rights Act of 1964, as amended, Duke Power's attorneys advised the company's officials that the policy of employing only Whites in the plant violated Title VII. Duke Power's attorneys recommended that the company institute two new policies. First, to work in the plant employees would be required to have a high school diploma. Second, employees would be required to pass two professionally prepared aptitude tests to work in the plant. These policies were neutral on their face since they applied to all employees subsequently hired to work in the plant.
- Mr. Griggs applied again to be transferred into the plant but was denied the transfer because of these two new policies. Mr. Griggs did not have a high school diploma nor ranked high enough on the tests. Mr. Griggs challenged these two policies by filing a complaint with the EEOC and subsequently filed a lawsuit in federal court.
- The U.S. Supreme Court held that Title VII prohibited the employer from requiring a high school education or a passing score on a standardized general intelligence test as a condition of employment or in transfers to jobs, where both requirements operated to disqualify Black applicants at a substantially higher rate than White applicants. Further, the company could not show that either the high school diploma policy or the tests were significantly related to successful job

performance (business necessity). The evidence showed that White employees had been working in the plant for many years satisfactorily performing their jobs who did not have a high school diploma or had not taken the tests.

- This ruling established the disparate impact theory under laws prohibiting employment discrimination.

## **Processing Internal Discrimination Complaints**

### **Complaint**

Formal complaints are filed in writing with the Office of Affirmative Action/EEO (OAA/EEO) filed within 60 days after last alleged discriminatory activity. Formal complaints shall be signed and dated and include a detailed statement of the alleged incidents including:

- 1) the grievant's name, address, university affiliation and telephone number
- 2) the nature, date(s) and description of the alleged violation(s);
- 3) the name(s) of person(s) responsible for the alleged violation;
- 4) the cause of action based upon membership in a protected category (e.g. race, religion, sex, national origin);
- 5) the harm that the grievant has suffered or will suffer as a result of the alleged protected category membership;
- 6) any background information that the grievant believes to be relevant, including possible witnesses; and,
- 7) requested relief or corrective action.

If a complaint contains incomplete information, the OAA/EEO will promptly seek to gather the needed information.

### **Response**

Within five (5) days after the receipt of a formal complaint the OAA/EEO shall provide a copy of the complaint to the respondent. The respondent must submit a written response to the allegations within ten (10) calendar days.

### **Role of OAA/EEO**

Within thirty (30) working days after the receipt of the respondent's written response, the OAA/EEO must conduct an investigation and take one of the following steps:

- 1) dismiss the complaint on the grounds that the evidence submitted in support of the complaint or developed in the investigation does not warrant further action;
- 2) resolve the matter with the appropriate administrator; or
- 3) allow the parties to sign a statement of agreement resolving the complaint.

### **Appeal**

Upon failure to reach an agreement resolving the complaint or if the OAA/EEO dismisses the complaint; a written appeal may be made by the grievant within ten (10) calendar days of notification.

**Hearing**

After the grievant files an appeal the Executive Director of the OAA/EEO shall convene a Hearing Panel within twenty (20) calendar days of the appeal request. Decisions of the Hearing Panel shall be made by simple majority vote. The grievant had the burden to establish proof - the standard of proof is by preponderance of the evidence. The Hearing Panel shall prepare and submit a written decision within five (5) working days after the hearing to the Executive Director of the OAA/EEO. The Executive Director of the OAA/EEO shall provide a copy of the Panel's written decision to both the respondent and the grievant within five (5) working days after receipt from the Hearing Panel.

**Appeal of Hearing Panel's Findings**

If either party takes exception to the decision of the Hearing Panel and wishes to appeal, that party shall, within in five (5) working days of receipt of the Hearing Panel's decision, notify the Executive Director of the OAA/EEO, in writing, of the intent to appeal. If not appeal is received within the allotted time frame, the case is closed. If an appeal does occur, it is forwarded to the Vice President, or designee, to whom the respondent ultimately reports. The Vice President's review is not to hear new evidence; rather it is to ensure that the hearing and recommendations of the Hearing Panel were not arbitrary, capricious or discriminatory.

# SEXUAL HARASSMENT

## **Definition**

The EEOC defines sexual harassment as: *Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.*

*Sexual harassment can occur in a variety of circumstances, including but not limited to the following:*

- 1) The victim, as well as the harasser, may be a woman or a man. The victim does not have to be of the opposite sex.*
- 2) The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.*
- 3) The victim does not have to be the person harassed, but could be anyone affected by the offensive conduct.*
- 4) Sexual harassment may occur without economic injury to or discharge of the victim.*
- 5) The alleged harasser's conduct must be unwelcome.*

## **Sexual Harassment by a Supervisor that Results in a Tangible Employment Action (Quid Pro Quo)**

An employer is vicariously (always) liable for sexual harassment by a supervisor that results in a tangible employment action. A tangible employment action is an action that results in “a significant change in employment status”. Unfulfilled threats are insufficient.

Characteristics of a tangible employment action include:

- 1) When the supervisor brings the official power of the enterprise to bear on subordinates.
- 2) Usually inflicts a direct economic harm.
- 3) Can only be caused by a supervisor or other person acting with the authority of the company. Examples of tangible employment actions include:
  - A) Hiring and firing
  - B) Failure to promote
  - C) Demotion
  - D) Undesirable reassignments
  - E) Decision causing a significant change in benefits
  - F) Compensation decisions
  - G) Work assignments

There is no affirmative defense available in such cases. The Supreme Court recognized that this result is appropriate because an employer acts through its supervisors, and a supervisor's undertaking of a tangible employment action constitutes an act of the employer.

### **Sexual Harassment by a Supervisor that Does Not Result in a Tangible Employment Action**

Sexual harassment by a supervisor that creates a hostile environment, but does not result in a tangible employment action - for these types of cases the employer can claim an Affirmative Defense to liability and/or damages.

The Affirmative Defense consists of two necessary elements:

- A) The employer exercised reasonable care to prevent and correct promptly any harassment; and
- B) The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

### **Sexually Hostile Environment**

**Definition:** Has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment. This is measured by:

*Sufficiently Severe or Pervasive* - Would a reasonable person find the behavior to be sufficiently severe or pervasive so as to alter the employee's terms and conditions of employment?

*Knew or Should Have Known* - The employer is only liable if it knew or should have known about the behaviors and failed to take immediate and appropriate corrective action.

## **Preventing Sexual Harassment**

Prevention is the most effective tool for eliminating sexual harassment. The official in charge should ensure that all employees are informed of the sexual harassment policy and should institute immediate and appropriate corrective action if such prohibited conduct occurs.

An employer is responsible for having a policy prohibiting sexual harassment. This policy should clearly define what constitutes sexual harassment, delegate responsibility on enforcing the policy, include procedures for enforcing the policy, and identify discipline to be imposed if the policy is violated. Procedures for enforcing the policy are as follows:

- 1) Making a complaint without fear of intimidation
- 2) Conducting an immediate investigation of the complaint
- 3) Taking immediate and appropriate corrective action

All employees should be fully informed and provided training on policies and procedures.

All personnel should be held responsible for immediately reporting acts of sexual harassment to the official in charge. Except for the victim, failure to report such conduct may result in a reprimand. If the complaint is substantiated, depending on the severity of the conduct, the official in charge may take disciplinary action against the perpetrator up to and including termination.

## **Disciplinary Actions & Remedies**

- 1) Formal training
- 2) Private or public apology
- 3) Verbal or written warning
- 4) Transfer
- 5) Reassignment of duties
- 6) Mandatory counseling
- 7) Suspension
- 8) Demotion
- 9) Termination

## **Sexual Harassment as Sex-Based Employment Discrimination**

Please determine whether the following statements are *true*, *false*, or *maybe* under employment laws.

1. A man as well as a woman may be a victim of sexual harassment, and a woman as well as a man may be the harasser.

TRUE                  FALSE                                  MAYBE

2. The victim does not have to be the person to whom unwelcome sexual conduct is directed. He or she may be someone who is affected by such conduct when it is directed toward another person.

TRUE                  FALSE                                  MAYBE

3. If the victim does not complain to the harasser or report the harassment to the appropriate administrator, the employer is still responsible for the unlawful conduct when committed by a supervisory employee.

TRUE                  FALSE                                  MAYBE

4. If the harasser is a non-supervisory employee, the employer is not responsible for the act committed by the harasser unless management knew or should have known and failed to take immediate and appropriate corrective action.

TRUE                  FALSE                                  MAYBE

5. Submission to the request(s) for sexual favors negates the victim's right to file a sexual harassment charge.

TRUE                  FALSE                                  MAYBE

6. If an employee is receiving benefits (promotions, salary increases, etc.) as a result of a sexual relationship with a supervisor/manager, employees being denied these same benefits are eligible to file a complaint of sexual harassment.

TRUE                  FALSE                                  MAYBE