Plaintiff’s Attorney Perspective: Practical Advice for Preventing Workplace Discrimination Claims
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He received his bachelor’s degree from the University of Wisconsin-Whitewater and his J.D. degree from the University of Wisconsin.

Mr. Brown is a member of the State Bar of Wisconsin and has been appointed to the State Bar’s Diversity Outreach Committee.
Today’s Host:

Ms. Littlewood has over fourteen years of experience representing employers in both the private and public sector, in a variety of labor and employment-related issues.

Ms. Littlewood currently works for ePlace Solutions Inc. as the organization's Employment Practice Liability Manager and In-house counsel.

Prior to joining ePlace, Ms. Littlewood worked as a Deputy Attorney General for the State of California and practiced at a major law firm in California's Silicon Valley.

Ms. Littlewood also taught employment law for eight years as an adjunct professor at California State University, Fresno.

Ms. Littlewood has her B.S. in Business Administration, with an emphasis in Human Resource Management and a Juris Doctor from the University of California, Davis.
KNOW THE APPLICABLE LAWS
Federal Statutes

Understand the basic rules and consult with an employment attorney when needed.

• Title VII of Civil Rights Act of 1964;
• Age Discrimination in Employment Act of 1967;
• Americans with Disabilities Act of 1990;
• Equal Pay Act of 1963; and
• Civil Rights Act of 1991.
Understanding the Protected Classes

- Race
- Color
- Religion
- Ancestry
- Gender
- National origin
- Pregnancy status
- Age
- Disability
State Laws: Additional Protections

- Arrest or conviction records
- Marital status
- Use of outside lawful products
- Sexual orientation
- Military service
When a potential client speaks with you about a possible employment claim against an employer, what is the most important factor in determining whether you will take the case?

a. The employer  
b. Facts of the claim  
c. Quality of the employee
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“Where there is discrimination, there is typically a culture of discrimination. Rare is the circumstance where a couple of rogue managers or employees discriminate or harass.

Harassers typically do so because they know they can.

They do so because they believe that the upper levels of management will support them. The proof is that so often after the harassment the employer’s response is tepid. That is a culture of discrimination.”
Eliminating the Culture of Discrimination/Harassment

What advice would you give employers on how to eliminate a culture of discrimination and avoid being sued by their employees?

A. Conduct “team building” exercises with each department

B. Terminate management unless they are ready and willing to start taking complaints seriously

C. Behave like you were taught in Kindergarten: communicate and be nice
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Eliminating the Culture of Discrimination/Harassment

Communicate with your employees and remember what you learned in kindergarten. So often, plaintiff employees come to us and are angry and hurt because of something that an employer did. When we communicate with that client about the motivation – sometimes economic necessity – the client better understands and accepts the employers’ decisions.

The other issue is that employers can be nice, just like they learned to be when they were five. Frequently, clients come to us and are not driven by greed. They are hurt and they feel betrayed. Even in a termination, an employer need not be heartless or cruel.

The Golden Rule works in avoiding claims.
Statutes provide for protection against retaliation

- Employee engaged in “protected activity”

✓ Merit of complaint irrelevant
✓ Subsequent actions towards the employee will be scrutinized

- Evaluation of a plaintiff’s retaliation claim

✓ Is the cause for the action just?
✓ Is there more evidence than the assertions of the client?
✓ Does the employer have a history of discriminatory behavior?
THE ORGANIZATION’S POLICIES
It is very important to clearly establish organizational polices and practices.
Policy Considerations

• Worker’s compensation?
• Unemployment insurance?
• At-will or “for cause” employment?
• Performance Improvement Plans?
• Job applications for all positions?
• Background checks?
• Necessary employment posters or notices?
• External or internal payroll?
• Set forth a clear, concise employment policy accessible to all employees

• Have all new employees sign statement acknowledging that they understand and will abide by policy terms

• Provide easy-to-read information on material policy terms, including at-will employment and discretionary termination
Review and update handbook once a year
A Bad Policy = A Good Claim for the Employee

Facially discriminatory

vs.

Neutral but discriminatory effect when the policy is implemented

*BOTH* can result in a lawsuit!
“When I hear that an employer has instituted a policy that is facially discriminatory or put a discriminatory statement in writing that has affected the employment of the employee, I tell the employee that they have a strong claim.”
Trouble Spots: Hiring and Firing
Hiring decisions should follow neutral and objective job-related qualification standards.
Hiring Considerations

Be prepared for the possibility of a lawsuit from those not hired:

- Develop job description, including minimum qualifications
- Only interview those who meet, at least, minimum qualifications
- Avoid interview questions that touch upon protected class status
- Conduct a reference check with past employers
- Document why candidates were not chosen
Discipline

- Establish Range of Disciplinary Actions
  - Informed to correct deficiency;
  - Verbal warning;
  - Written warning;
  - Performance Improvement Plan;
  - Demotion;
  - Suspension;
  - Termination for poor performance; and/or
  - Termination for misconduct.
Discipline

- For each disciplinary action, provide infraction of specific workplace rule(s)
- A progressive discipline policy (step-by-step increase in penalties) might be interpreted as a binding contract right
  - Conspicuously state in handbook that employer may impose any disciplinary action, at any time, at its discretion
- Severe misconduct should likely result in immediate termination
  - Ensure the employee does not have access to company property or confidential information before terminating
Termination

- Voluntary Termination
  - Quitting may make the employee ineligible for unemployment benefits
- Termination for Severe Misconduct
  - This may also result in ineligibility for unemployment benefits
- Document reasons for termination and explain to employee
- Consider Potential Claims
  - Has the employee recently:
    - Been on medical leave?
    - Alleged harassment or hostile work environment?
    - Requested accommodation based on disability?
Post-Termination Considerations

• If you foresee a possible claim:
  • Preserve all relevant documents and electronic files
  • Gather all facts from existing employees and supervisors while memories are still fresh
  • Record, in writing, all statements and fact-finding results
• Reference Check
  • Decide whether to provide reference check (limited, unfettered, or none at all)
  • Apply policy consistently to all former employees in order to avoid potential discrimination claims
The Role of Human Resources

How important do you think the role of HR is in helping employers avoid getting sued by their employees? 

Effective HR is huge!
Effective HR

To be effective, HR must:

1. Be willing to confront management if the organization is making a poor HR related decision
2. Speak openly with employees about the organization’s expectations
3. Be willing to confront employee about often uncomfortable issues (poor performance, etc.)

“Management should prize the HR person who keeps the enterprise out of trouble.”
Erickson v Dept. of Corrections of the State of Wisconsin

My client was raped by an inmate when she worked as a clerical person at a minimum security facility. We made law in Wisconsin that notice for Title VII discrimination was satisfied by the employee mentioning to supervisors that the inmate “creeped her out”.

War Stories
War Stories

Duello v. Board of Regents of the University of Wisconsin

Equal Pay Act claim. Plaintiff sued the University for paying a tenured faculty member less than comparable men.

Approximately $400,000 paid to the employee
War Stories: Big Verdicts/Settlements

Over $1 million

Several in the $500,000 range

Confidential settlements near $1 million
Avoid a Claim

Fill in the blank:

“The most common employer mistake is ________________.”

a. Not following the law
b. Failing to communicate honestly with employees
c. Creating a hostile work environment
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