Best Practices for Avoiding Discrimination and Harassment Claims



PRESENTED BY

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PRESENTED FOR

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Foster Garvey

Learning Objectives



Understand the current status of and trends in discrimination and harassment in order to help reduce risks



Weigh in on topics to include/avoid in workplace training and policies given the current landscape



Make recommendations to support a workplace culture where discrimination and harassment have no place



Legal Framework at a Glance

- Federal law provides the core framework, including Title VII, the ADEA, ADA and FMLA
- Washington law adds protections beyond federal law, through the Washington Law Against Discrimination (WLAD) and some local laws – these cover sexual orientation, gender identity, military/veteran status and others
- Most employee-protective law applies
- Law = the floor; to retain good employees, you need to do more

Special Considerations – Unions/Public Employers

- Civil service rules – follow them! May create a parallel forum for complaints
- Civil service selection – disparate impact risk in exams; beware DEI scrutiny and reverse discrimination claims
- Ensure follow process requirements – CBA; Just Cause; *Loudermill* pre-disciplinary due process; civil service rules
- Local Government Whistleblower Protection (RCW 42.41)
- First Amendment retaliation claims under *Pickering* and *Garcetti*



Workplace Discrimination and Harassment Basics

- Discrimination = an adverse employment decision and/or denial of equal treatment as to an employee, because of their membership in a protected class
- Harassment = a subset of workplace discrimination where an employee is subjected to unwelcome workplace conduct because of their membership in a protected class, and conduct is so severe or pervasive that it affects the terms and conditions of their employment
  - Harassing conduct can be unwelcome verbal, physical or visual conduct, including any conduct that affects someone because of their protected status
  - Harassing conduct can come from individuals outside your organization (vendors, members of the public)
- Both supervisors and coworkers can be held personally liable

Retaliation Remains Number One Risk Area

- Retaliation occurs when an employer takes adverse action because an employee engaged in protected activity
  - Test = would challenged action dissuade a “reasonable worker” from protected activity
- Protected activity can include raising a concern, submitting a formal complaint, participating in an investigation or requesting an accommodation
- Employees are protected from retaliation even if their underlying complaint is unsubstantiated



Recent EEOC Activity

- In FY 2025, 88,201 new EEOC charges were filed
  - Retaliation remains the number one charge type – 62% of charges
  - #2 = Disability, 36,256 charges; 41%
  - #3 = Race, 29,338; 33%
- EEOC initiated 107 discrimination lawsuits, down from 142
- EEOC stopped recognizing disparate impact as viable theory after 2025 Executive Order; now poised to rescind Uniform Guidelines on Employee Selection Procedures

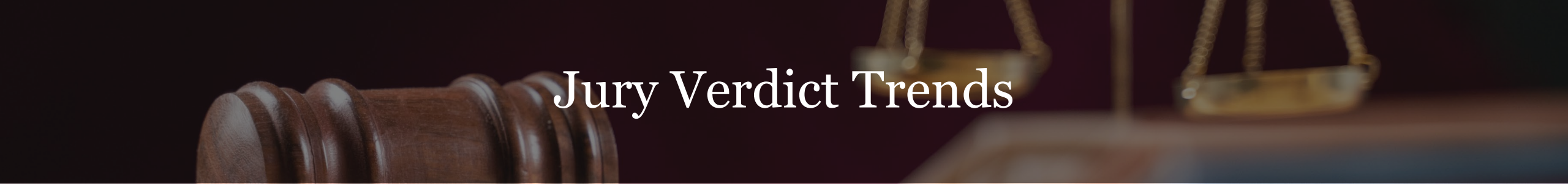


Important Recent Shifts

- EEOC stated priorities
  - Rooting out unlawful race and sex discrimination arising from DEI-related programs, policies and practices
  - Protecting American workers from anti-American bias
  - Supporting religious liberty by protecting workers from religious bias and harassment and protecting rights to religious accommodations
- Reverse discrimination claims are on the rise; evaluated under the same evidentiary standards as traditional discrimination claims. *Ames v. Ohio Dept. of Youth Svcs (US Sup Ct 2025)*
- Title VII protects against discriminatory job transfer with showing of "some harm." *Muldrow v. City of St. Louis (US Sup Ct 2024)*
- Religious accommodation requests present a higher bar for employers after *Groff v. DeJoy (US Sup Ct 2023)* – employers must show *substantial burden* to reject request

Important Recent Decision – DEI Training

- *Diemert v City of Seattle (9th Cir 2026)*
  - Joshua Diemert, white man, worked for the City
  - Claims were Equal Protection Clause violation; hostile work environment, constructive discharge, disparate treatment, and retaliation
    - District Court dismissed all claims on summary judgment; 9th Circuit reversed as to hostile work environment claim
  - Required participation in City's Race and Social Justice Initiative (RSJI)
    - Included training on racial justice and racially aligned affinity groups
  - Held workplace training programs designed to address racial barriers not inherently discriminatory
  - Determined 10 workplace incidents over 5 years that referenced Diemert's race could support hostile work environment claim; reversed summary judgment; issue for trial



Jury Verdict Trends

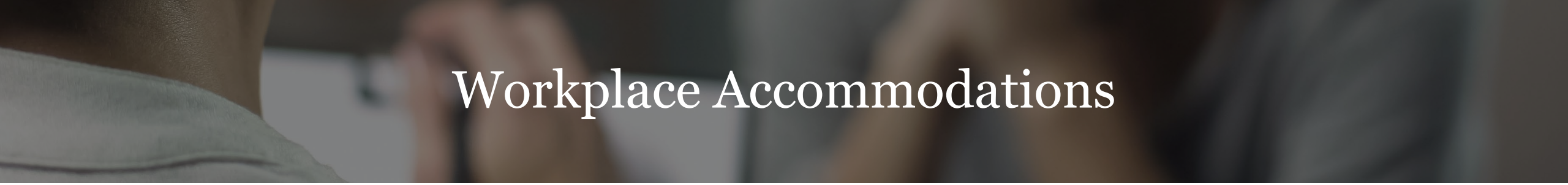
- Headline-grabbing jury verdicts in employment discrimination cases
  - Examples: $22 million in North Carolina (2024); $20.5 million in Pennsylvania (2024); $11 million in San Diego (2025)
- Including in Washington, some recent examples:
  - Retaliation – $23 million (ED WA (Yakima) 2026)
  - Race discrimination and harassment – $21 million (King Cty. 2024)
  - Reverse race discrimination, age discrimination – $24.2 million (King Cty. 2024)
  - Race discrimination and retaliation – $238 million ($39.6 million emotional distress award) (ED WA (Yakima) 2024) – *new trial ordered*
  - Disability discrimination – $5 million (USDC Spokane 2025)
- Even one lawsuit can produce devastating financial consequences and substantial negative publicity

AI in the Workplace (1/2)

- Many available uses of AI tools in HR/personnel arena and significant legal risks
- To avoid bias/discrimination risks, must vet, understand and audit AI tools, including:
  - What data is being used?
  - What assumptions are being made?
  - Does data used incorporate historical biases?
- Beware of fake, AI-generated “evidence”

AI in the Workplace (2/2)

- Legislation with employment focus in several states, including California, Colorado, Connecticut, Illinois and Texas
  - Federal legislation unlikely; patchwork of state statutes will be reality
- Some litigation against vendors of AI tools, but employers will always be on the hook when employment decisions are involved
  - Class action against Eightfold AI (CA 2026) – FCRA claims
- **Best practices**: (1) Develop AI use policy; (2) Vet, understand and audit AI tools; (3) Strengthen contractual protections; (4) Train and re-train employees; (5) Conduct bias audits; (6) Use notice and consent protocol; (7) Ensure human oversight, esp. before action taken



Workplace Accommodations

- Disability discrimination claims are often accompanied by failure to accommodate claims
- Employers are seeing many requests for accommodations
  - In 2025, 56% of HR professionals surveyed reported a significant increase in accommodation requests, third consecutive year of growth
  - Return-to-work requirements and mental health issues remain key drivers
- Be sure your team handles workplace accommodation process carefully
  - Very little is required to trigger employer obligation to engage in interactive process
  - Train supervisors and managers: what to listen for, when to notify and how to involve HR



Training Programs:
Moving Beyond "Check the Box"

- Employers should move beyond low-impact, computer-based training and invest in live, expert-led training with practical skills
- Generic compliance training rarely changes manager behavior
- Scenario-based training helps managers recognize common retaliation patterns, such as schedule changes after complaints, performance improvement plans after complaints, and project exclusion after equity concerns
- Training should begin during new manager onboarding, continue through annual compliance training and be reinforced when complaints arise



Policies:
Comprehensive, Clear and Current

- Policies should clearly prohibit unwelcome verbal, physical and visual conduct and include representative, non-exhaustive examples
- Policies should apply to more than the traditional workplace: off-site events, business travel and remote or telework settings must be included
- Policies should address employees, supervisors, officers, directors, customers, members of the public, and vendors
- Policies should provide multiple complaint avenues, clear consequences for violations, robust anti-retaliation language and catch-all protection for any characteristic protected by federal, state or local law
- Carefully consider ramifications of extending your local policy beyond state law



Additional Policy Action Items

- Review DEI policies for Title VII compliance, and ask whether any employment decisions are being based on protected characteristics
- In DEI training, consider not just content, but tone, context, and voluntary and open participation
- Communicate “no retaliation” policies broadly and regularly, and train managers on those requirements
- Consider making the non-harassment policy a stand-alone document with a separate employee acknowledgement
- In Washington, state anti-discrimination requirements extend beyond federal counterparts, and have not superseded or relaxed by Presidential executive orders



Workplace Culture:
No Place for Discrimination and Harassment

- Goal = create an environment where employees feel comfortable intervening and reporting discriminatory or harassing behavior
- Clear policies, including reporting options
- Training – all employees and managers and supervisors, on receiving and reporting complaints, as well as anti-discrimination requirements
- Be an upstander
  - Leaders must model
- Address issues before they become formal complaints
- Use surveys and metrics to track employee confidence in speaking up, whether complaints are handled fairly, and team-level trends



Investigations: Prompt, Thorough and Fair

- Effective investigations require promptness, thoroughness, open-mindedness and a problem-solving mentality
- Employers should begin investigating within 24 to 48 hours, because delay can signal that the complaint is not being taken seriously
- At the outset, consider: recordkeeping (notes, audio, transcript), confidentiality requirements, post-investigation report plan, and privilege issues
- Investigators should interview all relevant witnesses and drill down on details such as what happened, when, where, how often and how the conduct affected the employee



Investigations: Fairness Matters

- Reminder: **3 of 7** just cause tests point to investigation
  - Sufficient investigation – Did employer conduct investigation before making decision?
  - Fair investigation – Was investigation fair and objective?
  - Proof – During investigation, did you find proof of misconduct or performance issue?
- *Sidibe v. Pierce County (Div II 2020) (unpublished)* – internal affairs investigation supported claim of racial discrimination based on disparate treatment
- Commission investigate? Judge/decision-maker cannot both investigate and decide; would create due process issue



Corrective Action and Post-Investigation Monitoring

- Employers should consider interim measures, communicate conclusions and follow up to confirm there is no retaliation or further concern
- If misconduct or retaliation is substantiated, remedial action must be immediate
- Possible remedial action includes reversing the retaliatory action, disciplining the offender, implementing monitoring, communicating the correction to the affected employee, and policy changes and/or additional training
- Employers should consider whether the employee needs to be made whole through reinstatement, removal of discipline or similar measures
- Post-investigation monitoring should include regular check-ins, scrutiny of later employment actions, conversations with managers about non-retaliation expectations, attention to red flags and root cause analysis to improve future training and protocols



Key Takeaways

- Have a good offense – create a culture where there is no place for discrimination or harassment
  - Leaders must set the tone
  - Everyone plays a role – upstanders are key
- The landscape is shifting in some ways, but the law has not changed
- Make training and policies count
- Investigation set up and follow-up are critical

Case Study: After the Complaint

- Maintenance worker reports a supervisor's harassment comments.
- Investigation does not substantiate complaint.
- Little over a month, worker gets shift change and performance improvement plan
- Two weeks later, worker is disciplined
- Worker complains of retaliation

YOUR TASK:

What issues should employer consider?

Case Study: Return to Office

- After a return-to-office mandate, employee mentions anxiety in passing to a supervisor
- Supervisor does nothing, and employee is later disciplined for attendance
- Employee complains employer failed to accommodate their disability

YOUR TASK:

What issues should employer consider?

Questions?

Thank you.



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