



# NEW DEVELOPMENTS CONCERNING EMPLOYMENT DISCRIMINATION AND HARASSMENT

by Greg Hammond and Krista Kleiner

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## **ABSTRACT**

There have been many new developments in the area of employment discrimination and harassment in the workplace. As these issues define the types of behavior allowed in the workplace, it behooves both workers and employers alike to familiarize themselves with current laws and regulations. Most of the new laws stem from recent state and federal court decisions that specifically define what is and what is not harassment and discrimination. This report discusses some of the trends in California workplace policy and reviews the results of the most recent Gallup poll on employment discrimination as well as the latest EEOC statistics for case filings.

## EMPLOYER LIABILITY

On January 18, 2005, the California Supreme Court in *Miller v. Department of Corrections* handed down a ruling that greatly expanded employer liability in sexual harassment suits. The court ruled that employees may sue their employers for sexual harassment if a consensual affair between a supervisor and a subordinate creates a hostile work environment for employees NOT involved in the affair (Klawitter, 2005).

The case involved Lewis Kuykendall, a deputy warden at the prison where the plaintiffs worked, who was having sexual affairs with three of his subordinates. The deputy warden and the three women not only made no effort to conceal their affairs, but the women would often fight with each other over Mr. Kuykendall's affections in the workplace. The women having sex with Mr. Kuykendall received favoritism in the form of promotions and other office perks denied to other female employees. When the plaintiffs, Edna Miller and Francis Mackey, complained about what was going on, they were physically accosted by a female admirer of Kuykendall (Klawitter, 2005).

Disgusted with this work environment, the plaintiffs sued for sexual harassment, sexual discrimination and retaliation. Both plaintiffs eventually resigned under withering criticism from their superiors. While the district and appeals courts sided with the defendant, the California Supreme Court reversed the decision and ruled in favor of the plaintiff, basing their reasoning on a 1990 EEOC policy statement (Klawitter, 2005).

The basic point in the EEOC statement was that if sexual favoritism was widespread in the workplace, then employees not participating in the sexual favors could view adverse promotion and other workplace decisions a consequence of their non-participation in the trysts. The EEOC concluded that this set of circumstances could lead to a hostile work environment. Considering the prevalence of consensual romances in the workplace today, the implications of this decision cannot be understated. Simply said, an employee who objects to some adverse employment action by a superior involved in a known office affair may file a lawsuit for sexual discrimination and retaliation. To avoid liability, employers need to make sure that they train their supervisors and managers to exercise extreme caution while engaging in any sexual romances and relationships in the workplace. Any office romance involving a supervisor or person of authority, regardless of consent, can be interpreted as sexual harassment inflicted on other employees (Klawitter, 2005).

## **SEXUAL HARASSMENTS BY NON-EMPLOYEES (AB 76)**

In 2005 the California legislature passed a new law, AB 76, which holds employers liable for sexual harassment of their employees by non-employees. Employers will be held liable if they knew or should have known of the offensive behavior and did nothing to prevent it. This new law greatly expands the potential liability faced by employers in California as employees can be harassed by customers, suppliers, delivery persons, or any non-employee that has contact with employees. California business owners are now legally responsible for anticipating and preventing sexual harassment of their employees from these sources (UC Berkeley, 2005).

## **TRANSGENDER DISCRIMINATION (AB 196)**

Also in 2005, the California legislature passed a law prohibiting transgender discrimination. In the bill the definition of sex discrimination in the California Fair Housing and Employment Act was modified to include gender. It is now illegal in California for an employer to impose dress codes on any employees who feel the dress code impinges on their gender identity (UC Berkeley, 2005).

## **EEOC SETTLES FIRST SAME-SEX SEXUAL DISCRIMINATION SUIT**

In 1998 the U.S. Supreme Court issued a landmark ruling in *Oncale v. Sundowner Offshore Services, Inc.* that same-sex harassment was a violation of Title VII. In 2000 the EEOC settled its first same-sex harassment suit in which a meat packing plant in Wisconsin agreed to pay 1.9 million dollars to a group of men who claimed they were sexually harassed by their male superiors. The plaintiffs demonstrated they were subjected to teasing, ridicule, and oppression and that these actions created a hostile work environment. They also claimed retaliation against anyone who protested the treatment. In today's workplace employers must be aware that either gender can sue for sexual discrimination and harassment. Sexual harassment is no longer defined as men abusing women. Men can abuse other men, women can abuse men, and women can abuse other women. To be safe employers must implement a zero tolerance harassment policy that clearly states this reality (Fox and Karunaratne, Jan 2000).

## **FORD SETTLES MAJOR SEXUAL HARASSMENT SUIT**

Ford Motor Company was charged in 2000 by female employees with sexual harassment, racial discrimination, and retaliation. It settled with the EEOC for \$8 million in damages. Ford was required to implement a \$10 million dollar harassment prevention training program for all of its employees and was compelled to boost the

number of females in introductory supervisory positions to 30 percent percent representation. Clearly, Ford management paid a high price for failing to treat its employees fairly and with respect (Fox and Karunaratne, Jan 2000).

## **CALIFORNIA DOMESTIC PARTNER RIGHTS EXPANDED**

In January of 2005, the California legislature passed the Domestic Partner Act, which in essence granted gay and lesbian couples most of the rights currently enjoyed by married couples. In August, the California Supreme Court ruled in *Koebke v. Bernardo Heights Country Club* that business must treat gay couples the same as married couples.

The Bernardo Heights Country Club had a policy of extending certain benefits to its married members to encourage a family friendly environment. The plaintiffs in the case were a female club member and her lesbian domestic partner. The country club's management refused to extend spousal privileges to the woman's partner. The women were outraged and sued the club for discrimination. The country club prevailed at both the district and appeals courts. However, the California Supreme Court reversed the decisions of the lower courts in favor of the plaintiffs ruling that "a business that extends benefits to spouses it denies to registered domestic partners engages in impermissible marital status discrimination." This effectively altered California workplace policy regarding benefits offered to employees. It is now illegal to differentiate in any way between gay and married couples. As far as the California legislature and courts are concerned, there is no difference between gay domestic partners and married couples (Klawitter, 2005).

## **SEXUAL HARASSMENT PREVENTION TRAINING NOW MANDATORY IN CALIFORNIA**

With the recent passage of California law AB 1825, sexual harassment prevention training became the legal responsibility for every California business with 50 or more regular employees. The theory behind the law was that by mandating regular sexual harassment prevention training, the state would see a decline in the number of sexual harassment lawsuits filed due to increased awareness. The law requires that all employees in a supervisory position be trained every two years in sexual harassment prevention. Interestingly, while the law requires training to prevent sexual harassment, it only "encourages" training to prevent discrimination based on race, age, and other protected categories (Cobey and Goldman, 2005).

## **OFFICIAL PROTEST MUST PRECEDE QUITTING**

In 2004 the U.S. Supreme Court issued an important ruling clarifying the grounds for a sexual harassment and constructive discharge lawsuit. The ruling stemmed from a case involving a female Pennsylvania State Police communications officer who claimed that the sexual harassment she received from her supervisors left her with no option but to quit her job. She sued for sexual harassment and constructive discharge.

The Pennsylvania State Police countered that the plaintiff had not availed herself of the complaint system the department had in place to deal with these issues. In *Pennsylvania State Police v. Suders, U.S., No. 03-95, 6/14/04*, the court ruled that unless the woman could prove she quit her job because of an adverse retaliatory action resulting from her complaints, she had no basis to sue for sexual harassment because she did not lodge a complaint within the existing grievance structure. Employees that believe they are being harassed or discriminated against must protest in some form to the company before filing suit.

## **WHEN DOES FREE SPEECH BECOME HARASSMENT?**

The Ninth Circuit court of appeals in San Francisco recently attempted to define the apparent conflict between free speech and harassment laws. When does free speech become harassment? This fine line was defined as the intent of the speech exercised. The justices ruled that if the speech was intended to cause offense, it was harassment and therefore not protected under the first amendment.

The case *Peterson v. Hewlett Packard* centered on an employee of Hewlett Packard, Peterson, who took offense to the diversity posters the company displayed throughout the workplace. Peterson believed that the posters condoned and promoted homosexuality. Homosexuality was offensive to Peterson's Christian religious beliefs. In response to the diversity posters, Peterson posted Bible verses in his cubicle which condemned homosexuality. Hewlett Packard management ordered Peterson to remove the Bible verses from his cubicle. He refused and sued the company for harassment. The court deemed the Bible verses, not the diversity posters, as harassment and not protected free speech because the employee admitted that he intended the verses to be offensive to homosexuals (Aubry, 2005).

The Ninth Circuit also dealt with free speech and harassment in *Bodett v. Coxcom, Inc.* In this case a gay employee sued her employer for discrimination because the employer was constantly trying to convince the employee to abandon her homosexuality. She was told that homosexuality was a sin which was causing

the gay employee's unhappiness in life. The employer also asked her gay employee to accompany her to church and to prayer meetings. The court ruled that these actions contributed to a hostile work environment and were considered harassment, not free speech. The court based its ruling on the fact that the company was violating its own posted non-harassment policy. Simply stated, if an employer has a non-harassment policy, they cannot trespass that policy on grounds of freedom of speech (Aubry, 2005).

## **EMPLOYERS MUST PREVENT HARASSMENT IN THE WORKPLACE**

Employers, especially in California, must realize that the courts have no tolerance for harassing speech within the workplace and will find companies liable for any infractions. Employers must make sure that their supervisors and managers are anticipating and preventing harassment from occurring in the workplace.

In 2003 a California appeals court held an employer liable for failing to control the abusive speech of one of its employees. In *Marigny v. Mercury Air Center*, the plaintiff, Marigny, was insulted by a trainee in the presence of a supervisor, who took no disciplinary action against the trainee. The trainee called Marigny "a skinny nigger," "boy," and said he would "whoop" him. Marigny was very offended by this; and after receiving no response from the supervisor, he related the incident to the Director of Human Resources, who responded by saying that "everyone has the right to express themselves" (Aubry, 2005).

The lower court found Mercury Air Center guilty of negligently failing to prevent harassment and of intentional infliction of emotional distress. They granted the plaintiff \$15,000 in compensatory damages but ruled there was not enough proof of malice to grant punitive damages. The plaintiff appealed, and the appeals court reversed the lower court's decision stating that there was sufficient proof of malice because the employer brushed off the plaintiff's complaints in a "negative and dismissive manner." A new trial was granted, which will most likely result in a much larger reward (Aubry, 2005).

Employers need to have a zero tolerance policy towards any type of speech that could reasonably be considered harassment by a protected class. Employers need to train their management to take all complaints seriously. The Marigny case showed that the HR director's comment that "everyone has the right to express themselves" is both legally and ethically wrong. In California employees do not have the right to say rude and offensive things to other people on the basis of "free speech;" and employers that allow this manner of speech in the workplace can be held liable for failing to prevent a hostile work environment and contributing to an atmosphere of harassment (Aubry, 2005).

## **RULES FOR RETALIATION SUITS BECOME LESS FRIENDLY FOR EMPLOYERS**

The California Supreme Court has ruled on a case that changed the rules on retaliation claims to heavily favor employees. A retaliation claim requires the employee to protest some kind of discrimination or harassment by their employer and then prove the employer reacted to their protest with some “adverse action” which caused the employee to suffer damages. Employees have one year from the date that the retaliation occurs to file a claim. Suits brought to the court beyond the one year statute of limitations are thrown out of court. That was the law before court ruled on *Yanowitz v. L’Oreal USA, Inc*, in August, 2005 (Klawitter, 2005)

The *Yanowitz* case expanded the interpretation of these rules significantly in favor of the employee. The plaintiff, Yanowitz, was employed as the Regional Sales Manager for L’Oreal USA. She alleged that her male supervisor told her several times to fire one of her female sales representatives that he did not deem attractive enough for the job. Yanowitz asked her manager for an “adequate justification” for firing the sales rep. None was given other than the initial reasoning that she was not attractive. Yanowitz refused to fire the employee (Klawitter, 2005).

L’Oreal management viewed Yanowitz’s actions as insubordinate. Soon after the incident Yanowitz began to be criticized heavily by her manager, and she received numerous negative performance reviews. Prior to this incident she had received only positive reviews and little if any criticism. Yanowitz claimed this adverse treatment was retaliation for her refusal to obey the manager’s order to fire the “unattractive” sales rep, which Yanowitz claimed was “sex discrimination” (Klawitter, 2005).

Lawyers for L’Oreal argued that the plaintiff had no case for retaliation because she simply refused to obey the order. For a sex discrimination and retaliation suit to be valid under the Civil Rights Act, a protest must be made to management and retaliation must follow. The defense argued the case should be dismissed because Yanowitz never protested the order. Or did she? The court ruled that Yanowitz did indeed protest the order when she asked her manager to provide “adequate justification” to terminate the sales rep. This question was deemed sufficient warning to management that Yanowitz was protesting sex discrimination. The court felt the manager’s failure to ask Yanowitz what she meant by “adequate justification” was evidence that the manager knew Yanowitz was protesting sex discrimination (Klawitter, 2005).

This interpretation of the law places an incredible burden on employers to inquire as to the meaning of statements made by employees into business practices that might later be interpreted as a protest to discrimination. The court's expansion of the definition of what a protest is will certainly make it more difficult for businesses to dismiss discrimination claims. Previous to this ruling employees were required to indicate to their employers what specific actions they thought were discriminatory. It is now the employer's responsibility to discern that a vague statement by an employee is not a veiled protest (Klawitter, 2005).

Having lost the motion to dismiss on grounds that no protest had been made, lawyers for L'Oreal began to attack Yanowitz's retaliation claim. They argued that the plaintiff had not suffered any materially adverse action as a result of her supposed protest. She had not been fired or demoted, and her salary had not been docked. In short, her claims of negative reviews and verbal criticism did not rise to the level of retaliatory conduct. The court disagreed saying that the totality of the employer's conduct towards her amounted to sufficient adverse conduct to materially affect her job and chances of advancement in the company. This ruling also greatly expanded the definition of "adverse action" in favor of employees (Klawitter, 2005).

The defense team for L'Oreal then argued that Yanowitz had no merit to file a retaliation claim because she filed the lawsuit beyond the statute of limitations. The alleged retaliation had occurred beyond the one year filing deadline. Certainly, the law was firmly on the side of L'Oreal. This was an issue of fact. Yanowitz waited too long to file the lawsuit.

However, the California Supreme Court did not agree with the filing deadline for retaliation claims and rewrote the law. In its ruling the court stated that when filing retaliation claims, employees may avoid the one year statute of limitations to file a claim if they can show that the adverse actions they were suffering were part of a pattern of retaliatory conduct that could stretch over a period of years. Up to this point employers could use the one year statute of limitations to dismiss retaliation claims (Klawitter, 2005).

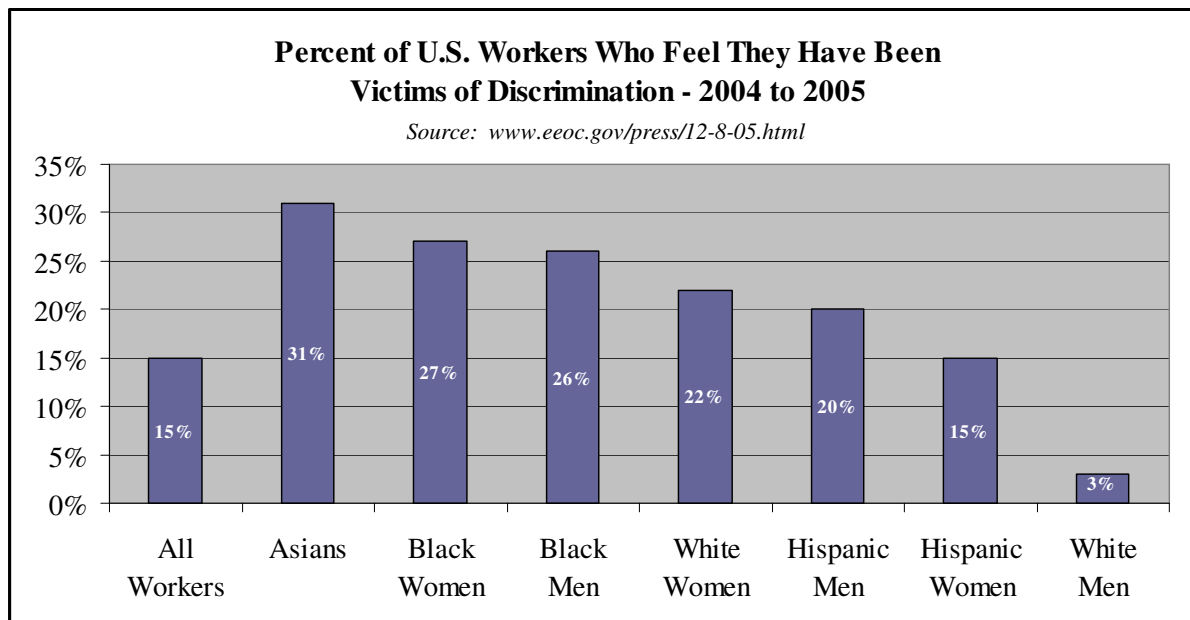
This case greatly impacted employers in California. In the past managers could be trained to look for specific complaints of discrimination and act accordingly. Now, managers need to be trained to look for any statement that might possibly be interpreted as a protest of discrimination. *Yanowitz* also upheld the broadest definition of "adverse action," thus making it more difficult for employers to operate their businesses for fear of being accused of retaliation to statements that may or may not be "protected activity" under the Civil Rights Act. Also, the court expanded the statute of limitations indefinitely on filing retaliatory claims provided the plaintiffs can prove the adverse actions were part of an ongoing pattern of retaliatory conduct.



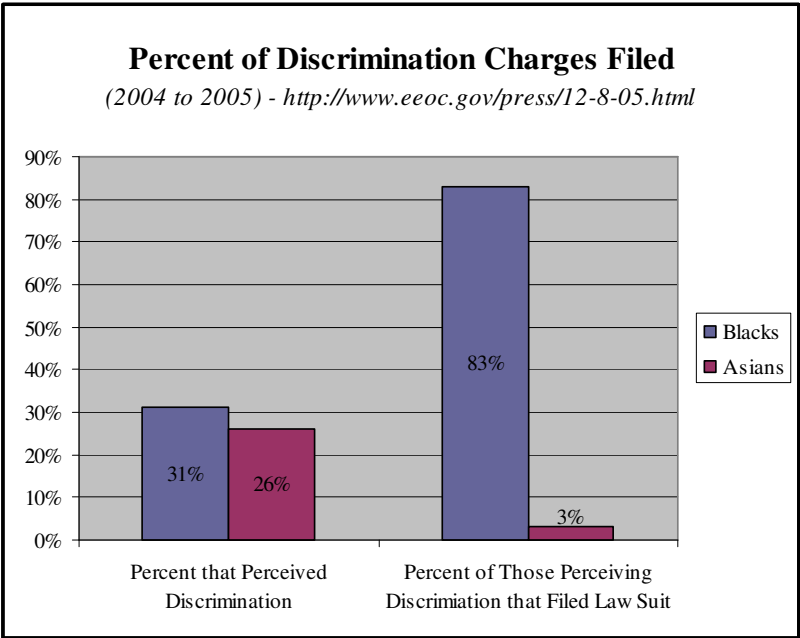
The court's ruling also expanded the class of protected peoples to include the physically unattractive (Klawitter, 2005).

## CIVIL RIGHTS ACT TURNS 40

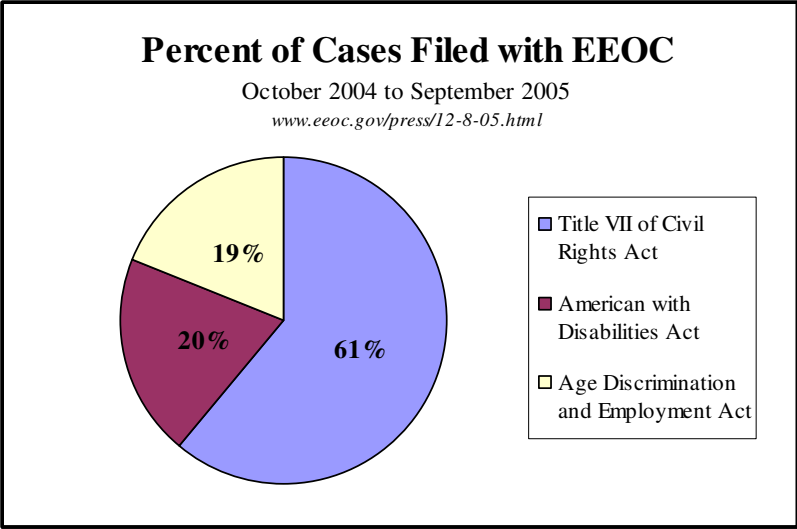
In celebration of the 40<sup>th</sup> anniversary of the 1964 Civil Rights Act, the Gallup organization conducted a poll of American's attitudes regarding discrimination in the workplace. The poll asked ordinary American's whether they had perceived any bias or discrimination. Fifteen percent of all workers felt they were victims of discrimination. The racial group reporting the highest overall percentage was Asians at 31 percent. Blacks were second at approximately 27 percent. Interestingly, 22 percent of white women believed to have been victims of discrimination versus only 3 percent of white men.



The statistics on perceived discrimination vary greatly when compared to the statistics of actual court filings. For example, 31 percent of Asians reported a perception of being treated unfairly; but only 3 percent of Asians actually filed a lawsuit. Conversely, blacks file over 80 percent of all discrimination lawsuits.



From October 2004 to September 2005, there were 75,428 charges of employment discrimination filed with the EEOC. The following chart shows the breakdown of cases filed under the respective laws.



## **CONCLUSIONS CONCERNING WHAT EMPLOYERS SHOULD DO TO PREVENT DISCRIMINATION AND HARASSMENT IN THE WORKPLACE**

As this article has made clear, the first step that an employer should take is to understand applicable state and federal law in these areas and how it should be implemented. A good place to start is to contact the employer's respective state agency monitoring enforcement and receive their recommended literature. In California, for instance, that would be the California Department of Fair Employment and Housing. At the federal level the agency to contact is the U.S. Equal Employment Opportunity Commission. What they will emphasize for the employer to do today are the following prevention strategies:

### **1. Develop a Proper Policy and Complaint Procedure**

An employer should provide every employee with a copy of its anti-discrimination/harassment policy and complaint procedure and redistribute it periodically. It should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations, incorporating them into employee handbooks, and making them available on company web-sites. If practical, the employer should provide training to all employees to ensure that they understand their responsibilities and rights under the company's anti-discrimination/harassment policy.

This policy and complaint procedures should contain at a minimum the following information:

- A clear explanation of forbidden conduct;
- Assurance that employees who make complaints of discrimination or harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint procedure that provides multiple avenues of complaint;
- Assurance that the employer will protect the confidentiality of discrimination and harassment complaints to the extent appropriate;
- A complaint process that provides an unbiased, immediate, and complete investigation by one or more properly trained investigators; and
- Assurance that the employer will take prompt and appropriate corrective action when it determines that discrimination or harassment has occurred.

## **2. Other Preventive and Corrective Measures Should Take**

An employer's responsibility to exercise reasonable care to prevent and correct discrimination and harassment is not limited to implementing an appropriate policy and complaint procedure. An employer's duty to exercise reasonable care includes instructing all of its supervisors and managers to address or report to appropriate person's complaints of discrimination or harassment regardless of whether they are officially designated to take complaints and regardless of whether a complaint was communicated in a way that conforms to the organization's particular complaint procedures. For example, if an employee files an EEOC charge alleging unlawful discrimination or harassment, the employer should launch an internal investigation even if the employee did not complain to management through its internal complaint process.

Furthermore, reasonable care requires management to correct discrimination and harassment regardless of whether an employee files an internal complaint if the conduct is clearly unwelcome. For example, if there are areas in the workplace with graffiti containing racial or sexual epithets, management should eliminate the graffiti without waiting for an internal complaint.

An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-discrimination/harassment policy and complaint procedures. Periodic training of those people can help achieve that result. Such training should explain the types of conduct that violate the employer's anti-discrimination/harassment policy, the importance of the policy, the responsibilities of supervisors and managers when they learn of alleged discrimination or harassment, and the prohibition against retaliation.

An employer should keep track of its supervisors' and managers' behavior to make sure that they carry out their responsibilities under the organization's anti-discrimination/harassment program. For example, an employer could include such monitoring in formal performance evaluations.

Reasonable preventive measures include screening applicants for supervisory jobs to see if any have a record of engaging in discrimination or harassment. If so, it may be necessary for the employer to reject a candidate on that basis or to take additional steps to prevent discrimination or harassment by that person.

Finally, it is advisable for an employer to keep records of all complaints of discrimination and harassment. Without such records the employer could be

unaware of a pattern of discrimination or harassment by the same person. Such a pattern would be relevant to later possibly necessary credibility assessments and disciplinary measures.

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Note: The title graphic was designed by Carole E. Scott.

