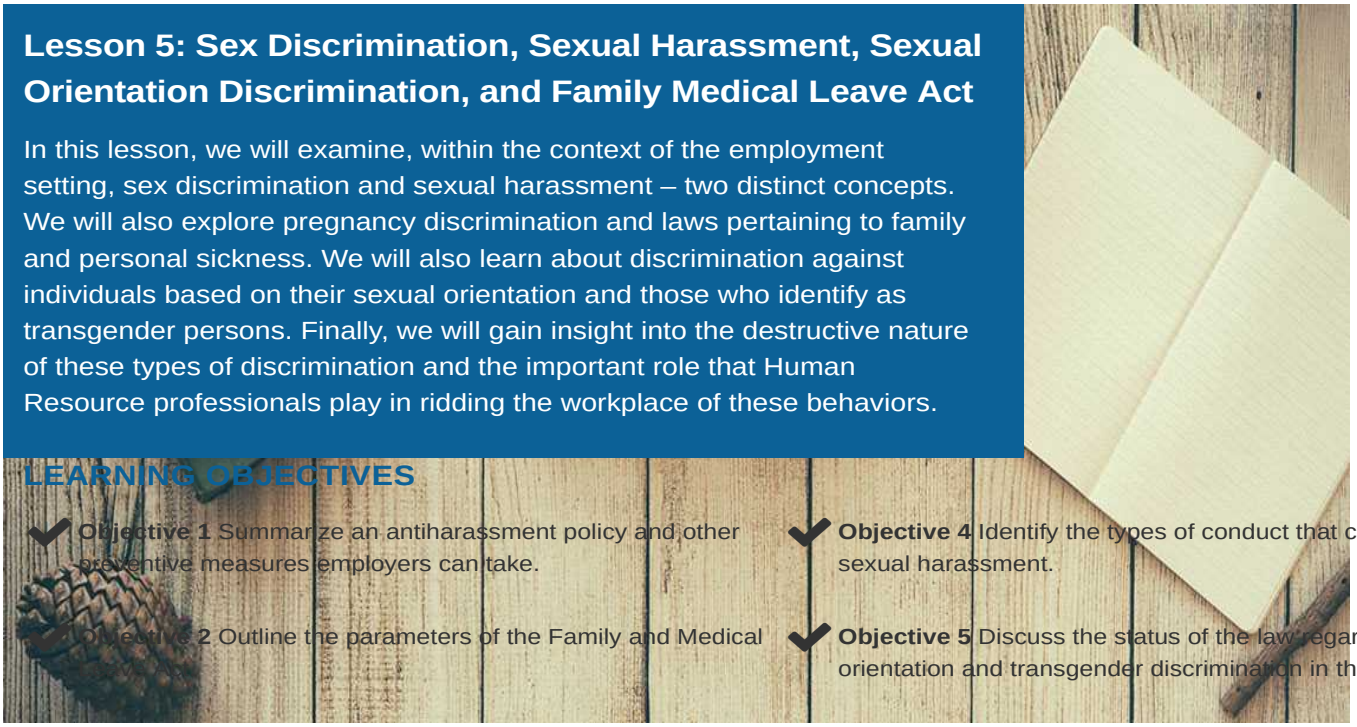
Lesson 5: Sex Discrimination, Sexual Harassment, Sexual Orientation Discrimination, and Family Medical Leave Act

In this lesson, we will examine, within the context of the employment setting, sex discrimination and sexual harassment – two distinct concepts. We will also explore pregnancy discrimination and laws pertaining to family and personal sickness. We will also learn about discrimination against individuals based on their sexual orientation and those who identify as transgender persons. Finally, we will gain insight into the destructive nature of these types of discrimination and the important role that Human Resource professionals play in ridding the workplace of these behaviors.



LEARNING OBJECTIVES

- **Objective 1** Summarize an antiharassment policy and other preventive measures employers can take.
- **Objective 2** Outline the parameters of the Family and Medical
- **Objective 3** Describe proof required, exceptions, and remedies for victims seeking relief under Title VII.
- **Objective 4** Identify the types of conduct that can constitute sexual harassment.
- **Objective 5** Discuss the status of the law regarding sexual orientation and transgender discrimination in the workplace.

Text Readings

Employment Law: New Challenges in the Business Environment, Chapters 10, 11, 12 and 13

Additional Readings

Required Readings

- "He Said, She Said": Supreme Court nominee Thomas accused of sexual harassment(https://ashworth.idm.oclc.org/login?url=https://www-proquest-com.ashworth.idm.oclc.org/newspapers/he-said-she/docview/1827082885/se-2?accountid=45844)

Supplemental Readings

- Ceridian - Human Capital Management(https://www.ceridian.com/)
- Diversity - A World of Change(https://www.diversity.com/)

Lecture Notes

Welcome to Lesson 5. Did you know that prior to 1964, when Title VII was passed, it was common for states to have laws limiting or prohibiting women from working at certain jobs under the theory that such laws were for their protection? It seems impossible now that this could have been the case, but it was. In 1908, the United States Supreme Court upheld protective legislation for women, justifying a separate class for employment purposes. The Court stated that a woman must “rest upon and look to her brother for protection ... to protect her from the greed as well as the passions of men.” Our laws continued holding this view until the Civil Rights Act of 1964.

Sex Discrimination

Sex discrimination takes place when individuals of one gender are favored in an employment decision over the other gender. ***Sex plus discrimination*** is sex discrimination combined with another type of discrimination (Moran, J. J., 2014). Note the men can be victims of sex discrimination as well. Companies’ catering to customer gender preferences and men denied employment at establishments such as Hooters are both examples of discrimination. A ***bona fide occupational qualification*** can operate as an ***affirmative defense***for employers. The textbook case ***Ersol L. Henry and Terri J. Lewis v. Milwaukee County*** does a good job of explaining how a BFOQ works.

Women are entitled to earn the same pay as men for performing the same job. While women constitute nearly 50 percent of the workforce, nearly 80 percent work in traditional “female” jobs—secretaries, administrative support personnel, and salesclerks. Research shows that many professional women hold jobs in such areas as public relations, human resource management, and law—areas that are not the best stepping stones for advancement into higher level positions. Sixteen percent of the female workforce is employed as professionals, but 10% are nurses or K-12 teachers. Women in such jobs earn about $3,500 less a year than women who work in male-dominated fields. On average, women working full-time earn 74 cents for every dollar men earn. This gap is wider for black females who earn only 64 cents for each dollar men earn. Paying employees different wages based on gender for the same or similar

Paying employees different wages based on gender for the same or similar jobs is still an active practice. Unfortunately, because employees are often reluctant to discuss their wages with other workers, these practices may not immediately come to light.

Sexual Harassment

Sexual harassment is a form of discrimination in the terms and conditions of employment. The concept of sexual harassment was thrust into the spotlight with the testimony of Anita Hill during the 1991 confirmation hearings for associate justice of the Supreme Court, Clarence Thomas. When Thomas was nominated for the position, friends of Hill reported to the Senate Judiciary Committee that she had revealed to them details of exchanges with Thomas that could have amounted to sexual harassment. These instances occurred when Hill worked for Thomas during the time he was head of the EEOC about 10 years previously. The committee contacted Hill and she testified in televised hearings. Americans were suddenly talking about sexual harassment. Eight months after the Hill-Thomas hearings, sexual harassment complaints filed with the EEOC increased more than 50 percent. In addition, the damages awarded to victims increased dramatically. To learn more about this scandal, read "He Said, She Said."(https://ashworth.idm.oclc.org/login?url=https://www-proquest-com.ashworth.idm.oclc.org/newspapers/he-said-she/docview/1827082885/se-2?accountid=45844) There is also a documentary about Anita Hill.

Sexual harassment remains one of the most often litigated areas of employment law. It is a problem that exacts significant costs on victims and businesses. Research shows that women who are sexually harassed on the job use leave time to avoid the uncomfortable situation. Others who are harassed in the workplace quit their jobs. Another portion try to ignore the harassment and suffer a drop in productivity. Coworkers who know about the situation also suffer a drop in productivity.

So what constitutes sexual harassment? There are two distinct situations in which an employer may be liable for sexual harassment: ***vicarious liability*** (formerly called ***quid pro quo***– Latin, loosely “something for something”) and ***hostile work environment***. As your textbook indicates, sexual harassment that involves a request for sexual favors from a supervisor gives rise to vicarious liability. The plaintiff must sue his or her employer. A hostile work environment could include offensive touching, crude jokes, and/or the displaying of sexually graphic material that the victim finds offensive. If the victim wishes to sue the offender, he or she must do so in tort law.

In the first instance, a supervisor has the ability to affect the employee’s job through a ***tangible employment action***. An example of a tangible employment action is a superior demanding sexual favors from a subordinate in exchange for being hired, transferred, promoted, given raises, bonuses, desirable workload, avoiding termination, etc. These behaviors inflict direct economic harm on the employee being harassed and, indirectly, they are not fair to those employees who are passed over for promotions and the like (Moran, J. J., 2014).

If a supervisor says, “Sleep with me if you want to keep your job,” then the supervisor is threatening to make a tangible employment decision that may

cost the victimized employee his or her job for refusing. Annoying or spiteful acts not rising to these levels are not considered to be sexual harassment unless they become so severe and/or pervasive and permeate the atmosphere to such a degree as to amount to ***constructive discharge***. You will recall from an earlier lesson that constructive discharge applies the ***reasonable person standard***. A supervisor's threat to terminate an employee who does not engage in sex with him or her has serious employment consequences. On the other hand, a coworker's demand for sex, however bothersome, does not have similar consequences unless the behavior is sufficiently ongoing and offensive as to constitute a hostile work environment.

In both situations, the aggrieved employee must regard the advances or conduct as unwelcome. If an employee elects to sleep with his or her boss and welcomed the advances, he or she likely will have a difficult time proving a claim of sexual harassment. Hostile work environment can be based on sex or on the basis of other protected characteristics such as race, while vicarious liability relates only to sex. Examples of hostile work environment include repeated sexual jokes, sexually suggestive comments, and inappropriate touching directed at an individual.

An employer can raise an ***affirmative defense*** to sexual harassment of a subordinate by a supervisor when no tangible employment action has occurred. A tangible employment action usually causes economic harm, such as a demotion, termination, or withholding a salary increase. When no tangible employment action has been taken, an employer may establish an affirmative defense by showing that it exercised reasonable care to promptly prevent and correct the behavior and that the employee unreasonably failed to avoid harm or take advantage of any preventive or corrective opportunities provided by the employer.

Employers must take actions to prevent sexual harassment and address it when it does occur. They should also draft an ***antiharassment policy*** that defines prohibited conduct, prohibits all occurrences of prohibited conduct, including ***retaliation***, informs employees how to make complaints, and ensures that complaints will be addressed. In addition, employers need to make managers and employees aware of the policy and hold training on the policy, explaining how everyone can work to avoid and respond to sexual harassment. Employers must also have a complaint procedure in place that promptly investigates claims and takes appropriate disciplinary action if the claim is determined to be valid.

Pregnancy Discrimination Act

Consider the following scenario: A woman who is obviously pregnant applies for an opening in your organization. The hiring manager is not thrilled at the prospect of a new hire going out on leave soon after beginning work. The manager calls you and states that he does not want to hire this applicant and wants you to endorse that decision. How would you advise this manager?

The scenario in the preceding paragraph is bound to come up often, given that we humans reproduce! To refuse employment simply because the applicant is pregnant would violate the Pregnancy Discrimination Act. To analyze the situation, you want to know if the individual is qualified for the job and if there are others who are better qualified. If she is qualified and there are no better-

qualified applicants, you next want to learn more about the position and the employer's immediate needs for the position. Occasionally, there is an urgent need for an experienced worker to produce a result or accomplish a task on a short-term basis. If a newly hired employee must take leave within a few months after beginning employment, she cannot meet the urgent need. Usually, however, there is no such short-term need and the employee could go out on leave, return, and pick up where she left off.

Pregnancy discrimination requires an employer to take a ***tangible employment action*** due to a woman's pregnancy. Pregnant women must be assessed based upon their ability to perform a job rather than their physical condition. According to your textbook, roughly half of all working pregnant women return to their jobs before their children turn one year old (Moran, J. J., 2014). Certainly, there is some inconvenience, which often comes in the form of other employees having to cover for these workers. But the truth of the matter is that any employee could encounter a medical emergency of any type and need to take medical leave shortly after being hired. Pregnancy is really no different.

Family and Medical Leave Act (FMLA)

In this lesson we also explore the Family and Medical Leave Act (FMLA), one of the federal statutes governing the workplace. It was signed into law during the Clinton administration. FMLA differs from antidiscrimination statutes such as Title VII because it imposes an affirmative obligation on the employer. Instead of telling employers what ***not*** to do, FLMA tells them what to do. Under FMLA, covered employers must permit eligible employees to take unpaid leave to have or care for a newborn, care for an adopted or foster child, care for a close relative with a serious health condition, or because of the employee's own serious health condition. Any employee who takes FMLA leave has a certain amount of job protection. He or she has the right to return to the same or an equivalent job. The courts are still answering questions raised by FMLA. Managers need sound guidance from HR professionals, and possibly attorneys, to navigate the gray areas of this statute.

Note that FMLA does not apply to every employer. Consult your textbook to learn the specifics of this legislation. Note, too, that three states have taken the initiative to provide employees with a partially paid FMLA leave. In 2004, California took the lead. Washington and New Jersey followed. Legislators recognized the burden that unpaid leave imposes on workers.

Sexual Orientation and Transgender Discrimination

Protection under Title VII does not extend to sexual orientation and transgender discrimination. Some states and cities, however, have passed laws prohibiting such discrimination. Perhaps your organization has a policy against harassment based on sexual orientation and transgender status. Regardless of whether any laws or policies have been violated, discriminatory conduct along these lines must be addressed. Training supervisors and employees who disagree with homosexual activities or a person's decision to undergo gender change poses major challenges for Human Resource professionals. Some employees may engage in conduct that makes the environment uncomfortable and even hostile for homosexuals. Courts often will look for alternative ways to find remedies for employees who are discriminated against due to their sexual orientation. Examples include First Amendment free speech rights, federal and

state equal protections laws, or specific state laws that afford protections that Title VII does not.

HR personnel charged with training supervisors and employees may need to remind trainees when conducting training on diversity in the workplace that the workplace belongs to the ***employer*** and not the employees. Employees simply do not have the right to engage in conduct that might cause liability for the employer or violate the employer's policy. Since it is the employer's workplace, the employer must make and enforce the rules. Employees who cannot conduct themselves in a professional manner, i.e., treating all coworkers with respect and keeping their personal opinions quiet, may need to seek employment elsewhere. If an employee wants to stay, he or she should accept the reality that the private lifestyles of coworkers are irrelevant to what needs to be accomplished in the workplace.

The fact is that gay, lesbian, bisexual, and transgender employees are a growing part of the workforce. For years, many of these employees have kept their status private in order to avoid discrimination in the workplace. In light of the U.S. Supreme Court's recent decision regarding same-sex marriage, however, same-sex partners will marry in increasing numbers, bringing their status to light. They will also adopt children who may interact with supervisors and coworkers. Human Resource professionals need to do their best to promote understanding and a workplace that is comfortable for all employees. They must also keep abreast of employment law changes that come about as a result of this seminal case.

Some Closing Thoughts

Human Resource professionals have key responsibility for limiting the negative effects of sex discrimination and harassment in the workplace. They must understand and recognize the many behaviors and policies that can be tainted with sex discrimination and harassment. Educating executives, managers, and employees is crucial in preventing these types of discrimination and ridding the workplace of them where they exist. Human Resource professionals must lead by example. They must also garner the support of top management and educate them on the benefits of being proactive through prevention. Lawsuits are often the consequence of employers turning a blind eye or downplaying discrimination and harassment violations in the workplace. Consult the websites listed above under Supplementary Resources to keep you up-to-date in these and other areas.

References

Moran, J. J. (2014). ***Employment Law: New Challenges in the Business Environment*** (6th ed.). Upper Saddle River, NJ: Prentice Hall.

PowerPoint Lecture Notes

Use the lecture notes available in PowerPoint as you study this chapter by CLICKING THE LINK BELOW. These notes will help you identify main concepts and ideas presented in this chapter.

If you do not have PowerPoint on your computer, you can download a free viewer from Microsoft by clicking here(http://www.microsoft.com/downloads/details.aspx?FamilyID=048dc840-14e1-467d-8dca-19d2a8fd7485&DisplayLang=en).

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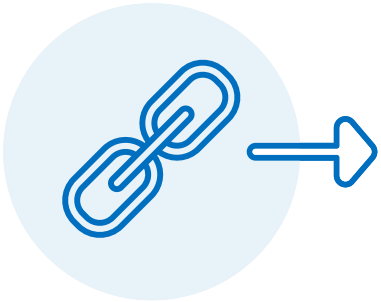
[05] Lessons 4 & 5 Exam



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