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## **Civil Behavior on the Project:** *A Leader's Perspective*

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## TABLE OF CONTENTS

<b>TABLE OF CONTENTS</b> .....	<b>2</b>
<b>OVERVIEW FOR THIS COURSE</b> .....	<b>4</b>
<b>LEARNING OBJECTIVES</b> .....	<b>5</b>
BENEFITS TO YOU .....	6
<b>“LEGAL LINKS” IN THE WORKPLACE</b> .....	<b>7</b>
<b>CIVIL BEHAVIOR’S FOUR COMMANDMENTS</b> .....	<b>9</b>
<b>DESCRIBING BEHAVIOR EFFECTIVELY</b> .....	<b>11</b>
<b>TITLE VII OF THE CIVIL RIGHTS ACT OF 1964</b> .....	<b>14</b>
<b>ILLEGAL WORKPLACE BEHAVIORS</b> .....	<b>16</b>
DISCRIMINATION .....	16
AGE DISCRIMINATION IN EMPLOYMENT ACT .....	17
DISCRIMINATION BASED ON DISABILITIES .....	18
HARASSMENT IN GENERAL .....	21
HARASSMENT AS INTIMIDATION .....	22
<i>The EQUAL PAY ACT</i> .....	22
SEXUAL HARASSMENT .....	24
<i>EXAMPLES OF HARASSMENT COURT DECISIONS</i> .....	26
RETALIATION.....	27
<i>UNFAIR LABOR PRACTICES</i> .....	28
<b>THE MANAGER’S OBLIGATION TO ACT</b> .....	<b>29</b>
<b>SAMPLES FOR REFERENCE</b> .....	<b>32</b>
DOCUMENTATION FOR TERMINATION .....	32
<b>WORK PLACE INVESTIGATION MODEL</b> .....	<b>34</b>

RECORD OF EMPLOYEE INTERVIEW .....35

*RESOLVING CRITICAL PERFORMANCES AND/OR INCIDENT MISCONDUCT* .....36

*REGARDING WRITTEN REPRIMAND, SUSPENSION or TERMINATION* .....37

EMPLOYEE CONFERENCE OR INTERVIEW .....38

EMPLOYEE CONFERENCE SAMPLE .....39

DISCHARGE CHECKLIST .....41

**SUMMARY OF LAWS TO UNDERSTAND..... 42**

    HARASSMENT.....43

    AGE DISCRIMINATION .....44

    AMERICANS WITH DISABILITIES ACT.....45

    FAMILY AND MEDICAL LEAVE (FMLA) .....46

    NATIONAL LABOR RELATIONS ACT.....47

    BANKRUPTCY AND GARNISHMENT .....47

    RETALIATION.....48

    WORKERS COMPENSATION LAWS .....48

    IMPLIED CONTRACT .....48

    DEFAMATION .....49

## OVERVIEW FOR THIS COURSE

Welcome to this course – we designed it to be the most important training you ever receive on the job because:

- ✓ It will teach you how to respond appropriately to inappropriate or illegal behavior you may encounter at work.
- ✓ It will give you more confidence as a manager or supervisor by clearly explaining your employer's expectations of you when dealing with workplace behavior issues.

The intended audience for this course is anyone in a leadership – *management, supervisory, or influential even if not supervising team members directly* -position as well as line team members who should know their rights and obligations in today's employment environment. It will help students understand and be able to apply the legal foundations of behaving in a civil manner within the project workplace whether as a member of management or a team member. While it is not intended to replace any similar training provided by an employer, it will be a strong supplement for any that currently exists and will provide a good foundation where none exists.

Participants will learn about the legal linkage and liabilities between employers and team members and how to reduce the potential risk of expensive litigation as much as possible. There are guidelines on providing effective documentation that helps to show the person acted in a reasonable way and to describe the training and guidelines an employer should be providing to the workforce.

We have also included brief summaries of illegal workplace behaviors, sample cases for reference, samples of useful documentation forms, and summaries of the more important laws for easy understanding.

**This course deals with the *management of the team members working on any given project*. It is NOT ABOUT the tools of managing projects: i.e., the discipline called Project Management. So if we say "*Project Management*" in this course, we are referring to any member of the management group at any level within the project who has authority and responsibility over other team members.**

## LEARNING OBJECTIVES

The intended learning objectives are:

1. Knowing how to respond appropriately to inappropriate or illegal behavior you may encounter at work.
2. To give you more confidence as a manager or supervisor by clearly explaining your employer's expectations of you when dealing with workplace behavior issues.
3. To help you avoid saying or doing something (*whether intentional or not*) that may cause someone to bring legal action (\$\$\$) against you.
4. To keep someone else (*whether intentional or not*) from denying you any of the rightful opportunities to which you are entitled as a team member.
5. To make sure you can no longer say with credibility "*I didn't know that*" regarding workplace issues of harassment, discrimination, and retaliation.
6. To explain the "LEGAL LINK" between you and your employer making it responsible for your actions in the workplace.
7. To explain the "LEGAL LINK" between YOU and your team members making YOU responsible for their actions in the workplace.
8. To help you apply in your workplace the practical examples and models taught here.
9. To help you beware of what you say and do in the workplace
10. To help you understand why you should not rely on "common sense"
11. To help you investigate and document your findings about a situation
12. To help you know when to ask for help in a situation
13. To help you decide what are the "right things to do" in a given situation
14. To help you describe situations effectively
15. To help you understand the difference between objective and subjective statements
16. To identify the specific legislation that provides the foundation for civil behavior in the workplace
17. To understand and be able to react appropriately to the various illegal workplace behaviors covered in that legislation
18. To understand how acts of "good intentions" could be perceived as discriminatory
19. To understand how "having a little harmless fun" could be seen as harassment

20. To help you understand the concept of “quid pro quo” and the dangers associated with it
21. To understand the scope of harassment decisions by providing actual court cases
22. To understand general concepts about unfair labor practices
23. To understand the manager’s obligation to act
24. To understand what you must tell a team member before they tell you something in confidence
25. To understand the liability associated with the concept of “you knew or should have known”

## Benefits to You

It will give you a greater understanding of today’s workplace behavior requirements allowing you to work more confidently and productively. It will also help if you are a manager to avoid potential legal and career risks associated with inappropriated behavior in the workplace.

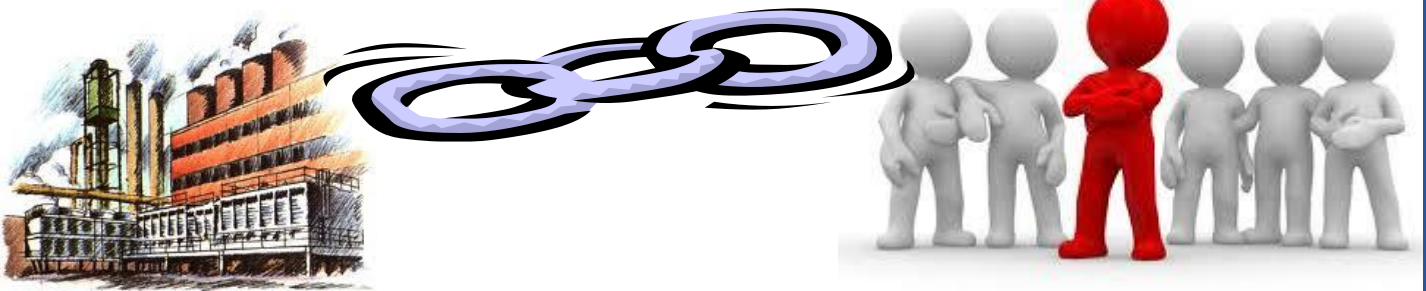
There has been a steady increase of lawsuits in our country stemming from behavioral issues in the workplace. This litigation is very expensive from *financial and productivity standpoints* of employers and financial and career impact standpoints of team members. You can do a lot to protect yourself from negative financial and career impacts by learning what your employer expects you to do.

Also, to help you avoid saying or doing something (*whether intentional or not*) that may cause someone to bring legal action (\$\$\$) against you. And, to keep someone else (*whether intentional or not*) from denying you any of the rightful opportunities to which you are entitled as a team member.

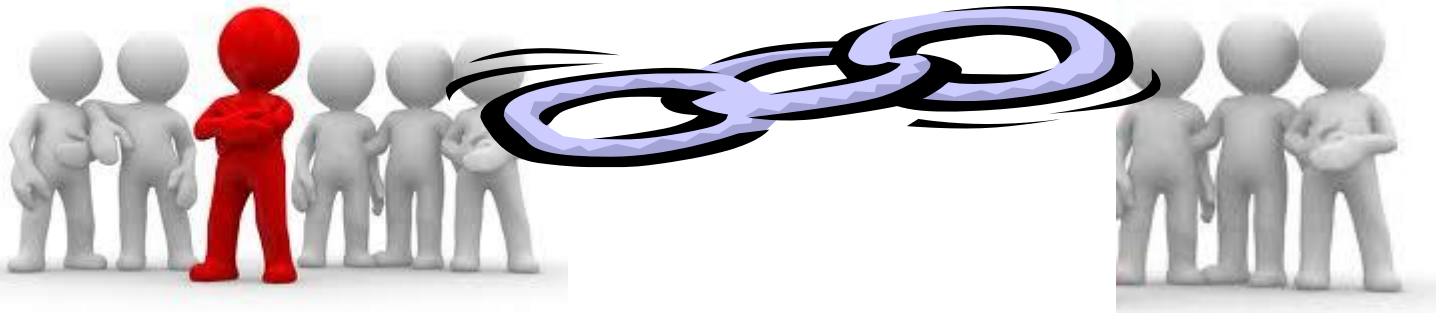
- **We are not lawyers and are not trying to make you into lawyers.**
- **You must contact your organization’s Human Resources Department to learn how your organization deals specifically with the issues we raise in this course**
- **After this course, you can no longer say with credibility, “I didn’t know that” regarding workplace issues of harassment, discrimination, and retaliation.**
- **Your understanding is more important than your agreement with these issues.**

## "LEGAL LINKS" IN THE PROJECT WORKPLACE

There are two very critical "legal links" in any project workplace about which you, as a leader in any capacity, must be aware:



There is a LEGAL LINK between your employer and YOU as a leader of a portion of their workforce making it responsible for your actions in the workplace.



Additionally, there is also a "LEGAL LINK" between YOU and your team members making YOU responsible for their actions in the project workplace.

The Organization that employs you is legally responsible for your behavior while you are considered "at work". If you do something illegal during work hours (when you're considered "at work") but not necessarily onsite at the project, the organization could be sued for your actions REGARDLESS IF ANY OFFICIAL IN THE ORGANIZATION ACTUALLY KNEW YOU WERE DOING IT!

The lawsuit will probably say, “*The organization’s management knew or should have known you were doing that illegal act which demonstrates their failure to supervise you or to train you not to act that way.*” That situation can become very expensive to the organization (and possible you) very quickly!

The lawsuit would ask for (AND PROBABLY GET) a lot of money from the organization because the organization has "deeper pockets" (more money) than you do!

What are some examples in your job that can mean “at work on the project but not necessarily onsite”?

(You could be running a work-related errand while driving a project vehicle and cause an accident. You could be traveling to a distant project meeting and get into an altercation at an airport. You could be attending a meeting at a client’s office.)

**Why should you be aware of this issue?**

(Your behavior is a result of your understanding and willingness to apply the concepts we offer in this course.)

**What relationship is there between this course and the concept that your employer could be held liable (and pay BIG \$\$\$\$) for your illegal actions if someone could prove they “failed to train you to act appropriately”?**

(If they could not show proof they trained you to act appropriately – *and you passed a test to show that you understood what was taught* – they could be held liable for your actions. However, if they COULD SHOW THAT PROOF, that could diminish their risk and allow them to claim you acted illegally *even though they taught you not to!*)

What about between your employer and the team members who work for you? (Essentially the same as above)

What about between you and your team members?

(Essentially the same as above)

The US Supreme Court ruled that even if an employer is held responsible for the discriminatory conduct of one of its supervisory personnel, ***it can avoid a punitive damage award by showing that the supervisor's conduct was contrary to the employer's good faith efforts to comply with the law.***

-June 1999 Kolstady v. American Dental Association (A “punitive damage” is a “punishment” penalty for doing something wrong. This is in addition to any compensation damages awarded.)

(If your employer could prove that they reimbursed you for this course and that you passed the test at the end to get your certificate, do you think a court would think this is a “good faith effort by your employer to comply with the law?”)



## CIVIL BEHAVIOR'S FOUR COMMANDMENTS

Here are four basic behaviors that you must keep in mind in a project workplace regardless of where it is or what it does:

### 1. BEWARE OF WHAT YOU SAY AND DO!

If there is a chance that someone may be offended or misunderstand something you are about to say or do, you are better off not saying or doing it!

You must learn to consider your potential words or actions ***through the eyes of your audience*** because that is who would be making the charge against you.

The question to ask yourself ***before you act*** is, "*Could they possibly take this wrong?*" If there is a chance they could, don't say or do it! (Remember, you can't *un-ring* a bell after the fact.)

### 2. DO NOT RELY ON "COMMON SENSE"!

We have become such a diverse society that something very familiar to you may be strange and threatening to someone else. Do not assume that everyone thinks like you do and shares the same "common sense"!

(For example, relaxing with your feet on your desk while talking to someone is considered *very insulting* in some cultures if you show them the bottom of your shoes!)

The excuse, "*Anyone with common sense would understand that I didn't mean any harm*" **carries no weight** with the law. If you offended someone (intentionally or not) to the extent that it impacts his or her work, then you were wrong to do it!

### 3. INVESTIGATE and DOCUMENT YOUR FINDINGS

*"If it isn't documented, it didn't happen"* should guide your actions when you become aware of potential problems within your department.

Learn to keep accurate and objective records you can refer to later as needed. Focus on the five "**Ws**": ***who, what, where, when, why***, (and ***how*** if necessary).

If you cannot document that you acted promptly on a problem, issues of **negligence** (“you knew or should have known”) may come up against you later.



#### 4. GET HELP FROM YOUR MANAGER AND/OR HUMAN RESOURCES

Never be afraid to ask for help in situations where you aren't confident of what to do next. (And then document that you did ask for help and what the result was.)

Remember, “common sense” does not apply when dealing with project workplace issues like we discuss in this course. You must be able to show (“*if it isn't documented, it didn't happen*”) that you acted according to organizational guidelines by applying what you were taught in this course.



We are not saying there are guarantees of which way a court will decide regarding workplace issues. However, we are saying that making an attempt to do what a jury would consider “the right thing” *might reduce the amount of penalty in a lawsuit.*

This course is designed to help you decide what “the right things” are to do.

Suppose you were a member of a jury trying to decide whether a manager properly documented the event in question. Which of these documentation methods would have the greatest credibility for you and why?

- An electronic text file on a computer that provides spell checking and allows inserting, deleting, or moving text as needed by the user.
- A bound paper diary with handwritten entries on pre-numbered pages.

(The second one would *probably* carry more weight because it would be difficult to re-create that after the fact. We say “probably” because there are never any guarantees in a legal case!)

## DESCRIBING BEHAVIOR EFFECTIVELY



Suppose you were on a jury hearing a case about “Unlawful Discharge”. You read the note below from a disciplinary report the defendant (the manager of the team member who is suing the employer) wrote about the plaintiff (the team member suing the employer for unlawful discharge).

- What questions would you have?
- What would it make you think about the manager?

*“John still has a bad attitude about work. He takes no pride in his work nor shows any professionalism in the way he deals with customers or fellow team members. When I try to correct him, he gets all worked up and talks disrespectfully about the department, the project, and the company.”*

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Two things are important here:

1. **You must be able to separate the person from their behavior so you do not appear to be a vindictive or incompetent manager or supervisor.**

*“You failed to complete the assignment”* focuses on legitimate work-related behavior while not attacking the person.

*“You’re lazy! You didn’t finish the assignment!”* attacks the person and makes you sound like a bully. The work-related aspect is diminished.

2. **You must be able to express the OBJECTIVE BEHAVIORS that concern you: NOT YOUR SUBJECTIVE OPINION.**

Think of “objective behaviors” as something everyone would agree on regardless of any personal beliefs. *He threw the pencil sharpener* is an **objective behavior** for which all observers would agree

because they saw him do it. *He was rude* is a **subjective behavior** because all observers may not share your opinion of what constitutes rudeness.

For example, telling someone to “*show a more professional attitude*” does not mean much because it does not clarify what you expect him or her to DO (a behavior) differently.

However, you should say:

- **“DRESS** according to our organization’s policy for meeting clients (a behavior)
- **SPEAK MORE SLOWLY** (a behavior)
- **SMILE AND REPEAT THEIR NAME IN THE CONVERSATION** (a behavior)
- **ANTICIPATE THEIR QUESTIONS WITH INFORMATION ABOUT OUR PRODUCT** (a behavior)
- **LISTEN INTENTLY AND ASK QUESTIONS WHEN YOU DO NOT UNDERSTAND** (a behavior)

and doing those things will make you seem more PROFESSIONAL”

Which of these descriptions would be easier for you to prove about an team member’s failure to perform as expected? Why?

- ✓ **This description:** *Documentation of his day’s production results compared to his job description of what the project pays him to do.*

“Joe’s job description as a machine operator (attached) specifies the project standard requiring a minimum average of 30 pieces per hour. His production this week has averaged 23 per hour.”

- ✓ **Or this description:** *Joe has a bad attitude about work.*

The answer is the first one because it deals with objective facts. Joe is paid for productivity and not for having a “good attitude”. (Think about this...you have probably seen an employer keep a highly productive team member that couldn’t get along with people. The reason is that, unless they *are paid to get along with people such as waiting tables, hospitality services, or customer services*, then productivity is the priority and you must address that in a complaint.)

Which would have more effect on a three-year-old child: saying “**settle down!**” over and over or saying, “**Stop running through the room! Stop jumping on the sofa! Stop pulling the dog’s tail!**”?

“Stop running through the room! Stop jumping on the sofa!  
Stop pulling the dog’s tail!”?

Why do you think so?

You are talking about the specific behavior that you want him to stop doing. Perhaps that collectively means “settle down” to you but unless you first describe the behavior you want changed in a way the person can understand it, the “settle down” phrase is meaningless.



## REVIEW

Describe some **BEHAVIORAL TRAITS** that could be used to describe these **ATTITUDES** or **OPINIONS**:

“Rude”

“Thoughtless”

“Inappropriate”

“Embarrassing”

## TITLE VII OF THE CIVIL RIGHTS ACT OF 1964



You must be aware of the major provisions of TITLE VII of the CIVIL RIGHTS ACT of 1964. Your awareness of it can reduce the potential for you and your employer being sued successfully and paying BIG \$\$\$.

Title VII is a provision of the Civil Rights Act of 1964, which prohibits discrimination in virtually every employment circumstance on the basis of race, color, age, religion, gender, pregnancy, or national origin.

The purpose of Title VII's protections is to "**level the playing field**" by forcing employers to consider only objective, job-related criteria in making employment decisions. The above classes of individuals are considered "protected" under Title VII because of the history of unequal treatment, which has been identified in each case.

Title VII must be considered:

- When reviewing applications or resumes (i.e., by not eliminating candidates on the basis of a "foreign" last name or an "ethnic-sounding" first name).
- When interviewing candidates (i.e., by asking only job-related questions).
- When testing job applicants (i.e., by treating all candidates the same and ensuring that tests are not unfairly weighted against any group of people)
- When considering team members for promotions, transfers, or any other employment-related benefit or condition.

The Pregnancy Discrimination Act of 1978 amended Title VII to provide that ***pregnant women are treated the same as other team members who are disabled***. The employer's policies for taking leave, health benefits during leaves, and reinstatement after leave applies equally to pregnant women and other team members. **This is probably the most significant law related to fairness.**



If any team member in the above defined protected class feels as though they are being treated unfairly, they have reason to file a charge of discrimination. An important part of this law is perception.

Even if there is no discriminatory intent, **the appearance of unfairness can lead to a charge.**

It always important to provide equal access to training, privileges, and promotions to all people in your department.

## ILLEGAL WORKPLACE BEHAVIORS

The following are some of the most common illegal project workplace behaviors.

### DISCRIMINATION

Discrimination means "different treatment".

This means that you **CANNOT** (we do not mean "SHOULD NOT") treat people (management, non-management, classified or unclassified service, customers, vendors, or visitors) differently for reasons of: Race, Age, Sex, Disability, Religion, Citizenship Status, Color, or any other factor protected by law.



"Different treatment" by way of trying to do a favor could cause problems for you, too.

You may want to let a hard working, reliable employee who is a single parent off work early so they can pick up their child from daycare as a way of saying "thank you" for being such a good employee.

Would you also be willing to let one of your least favorite employees leave early to pick up their child, too?



"What are AT LEAST FIVE SITUATIONS of DISCRIMINATION that could happen in a project workplace?"



## AGE DISCRIMINATION IN EMPLOYMENT ACT

It is illegal to discriminate under the Age Discrimination in Employment Act (ADEA).

You cannot discriminate because of age against an applicant or team member or applicant who has attained age 40.

If the "older" worker can get in front of a jury and convince them that he or she was over 40 when an adverse employment decision (such as demotion, reassignment, or discharge) affected him or her, they have a good chance of winning. **Especially if there are older people in the jury!**



Obviously, you must be very careful at team member birthday parties, awards for length of service, or any situation where we are tempted to joke about our own age, and the ages of other team members.

“Well, **GRANDPA**, how’s it feel to be the oldest employee we have here?”

Let’s discuss this...

“Is that why I didn’t get the promotion? Because he thinks I’m too old?”

How could comments like, “you can’t teach an old dog new tricks” or “we need some new blood around here” create problems at a work place birthday party for an older employee?

One of the main provisions of the Act is that employers, with very few exceptions, can no longer force an employee to retire.

HAPPY RETIREMENT

## DISCRIMINATION BASED ON DISABILITIES

The AMERICANS WITH DISABILITIES ACT prohibits discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training and other terms, conditions and privileges of employment.

This law is designed to remove barriers, which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities. An individual has a disability under ADA when he/she has a physical or mental impairment that substantially limits one or more major life activities.



When an individual's disability creates a barrier to employment opportunities, the ADA requires employers to consider whether a **reasonable accommodation** could remove the barrier. *A qualified individual is one who, with or without a reasonable accommodation, can perform the essential functions of a job.*

A **reasonable accommodation** is a modification to a job, which will allow an individual with a disability to perform the job's essential functions. An employer is required to make a reasonable accommodation to a known disability of a qualified applicant or team member.

A reasonable accommodation *may include but is not limited to:*

- Making facilities used by team members readily accessible and usable by persons with disabilities
- Job restructuring
- Modifying work schedules
- Reassignment to a vacant position
- Acquiring or modifying equipment or devices
- Adjusting or modifying examinations, training materials or policies providing qualified sign language interpreters





Which question would be legal in an interview with an applicant who appears to be disabled?

Why?

1. How often do you have to go to the doctor?
2. How will you get to work?
3. Do you think you can perform the job as I've described it?
4. How much work did you miss during the past year at your prior employer?

Question #3 is legal because it is focused on whether they can perform the job. Everything else is about their disability.

How could your ILLEGAL comments be dangerous for you and your employer?

If they failed to get the job, they could assume your illegal questions indicated your intention to hold their perceived disability against them and that is illegal.

Do you think the existence of that risk is reasonable?

Which is not a reasonable accommodation for a team member with a disability?

1. Providing brailled signs in a building.
2. Buying expensive computer equipment.
3. Allowing them to complete only 80% of the job duties assigned.
4. Providing the person assistance on non-essential functions of the job.

Number 3 is not reasonable. They still must meet all of the requirements of the job. The accommodations provided help them meet those requirements.

Which of these is not a protected class under Title VII of the Civil Rights Act?

- A pregnant woman
- An Hispanic man
- A white man
- A woman

The white man is the only one that is not part of a minority. (If we said, "A white man over 40", then we would have someone who is part of a minority because most of the US population is less than 40 years old as of when this course was developed)

Which of these practices could result in a violation under Title VII of the Civil Rights Act?

1. Offering specialized training to the most senior team members
2. Hiring a qualified applicant outside of policy
3. Hiring the most qualified person for an open job
4. Paying incentives for production

Offering specialized training for the most senior is giving them special attention that you are not offering to anyone else. Even though it is intended as a good act, failure to offer it to everyone may be a source for a discrimination claim from someone not receiving that training.

## HARASSMENT IN GENERAL

Whether you call it "playing" or "just kidding around", you **CANNOT** do or say anything that makes someone so uncomfortable that it affects his or her work negatively.

This means that you **CANNOT** (we do not mean "SHOULD NOT"):

- ✓ Use offensive language
- ✓ Engage in any offensive behavior such as:
  - Tell offensive jokes
  - Make gestures, sounds, or show pictures that may offend someone at work.

You **CANNOT** engage in any behavior that may be considered harassment relating to an employee's race, religion, color, national origin, age, disability; citizenship status or other factor protected by law.



"So what's the big deal with having a little harmless fun?"

The "big deal" with harassment comes from the fact that team members are entitled to make a living by doing the best job they can for their employer. If they have trouble concentrating on their job because co-workers say or do things that makes them uncomfortable, those coworkers **are putting their victim's job at risk**. If someone were putting your job at risk, would you laugh? What would you do about it?

## HARASSMENT as INTIMIDATION

However, managers need to know that any type of intimidating behavior (i.e., degrading, yelling at, publicly disciplining, sarcastic comments, divulging confidences, etc.) could be construed as hostile.

A manager who behaves in an intimidating manner may not be specifically singling out a particular team member; it may just be his or her “management style.” The risk here is that a team member may take it to mean, “You don’t like me” which could lead to feelings of intimidation and then a “hostile environment”.

An intimidating, hostile management style is inappropriate because it not only could be construed as illegal, but it is ineffective as well.



## The EQUAL PAY ACT



The Equal Pay Act is an amendment to the Fair Labor Standards Act that prohibits employers from discriminating between men and women by paying one gender more than the other *"for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."*

Which is not permitted under the EQUAL PAY ACT to justify a pay difference?

- A difference in seniority.
- A difference in education.
- A difference in personality.
- A difference in performance.

A difference in personality is not permitted to justify a pay difference because it is probably not a “bona fide occupational qualification” [BFOQ] of the job performance. You must be able to demonstrate that the reasons for a pay increase are specifically tied to that job.

A difference in personality *may apply* if it's a public relations job where being charming and friendly are essential for business. However, if the team member works essentially alone in a cubicle, it would be hard to justify it.

Paying an external candidate a significant amount higher than current team members doing the same job can be a BIG problem.

This is especially true if a department is all women and the new hire is a man.

## SEXUAL HARASSMENT



The concept of “sexual harassment” includes:

- A male harassing a female
- A female harassing a male
- A female harassing another female
- A male harassing another male.

Whether you call it "playing" or "just kidding around", you **CANNOT** say nor do anything that would make a team member think he or she must "give in" to any kind of sexual advances in order to receive favorable treatment from you regarding any condition of employment.

This means that you ***CANNOT*** (we do not mean "SHOULD NOT") give a team member reason to think you are expecting a trade of sexual favors for:

- A promotion
- A favorable performance assessment
- Assignment of favorable duties
- Assignment of favorable work hours
- Assignment of favorable equipment or resources
- Better wages or overtime opportunities
- Anything that suggests a TRADE (“quid pro quo” in legalese) is required before you will provide a favorable outcome to their request.



“SEXUAL HARASSMENT” must include a feeling that the comments made were **UNWELCOME and UNINVITED**. If a team member says something that you think is a genuine compliment such as, *“That sure is a bright and cheerful outfit for spring!”* you can reply, “Thank you” without any problems.



However, if the team member makes you feel uncomfortable by making UNINVITED or UNWELCOMED comments about how it accents your figure or anything else you think is inappropriate, then it approaches sexual harassment. If that happens, tell him or her IMMEDIATELY, *“Please don't say that. You are making me very uncomfortable”*.

**If he or she apologizes and drops the issue, go on about your work.** (However, if it does bother you but you do not say anything, it *may be* more difficult to lodge a complaint later because they could always say, “If I thought it bothered you, I would have stopped.”)

If they persist, say something like, *“That's enough! I'm contacting my manager and Human Resources about this.”* **THEN DO IT!** [Be sure to document your contact with HR!]

(Contact your manager or the Human Resources Department for reporting instructions.)

“Surfing the web” and showing team members websites you find with offensive content can also be a form of harassment. Forwarding messages with sexual jokes you have received can be harassment. **DO NOT DO IT!**



What can you say or do in your project workplace to make sure the other person realizes their comments are “unwelcome and uninvited”?

## EXAMPLES OF HARASSMENT COURT DECISIONS

- An employer avoided a sexual harassment lawsuit because when they (management) heard about the harassment, *they immediately implemented a no-harassment policy*, and the harassment ceased.

Webb v. Cardiothoracic Surgery Associates, 1998

- Ford Motor Company succeeded in having a case dismissed because they distributed a policy that prohibits harassment and thoroughly investigated reported inappropriate behavior each time the plaintiff complained.

Kolnicki v. Ford Motor Co., 1995

- After receiving a complaint of harassment, the employer promptly suspended the accused harasser and investigated the allegations. When the team member who complained sued, the lawsuit was dismissed based on the **employer's prompt investigation**.

Juarez v. Ameritech Mobile Communications. Inc., 1995

- A legal secretary charged a partner in the law firm sexually harassed her during the short time she worked there. At trial, the evidence showed that several people in the firm knew of separate instances of harassment by this partner, but no single person knew of all the instances. The firm's failure to conduct a thorough, centralized investigation resulted in a jury verdict of over \$7 million, which was later reduced to slightly more than \$3 million, **with approximately \$250,000 paid by the partner personally**.

Weeb v. Baker & McKenzie, 1994

- A female team member charged that she reported her supervisor's unwanted sexual harassment to others in the company, but her complaints were ignored (**the company could not offer proof that it acted on her complaints.**) The jury awarded her \$35,000 for her emotional distress and \$50 million in punitive damages (later reduced to \$350,000).

Kirnzeyv. Wal-Mart Stores Inc., 1995

## RETALIATION

Whether you justify it as "pay back", "getting even", or "what goes around, comes around", you **CANNOT** do anything to a team member who has reported someone engaging in illegal behavior.

Legal



This means that you **CANNOT** (we do not mean "SHOULD NOT") do anything harmful to a team member who has:

- Reported someone who practices discrimination in the project workplace.
- Reported someone for harassing them or other team members whether it is sexual or not.
- Reported someone for behavior contrary to company or project policy which may include theft, drug abuse, sleeping on the job, drinking alcohol on the job, belligerence toward other team members, visitors, vendors, or citizens, falsifying records, conviction of a crime, excessive absence from assigned work area without permission or *any causes for disciplinary action as defined in your employer's Policy and Procedures manual.*

REVIEW

“What are AT LEAST FIVE SITUATIONS of RETALIATION that could happen in your workplace?”

## UNFAIR LABOR PRACTICES



Employers may not take action that would interfere with employees' rights under the National Labor Relations Act (NLRA).

Here are two activities under this act that could cause managers problems if you were not aware of them.

- 1. You cannot interfere, restrain, or coerce a team member from exercising his or her rights. These rights include raising concerns about the conditions of employment and organizing for the purpose of improving working conditions.***
- 2. You cannot discharge or otherwise discriminate against a team member because he/she filed charges or gave testimony under the NLRA: retaliation against such team members, or any adverse employment action, is strictly forbidden***



Additionally, you cannot discipline team members for discussing their wages with each other regardless if your policies discourage them from doing it.\*

\*However, **you can be** disciplined for divulging confidential salary information about other team members!

## THE MANAGER'S OBLIGATION TO ACT

It is very important that you understand this...



If a team member brings information to you about an illegal activity such as:

- Discrimination
  - Harassment of any kind
  - Retaliation
  - Theft
  - Forging signatures of time cards
- Or anything contrary to the rules, regulations, and policies of your organization

**You have an obligation to act on it!!**

Suppose a team member tells you in confidence about someone selling drugs at work. They ask you to leave their name out of it.

- Would you contact your manager and/or Human Resources about this?

Why or why not?

- Would you insist on keeping the employee's name out of it?

Why or why not?



Suppose the investigators say they must know who told you so they can complete their investigation.

- Would you tell?

Why or why not?

What should you tell a team member BEFORE they divulge confidential information to you?

You must tell them something like this: *"If what you tell me involves illegal activity, I have an obligation to report it. Otherwise, I become part of a cover-up."* Talk to your manager or the HR Department for the way your organization wants you to phrase it.

Which do you **PERSONALLY** think is your greater obligation?

- Keeping confidentiality with a team member or
- Your duty to report illegal activity

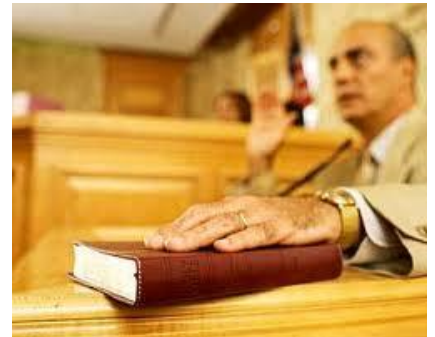
Think about what we said earlier about NEGLIGENCE and the concept that YOU *"knew or should have known."*

Suppose a team member tells you about a coworker who is making them uncomfortable with comments about a swimwear catalog that they have been showing in the cafeteria.

Then they finish the story saying, *"I guess it's not really such a big deal now that I hear myself tell it. Can we just forget about it? I will handle it. Sorry I wasted your time."*

They leave your office and, since they said, "It's not a big deal, I'll handle it," you do forget about it and go back to your work.

About three months later a lawsuit arrives. It is filed by the team member that came to talk with you and charges sexual harassment against the coworker. You are called to testify in court.



What questions do you think the employee's attorney would ask you?

They would ask if you had heard about this from the team member.

How would you answer?

*"Yes, I did but after she told me, she said not to worry about it because she realized it was not such a big deal."*

What do you think the jury would think about your capabilities as a manager *acting as a representative of your employer*?

That you were not smart enough to realize it still had happened and by not reporting it, you allowed it to continue.

What do you think the jury would think about your employer?

They failed to train their management staff.

How do the concepts of NEGLIGENCE and your DUTY TO ACT apply in this situation?

This is clearly a failure to act by the manager. The team member saying "Never mind" does not relieve the duty to act.

If you were in the jury, who all (if anyone) would you find guilty?

## SAMPLES FOR REFERENCE

Use these samples as a foundation for building your team member relations documentation. If you have any questions, be sure to call HUMAN RESOURCES for guidance.

### Documentation for Termination

Your organization's policies for the number of incidents before probation and termination must be followed. These are just general examples.

1. *Completed new hire training on 2/1/12. Attached is copy of his performance test at the end of our departmental "new hire" training.* (This is especially helpful if you have a documented training program in place in your department for new hires. That makes it hard for them to say, "You never taught me to do that.")
2. *Employee failed to meet production standards* (Attach a copy of the department's production standards and a copy of his recent production.). *I provided additional coaching and training on 3/15/12.* (Attach a statement stating he could perform to the expected standard after the additional training.)
3. *Employee continues to have production problems* (attach proof or describe); *I met with him to discuss my concerns on 4/15/12; He replied, "(include his comments)".* Verbal Counseling
4. *Met with team member to give Written Notice that production performance still was not to acceptable standards on 5/15/12* (attach proof or describe);





5. *Still not meeting production standards (attach proof or describe); Placed team member on probation (define length) with Written Notice on 6/15/12*
  
6. *Employee still not meeting standards (attach proof or describe). Recommending termination 7/15/12.*



If you remember this, you will save yourself a lot of problems as a workplace leader...**"If it isn't documented, IT DIDN'T HAPPEN!"**

A federal jury rejected the age discrimination claim of a former Baccarat sales representative. During trial, Baccarat presented evidence they fired the representative after 23 years of service based on a **long documented history** of conflict, a lack of cooperation with co-workers, and behavior disruptive to the workplace. These were job-related reasons that refuted her claim of age discrimination. Leopold v. Baccarat, 1998

## PROJECT WORK PLACE INVESTIGATION MODEL

This is an example of an effective incident investigation report that can serve as an example of what to consider. **Contact your manager or HR Department for specifics about your organizations forms and policies.**

**(Your employer's name)** has received information that alleges violations of specific company policies. This interview is a part of a confidential investigation into those possible violations.

You should not think the fact that (employer's name) is conducting an investigation means that (employer's name) has concluded that any improper actions have occurred. In addition, it does **not mean** that (employer's name) has formed any conclusion that you are implicated in any improper activities.

### **The subject matter discussed during this interview is confidential.**

Do not talk about the subject matter of this interview with anyone nor tell anyone this interview has occurred. If a coworker asks you any questions about this interview, your response should be; *"I cannot give you that information."* If a supervisor, manager, or any official asks you any questions about this interview, you should tell that individual to contact Human Resources for any information they may need.

We, the undersigned, give you our assurance that we will treat any information developed during our investigation, including information obtained during this interview, as confidential information to the extent practicable.

We also give you our assurance that (employer's name) will not tolerate any retaliation against you by any (employer's name) employee because of your cooperation in this investigation.

However, the information obtained during this investigation will be discussed and revealed to individuals who have a need to know this information in the course of their business with (employer's name). In addition, the information obtained during this investigation may be discussed and revealed to individuals to whom (employer's name) has a responsibility to disclose such information.

**RECORD OF TEAM MEMBER INTERVIEW**

**UNACCEPTABLE PERFORMANCE AND/OR INCIDENT MISCONDUCT REVIEW**

TEAM MEMBER NAME: \_\_\_\_\_

JOB / POSITION / TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_ DEPARTMENT ASSIGNED: \_\_\_\_\_

SUPERVISOR'S NAME: \_\_\_\_\_

OTHERS PRESENT: \_\_\_\_\_

DESCRIBE THE PERFORMANCE DEFICIENCY(S) OR INCIDENT WARRANTING DISCUSSION

The TEAM MEMBER WAS TOLD THIS... (If performance issues, cite specific behavioral expectations or requirements)

The TEAM MEMBER 'S REACTION AND COMMENTS WERE... (Cite quotes and specific behavioral comments when possible.)

AGREED UPON FOLLOWUP ACTION (State special instructions, offers of assistance, supervision, training, and specific measures, standards and actions required of team member,)

OTHER COMMENTS (Attached any additional information to this document, give dates, personnel, equipment involved, etc., and specifics)

SIGNATURE OF INTERVIEWER \_\_\_\_\_

SIGNATURE OF TEAM MEMBER \_\_\_\_\_

DATE FORWARDED TO HIGHER LEVEL OF SUPERVISION \_\_\_\_\_

DATE FORWARDED TO HUMAN RESOURCES \_\_\_\_\_

**RESOLVING CRITICAL PERFORMANCES AND/OR INCIDENT  
MISCONDUCT**

TEAM MEMBER NAME: \_\_\_\_\_

JOB / POSITION / TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_ DEPARTMENT ASSIGNED: \_\_\_\_\_

SUPERVISOR'S NAME: \_\_\_\_\_

OTHERS PRESENT: \_\_\_\_\_

STATE THE PURPOSE OF THE INTERVIEW

LIST ALL JOB INCIDENTS THAT ILLUSTRATE UNACCEPTABLE PERFORMANCE OR MISCONDUCT (Cite specific unacceptable behaviors and reference your employer's policies section that pertains.)

DESCRIBE WHAT THE TEAM MEMBER MUST DO TO PERFORM ACCEPTABLY (List specific measures including quality, quantity, and time elements, standards, and actions required of the team member.)

ADDITIONAL INSTRUCTIONS, ASSISTANCE, OTHER FOLLOW-UP ACTION OR DEADLINES TO CORRECT/IMPROVE PERFORMANCE OR MISCONDUCT

THE TEAM MEMBER 'S REACTION AND COMMENTS WERE

ATTACH ANY ADDITIONAL INFORMATION TO THIS DOCUMENT. (Give dates, personnel, equipment involved, etc., and specifics.)

SIGNATURE OF INTERVIEWER \_\_\_\_\_

SIGNATURE OF TEAM MEMBER \_\_\_\_\_

DATE FORWARDED TO HIGHER LEVEL OF SUPERVISION \_\_\_\_\_

DATE FORWARDED TO HUMAN RESOURCES \_\_\_\_\_

**REGARDING WRITTEN REPRIMAND, SUSPENSION or TERMINATION**

TEAM MEMBER NAME: \_\_\_\_\_

JOB / POSITION / TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_ DEPARTMENT ASSIGNED: \_\_\_\_\_

SUPERVISOR'S NAME: \_\_\_\_\_

OTHERS PRESENT: \_\_\_\_\_

LIST THE UNACCEPTABLE PERFORMANCE DEFICIENCIES AND / OR INCIDENT / MISCONDUCT THAT HAVE OCCURRED (Use measurable behaviors as much as possible. Refer to standards, policies, or documents that define expected behavior or performance.)

LIST DEVELOPMENTAL EFFORTS OR OTHER ASSISTANCE THAT WERE MADE TO RESOLVE THE UNACCEPTABLE PERFORMANCE OR MISCONDUCT (if applicable)

DISCIPLINARY ACTIONS WILL NORMALLY BE TAKEN IN SUCCESSIVE STEPS. (However violation of some rules is more serious than others. Immediate suspension and/or termination may be the first disciplinary action taken for violation of a serious nature. In this case, list the unacceptable performance and/or incident/misconduct that occurred, the action taken and the effective date.)

TEAM MEMBER REACTION AND COMMENTS WERE (Use quotes regardless if the comments were offensive.)

SIGNATURE OF INTERVIEWER \_\_\_\_\_

SIGNATURE OF TEAM MEMBER \_\_\_\_\_

DATE FORWARDED TO HIGHER LEVEL OF SUPERVISION \_\_\_\_\_

DATE FORWARDED TO HUMAN RESOURCES \_\_\_\_\_

**TEAM MEMBER CONFERENCE or INTERVIEW**

**SUMMARY PLAN of CORRECTION**

Team member comments about the conference:

Plan of correction (to be developed by supervisor and team member)

Date to review the Plan of Correction: \_\_\_\_\_

(This may be based on performance goals set, probation period, or other appropriate date based on the circumstances)

I acknowledge that I worked with my supervisor(s) to develop a Plan of Correction and understand the consequences of additional policy violations or failure to improve my performance.

Date \_\_\_\_\_

Team Member's Signature

\_\_\_\_\_

Supervisor's Signature

\_\_\_\_\_

(Witness if any) Signature

**TEAM MEMBER CONFERENCE SAMPLE**

**FAILURE to MEET STANDARDS of CONDUCT or PERFORMANCE**

Team member: \_\_\_\_\_ Employee #: \_\_\_\_\_ Department: \_\_\_\_\_

Supervisors in attendance: \_\_\_\_\_

Date: \_\_\_\_\_

Purpose of the meeting:

\_\_\_\_\_ Verbal Counseling (team member should be given the opportunity to sign; for supervisor's file)

\_\_\_\_\_ Written Conference (team member should be given the opportunity to sign; forward original to HR)

\_\_\_\_\_ Probation (team member should be given the opportunity to sign; forward original to HR)

\_\_\_\_\_ Termination (forward original to HR)

The team member has violated this standard of company conduct or performance (specific reference):

Has this violation been addressed previously? \_\_\_\_\_ Yes \_\_\_\_\_ No

If yes, when? \_\_\_\_\_

State the specific incident(s) that resulted in the violation (be sure to include the date(s)the incidents occurred

The team member is placed on probation for the following number of days:

\_\_\_\_\_ N/A \_\_\_\_\_ 90 \_\_\_\_\_ 180 \_\_\_\_\_ until \_\_\_\_\_

Further violation of this or any other company policy will result in disciplinary action up to and including discharge.

I acknowledge that the above information was discussed in the meeting. I have been given the opportunity to make comments on the Plan of Correction Form and receive a copy of this form.

**Team member does not sign or make comments for a termination meeting.**

Date \_\_\_\_\_

Team member's Signature

\_\_\_\_\_

Supervisor's Signature and phone number

Supervisor's Signature and phone number

Use observable, descriptive terms. Do not put in your opinion or feelings about the matter. For example, write, ***"She rolled her eyes, sighed, and walked away from the conversation"*** instead of ***"clearly she has a bad attitude and does not care."*** The reader needs to be able to picture what occurred.



## **DISCHARGE CHECKLIST**

(Do a little “homework” before contacting HR for guidance on a termination by making sure you have answered all of these questions.)

Has the team member been warned (verbally and in writing) in diplomatic, clear and unmistakable terms about:

- What were the objective expectations?
- What he was doing wrong?
- What corrections would have to be made?
- What are the consequences if things do not improve?

Has the team member had an appropriate amount of time and support to correct the situation?

Have all facts (not assumptions!) been documented?

Were the expectations of the team member reasonable?

Has the organization investigated the situation and verified all facts in the matter?

Has the organization interviewed the team member to provide the opportunity to explain?

Has the organization considered the team member's record of service and the seriousness of the situation when taking action?

Can the reason for action taken be attributed to a specific offense in the policy manual?

## SUMMARY OF LAWS TO UNDERSTAND

Here is a brief summary of the message we want you to understand as a manager for and team member of your employer.

Remember, consider your actions through the eyes of someone outside of your department that did not witness the event (such as Human Resources or a jury) and ask yourself, ***“Would they think I acted fairly, consistently, and reasonably?”***



The principal points you need to remember are:

- **Violations of these laws can result in financial damages and penalties against your employer, and in some cases, the supervisors involved.**
- **Litigation is costly and time-consuming, even if your employer wins. We want to avoid lawsuits by being aware of and complying with the law.**
- **There are no guarantees when going to court.**

Suppose a team member is fired or denied a promotion. Your employer can still win the case by showing that it had a non-discriminatory business reason for its actions. The team member, on the other hand, may argue that the "reason" offered by your employer is a sham.

For example, if your employer argues that the team member was a poor performer, the team member might use favorable performance appraisals to suggest that his performance was acceptable. Similarly, if a female team member who has been terminated "for absenteeism" can show that male team members who missed the same amount of work were not fired, she can argue that your employer is simply using absenteeism as an excuse-and that the real reason the your employer fired her was her gender.

This demonstrates how complicated even a "cut and dried" situation can become. Even if the team member has clearly committed a "firing offense," the team member might still prove discrimination if others have committed similar offenses and have not been fired. This makes it important to check with your manager and Human Resources to see how they have handled similar situations. The way your employer has treated team members in a given situation in the past can, and should, guide how team members are treated in the future.

## Harassment

A claim for harassment is actually a special type of discrimination claim under Title VII. If racial, ethnic, or religious slurs, negative age-based comments, sexual harassment, or negative comments about individuals with disabilities *create a hostile work environment, or interfere with an employee's ability to perform his or her job*, the team member may have a harassment claim against the your employer .

Since sexual harassment is probably the most familiar type of harassment claim, it deserves special discussion. The most obvious sexual harassment claim-"quid pro quo" harassment-occurs when a supervisor demands sexual favors from a team member or applicant in exchange for the benefits of employment (such as hiring, promotion or pay), or retaliates against someone who refuses sexual advances. Obviously, a supervisor who does something like this would be fired once the conduct came to management's attention.



Most sexual harassment claims fall into a second category-"hostile environment" cases. Here, the team member alleges that unwelcome sexual-related conduct at the workplace created a hostile, abusive or offensive work environment. Examples of this type of conduct include sexually oriented jokes, display of sexual objects or pictures, and unwelcome touching or flirtations. Your employer may avoid liability for "hostile environment" harassment claims if it promptly investigates any claims or concerns that come to a supervisor's attention, and takes appropriate action to stop the conduct.

For this reason, you cannot ignore a sexual harassment claim (or any other harassment claim) that is reported to you or that comes to your attention. You must treat the allegation seriously, contact the Human Resources Department, and work with HR to get an investigation started.

## Age Discrimination



Under the Age Discrimination in Employment Act (ADEA), it is illegal to discriminate, on the basis of age, against an applicant or team member or applicant who has attained age 40.

Usually all the "older" worker has to show to get in front of a jury is that he or she was over 40 when an adverse employment decision (such as demotion or discharge) affected him or her.

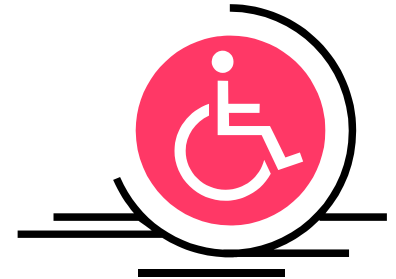
As under Title VII, your employer must show that it had legitimate business reasons (such as poor performance, a rule violation, or elimination of the job) for making its decision.

Obviously, you should avoid age-related comments. These comments are easy to make because aging is common to all people. For example, we often joke about our own age, and the ages of other team members, at birthday celebrations or other times when age is a natural subject of conversation. *"This is a job for a younger man," "You've been doing this too long,"* and *"We need young blood around here,"* are examples of the types of comments that create problems.

Even though these comments are innocent, attorneys will try to twist them to make it sound like you are biased against older team members—even if you are over 40 yourself.

## Americans with Disabilities Act

The Americans with Disabilities Act prohibits discrimination against "qualified individuals" with "disabilities" who can perform the "essential functions" of a job with or without "reasonable accommodation," unless accommodation would result in "undue hardship." The ADA also requires your employer to make reasonable accommodations to the known disabilities of a covered person unless doing so creates an undue hardship. The ADA is full of difficult-to-understand terms that make it one of the most complex employment laws.



Generally speaking, a person has a disability:

- If he/she has a physical or mental condition that "substantially limits" one or more "major life activities," or
- If he/she has a record of such a condition, or
- If he/she is regarded as having such a condition (even if he/she really does not).

Cancer, heart disease, blindness, deafness, severe obesity, AIDS, loss of limbs, back injuries and mental illness are common disabilities. Current alcohol or drug use, temporary conditions (such as a broken leg) and lack of education are not disabilities. The obligation to provide "reasonable accommodations" is probably the most common ADA issue. Changes in job duties, modified work or leave schedules, providing or modifying equipment, or devices, assigning non-essential functions to another team member, and facilitating access to the workplace are examples of reasonable accommodations.

Once a team member requests an accommodation, it is important to discuss with the team member the types of accommodations that could address the employee's concerns.

**Your employer does not have to provide a reasonable accommodation that causes undue hardship.** An undue hardship exists when very significant expense or job disruption may occur.

## Family and Medical Leave (FMLA)

The FMLA entitles eligible team members of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the team member had not taken leave. Eligible team members are entitled to:

- Twelve workweeks of leave in a 12-month period for:
  - the birth of a child and to care for the newborn child within one year of birth;
  - the placement with the team member of a child for adoption or foster care and to care for the newly placed child within one year of placement;
  - to care for the employee's spouse, child, or parent who has a serious health condition;
  - a serious health condition that makes the team member unable to perform the essential functions of his or her job;
  - any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" **or**
- Twenty-six workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible team member is the service member's spouse, son, daughter, parent, or next of kin (military caregiver leave).

**NOTE: Check the US Department of Labor (<http://www.dol.gov/whd/fmla/>) and with your HR representative for the most current terms and conditions.**

The team member is entitled to medical insurance coverage throughout the leave (by payment of premiums), and your employer must provide the same or an equivalent job to the team member upon return from the leave.

Most FMLA leave is also leave that your employer permits (with supervisor approval) under its family, personal and sick pay policies. You must remember that FMLA leave is an entitlement.



For example, your employer must give a team member unpaid leave to care for a spouse with a serious health condition, even if the supervisor would prefer otherwise. It is not necessary for the team member to specifically ask for FMLA leave. Once you know the reason for a leave request, you should treat it as a request for FMLA leave if it meets the requirements discussed above.

In general, the team member must give your employer 30 days advance notice if the need for FMLA leave is foreseeable. The team member must also provide certification of a serious health condition, and a doctor's release to return to work (if the leave relates to the employee's health condition).

## **National Labor Relations Act**

The NLRA grants team members the right to secure union representation, and provides that employers may not interfere with, restrain or coerce team members in the exercise of this right. If two or more team members act in concert regarding their wages, hours or working conditions, they have engaged in "protected concerted activities," and are protected from retaliation or coercion by the employer. The NLRA also gives your employer the right to state its position that its team members do not need a union.

## **Bankruptcy and Garnishment**

Federal law prohibits discriminating against a team member because he or she has filed for bankruptcy. It is also against the law to discriminate against a team member because the employee's wages have been garnished one or more times with respect to a single debt.

The best practice for supervisors is to immediately forward any court documents regarding bankruptcy or garnishment of a team member to Human Resources and to not discuss the matter with anyone.



## **Retaliation**

The federal employment laws all prohibit retaliating against a team member for exercising the rights granted under the laws, or expressing an interest in doing so.

For example, a team member who brought a sexual harassment claim against your employer, and was later fired, could allege that the firing was in retaliation for exercise of rights granted under Title VII. Of course, your employer could argue that the firing was for other non-discriminatory reasons.

**Please note that this lawsuit could be brought whether your employer won, lost or settled the harassment**

## **Workers Compensation Laws**

Each state has a workers compensation statute. These laws provide that a team member who is hurt on the job is entitled to compensation benefits and medical benefits from the employer, even if the injury was the employee's fault.

Any time a team member claims to have been hurt on the job and goes to the doctor, or expresses a desire to go to the doctor, you should treat the situation as if it is covered by workers compensation. This is true even if the team member probably aggravated a previous injury. It is also against the law to retaliate against a team member for asserting a workers compensation claim.

## **Implied Contract**

Written or oral promises or representations by supervisors can create an "implied" contract between your employer and the team member. For instance, a team member who has been told *"You'll have a job here as long as you do good work"* can argue that he has a contract that provides for termination only for cause.



## Defamation



Defamation can occur when someone makes a false statement that tends to harm the reputation of another person.

For example, telling someone that a team member stole from your employer, drinks excessively, had an affair with a coworker, or caused other team members to be hurt on the job, could lead to a lawsuit for

defamation. (We suggest that you not make negative comments *even if they are true about another team member*. No good can come from it and there is every chance that many problems will develop!)