



Oklahoma Attorney General Scott Pruitt's
Office of Civil Rights Enforcement Presents

TITLE VII 50TH ANNIVERSARY OCRE EDUCATIONAL OUTREACH

50th Anniversary of the Civil Rights Act of 1964

7.24.2014

Emphasizing Practical, Best Practices for Complying
With Oklahoma's Anti-Discrimination Act

[SEXUAL & OTHER HARASSMENT]

Kirk Turner/Newton O'Connor

Harassment Under Title VII:

What Employers Need to Know

Labor & Employment Law Group © 2014



W. Kirk Turner



A nationally recognized leader in employment and labor law, Kirk is the Director of the Firm's Labor and Employment Law Group, which provides interactive employee and supervisory training, counsel and litigation services for local, regional and national employers. Kirk's experience as a trial attorney in representing management in litigation in all areas of labor and employment law gives him a unique perspective to provide preventive counsel and training to employers of all sizes. In addition, he regularly provides management training and counseling in the practice areas of legal compliance and effectively managing employee performance and behavior, employment claim prevention, discrimination and harassment prevention, conducting internal investigations, wage and hour compliance, occupational safety and health, labor relations, union avoidance, immigration, unemployment claims management, disability benefits and workers' compensation and compliance.

Kirk has extensive experience in representing private and public employers in state and federal court discrimination, harassment, wage and hour, wrongful termination and civil rights matters, and routinely represents management in proceedings before the National Labor Relations Board, the Equal Employment Opportunity Commission, State fair employment agencies and the Department of Labor.

Kirk has been named one of "The Best Lawyers of America," one of Oklahoma's "Super Lawyers" and is ranked in Chambers, USA America's Leading Business Lawyers in the area of labor and employment law. He has been honored by the Oklahoma State Council for Human Resources Management with its "Excellence Award" for his outstanding contributions to the human resources profession.

Kirk has served on the Board of Directors of the Tulsa Area Human Resources Association ("TAHRA") for the past nineteen years. He is a past President of TAHRA (2002-2003) and currently serves as Vice President, Legislative Affairs and General Counsel. Kirk has been honored with the TAHRA President's Award and the TAHRA Excellence Award for his outstanding contributions to the human resources profession. Kirk is the Vice President-Legislative Affairs and General Counsel for the Oklahoma State Council for Human Resource Management, an affiliate of the Society for Human Resource Management, and is a past board member of the Tulsa Equal Employment Opportunity Coordinators' Association. Kirk has been a member of the National Employee and Labor Relations Committee for the Society for Human Resource Management, chairs the Tulsa Metro Chamber of Commerce Labor and Human Resources Task Force, is a member of the Oklahoma State Chamber of Commerce Human Resources and Legislative Affairs Committees, and serves as General Counsel for WorkForce Tulsa, the Tulsa Automobile Dealers Association and the Tulsa Better Business Bureau.

Kirk is a graduate of the University of Arkansas School of Law. He is a member of the American, Arkansas, Oklahoma and Tulsa County (labor and employment law sections) Bar Associations and has served as Chairman of the Labor and Employment Law Section of the Oklahoma Bar Association.

W. Kirk Turner
Newton, O'Connor, Turner & Ketchum, P.C.
15 West Sixth Street, Suite 2700
Tulsa, Oklahoma 74119-5423
(918) 587-0101
kturner@newtonoconnor.com

NEWTON O'CONNOR
TURNER & KETCHUM^{PC}
Attorneys & Counselors At Law

W. Kirk Turner

Kirk is a Shareholder and Director of Newton, O'Connor, Turner & Ketchum, where he focuses his practice on representing companies and management in Labor and Employment Law matters, as well as representing automobile dealerships in legal issues unique to that industry.

Kirk's experience as a trial attorney in representing management in litigation in all areas of labor and employment law allows him to provide preventive counsel and training to corporate clients in the areas of legal compliance, employment claim prevention, internal investigations, wrongful termination, civil rights, equal employment opportunity, wage and hour litigation, employee benefits, occupational safety and health, labor-management relations, union avoidance, immigration, unemployment, disability benefits and workers compensation discrimination.

Kirk is a member of the National Association of Dealer Counsel, a nationwide professional organization of attorneys who represent automobile and other vehicle dealers. Kirk also has extensive experience in representing employers in discrimination, harassment and civil rights matters, and routinely represents management in proceedings before the National Labor Relations Board, the Equal Employment Opportunity Commission, state fair employment agencies and the Department of Labor. Kirk has been selected for inclusion several editions of The Best Lawyers of America, and Super Lawyers and is the recipient of the Oklahoma State Council for Human Resources Management's 2007 Excellence Award.

Kirk has served on the Board of Directors for the Tulsa Area Human Resources Association ("TAHRA") for several years, was the organization's President in 2002-2003, and currently serves as its Vice President of Legislative Affairs and General Counsel. Kirk was the recipient of the 2001 TAHRA President's Award and the 2003 TAHRA Excellence Award. Kirk served five terms as the Vice President of Legislative Affairs and General Counsel for the Oklahoma State Council for Human Resource Management, an affiliate of the Society for Human Resource Management, and is a past board member of the Tulsa Equal Employment Opportunity Coordinators' Association. Kirk has been a member of the National Employee and Labor Relations Committee for the Society for Human Resource Management, has served on the Oklahoma State Chamber of Commerce Human Resources Committee and Legislative Affairs Committee, and serves as General Counsel for WorkForce Tulsa and the Tulsa Better Business Bureau.

Kirk is a graduate of the University of Arkansas School of Law. He is a member of the American, Arkansas, Oklahoma and Tulsa County (Labor and Employment Law sections) Bar Associations and is a past Chairman of the Labor and Employment Law Section of the Oklahoma Bar Association. Kirk is admitted to practice law in Arkansas and Oklahoma, the United States District Courts for the Northern, Eastern and Western Districts of Oklahoma, the United States District Court for the District of Colorado, the United States District Courts for the Eastern and Western Districts of Arkansas, the United States Court of Appeals for the Tenth Circuit, the United States Tax Court and the United States Supreme Court.

Kirk is rated AV[®] Preeminent[™], the highest rating awarded to attorneys for legal ability and professional ethics by the Martindale-Hubbell Peer Review Rating System. Kirk was named to the 2012 and 2013 Oklahoma Super Lawyers[®] list, the 2012, 2013 and 2014 Best Lawyers in America[®] listing, the Oklahoma's Top-Rated Lawyers[®] for 2012 and 2013, and the 2012 and 2013 listing for Tulsa's Top-Rated Lawyers by TulsaPeople Magazine.

Harassment Under Title VII:

What Employers Need to Know

Labor & Employment Law Group © 2014





W. Kirk Turner, Esq.

2700 Bank of America Center
Fifteen West Sixth Street
Tulsa, OK 74119-5423
(918) 587-0101

Kturner@newtonoconnor.com

Labor & Employment Law Group © 2014



Top Ten Reasons Applicants Don't Get Hired

10. When asked what they saw as their greatest weakness, they answered: "Sometimes I'm just lazy."
9. Answered the question, "Ever been convicted of a felony?" with: "Yes, see the attached rap sheet."
8. Under special skills on the application they wrote, "Can hot-wire a car in two minutes flat."
7. The applicant asked if sweat pants and a muscle tee shirt were okay for casual day.
6. Former supervisors listed are "John and Jane Doe." No phone number is listed "due to their participation in the witness protection program."

Labor & Employment Law Group © 2014



Top Ten Reasons Applicants Don't Get Hired

5. The applicant asked to use the phone so he can call in sick at his present job.
4. Was overly interested in your workers comp program.
3. Wants to know if you could spot him a couple of bucks for the snack machine.
2. When asked what leadership skills she had, the applicant replied: "I organized a strike at my last job."
1. Wants to know if the company has plenty of "hot" female interns.

Labor & Employment Law Group © 2014



RECENT HARASSMENT LITIGATION

Labor & Employment Law Group © 2014



Ohio Wal-Mart to Pay \$363,419 to Settle EEOC Sexual Harassment and Retaliation Suit

- Wal-Mart violated federal law by allowing a co-worker to sexually harass Wells, an intellectually-disabled employee.
- Wells worked for Wal-Mart for 11 years and harassment continued for several years despite knowledge of several members of store management.

Labor & Employment Law Group © 2014



Ohio Wal-Mart to Pay \$363,419 to Settle EEOC Sexual Harassment and Retaliation Suit

- Managers terminated Wells shortly after she made a formal complaint about the harassment.
- Consent decree includes payment of \$363,419 (\$295,000 of which is compensatory), training of managers and Human Resources on harassment prevention, posting of notice and submitting reports to EEOC for a 3 year period.

Labor & Employment Law Group © 2014



Albuquerque Car Dealership to Pay Over \$2 Million to Settle Same-Sex Harassment Suit

- Former lot manager subjected a class of men to egregious forms of sexual harassment, including "shocking" sexual comments, frequent solicitations for oral sex, regular touching, grabbing and biting of male workers on their buttocks and genitals.
- Dealership retaliated against male employees who objected to sexually hostile work environment.

Labor & Employment Law Group © 2014



Albuquerque Car Dealership to Pay Over \$2 Million to Settle Same-Sex Harassment Suit

- Multi-year consent decree includes:
 - Payment of over \$2 million in monetary relief;
 - Prohibition of discrimination or retaliation against employees;
 - Develop and implement policies and practices to provide employees with a work environment free of harassment and retaliation;
 - Evaluation of managers on compliance with anti-discrimination laws;
 - Requires the dealership to hire a monitor to oversee efforts to provide a harassment-free workplace; and
 - Dealership must also provide regular anti-discrimination training to its employees and managers and report other discrimination complaints to the EEOC for the duration of the decree.

Labor & Employment Law Group © 2014



Retailer Fred Meyer Settles Second EEOC Sexual Harassment Suit

- National grocery chain, Fred Meyer, will pay \$487,500 to seven workers at its Oak Grove, Oregon store to settle a sexual harassment lawsuit.
- Store's second lawsuit in just 5 years.
- Fred Meyers: Nationwide chain; over 30,000 employees; 131 stores; subsidiary of Kroger Co.
- According to the EEOC, female employees of the Oak Grove store were sexually harassed by the same customer from at least 2007.

Labor & Employment Law Group © 2014



Retailer Fred Meyer Settles Second EEOC Sexual Harassment Suit

- The male customer visited the store almost daily, sometimes several times a day, and made lewd comments to both employees and customers.
- Customer would also grab employees, corner them, touch them, touch their breasts, and pulled one employee onto his lap.

Labor & Employment Law Group © 2014



Retailer Fred Meyer Settles Second EEOC Sexual Harassment Suit

- Female employees complained to store management and security, but complaints dismissed as "hearsay."
- Employees were instructed that customer could not be excluded from the store unless the security department personally witnessed him engaging in the offensive behavior.

Labor & Employment Law Group © 2014



Retailer Fred Meyer Settles Second EEOC Sexual Harassment Suit

- Important Note:
 - Employers are responsible for ensuring a harassment-free workplace for their employees, **regardless if the harasser is a co-worker, manager, or customer.**

Labor & Employment Law Group © 2014



Harassment - Protected Classes

- Race
- Color
- Religion
- National Origin
- Sex
- *Title VII
- Pregnancy
- Disability
- Age

Labor & Employment Law Group © 2014



Importance of Training

Responding to the Litigation Explosion

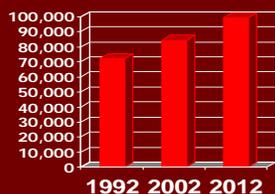
Labor & Employment Law Group © 2014



LEGAL DUTY TO TRAIN MANAGERS & EMPLOYEES



The Surge in Number of Harassment Charges



Labor & Employment Law Group © 2014



LEGAL DUTY TO TRAIN MANAGERS & EMPLOYEES



In response to the surge in claims, the Supreme Court declared:

“Employers **must** show they exercise reasonable care to
(1) *prevent* and
(2) *correct promptly*
any harassing [or discriminatory] behavior.”

Ellerth, 524 U.S. 742 (1998); *Faragher*, 542 U.S. 775 (1998).

Labor & Employment Law Group © 2014



Harassment Prevention

Labor & Employment Law Group © 2014



Recognizing the Two Categories of Harassment

1. *Quid Pro Quo* Harassment

- Applies to sexual harassment
- Employment, benefits, or working conditions granted or denied based on acceptance or rejection of sexual favors.

Labor & Employment Law Group © 2014



Recognizing the Two Categories of Harassment

2. Hostile Environment

- Unwelcome, offensive conduct that
 - Adversely affects or interferes with one's ability to perform the job, or
 - Creates a hostile or abusive work environment
- Applies to all protected classes
- Applies to workplace and elsewhere
- Applies to third party work contacts

Labor & Employment Law Group © 2014



Types of Conduct Creating a Hostile Environment

- Physical conduct
- Verbal conduct
- Non-physical, Non-verbal

Labor & Employment Law Group © 2014



Physical Conduct

- Fondling
 - Grabbing
 - Patting
 - Pinching
 - Stroking
 - Staring
 - "Accidental" contact
- 
- 
- Lewd, suggestive body language or gestures
 - Cornering, blocking
 - Leaning over
 - Attempted touching
 - Kissing
 - Attempted kissing

Labor & Employment Law Group © 2014



Verbal Conduct - Sex



- Repeated words or comments of a sexually offensive nature.
 - Ongoing remarks about a person's body, clothing, or personal life.
 - Frequent sexual teasing, name-calling, joking, noise-making.
 - Sexual requests or invitations.

Labor & Employment Law Group © 2014



Verbal Conduct – Other



- Repeated words or comments of an offensive nature directed at a protected characteristic.
 - Ongoing remarks about a person's color, race, religion, age, disability, pregnancy, or national origin.
 - Frequent teasing, name-calling, or joking about such matters.
 - Threats

Labor & Employment Law Group © 2014



Other Conduct



Labor & Employment Law Group © 2014 

Same Sex Harassment

- Violation of policy
- Potential liability for harasser
- Horseplay can lead to complaints/claims
- Harassment is in the eyes of the beholder
- "Boys will be boys" is no longer acceptable
- A culture of dignity and respect

Labor & Employment Law Group © 2014 

Who are the Offenders?

- Managers
- Supervisors
- Coworkers
- Customers
- Vendors
- Visitors



Labor & Employment Law Group © 2014 

PRACTICAL POINTS

How to Avoid Complaints of Harassment

Labor & Employment Law Group © 2014



Management Should:

- Treat all employees with dignity and respect.
- Communicate in an appropriate tone.
- Manage and discipline all employees using the same standards.
- Prohibit employees from: telling inappropriate jokes, using derogatory language or displaying or disseminating insensitive materials in the workplace.

Labor & Employment Law Group © 2014



Management Should:

- Prohibit employees from engaging in inappropriate behavior.
- Focus on performance and behavior.
- Use objective, legitimate, non-discriminatory reasons that can be supported with evidence in employment decisions.

Labor & Employment Law Group © 2014



Communication is the Key

- Training Classes/Orientation
- Performance Evaluations (anything we should know about?)
- Thorough and timely investigations
- Appropriate discipline
- Follow-Up



Labor & Employment Law Group © 2014



Correcting Promptly Flow Chart



Labor & Employment Law Group © 2014



Your harassment policy should include:

- Prohibition against harassment based on any protected class
- Equal application to men and women
- Separate sexual harassment section
 - *Quid pro quo*
 - Hostile environment

Labor & Employment Law Group © 2014



Your harassment policy should include:

- Focus on inappropriate or offensive behavior
- Applies to workplace and elsewhere
- Applies to third party work contacts
- Clear complaint procedure
 - Bypass provision
 - Multiple reporting options (what about after “normal” business hours?)
 - Names and numbers provided

Your harassment policy should include:

- Address multiple locations
- Requirement that supervisors immediately report
- Commitment to timely and thoroughly investigate complaints
- Confidentiality (not “secret”) provision
- No retaliation
- Provision for appropriate disciplinary action

What Should Employers and HR Professionals Be Doing?

Compliance Hot Spots

- Discrimination/Harassment/Retaliation
 - Updated complaint policies
 - Clear reporting obligations
 - Detailed reporting process
 - Prompt, thorough investigation
 - Confidentiality requirements and enforcement
 - No retaliation

Labor & Employment Law Group © 2014



Training Supervisors and Managers

- Legal obligations for managers and supervisors
 - Harassment, discrimination
 - Retaliation
- Effective communication, objective documentation, discipline, and discharge

Labor & Employment Law Group © 2014



Training Employees

- Compliance with employer policies
- Duty to treat others with dignity and respect
- Duty to report complaints/concerns
 - Immediate
 - Cooperation
 - Confidentiality
 - No retaliation
- Consequences of failure to comply

Labor & Employment Law Group © 2014



Be Diligent

- The cost of litigation is too high!
 - Attorneys' fees
 - Compensatory and Punitive Damages
 - Back Pay Liability
 - Management time and distraction
 - Public relations

Labor & Employment Law Group © 2014



Be Diligent

- Regardless of the circumstances:
 - You cannot over-communicate
 - You cannot over-train
 - You cannot over-investigate
- Investing in regular compliance audits, robust training programs and timely and thorough policy development is a much better investment than paying a lawyer to clean up messes.

Labor & Employment Law Group © 2014







W. Kirk Turner, Esq.

2700 Bank of America Center
Fifteen West Sixth Street
Tulsa, OK 74119-5423
(918) 587-0101
Kturner@newtonoconnor.com

Labor & Employment Law Group © 2014



This material was prepared by
Newton, O'Connor, Turner &
Ketchum, P.C. and is not
intended as legal advice.

Labor & Employment Law Group © 2014