



Association of Idaho Cities Annual Conference

AVOIDING DISCRIMINATION & HARASSMENT CLAIMS IN 2018 -

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Avoiding Gender Discrimination Claims



Headline News



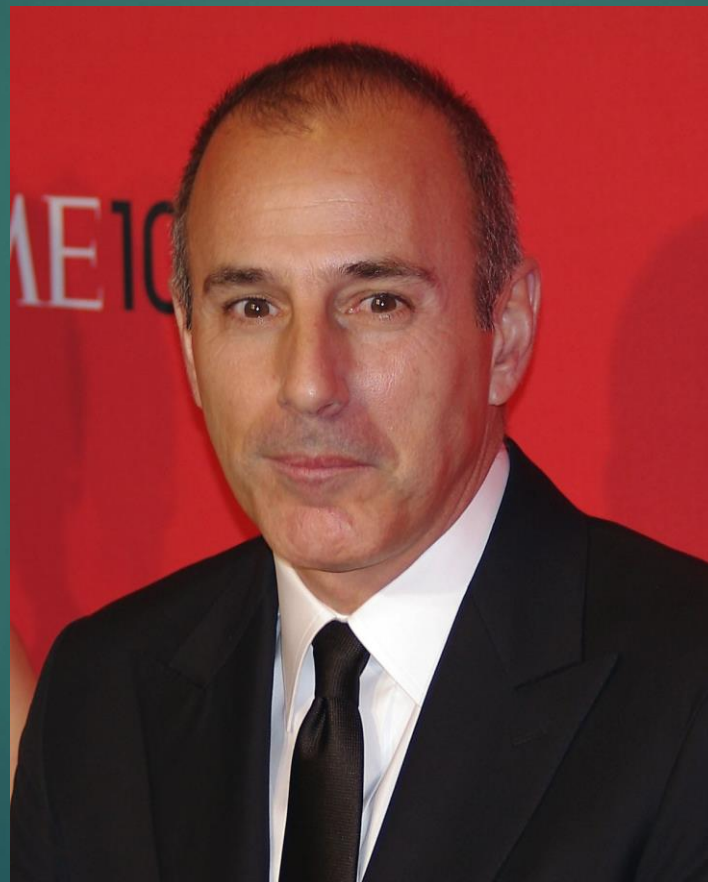
Fox Complaints of Harassment & Discrimination



Hollywood accusations...



The latest...



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Avalanche of Claims

▶ #MeToo

What Do These Claims Have in Common?

- Claims of discrimination and/or harassment brought by multiple employees
- Claims **ignored** – HR and Legal turned a blind eye
- “SUPERSTARS” protected
- Cronyism at play
- Blatant retaliation aimed at women who brought claims

What else?

- ▶ Millions of dollars spent in defense costs
- ▶ Millions of dollars spent on settlements
- ▶ Low morale/bad reputation
- ▶ Distraction and inefficiency in the workplace
- ▶ Stress for all involved as witnesses

The Numbers Don't Lie!



Discrimination Claims in Idaho

- 171 sex discrimination claims in 2017
- Up from 139 in 2016
- 36% of all IHRC claims received

2018 trend...

- ▶ According to IHRC Director Dr. Ben Earwicker, on a local level, harassment claims have gone up 7% since October 1, 2017.

On a National Level – EEOC Claims

- 12,428 harassment claims in 2017
- 996 Equal Pay Act claims in 2017

Enforcement Priority



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High Risk Workplaces

- ▶ 1. Homogenous workforce. Lack of diversity.
- ▶ 2. Young workforces.
- ▶ 3. Workplaces with “super stars” or “high value” employees.
- ▶ 4. Workplaces with significant power disparities.
- ▶ 5. Workplaces where work is monotonous or tasks are low-intensity.
- ▶ 6. Isolated workplaces.
- ▶ 7. Workplaces that encourage alcohol consumption.
- ▶ 8. Decentralized workplace with main office far away.

What can you be doing now?



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What Would a Jury Think?

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Can you show...

- ▶ 1. You have good, updated policies.
- ▶ 2. All of your employees know your policies.
- ▶ 3. Employees are regularly trained on the policies.
- ▶ 4. Policies are uniformly applied.
- ▶ 5. You take care of your employees.
- ▶ 6. Employees are treated fairly.

Keys to a Solid Legal Defense

- Legitimate, non-discriminatory reason
- Show that male and female comparators were not performing substantially the same work
- Show legitimate reasons for pay differences – tenure, performance, etc.
- Show women are treated fairly, workplace is professional, employer recognizes and enforces anti-discrimination and anti-harassment laws

Training



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1. Supervisor Training

- ▶ Do your supervisors know the law?
- ▶ Do your supervisors understand your policies?
- ▶ Are they consistently enforcing rules and policies?
- ▶ If not, it's time to train.
- ▶ They need to spot issues!

EEOC guidance...

- ▶ Supervisors need to know how to deal with harassment they observe, that is reported to them, or of which they have knowledge.
- ▶ Need clear instructions on how to report it up the chain of command.
- ▶ Need to set the example and the tone.

One example of why training may be needed
– what's the law on gender identity & sexual
orientation?



Gender Identity & Sexual Orientation

- ▶ According to IHRC statistics, 6 sexual orientation claims, 2 gender identity claims in 2017
- ▶ No activity by Idaho legislature – no hearing on Just Add the Words
- ▶ BUT....new IHRC director, Ben Earwicker

What's the law in Idaho?

- ▶ 9th Circuit found years ago that the language in Title VII barring discrimination “on the basis of sex” already covers gender identity and sexual orientation.
- ▶ But now there's a circuit split.
- ▶ Idaho Human Rights Act has the same language
- ▶ Idaho Human Rights Commission and Idaho Supreme Court pronouncements – defer to federal court interpretations

Gender Identity and Sexual Orientation – Idaho Law

Idaho Human Rights Act Does Not Clearly Prohibit
BUT:

- ▶ Local Ordinances Prohibit in 13 Cities
- ▶ Changing Federal Law
- ▶ Agency & Federal Law Interpretations Expanding (and Retracting!)
- ▶ Changing Social Norms

2. Employee training

- ▶ EEOC wants all employees trained on a repeat basis
- ▶ Training needs to describe illegal harassment
- ▶ Needs to educate employees about rights and responsibilities
- ▶ Should cover reporting procedure
- ▶ Should explain consequences of unacceptable conduct

All training is not created equal



EEOC training guidelines

- ▶ 1. Should be supported at the highest level.
- ▶ 2. Conducted by qualified, live trainers.
- ▶ 3. Should include examples tailored to the specific workplace and specific workforce.

Are your policies in compliance?



Policies



- ▶ Is your handbook up-to-date?
- ▶ Is your anti-discrimination policy in conformance with EEOC guidelines?

All anti-harassment policies are not created equal.

- ▶ 1. Needs to say harassment based on any protected class will not be tolerated.
- ▶ 2. Needs examples of prohibited conduct.
- ▶ 3. Should describe reporting system, with promise to investigate.
- ▶ 4. Should strive to maintain confidentiality, to the extent possible.
- ▶ 5. Must require immediate action.
- ▶ 6. Must prohibit retaliation.
- ▶ 7. Must be written in clear, simple words, in all languages of workforce.

Reporting System and Investigations

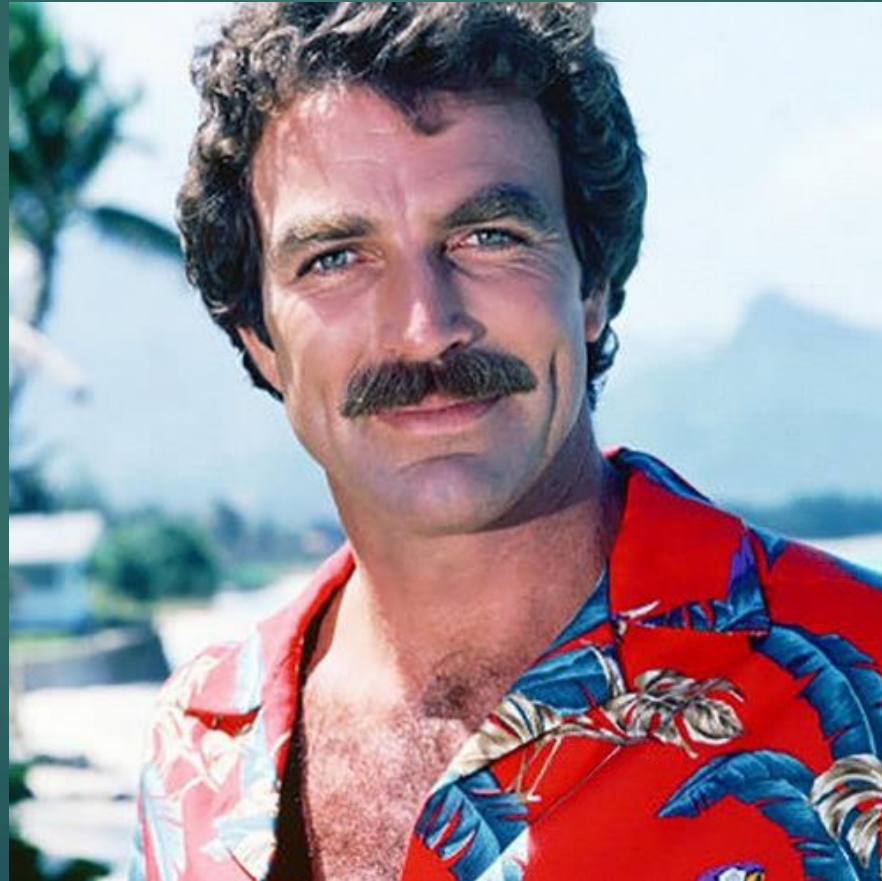
- ▶ 1. Employer's policy must provide for prompt and thorough investigation.
- ▶ 2. Employer must take this promise seriously.
- ▶ 3. Workplace environment must make employees feel safe to report.
- ▶ 4. Investigators must be trained and neutral.
- ▶ 5. Investigators must know how to document and create a report.
- ▶ 6. Procedures must be in place to prevent retaliation.
- ▶ 7. Due process – no presumption of guilt. Instead, investigation must be mechanism for determination.
- ▶ 8. Must include communication to complainant and respondent.

What does it mean to promptly investigate a claim?



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Who should investigate?



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Elements of an Investigation

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- ▶ Documents/ Evidence
- ▶ Interviews
- ▶ Report
- ▶ Resolution/Corrective Action
- ▶ Debriefing Complainant/Respondent
- ▶ Documentation

Interviewing Considerations

- ▶ Fairness
- ▶ Order
- ▶ Outline
- ▶ Location

How do you create a culture where employees feel comfortable reporting a problem?

- ▶ The era of assuming harassment and discrimination are HR issues is over.
- ▶ Management needs to participate in training and to set the example of what is expected of all employees.
- ▶ Civility and respect must be demanded. Consider respectful workplace policy and related training.

Thank you!

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