

## Bias Training Should Reflect EEOC Domestic Violence Guidance

By **Abigail Rubenstein**

*Law360, New York (October 24, 2012, 9:44 PM ET)* -- Employers should update their anti-harassment and discrimination training in light of recent U.S. Equal Employment Opportunity Commission guidance highlighting how employment decisions concerning workers who are victims of domestic violence, sexual assault or stalking can run afoul of Title VII and the Americans with Disabilities Act, attorneys said Wednesday.

The EEOC noted in a fact sheet published Oct. 12 that although federal discrimination laws didn't expressly protect victims of domestic violence, sexual assault or stalking, certain treatment of such victims could violate those laws. The guidance goes on to provide examples of situations that could land an employer in hot water.

Although the agency's guidance did not establish any new legal protections for employees, lawyers told Law360 that the EEOC's examples should remind employers of the importance of training their managers to deal with these difficult situations.

"For 2013, everybody should update their training materials to include these examples or similar ones," Spencer Hamer of Michelman & Robinson LLP said. "If you read the fact sheet, an employment lawyer looking at the examples could see the problems, but the average HR person or manager might not spot them all."

The examples in the EEOC's fact sheet show behavior the agency says may constitute disparate treatment, harassment or retaliation under Title VII or the ADA, emphasizing that acting on stereotypes rooted in protected characteristics like sex or disability violates the laws.

Among other examples, the fact sheet notes that it may violate Title VII for an employer to fire an employee after learning she is the victim of domestic violence out of fear of the potential "drama battered women bring to the workplace" or for a hiring manager to reject a male applicant who has obtained a restraining order against a former domestic partner based on the belief that only women can be victims of domestic violence.

In another example, the EEOC says the ADA may dictate that an employer who learns that a job applicant was a complaining witness in a rape prosecution and received counseling for depression can't refuse to hire her on the basis that she may require time off for symptoms or treatment.

Many employers rely on the same training year after year, even though discrimination case law is not static, but they should instead take advantage of opportunities where the EEOC points out potential angles of liability that the employer may not have thought of before, Hamer said.

“The examples should be directly lifted out of the fact sheet put into training materials for 2013,” Hamer said. “It should be a whole new part of the training, and employers should at least touch on these issues when doing their anti-harassment training.”

Because the EEOC's examples demonstrate that the agency may stretch discrimination laws to encompass groups it feels may be underserved and in need of special protection, it also could help employers realize that they may need to include more varied examples in employment training to encompass the kinds of behaviors that could attract government attention, according to Laura Maechtlen of Seyfarth Shaw LLP.

“It could cause employers to realize that standard examples of what constitutes discrimination or harassment may not be inclusive or could be outdated, so employers may want to update training and [talk to] front-line management and human resources employees to explain that the concept of discrimination and harassment can be broadly read,” Maechtlen said.

But when it comes to the specifics of training managers on how to deal with workplace issues that can emerge from domestic violence, sexual assault or stalking, employers also should keep in mind that laws besides federal discrimination laws could be implicated, such as the Family and Medical Leave Act or state laws that contain explicit protections for domestic violence victims, attorneys said.

“Many employers are covered by state or local laws that are much more precise on these issues,” Leslie Silverman of Proskauer Rose LLP said. “Title VII is a bit of a blunt tool.”

And though the EEOC fact sheet covers the intersection of federal discrimination laws with employment decisions related to employees facing domestic violence and stalking, many employers may wish to take steps that go beyond their legal obligations to support employees who experience these problems, attorneys say.

“If someone is subject to domestic abuse or sexual assault, from an employee relations perspective, that person needs the support of human resources at that time when they may be vulnerable, and providing support either through an [employee assistance program] or having communications on how someone might get treatment are good employee relations,” Sarah Bouchard of Morgan Lewis & Bockius LLP said.

--Editing by Elizabeth Bowen and Richard McVay.