

HRD Liability Update

Courtesy of Sample & Associatesã



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Diversity Training and Liability **By John Sample, Ph.D. SPHR**

Diversity training uses experiential learning as a way to help people understand, accept, and benefit from differences in the workplace. Usually these sessions focus on differences between people and the myths and stereotypes about women, minorities, people with disabilities, homosexuals, and different age groups. It is thought that by dispelling the myths and talking openly, people can learn to interact better.

As well intentioned as it may be, diversity training can occasionally backfire! Two cases from two separate state courts raise important issues. A third example resulted in nationwide embarrassment for a federal agency.

When managers for Lucky Stores - a California grocery store chain - attended diversity training in 1988, they were asked to identify common stereotypes associated with men and women and minorities. The purpose of the exercises was to bring these stereotypes out into the open, where they could be discussed and dealt with.

Unfortunately, an employee later discovered one of the store manager's notes from the session, which included such statements as "black females are aggressive" and "women cry more." These written comments were later used as evidence against the company in a law suit charging that the company hadn't enough to promote women and minorities. The lawsuit resulted in an award of more than \$90 million in damages (Stender v. Lucky Stores). In another diversity training case, a company was providing train-the-trainer experiences for the purpose of selecting diversity trainers. Candidates were asked to share an experience that led to their involvement in diversity training.

One white woman shared a story about a long term relationship she had been having with a black man. They had planned to marry, but she said several of his black female friends put pressure on him not to marry a white woman. The relationship ended.

Someone in the group asked the woman if she was angry with black women. She said no, only those who couldn't seem to accept the idea of interracial marriage. When the white woman finished talking, she looked up at one of the leaders of the train-the-trainer program - a black female. She claimed she saw hate and anger in the black trainer's eyes. She was

awarded damages as a result of her experience with the experiential training (Fitzgerald v. Mountain States Tel. & Tel. Co.).

Here the very workshop that was designed to expose strong, unacceptable emotions and responses so that they could be examined and controlled brought out an emotional response in the trainer that she could not deal with. While trainers can't be perfect, they should know when they are having unacceptable reactions and be able to put aside their biases or work through them for the sake of their company and for the success of the training.

The third example, a federal agency used inappropriate group exercises to demonstrate the effects of sex harassment. One particular exercise required male participants to walk a gauntlet of seated women who allegedly made cat calls, sexually offensive statements, and who allegedly groped the male participants as they walked by the women. This incident was reported in syndicated newspapers around the country, and it is not known if a lawsuit was filed.

These three cases raise interesting and serious issues for the training and development community. In the Stender case, written notes taken by a participant was subject to pretrial discovery and ended up as evidence before a judge and jury. Should designers and facilitators of training programs advise their participants to destroy their notes for fear of future litigation. What about flip charts and other media (video taping of groups and teams) that may capture often relevant - but potentially embarrassing - information? Should they also be destroyed!

One message from these examples is clear - do not break the law to demonstrate the law. Experiential exercises must have leave a lasting impression in the participant's minds, but breaking the law to demonstrate ineffective management also is ineffective from a learning perspective. Always demonstrate how to perform or behave correctly; instruction from negative examples does not always give the desired results and could result in legal problems. It is not unreasonable for the designer or facilitator to discuss plans to use certain experiential learning with a legal adviser. Legal input could help you decide whether a program is right for your company and whether it will give you the results you hope for without leaving you open to legal liability.

References

Fitzgerald v. Mountain States Tel. & Tel. Co. 68 F3d 1275 (10th Cir. 1995).
Stender v. Lucky Stores. 803 F. Supp. 259 (N.D. Cal 1992).

Note: This issue of the HRD Liability Update is excerpted from Sample, J. (July 1997). Training Programs: How To Avoid Legal Liability, HR Briefing Special Report. Prentice Hall, Bureau of Business Practice.

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