

**NEW TRENDS IN
EMPLOYMENT
DISCRIMINATION/
HARASSMENT TRAINING
AND
IMPLICIT BIAS**

CFMA

2018

- ❖ Recent Construction Industry Cases
- ❖ Challenges Unique to Construction Employers
- ❖ Implementing Proper Policies, Procedures, and Training
- ❖ Recent Employment Issues for the Construction Employer
 - Implicit Bias Theories
 - Prevailing Wage
 - Social Media

RECENT CONSTRUCTION INDUSTRY CASES



E E O C C A S E S

► Equal Employment Opportunity Commission (EEOC) Race Cases

➡ *EEOC v. the Laquila Grp. Inc.*

- New York Construction company paid \$625,000 and entered into a consent decree:

- 1) Training
- 2) Modified policies
- 3) Complaint Hotline
- 4) Reporting period

RECENT CONSTRUCTION INDUSTRY CASES



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► EEOC CASES CONTINUED.....

➡ *EEOC v. Local 28 Sheet Metal Workers*

- Settlement of \$12.7 million over 5 years

- 1) Hiring and job assignments
- 2) Black and Hispanic
- 3) Union and apprentice program
- 4) Claims of less work hours than white union workers

RECENT CONSTRUCTION INDUSTRY CASES



EEOC CASES

- EEOC RACE CASES

- *EEOC v. Skanska USA Building, Inc.*

GC Skanska sued for race discrimination involving the employees of its minority owned subcontractor, C-1, Inc. Construction Company.

- 1) Skanska (GC) supervised the C-1 employees
- 2) Claims that GC didn't properly investigate complaints of racially offensive comments and physical assault
- 3) GC paid \$95,000 to settle

RECENT CONSTRUCTION INDUSTRY CASES



- EEOC RACE CASES

- *EEOC v. Ready Mix*

Employer paid \$400,000 and entered into consent decree to settle race harassment claims which included the following allegations:

- 1) Repeated use of the “N” word
- 2) Noose displayed at worksite
- 3) References by supervisor of Ku Klux Klan
- 4) Racial jokes by co-workers

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RECENT CONSTRUCTION INDUSTRY CASES



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- Same Sex Harassment Case -

Jury awarded \$451,000 in back pay to former employee of construction company. The jury found that the male superintendent harassed a male iron worker where Superintendent admitted at trial that he thought the worker was feminine and did not conform to the gender stereotypes of “rough iron workers”

RECENT CONSTRUCTION INDUSTRY CASES



FEDERAL COURT TRIAL

V E R D I C T S

- Age Discrimination -

Judge granted summary judgment to Construction Company employer in layoff of employee claiming age discrimination

- Race Discrimination -

Judge entered verdict in favor of employer construction company in claim of race discrimination filed by three employees laid off during the recession. No race based jokes or comments directed at the former employees

CHALLENGES UNIQUE TO CONSTRUCTION COMPANY EMPLOYERS



C H A L L E N G E S

- **MULTIPLE JOB SITES**
 - Training
 - Posting
 - Lack of Control

CHALLENGES UNIQUE TO CONSTRUCTION COMPANY EMPLOYERS



CHALLENGES

■ UNION WORKFORCE

- Foremen/forewomen - Are they “supervisors?”
- Grievance Procedures
- Superintendents often Union members
- Hiring halls
- Apprentice programs limitations

CHALLENGES UNIQUE TO CONSTRUCTION COMPANY EMPLOYERS



CHALLENGES

■ CONTRACT COMMITMENTS

- EEO Hiring goals
- Residential hiring goals
- MBE/WBE goals
- Affirmation Action Plans (construction exemption)

CHALLENGES UNIQUE TO CONSTRUCTION COMPANY EMPLOYERS



C H A L L E N G E S



BEST PRACTICE TIPS TO MINIMIZE RISKS

- 1) Ensure proper postings (work with GC for various sites)
- 2) Train all supervisors and foremen/forewomen
- 3) Limit authority of foremen/forewomen
- 4) Have an EEO officer and publish
- 5) Know EEO contract commitments and make best efforts to comply

IMPLEMENTING PROPER POLICIES, PROCEDURES AND TRAINING



There are several key policies that must be included in an Employee Handbook related to our discussion today:

1. Equal Employment Opportunity Policy
2. Anti-Discrimination / Anti-Harassment Policy
3. ADA Policy
4. Pregnancy Accommodation Policy

****Distribute the employee handbook, require that employees sign an acknowledgment form.**

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IMPLEMENTING PROPER POLICIES, PROCEDURES AND TRAINING



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➤ EQUAL EMPLOYMENT OPPORTUNITY POLICY

- ▶ Must list the specific categories that are considered protected classes for the location in which the employees work:
- ▶ Federal Law/Illinois Law
 - ▶ Race, Color
 - ▶ Religion
 - ▶ National Origin, Creed, Ancestry, Citizenship Status
 - ▶ Sex and/or Gender, Sexual Orientation
 - ▶ Age (40 & over)
 - ▶ Military status
 - ▶ Marital Status, Pregnancy
 - ▶ Disability
 - ▶ Genetic Information
 - ▶ Arrest Record
- ▶ Include a statement that the EEO policy applies to all aspects of employment and that complaints may be made following the procedures in the Anti-Discrimination/Anti-Harassment policy.

IMPLEMENTING PROPER POLICIES, PROCEDURES AND TRAINING



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➤ **EQUAL EMPLOYMENT OPPORTUNITY POLICY**

- ▶ Where should the EEO policy /EEO Statement appear:
 - ▶ Employee handbook
 - ▶ Job advertisements
 - ▶ Employment applications
 - ▶ At all job sites (along with the Anti-Discrimination/Anti-Harassment policy and complaint procedure)

IMPLEMENTING PROPER POLICIES, PROCEDURES AND TRAINING



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➤ ANTI-DISCRIMINATION / ANTI-HARASSMENT POLICY

- ▶ Common Problems:
 - ▶ Only covers sexual harassment and does not address all forms of unlawful harassment such as racial harassment
 - ▶ Only addresses or prohibits harassment but not discrimination
 - ▶ Lacks a complaint procedure, out of date complaint procedure
 - ▶ Provides for discipline for false complaints of claims of harassment

IMPLEMENTING PROPER POLICIES, PROCEDURES AND TRAINING



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➤ ANTI-DISCRIMINATION / ANTI-HARASSMENT POLICY

- ▶ Recommendations for policy drafting and how to fix the “common problems”:
 - ▶ Provide a policy statement that all forms of unlawful discrimination and/or harassment are prohibited, list the specific protected categories
 - ▶ Provide a definition of harassment/discrimination, including examples
 - ▶ Detailed complaint (procedure/ HR/ EEO Officer / training supervisors and foremen/forewomen on policies and reporting procedures)
 - ▶ A statement that informs employees that if they don’t tell, we can’t fix it
 - ▶ Prompt investigation
 - ▶ No retaliation
 - ▶ **Caution: statement regarding consequences of an intentional false claim**

IMPLEMENTING PROPER POLICIES, PROCEDURES AND TRAINING



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➤ ANTI-DISCRIMINATION / ANTI-HARASSMENT POLICY

- ▶ Additional requirements if a public contractor:
 - ▶ Contracts may provide for specific provisions in addition to those recommended, which include:
 - ▶ Providing information on how to file an external complaint and the contact information for the Equal Employment Opportunity Commission and/or the Illinois Department of Human Rights
 - ▶ **Recommendation:** Cushioning the IDHR/EEOC requirements with an introductory statement, such as: The purpose of this policy is to establish prompt, thorough and effective procedures for responding to all complaints of harassment and/or discrimination so that problems can be identified and remedied internally.

IMPLEMENTING PROPER POLICIES, PROCEDURES AND TRAINING



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➤ AMERICANS WITH DISABILITIES ACT (“ADA”)

- ▶ Definition of “disability” is very broad
- ▶ Focus is less on whether the medical condition is a disability and more on whether the employer has engaged in the interactive process.
- ▶ Interactive process = discussions with employee regarding restrictions and whether there are any reasonable accommodations that may exist that would allow the employee to perform the essential functions of his/her position.
- ▶ ADA compliance statement on the employment application, such as: Company ABC provides “reasonable accommodations” for qualified individuals with disabilities, in accordance with the ADA, as amended, and applicable state and local laws.

IMPLEMENTING PROPER POLICIES, PROCEDURES AND TRAINING



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➤ PREGNANCY ACCOMMODATION ACT

- ▶ On January 1, 2015, The Illinois Pregnancy Accommodation Act went into effect.
- ▶ The Pregnancy Accommodation Act amended the Illinois Human Rights Act to specifically include pregnancy among the defined protected classes.
- ▶ Applies to employers with one or more employees.
- ▶ Requires notice to employees

IMPLEMENTING PROPER POLICIES, PROCEDURES AND TRAINING



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➤ PREGNANCY ACCOMMODATION ACT

➤ Some Key Points for policy:

- Explain that the Act is a state law that prohibits discrimination and/or retaliation against a covered employee on the basis of pregnancy
- Reiterate EEO policy - provides equal employment opportunities for all employees and/or applicants regardless of pregnancy, which is generally defined to include employees (or applicants) who are pregnant, have recently given birth, or who have a medical or common condition related to pregnancy or childbirth.
- Direct employees to inform supervisor or HR of need for accommodation, and provide examples of reasonable accommodations
- Provide that in response to an employee's (or applicant's) request for an accommodation(s), the Company will engage in a timely, good faith and meaningful exchange to determine an effective reasonable accommodation(s), if necessary, in accordance with the Act and/or any other applicable state or federal law
- Provide that the company may seek further information from the employee (or applicant) - such as medical documentation to justify any reasonable accommodation

IMPLEMENTING PROPER POLICIES, PROCEDURES AND TRAINING



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➤ AMENDED NURSING MOTHERS IN THE WORKPLACE ACT

- ▶ Previously required reasonable unpaid breaks for mothers to express milk for a child up to one year of age.

Amended August 2018

- ▶ Now reasonable break periods must be paid. The break time may (but not “must”) run concurrently with break time already provided.

RECENT EMPLOYMENT ISSUES FOR THE CONSTRUCTION EMPLOYER



R E C E N T I S S U E S

❖ **IMPLICIT BIAS**

- Intentional vs. unconscious discrimination
- “Expert” testimony
- Cultural factors
- Train or not?

RECENT EMPLOYMENT ISSUES FOR THE CONSTRUCTION EMPLOYER



B I A S

► bi·as /bīəs/

- **NOUN:** Inclination or prejudice for or against one person or group, especially in a way considered to be unfair.

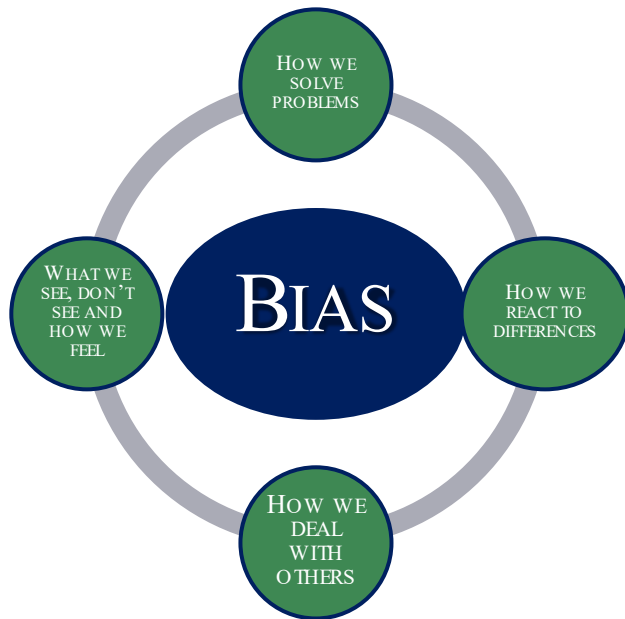
Example: “Her supporters said she was unfairly singled out because of her celebrity and because of bias against female executives.”

- **VERB:** Cause to feel or show inclination or prejudice for or against someone or something

Example: “the tests were biased against women”; “that rating scale is biased against members of a certain race.”

Definitions: <https://en.oxforddictionaries.com/definition/bias>

RECENT EMPLOYMENT ISSUES FOR THE CONSTRUCTION EMPLOYER



Influence of Bias

WHAT IS UNCONSCIOUS BIAS?

The theory is that everyone has unconscious beliefs and biases.

Psychologists suggest that all humans rely on categories to make sense of the world, what we believe is appropriate.

The graphic shows the theory of how biases are claimed to influence how people solve problems, how people react to differences, and the influence of bias on decisions. Biases can be intentional, unintentional, conscious, and unconscious. This theory is being used in disparate impact and disparate treatment discrimination cases.

IMPLICIT BIAS

- First 3 minutes of this video explains the theory

<https://www.youtube.com/watch?v=rbe5D3Yh43o&feature=youtu.be>

IMPLICIT BIAS TEST

► HARVARD - GENDER - CAREER TEST

<https://implicit.harvard.edu/implicit/user/agg/blindspot/indexgc.htm>

RECENT EMPLOYMENT ISSUES FOR THE CONSTRUCTION EMPLOYER



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❖ PREVAILING WAGE

- Illinois Law
- No contractual notice
- Liability
 - Wage differential (benefits too)
 - Fines and penalties
- Illinois Department of Labor Audits
- Suggested language for indemnity in sub-contracts and /or GC agreements with owners

RECENT EMPLOYMENT ISSUES FOR THE CONSTRUCTION EMPLOYER



❖ SOCIAL MEDIA

- Protected Concerted Activity
- Discipline Issues
- Don't Monitor
- Whistleblower Retaliation

ANY QUESTIONS.....

ANY QUESTIONS.....



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