Defending Against Employment Practices Liability Claims

Olympus Insurance Risk Conference

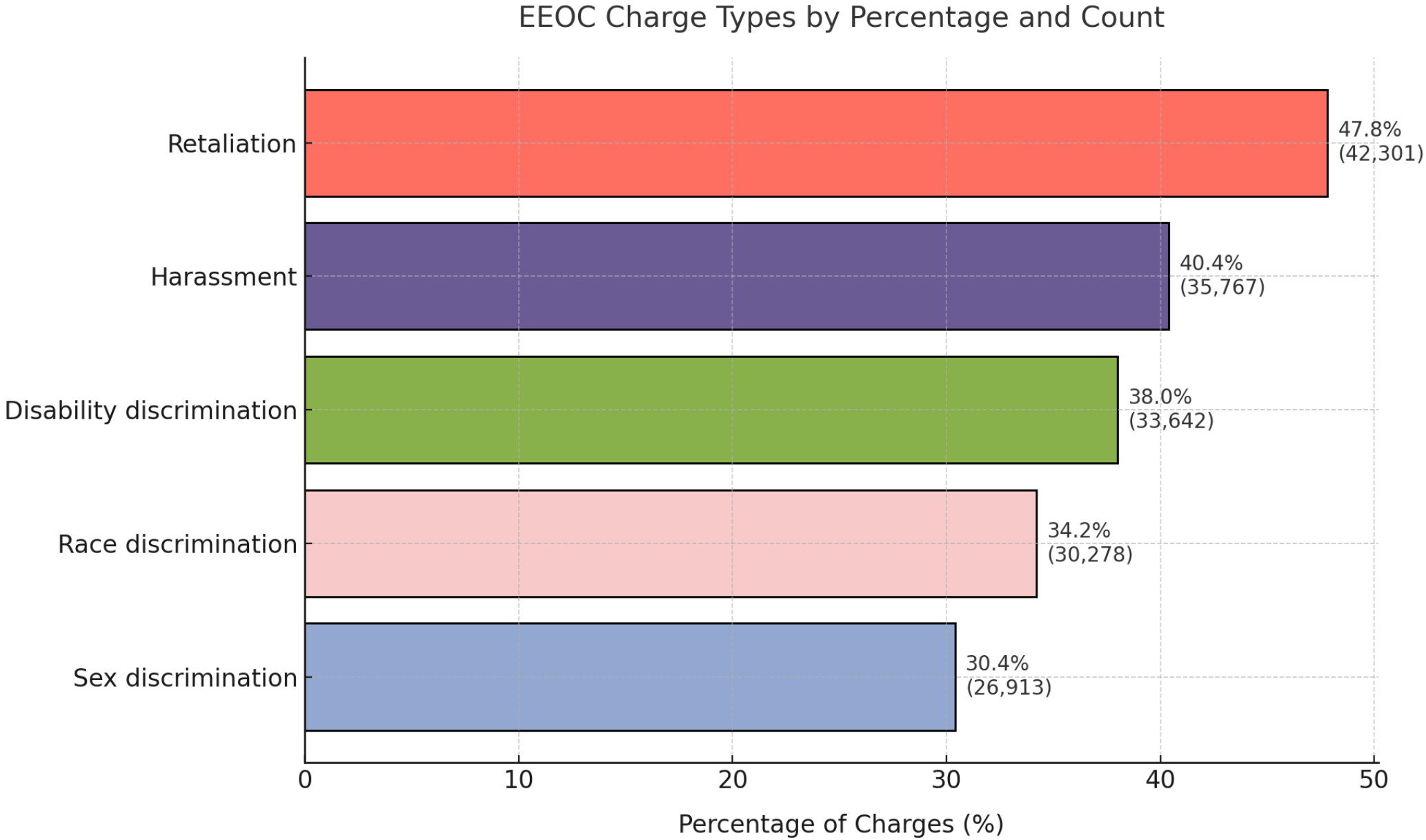
September 24, 2025

Prevention is the Best Defense

- Municipal officials need practical, actionable tools more than legal theory.
- Most claims arise from bad management practices, inconsistent documentation, or mishandling complaints.

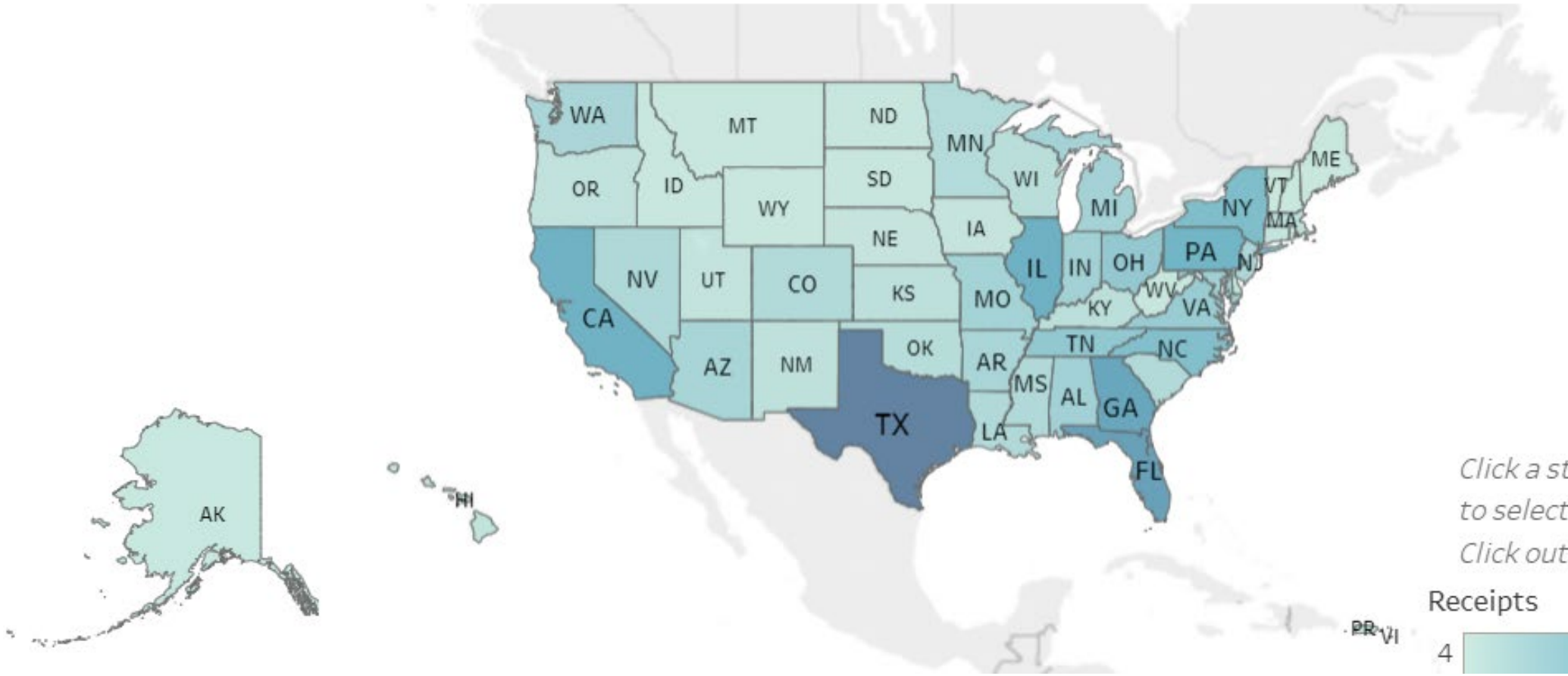
Charges received by the EEOC in 2024. (claim of some sort of discrimination)

- Total Charges: 88,531 charges
  - Up 9.2% increase from 2023.
- Monetary Impact To Organizations: “The EEOC secured nearly $700 million in monetary relief for victims of discrimination.”
  - $469.6 million for private sector and state and local government.
  - $190 million for federal employees.
  - $40 million as a direct result of litigation.


EEOC Charge Types by Percentage and Count
Retaliation
Harassment
Disability discrimination
Race discrimination
Sex discrimination
47.8%
(42,301)
40.4%
(35,767)
38.0%
(33,642)
34.2%
(30,278)
30.4%
(26,913)
0
10
20
30
40
50
Percentage of Charges (%)

EEOC Charge Receipts by State

FY 2024



Click a state to filter, hold Ctrl to select multiple states. Click outside of the US to reset.

Receipts

4 — 9,328

Why EPL Claims Matter for Your Organization

- Reputation: Can undermine public trust.
- Organizational Morale: Impacts culture.
- Legal Compliance.
- Financial Impact:
  - litigation costs, mediation, settlements, judgments (regardless of outcome)
  - Defense costs alone can exceed settlement values.
  - Rising costs of defense and settlements (even for meritless claims)
  - Rising costs of insurance

Common Types of EPL Claims

- Wrongful Termination: Claims that an employee was terminated for unlawful reasons.
- Discrimination: Allegations based on race, gender, disability, age, religion, or other protected classes under Title VII, ADA, ADEA.
- Harassment: Workplace or sexual harassment claims, often tied to supervisory behavior.
- Retaliation: Claims alleging punishment for filing complaints or participating in investigations.
- Leave & Accommodation Issues: FMLA leave, ADA accommodations, or other required adjustments.

Prevention Through Policies

- Maintain clear, updated policies on harassment, discrimination, retaliation, and workplace conduct.
- Policies should be reviewed annually. (legislative updates, case law, organizational changes, etc.)
- Ensure policies align with state and federal laws.
- Complaint procedures should be clearly outlined and encourage reporting without fear of retaliation.

Prevention Through Training

- Provide regular, mandatory training for all employees.
  - Harassment training, safety training, various other policy related trainings.
- All training efforts should be documented and employees should sign in or otherwise be documented as participating.
- Policies and training should be easy for employees to remember and understand.
- Vary the trainings by presenter, format, etc.

Prevention Through Front Line Supervisors

- What is a front line supervisor?
- A front line supervisor is a manager who directly oversees the work of non-managerial employees.
- They are the first level of management in an organization's hierarchy, acting as a crucial link between senior management and the workforce.

Prevention Through Front Line Supervisors Best “Bang of Your Buck”. Why?

- Direct Interaction:
  - They interact on a daily basis and are responsible for managing performance, enforcing rules, and handling interpersonal issues.
  - Constant interaction makes them the most likely individuals to witness or be involved in situations that could lead to a claim.
- Actions are Attributed to the Organization:
  - Their actions or inactions are considered the actions of the organization.
  - They are responsible for applying policies and procedures.
- Ignorance is Not a Defense:
  - Failure to act appropriately, even out of ignorance, can create legal liability.

Prevention Through Front Line Supervisors

- Because these supervisors are the front line of risk and should be trained regularly.
- Train them to:
  - Apply policies consistently.
  - Avoid favoritism.
  - Foster a culture of respect, fairness, and accountability.
- Legal and HR must be accessible.
  - Build and maintain relationships with these departments and people.

Front Line Supervisor Training: People Management & Leadership Skills

- Effective Communication:
  - Train to give clear instructions, engage in active listening, provide constructive feedback, have difficult conversations.
- Conflict Resolution:
  - Train to mediate disputes, address difficult behavior, or prevent minor disagreements from escalating.
- Performance Management:
  - Train to set clear expectations, prove regular feedback (both positive and negative), conduct effective performance reviews, and develop employee skills.
- Delegation & Time Management:
  - Train to effectively delegate tasks and manage their own time to empower employees.
- Leading Change:
  - Train to communicate and manage change effectively to minimize employee concerns and keep employees aligned with organizational goals.

Front Line Supervisor Training People: HR and Risk Mitigation

- EEO & Discrimination Prevention:
  - Train on laws and organizational policies, how to handle employee complaints, avoid favoritism, conflicts of interest, and to document concerns, interactions, discussions, complaints.
- Wage and Hour Laws:
  - Train on proper timekeeping, exempt vs. non-exempt employee classifications, rules regarding breaks and overtime.
- Workplace Safety:
  - Train to identify hazards, enforce safety procedures, OSHA compliance.
- Leave Management:
  - Train to navigate leave requests under FMLA and the ADA and to seek assistance from HR/Legal.

Documentation: Building a Defensible Record

- Strong documentation often determines the outcome of an EPL claim:
  - Job Descriptions: Ensure they accurately describe essential functions.
  - Performance Evaluations: Be honest and consistent. Avoid inflated positive reviews.
  - Discipline: Use progressive discipline (as appropriate) and document each step. (verbal warning, written warning, suspension, termination)
  - Consistency: Apply policies uniformly across employees.
- Documentation is the key to credibility. Judges and juries frequently side with the party that appears more credible and organized.

Documentation

- “Employee has a bad attitude.”
  - Good or Bad?
  - Why?
- “Employee arrived 30 minutes late to work for 3 separate shifts in July without giving prior notice to his supervisor.”
  - Good or Bad?
  - Why?
  - What can improve on this?
    - Specific dates.
    - Discussed the importance of timeliness.
    - How it impacts other employees.
    - How it impacts the organization.

Documentation: Vague Descriptions

- Avoid vague descriptions.
- Vague descriptions are statements that are subjective, lack specific details, and don't describe observable behaviors.
- They are problematic because they can't be objectively proven and can easily be interpreted as biased or discriminatory.

Documentation: Vague Descriptions

- Vague: "John has a bad attitude.“
- Specific: "On June 1st, John rolled his eyes and used a sarcastic tone when asked to complete a task of making phone call to John Doe. He then complained about having to make the call which led to an important call to a vendor being delayed by 15 minutes.“

- What’s wrong with the vague version?
  - It uses subjective judgments instead of objective facts.

Documentation: Vague Descriptions

- Vague: "Sarah is incompetent.”
- Specific: "Sarah failed to meet the required deadline for financial reporting on three separate occasions, which resulted in a finding from the independent auditor.”

- What’s wrong with the vague version?
  - Refers to an employee's character rather than her actions.

Documentation: Vague Descriptions

- Vague: “Ted is always late.”
- Specific: "On May 5th, May 7th, and May 12th, Ted arrived 20 minutes late to their scheduled shift without prior notification."
- What’s wrong with the vague version?
  - Lacks dates, times, or a clear chain of events.
  - Could the specific version be better?

Documentation

- “Ted arrived at least 20 minutes late to work for 3 separate shifts. May 5, 2025 arrived at 8:26. May 7, 2025 at 8:23. May 12, 2025 at 8:29. All shifts were scheduled to begin at 8:00. Employee did not give prior notice to his supervisor for any of the shifts he was late for. I spoke to Ted on May 12, when he arrived late and talked to him about the issue. I asked him if there was something going on and he stated “I just can’t seem to get out of bed without hitting snooze a few times.” I talked with him about the importance of being on time and how it affected other employees and the City’s operations. Specifically, his crew wasted more than an hour of combined time each time he was late because they had to wait for him. I discussed expectations moving forward.”

May 15, 2025

Dear Ted,

This letter serves as a formal Performance Improvement Plan (PIP) to address your consistent tardiness. We have previously discussed this issue informally on May 12, 2025, but it's important to formalize our expectations and provide a clear path forward to help you succeed.

Background:

On multiple occasions, you have arrived late to your scheduled shift. This has a direct negative impact on your team, as your crew must wait for you to begin critical tasks, leading to delays and reduced productivity. During our last conversation on May 12, 2025, you mentioned this was due to difficulty waking up in the mornings. While I appreciate your honesty, it is essential that all employees adhere to our company's attendance policy, which requires you to be at work and ready to begin your shift by 8:00 AM. As we discussed, not only does your tardiness impact your, it also impacts your crew who collectively missed several hours of work waiting for you. This caused them to have to work through lunch to get through their tasks for the day. As you know, this can negatively impact co-worker morale. Additionally, I had to wait for you each day in order to ensure our crews were adequately staffed.

Performance Expectations:

Moving forward, the following expectations are effective immediately:

- **Punctuality:** You are required to arrive at work on time for every scheduled shift. "On time" means you are at your workstation and prepared to start your duties by 8:00 AM.
- **Accountability:** If an unforeseen circumstance prevents you from arriving on time, you are expected to notify your supervisor at least 30 minutes before your scheduled start time.

Support and Path Forward:

I want to see you succeed here. To help you meet these expectations and address any challenges you're facing, I will personally meet with you every week for the next four weeks. We can use this time to discuss your progress, identify any obstacles, and ensure you have the support you need.

This plan will be in effect for 30 days. We will meet on a weekly basis on Thursdays at 4 pm to review your progress and discuss your performance. Consistent failure to meet these expectations, including any unexcused tardiness, may result in further disciplinary action, up to and including termination of employment.

Please sign below to acknowledge that you have read, understand, and agree to this plan. A copy will be placed in your personnel file

Difficult Conversations: Follow-up

- Document the conversation.
  - Create a record of what was discussed, any agreed-upon action items, and the timeline for completion.
  - Provides clarity for both parties and serves as important documentation.
- Set a follow-up date.
  - Schedule a check-in to review progress and provide ongoing support.
  - Reinforces that you are invested in their success and that the conversation was the beginning of a process, not a one-time event or the end.
- Stick to the plan.
  - Ensure you and the employee both follow through on the agreed-upon actions.
  - Consistency is key to building trust and showing that these conversations lead to real change.

Difficult conversations

Have a Respectful, Two-Way Dialogue

- Start with a clear, calm opening.
  - State the purpose of the meeting directly and with empathy. Avoid small talk that might sugarcoat the issue. Focus on the behavior, not the person. Use "I" statements to describe your observations and the impact of their actions.
- Listen actively.
  - After you've shared your perspective, be quiet and listen. Allow them to speak without interruption. Ask open-ended questions like, "Can you help me understand what's been happening?" or "What's your perspective on this?"
- Collaborate on a solution.
  - Conversation should lead to a collaborative path forward.
  - Brainstorm solutions together. Ask them what they think needs to happen or what support they need. This promotes a sense of ownership and accountability.

Responding to Complaints

- Take All Complaints Seriously: Even informal or minor. Concerns may escalate if ignored.
  - Get complaints in writing when possible. Why?
- Investigate Promptly and Impartially: Use Legal, HR staff, or external investigators.
- Protect Complainants: Implement interim measures (e.g., schedule adjustments, no-contact directives).
- Avoid Retaliation: Train supervisors and employees not to treat complainants differently.

Responding to Complaints: No Contact Policy Example

- An employee who is accused of inappropriate sexual conduct by another employee is prohibited from contacting the victim in relation to the alleged conduct, or from in any way attempting to prevent the victim or witness from pursuing the inappropriate sexual conduct complaint. **The accused employee will not question, coerce, intimidate, retaliate or communicate in any way during the investigation with the employee who has filed a report of inappropriate sexual conduct with the City, except that any communication that must occur due to an employment or work necessity will be done professionally and courteously and will be limited to the purpose of accomplishing the task and will be limited in content to the task.** Any violation of this section will subject the employee to disciplinary action up to and including termination, regardless of the outcome of the inappropriate sexual conduct charge. Retaliation against any complainant or witness of inappropriate sexual conduct will result in disciplinary action up to and including termination.

Defending Claims

- When a claim arises:
  - Legal Counsel: Engage the city attorney or outside counsel.
  - Insurance: Notify insurer immediately to preserve coverage.
  - Evidence: Preserve and rely on documentation, written policies, application of policies, witness credibility.
  - Strategy: Consider paths forward. Sometimes settlement is the fiscally prudent choice.
    - Organizational policy on settlement?
    - How can settlement help an organization?
    - How can settlement hurt an organization?

Common Concerns or Issues with Supervisors

- I’m waiting for the right time.
  - Don’t wait.
  - It’s never the right time.
- New supervisor or manager.
  - People want the title, the pay, the office, etc. But they don’t want to do the hard things that come with it.
- Becoming a new manager.
  - The things that were funny yesterday aren’t funny today.
- Don’t want to have the difficult conversations.

Employment Liability Prevention Toolkit

A Quick Reference for Supervisors and Managers

✓ 1. Policies & Expectations

- [ ] Employees know where to find and have access to my organization's policies.
- [ ] Employees understand that policies apply equally to everyone (no special treatment).
- [ ] Supervisors and managers set a good example by following policies and procedures.

✓ 2. Hiring & Promotions

- [ ] The organization uses objective, job-related criteria when hiring or promoting.
- [ ] Interviewers ask consistent questions that have been vetted by HR/Legal to all candidates.
- [ ] Job descriptions are regularly reviewed for accuracy.

✓ 3. Documentation

- [ ] Supervisors and managers document performance and conduct promptly, factually, and specifically.
- [ ] Documentation avoids vague terms and uses behavior-based descriptions.
- [ ] Supervisors and managers keep records consistently and properly so they're available if needed later.

✓ 4. Handling Complaints

- [ ] Complaints are taken seriously (even if it seems minor or informal).
- [ ] Complaints are promptly reported to HR/Legal if required.
- [ ] Employees are not discouraged or punished for speaking up.

✓ 5. Daily Management Practices

- [ ] Supervisors and managers are trained to give feedback regularly; not just at evaluation time.
- [ ] Employees are treated with respect and fairness.
- [ ] Small problems are addressed early before they escalate.

✓ 7. Retaliation Prevention

- [ ] Supervisors and managers know that retaliation is the most common claim.
- [ ] Supervisors and managers avoid negative actions that could look like punishment after a complaint.
- [ ] Supervisors and managers double-check employment decisions that impact employees alleging retaliation.

✓ 8. Training & Accountability

- [ ] All employees attend regular harassment and conduct training.
- [ ] Supervisors and managers regularly attend specific training supervisor/manager related training.
- [ ] Supervisors and managers understand they are responsible for creating a safe and respectful culture.

✓ 9. Work Environment Awareness

- [ ] Supervisors and managers check in regularly with employees about morale and concerns.
- [ ] Supervisors and managers pay attention to patterns (e.g., high turnover or conflict in one area).
- [ ] Supervisors and managers share concerns with HR/Legal before they become legal problems.

Takeaways

- Prevention is less costly than litigation.
- Supervisor training is the best investment in risk reduction.
- Regularly review, update, and train on policies and procedures.
- Documentation wins cases. (Or loses them.)
- Respond to complaints quickly and fairly.
- Use HR, legal counsel, and insurers as partners.
- Documentation is good.
- Retaliation is bad.