

EEO UPDATE

COMPULSORY EEO TRAINING ESSENTIAL TO MINIMISE LIABILITY FOR DISCRIMINATION CLAIMS

A recent decision of the NSW Administrative Decisions Tribunal highlights the importance of conducting compulsory EEO training in defending discrimination claims.

In *Hunt v Rail Corporation* (July 2007), Rail Corporation (“**Rail Corp**”) was found vicariously liable for sexual harassment of Ms Hunt. The sexual harassment involved humiliating graffiti in the men’s toilets where Ms Hunt worked and a pornographic magazine being placed under Ms Hunt’s door. Despite an extensive investigation, Rail Corp was unable to determine who was responsible for the graffiti and magazine.

In defending the claim, Rail Corp sought to rely upon the “all reasonable steps” defence to vicarious liability. Under EEO laws, employers are vicariously liable for all unlawful acts of discrimination or harassment by employees, unless the employer can prove that all reasonable steps were taken to prevent unlawful conduct from occurring. If the employer can show “all reasonable steps” were taken, the employer will not be liable.

All reasonable steps include:

- having a comprehensive EEO Policy in place that is well communicated;
- providing training to managers and employees;
- supervising and monitoring the workplace;
- having a complaints procedure; and
- taking appropriate action when complaints are made.

The Tribunal found that Rail Corp had taken extensive steps to investigate and address Ms Hunt’s complaints, including engaging a hand writing expert, installing close circuit TV to monitor the stairs near the toilet, regularly inspecting the toilets for graffiti and applying anti-graffiti paint. Rail Corp also conducted 17 EEO briefing sessions for employees over the course of 18 months. However, the Tribunal found there was a fundamental flaw in Rail Corp’s defence because the EEO training and briefings conducted by Rail Corp were not compulsory. The Tribunal said this meant that *“it was possible some staff, perhaps those who were least aware of anti-discrimination, sexual harassment and bullying policies, were able to avoid attending the briefing sessions.”*

Accordingly, Rail Corp failed to make out the “all reasonable steps” defence and was found vicariously liable for the harassment. Ms Hunt was awarded \$20,000 in compensation. Undoubtedly Rail Corp’s legal costs in defending this matter would have been significantly more than \$20,000.

This case demonstrates the importance of conducting EEO training in defending discrimination and harassment claims and the requirement for such training to be compulsory for all managers and employees. Employers should also consider including contractors and other workplace participants in the training.

If you require assistance with designing or implementing EEO training in your workplace, please contact Nicole Gower, head of the firm’s specialist Workplace Training Practice on (02) 9458 7563, or one of the firm’s partners, whose details are set out below.

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WORKCOVER NSW RELEASES BULLYING GUIDELINES

WorkCover NSW has recently published Guidelines for Preventing and Dealing with Workplace Bullying. The Guidelines explain the elements of bullying, provide examples of workplace bullying and identify common causes.

The Guidelines also explain the steps employers should take to prevent and deal with workplace bullying, as follows:

- develop a bullying prevention policy;
- identify and control bullying risk factors;
- create awareness;
- inform, instruct and train (based on the case above, this training should be compulsory);
- encourage reporting; and
- respond to incidents and reports.

While the Guidelines are not legally binding, they provide useful guidance on the steps expected of employers to minimise legal claims of workplace bullying.

A link to the Guidelines is set out below:

http://www.workcover.nsw.gov.au/Publications/OHS/SafetyGuides/preventing_dealing_with_bullying_workplace.htm

Some other States and Territories already have similar guidelines in place, including Victoria, Western Australia, Queensland, South Australia and ACT.

CONTACT US

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