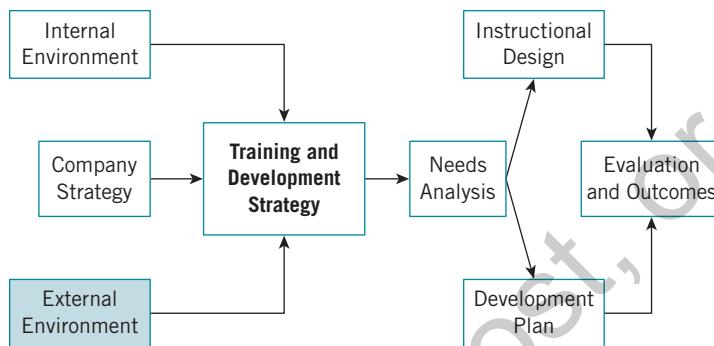


LEGAL ISSUES IN TRAINING AND DEVELOPMENT



Learning Objectives

1. Identify the key provisions of antidiscrimination legislation.
2. Differentiate between types of discriminatory actions.
3. Assess whether an organization is guilty of discriminating.
4. Discuss how ethics influences behavior.
5. Explain how reasonable accommodation applies to training.
6. Assess whether training has increased or decreased an organization's potential liability.

Shirley Hoffman worked for the Optical Services Department at Caterpillar Inc., and for the majority of her time at Caterpillar, her performance had been rated as average or better. One of the pieces of equipment within her department, but not one that she was required to use, was a high-speed scanner. Furthermore, she was not trained on how to use it. However, many of her coworkers were similarly situated, and only some in the department had been trained to use the high-speed scanner.

What made Shirley's situation different from that of the others who had not been trained to use the high-speed scanner are a few important facts. First, Shirley had requested to be trained on the use of the high-speed scanner. Second, everyone who previous to her had requested to be trained had received the training. Finally, Shirley is disabled, and she felt that fact was the basis for the decision to deny her the training.

Shirley's disability is that she is missing her lower left arm. Under the Americans with Disabilities Act (ADA), Shirley is

eligible for reasonable accommodations in her current position. She receives those accommodations and, as stated, has average or better job performance.

Despite those facts, Caterpillar refused to train her on the high-speed scanner. Caterpillar denied her request for a couple of different reasons. One reason was that using the high-speed scanner was not a requirement of her current job, and therefore the company was not obligated to train her to use it. Also, the main issue with using the high-speed scanner was the ability to quickly remove jams from the equipment, which incidentally occurred quite frequently. Based on her current accommodations, Caterpillar did not believe it would be possible for her to operate the equipment at the speed required.

The courts found merits with both sides of the argument. Supporting Caterpillar's position, the court determined that it was not obligated to train Shirley to use the high-speed scanner because it wasn't an essential function of her job.

However, that represented only part of her complaint. In addition, Shirley argued that being trained on the equipment would make her more eligible for other positions within Caterpillar. Therefore, denying her this training was still discriminatory and a violation of the ADA.

Here the courts sided with Shirley because Caterpillar made the decision not to provide training on the assumption that she would not be able to operate the equipment as needed. Under the ADA, making an assumption such as this is problematic. If Caterpillar wanted to deny Shirley training on the basis of her not being able to operate the scanner to the required level, then it should have properly evaluated her physical capabilities.¹

The law interacts with the provision of training and development in many different ways. Sometimes it is explicitly mentioned in legislation. Similar to other areas of human resource (HR) management practice, employers need to be concerned about the potential discriminatory effects when selecting who will participate in a specific training or development activity. Even if it is not explicitly mentioned in a piece of legislation, the legal environment, which is external to the organization as shown in the framework opening this chapter, impacts the decision of whether an organization should provide employee training.

In most cases, the legal environment encourages organizations to provide their employees with training. The primary way that the law promotes the provision of training is by lowering an organization's potential liability for actions taken by its employees. When an employee injures another person, either a coworker or a customer, or even causes harm to him- or herself, the organization may be held liable for the damages that result. These injuries and damages can take many forms. An employee could literally physically hurt someone by not taking proper safety precautions. The injury could be economic in nature as in the case where a discriminatory employment decision was made (e.g., not hiring someone on the basis on race). Similarly, the injury could be emotional

or psychological in the case of harassment. However, if an organization provides its employees with proper training to avoid these negative outcomes, it can point to that training as evidence that it took reasonable steps to limit the possibility that its employees would cause injury. Consequently, the employer would argue that it was not negligent and therefore should not be held liable for any damages incurred.

This chapter explores both the legal requirements and implications of providing employee training. Further, it discusses the ethical implications, particularly in relationship to equal employment opportunities. While much of the law, and this textbook, promotes the provision of training and development, the chapter also discusses the special case of independent contractors, one of the few situations where an employer would not want to provide an individual with training or development opportunities.

JURISDICTION AND ETHICS

Jurisdiction refers to whether or not a specific law applies to your organization. The major focus of this chapter, in terms of both legal coverage and ethical implications, is on laws that protect against discrimination, but it is not limited to these laws. Two important ways that jurisdiction is an issue for organizations in regard to discrimination are geography and size. Depending on how many people your organization employs or where it is located, a particular law may or may not apply to you.

In terms of organization size, most antidiscrimination laws provide for a threshold number of employees. Therefore, if your organization's workforce is under that threshold level, the law does not apply to you. For example, the Civil Rights Act states that it applies to companies with workforces of 15 or more employees. So, from a legal standpoint, if your organization only employs 14 employees, then technically you are not bound by the provisions of the Civil Rights Act. While it is interesting to note the employee threshold for these laws, you should keep in mind that if you work in an HR department, have HR in your job title, or even just have formal responsibilities for HR issues, then you are most likely working in an organization that meets the minimum threshold, and therefore these laws apply to your organization.

Besides size, geography represents the other key jurisdictional concern. For example, federal legislation and Supreme Court decisions apply to workplaces across the United States. For simplicity and applicability, this chapter covers the main components of these laws. However, this does not represent the totality of antidiscrimination legislation, nor does it cover the other laws that impact the provision of training and development. Many states, and even some counties and cities, extend employment protections to additional groups of which you need to be aware. For example, let us compare how protections differ between the states of Illinois and Missouri. This comparison is interesting because these states border one another and yet there are major differences in how they have chosen to extend employment protections. First, in the state of Missouri, as in the majority of states, it is legal for private employers to discriminate against someone on the basis of sexual orientation or gender identity. By comparison, the state of Illinois passed legislation to extend employment protections to those who identify as lesbian,

Exhibit 2-1 Status of Protections for Lesbian, Gay, Bisexual, Transgender, or Queer (LGBTQ) Workers by State

	Exclusively protects LGB workers	Inclusively protects transgender workers	Does not protect any LGBTQ workers
All workers	Wisconsin	California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington	Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Louisiana, Mississippi, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, West Virginia, Wyoming
Only public sector workers	Alaska, Arizona, Missouri, North Carolina, Ohio	Indiana, Kentucky, Michigan, Montana, Pennsylvania, Virginia	

Source: Human Rights Campaign, "State Maps of Laws and Policies." Available from http://www.hrc.org/state_maps.

gay, bisexual, transgender, or queer (LGBTQ). If you are curious whether your state extends protections to its LGBTQ workers, you can look it up in Exhibit 2-1. You should also be aware that this is an active area of employment law with efforts at both the state and federal levels to further expand these protections.²

What If a Law Does Not Apply?

Raising the jurisdictional issue is important because it provides an opportunity to consider the moral reasons that these laws were initially enacted. Specifically, these jurisdictional issues serve to illustrate the difference between legal and ethical behavior. Legally, if a law does not apply to your organization, then you by definition cannot violate it. Therefore, if you live in a state that does not protect a certain category of worker and/or have a company that is small enough that it fails to reach the threshold level of the law, then you cannot be successfully sued for that type of discrimination.

So, if you are safe from lawsuits, why don't you discriminate? One answer is ethics. On a personal and/or societal level, there is a recognition that it is not appropriate to discriminate against another person because he or she belongs to a certain group. Think of a couple of maxims under which many of us were raised. For example, there is "all men are created equal" from the Declaration of Independence. Similarly, there is the Golden Rule, which advises that you "do unto others as you would have them do unto you." Living by such teachings would seem to discourage discrimination. In addition, many professions have standards of practice that include reference to not discriminating. For example, in its Code of Ethics, the Society for Human Resource Management includes guidelines that state that its members should "foster a trusting work environment free of harassment, intimidation, and unlawful discrimination."³

But if you can't be sued, how are such ethical standards enforced? If organizations or individuals violate such norms, they may find themselves ostracized. Organizationally,

this may be reflected in individuals choosing not to do business with you. Consumer boycotts are one of the most visible responses to organizations that have a reputation for discriminatory behavior. Many organizations and products have been boycotted to varying degrees of success. One of the most successful consumer boycotts was headed by Cesar Chavez and the United Farm Workers, who called for a boycott of nonunion grapes that resulted in improved wages and working conditions for the largely minority farmworkers in California.⁴

However, not all boycotts are equally successful. Two less successful boycotts focused on members of the LGBTQ community. These boycotts are discussed here because they operated in opposite directions. One boycott was called by progressives against Chick-fil-A for its corporate practices and contributions to causes that discriminated against the LGBTQ community.⁵ By contrast, there have been boycotts from politically and religiously conservative groups against organizations such as Disney for their support of the LGBTQ community.⁶

In addition to consumer boycotts, which are visible, public, and can directly impact an organization's profitability, other individual and potentially less visible responses to discriminatory behavior can hurt organizational effectiveness. Discriminatory behavior can undermine the cohesiveness and effectiveness of work groups. Individuals who are the target of, or even a bystander to, discriminatory behavior will become demotivated and disengaged. This can lead to an increase in employee turnover, particularly if the organization allows the discriminatory behavior to persist. Such voluntary and arguably preventable turnover represents a real cost to the organization.

Of course, increased turnover presupposes that individuals are already employees. If an organization develops a reputation for discriminatory behavior, then this will result in a smaller applicant pool. Beyond members of the group that is discriminated against being less likely to apply for employment, discriminatory behaviors will also impact the career decisions of their allies and those offended by the general concept of discrimination. Smaller applicant pools generally make it harder for organizations to find the qualified individuals that they need and can result in higher recruitment and selection costs.

EQUAL EMPLOYMENT OPPORTUNITY

When people use the term *equal employment opportunity* (EEO), they are focusing on reducing discrimination. Within the domain of EEO, the main piece of legislation that people think about is the Civil Rights Act. First signed into law in 1964, the act was amended in 1991. When originally passed, the Civil Rights Act protected people on the basis of sex, race, color, national origin, and religion. These are the original **protected classes**. While subsequent pieces of legislation at the federal, state, and local levels have expanded the number of protected classes, they generally follow a similar pattern.

Exhibit 2-2 provides a list of the major pieces of legislation applicable to training and development and the classes of individuals that they protect. In addition to the original year that the legislation was enacted, Exhibit 2-2 provides a column stating when there was a major amendment to a particular piece of legislation. For example, as shown in the exhibit, the Civil Rights Act was originally passed in 1964 and was

Exhibit 2-2 Major Federal Laws Applicable to Training and Development

Act	Enacted	Amended	Summary	Jurisdiction
Equal Opportunity/Nondiscrimination				
Civil Rights Act	1964	1991	Title VII established protected classes/prohibits discrimination based on race, color, religion, sex, and national origin	Employers with 15 or more employees
Age Discrimination in Employment Act	1967	1978 and 1986	Established protected classes/prohibits discrimination based on age, but only for those 40 years old and older	Employers with 20 or more employees
Americans with Disabilities Act	1990	2008	Requires reasonable accommodation and prohibits discrimination for qualified individuals who have a disability, including those who have a history of a disability or are perceived to be disabled	Employers with 15 or more employees
Uniformed Services Employment and Reemployment Rights Act	1994		Prohibits discrimination and provides for reinstatement upon return from active duty	All employers
Pregnancy Discrimination Act	1978		Prohibits discrimination due to pregnancy, childbirth, or related medical conditions	Employers with 15 or more employees
Additional Legislation				
Occupational Safety and Health Act	1970		Employers have a general duty to maintain a safe workplace; depending on the job, there may be additional requirements regarding hazard communication and training	Private employers

amended in 1991. Laws such as the Civil Rights Act are typically amended to clarify or address issues that have been raised because of court challenges. The column showing the year amended is included in the exhibit to remind you that it is important to stay abreast of changes.

Civil Rights Act

Title VII of the Civil Rights Act provides that people be treated equally in compensation, terms, conditions, or privileges of employment. Training and development activities fall within this list, and training is specifically mentioned in the act. It is important to prevent discrimination with training and development not only for its explicit mention and inherent value but also in the more general roles it serves in organizations. From a positive perspective, training represents an opportunity to enhance employees' knowledge, skills, and abilities (KSAs), which will improve career opportunities and increase individuals' value to the organization. For example, individuals who have gone

through training become eligible for more desirable work assignments, promotions, and raises. Someone who is denied the right to participate in a specific training program may become ineligible for subsequent organizational rewards and recognitions. Besides the positive perspective, there is the remedial nature of training. Being sent to a remedial training program could be viewed as potentially punitive or harassing, which could also lead to a charge of discrimination.

The potential to discriminate is present in both formal and informal training and development activities. The main area of concern is the selection of employees to participate in a given training or development activity. However, how someone is treated or evaluated within a training and development activity or program could also lead to a charge of discrimination.

Another thing to keep in mind with the Civil Rights Act is that all categorizations within a protected class are equally protected. For example, while women are protected on the basis of sex, so are men. Similarly, someone who is Caucasian is just as covered by the category of race as those who are Asian, African American, multiracial, and so forth. This in no way is meant to diminish the long history of discrimination against women, people of color, and others who were the inspiration of the Civil Rights Act, but is simply a statement of the broad coverage of the legislation.

This section continues with an explanation of the three ways that organizations may be found to be acting in violation of the Civil Rights Act. In each case, the name is descriptive of the type of discrimination that is occurring, and they are treatment, impact, and retaliation. Treatment is the most direct of the three violation types, with a specific decision or behavior having an immediate and/or visible outcome. Impact cases are the results of indirect or inadvertent discrimination, meaning that a decision or policy isn't meant to, visibly, be discriminatory but the outcome still is discriminatory. Finally, retaliation cases represent a negative organizational response to a charge of discrimination.

In addition, the term *adverse* or *disparate* normally precedes *treatment* or *impact*. Basically, adverse treatment and disparate treatment are the same thing, as are adverse impact and disparate impact. Both terms denote that people are treated or impacted differently. The key difference between the terms is that *disparate* is value neutral, simply meaning that two individuals, or groups, are treated or impacted differently. By contrast, *adverse* implies a value difference because *adverse* means something that is preventing success or is harmful. So while both terms are often used interchangeably, it is arguably more accurate to refer to discriminatory behavior as adverse versus disparate.

Adverse treatment.

As its name implies, **adverse treatment** occurs when employers treat their employees differently. Furthermore, this differential treatment is the result of some protected class status and results in a negative outcome for the person making the charge of discrimination. Of the types of discriminatory behavior discussed in this chapter, it is the most immediate, direct, and visible form. Because of its overt nature, adverse treatment is typically considered to be intentional.

Consider the following example and identify which, if any, of the reasons could result in a charge of adverse treatment. Corporate headquarters just sent Michael notice

of the annual leadership training program that involves an outdoor/wilderness component, and you have to decide which of your employees to send. The only qualifications for the program are that the employee be a college graduate and have worked for the company at least three years. Based on those criteria, the two people on Michael's staff who qualify are Peter and Sally. In scenario one, Michael decides to send Peter because men make better leaders, so why waste the training on Sally? In scenario two, Michael still decides to send Peter because he is concerned that the outdoor/wilderness nature of the program will be too physically strenuous for a woman to complete. If both scenarios sound discriminatory to you, that is because they both are examples of adverse treatment. In each case, Peter is chosen because he is a man, and because sex is a protected class, Michael is guilty of adverse treatment.

If Michael told Sally that she was not going to receive training for either of those reasons, it would be a relatively simple case for the courts to decide. But even in the absence of a direct statement, it is still possible for Sally to demonstrate that she has been the target of employment discrimination. Sally would be able to show that she has received discriminatory treatment by establishing a *prima facie* case of discrimination through a four-part test.⁷

1. The individual claiming discrimination is the member of a protected class.
2. The organization/employer provides the training for its workers.
3. The individual was eligible for the training.
4. Others who were similarly situated, but not members of the same protected class, were provided with the training.

So let us walk through this four-part test to see how Sally could show that she was the target of discriminatory actions by Michael. First, Sally has to establish that she is the member of a protected class. Keep in mind that we are all members of a protected class; the key issue is which part of Sally's identity is the source of discrimination. Based on the information provided, it can be assumed that she is basing her case on sex, specifically that she is a woman. However, it is not uncommon for plaintiffs to argue that the decision was based on membership in multiple protected classes (e.g., race). Second, given the annual nature of the training program, the case satisfies condition 2 as well. Third, Sally has been with the employer for over three years and has a college degree. If she did not have a college degree or had been with the company for less than three years, then she would be unlikely to have a case. Finally, Peter, a man, was selected over her. Unless he was significantly more qualified because, for example, he had been with the company much longer and/or had advanced degrees, then Sally would have a strong case that she had been the target of discrimination.

Adverse impact.

Adverse impact is discrimination that occurs as a by-product of some seemingly neutral factor or policy. One implication of this is that adverse impact does not require animus or

intentionality on the part of the organization. Common reasons that people get sent to training include their performance rating. This can be either positive, in that they qualify for advanced training, or negative, in that they require some level of remedial training. Typical ways of assessing employee performance, and by extension eligibility/need for training, are through regular employee appraisals and aptitude tests.

Ostensibly, the use of appraisals and tests would seem an appropriate and neutral method for determining who should or should not participate in training and development. However, if there is some bias in the appraisal process or an aptitude exam favors one group over another, then members of a particular protected class will be less likely to be selected into a training or development program. If the imbalance is sufficient enough, then the organization may be found guilty of adverse impact, even if it did not intend to discriminate against its employees.

Because there is not necessarily an overt cause of the discrimination, it is difficult to determine adverse impact from a single individual. Determinations of adverse impact rely on statistical analyses. The 4/5ths rule is the general guideline for determining whether or not a specific practice or test is discriminatory. For example, you have 100 men in an organization, and from an aptitude exam, 10 of them are identified as eligible for training. This means that there is a selection rate of 10%. Now if, in that same organization, there are 50 women, how many women will need to be selected in order for there to be no discrimination? Using the 4/5ths rule, the selection rate for women should range between 8% and 12%. Multiply this by the number of women, 50, and you may anticipate that between 4 and 6 women are also eligible for training. If fewer women are achieving the requisite score, this provides evidence that the aptitude exam may be resulting in adverse impact.

Selection issues as so far described represent only one of the ways that organizations can engage in adverse impact. When you are looking at a simple comparison of the selection rates between protected classes, you are focusing on what are known as **flow statistics**. In addition to flow statistics, organizations need to be concerned with *concentration* and *stock* statistics in regard to creating disparate impact. As the name implies, concentration statistics look at where employees are located. While definitely a concern with staffing and deploying employees, it is arguably less of a concern for training, relative to flow and stock statistics.

While people normally focus on flow statistics to determine adverse impact, stock issues may exist even if there are no flow problems. In the case of training and development, stock statistics look at the pool of those eligible to participate relative to those who apply to and/or actually participate. Let's go back to the earlier scenario of Sally not taking part in leadership training, but we'll change the facts some to explain how it could be an adverse impact case. The first change is that someone has to self-nominate or otherwise apply for the training. Michael is no longer the decision maker, so Sally has the same odds of being selected as Peter. For some reason, Sally doesn't apply, so Peter attends the leadership training. If you are thinking that it was Sally's choice so there can't be discrimination, what if we add to the scenario that this pattern is repeated across the company? Now the situation is that there are 20 Peters and 20 Sallys. In 6 departments, both Peter and Sally apply for the program. Half the time, Peter is selected, and the

other half of the time, Sally is selected. The selection rates are the same, so there isn't a flow issue. However, in the remaining 14 departments, Sally decides not to apply. As a result, there are 17 Peters and only 3 Sallys in the leadership training program. In other words, 85% of the eligible men are in the program, and only 15% of the eligible women are participating. While this could be just coincidence, the disparity between those participation rates with the stock statistic that is 50-50 does bear closer scrutiny to determine if some common factor could be causing women not to apply and hence be creating an issue of adverse impact.

Impact beyond selection.

While this discussion of adverse impact has focused on selection for and participation in a training or development program, this is not the only time that organizations should be concerned about it. First, organizations should be aware that the method of delivery has the potential to create adverse impact. This is primarily a concern with training or development provided online. Although, as discussed in Chapter 8, one of the strengths of online education is to increase overall access to training and development, it also has the potential to create adverse impact because not everyone has equal access to online resources.⁸

Two other critically important areas include evaluation and transfer of training. While a longer discussion about evaluation takes place in Chapter 5 and 6, note that the method for evaluating learning, just as any neutral test, has the potential for creating adverse impact. Also, after a training or development program has been completed, managers need to be careful about adverse impact during transfer back to the workplace. Transfer involves using newly acquired KSAs and is discussed more fully in Chapter 6. For now, it will suffice to keep in mind that when managers create opportunities to utilize what was learned (i.e., assigning work tasks), they do so in a nondiscriminatory manner.

Retaliation.

Once someone raises a concern about adverse treatment or adverse impact, an organization needs to be careful that it doesn't engage in retaliation. A finding of **retaliation** can occur when the organization punishes or sanctions someone who has made a claim of discrimination. It is important to note that the person making the claim of discrimination is protected regardless of whether that individual is saying that she or he was the target of the discrimination or was simply the observer of someone else who was the target of discrimination. Similarly, individuals are protected from retaliation regardless of whether their initial charge is proved to be true or false.

Examples of retaliatory behavior include, but are not limited to, the following. With regard to development, an organization could be guilty of retaliation for not selecting a person for, or kicking a person out of, a mentoring program who had raised a charge of discrimination. Conversely, someone with a good performance record who is suddenly sent to remedial training after making a charge of discrimination could also be the target of retaliation. As is the case in many scandals, it is not necessarily the initial event but

how the organization responds that causes the problem. Therefore, companies should take charges of discrimination seriously and be conscious of how they treat people who bring them.

Religion within the Civil Rights Act.

Religion represents a special case under the Civil Rights Act, which has important implications for organizational training. Specifically, the Civil Rights Act protects individuals on the basis of sincerely held beliefs and holds that they should be provided reasonable accommodations. A **reasonable accommodation** represents a change that makes it possible for a person to do his or her job, or in this case to participate in a training or development activity. What is considered reasonable will depend on the specific circumstances.

A common example of reasonable accommodation involving an employee's religion is scheduling. This often results when training is scheduled on a holiday and/or during a period of time when an employee's religion prevents him or her from engaging in work. Organizations can accommodate these employees by changing the date that the employee is expected to participate in the training. An alternative accommodation could involve changing the delivery format (e.g., from face-to-face to online).

A more complicated request for reasonable accommodation occurs when the employee states that his or her religious beliefs preclude the content of the training itself. While this may seem hypothetical, there have been cases where individuals objected to having to attend diversity training that they felt required them to support LGBTQ coworkers, customers, or patients in a way that was in conflict with their sincerely held religious beliefs. Although courts have determined that supporting diversity can represent a business necessity, organizations still need to be cautious about how and when they discipline their employees.⁹

One implication of referring to an accommodation as reasonable is that some requests for accommodation can be considered unreasonable. Unreasonable accommodations do not need to be provided to an employee because they are considered to represent an undue hardship. There are many reasons that a request for an accommodation could be considered unreasonable, but one example involves safety. Many religions involve requirements for or limitations on the type of clothing that followers must wear. Unfortunately, those requirements or limitations may compromise the ability of the employee to wear necessary safety equipment and/or may represent a hazard depending on the environment or machinery. In these cases, there may not be a way to create a safe training environment while also accommodating an employee's religious beliefs.

A complicating factor for the provision of reasonable accommodations on the basis of religion is that they are based on the individual's sincerely held beliefs. A consequence of this standard is that not all people who belong to the same faith will require the same accommodations. For example, if your organization had several Jews within its workforce and chose to hold a mandatory training program on a Saturday, many would not raise a religious objection and would simply attend. However, an observant Jew would reject on the grounds that Judaism does not allow work (which includes training) to occur on Saturday.

While you might want to say, “Sarah and Ben don’t have an objection, so why can’t *you* attend?” be careful. Making such a statement and/or disciplining an employee for not attending the training may be interpreted as a violation of the Civil Rights Act. This can be further complicated by the fact that you may have been previously unaware of that employee’s religious beliefs and/or that person does not exhibit behaviors you feel are consistent with that level of religious observance. Acting as the judge of what is a legitimate religious belief is problematic under the Civil Rights Act.

Americans With Disabilities Act (ADA)

The Americans with Disabilities Act (ADA) impacts the provision of training and development in two important ways. The law was passed in 1990 and amended in 2008. The ADA prevents discrimination against individuals who are disabled. While the definition of disability may be considered broad, it is not an absolute guarantee that someone will be provided with a specific training and development opportunity. This is because an organization’s responsibility to provide someone with training and development opportunities is limited to reasonable accommodation.

Let’s begin by defining who is covered by the ADA.

“In general. Disability means, with respect to an individual—

- (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (ii) A record of such an impairment; or
- (iii) Being regarded as having such an impairment”

It should also be noted that when the ADA was amended in 2008, it was motivated by the need to broaden who was considered disabled (which had been narrowed by court decisions). However, in addition to being disabled, a person needs to be qualified. Someone is considered qualified if she or he has the “requisite skills, experience, [or] education.”

Reasonable accommodation.

One of the most important aspects of the ADA is that it provides for reasonable accommodation. Similar to accommodation based on religion, under the ADA, reasonable accommodation involves some alteration of the training to allow the individual with the disability to participate. You may be familiar with some training-related reasonable accommodations that are common on college campuses. First, there are the physical accommodations. For example, is the building or classroom wheelchair accessible? Especially if training is being conducted off-site, do not assume that a facility is wheelchair accessible. Other accommodations are more directly tied to the learning experience itself—for example, the ability to use a note-taker or alterations to the testing environment (i.e., time and/or location).

As the discussion of reasonable accommodation for religious issues shows, this can be a complicated issue. While there are some general concepts and recommendations for

applying reasonable accommodation, it is important to keep in mind that each employee and situation is different. Therefore, the best thing for you to do is to keep an open mind and to avoid being judgmental. One of the frustrations that people often have with providing accommodations is not knowing exactly why an accommodation is needed. Regardless of whether the desire to know is motivated by basic curiosity, empathy, or cynicism, the fact is that medical information is private and you don't have a right to that information.

Having said that, it is a good idea to engage with the employee to determine how and which, if there are options, to implement. Although such a conversation is not mandated, it is a gesture of goodwill that can help result in better outcomes, both through determining how to make an accommodation as effective as possible and through employee engagement. Another reason to keep an open mind is that the need for accommodation may not be consistent across contexts. For example, there may be some employees who do not need any accommodation to perform their regular job duties but would need them if they were asked to participate in training. Alternatively, someone who is already receiving accommodations may not require any accommodations in order to successfully complete a training program. Because of this, it is important that someone's accommodation status does not influence training decisions.

While the purpose of the ADA is to see that people with disabilities are not discriminated against when they can be accommodated, there are limitations. Specifically, organizations are only required to provide reasonable accommodations. If an accommodation request is unreasonable and would be considered to create an undue hardship for an organization, then it does not need to be provided. An accommodation request becomes an undue hardship if it creates too great of a burden for an organization. The undue hardship can result from a burden that is excessive in terms of costs or the amount of restructuring that would be required in order to accommodate the employee.

A related consideration with the ADA is that accommodations are simply intended to give someone with a disability an equal opportunity to succeed. This means that if an accommodation is working, then no other performance accommodation is needed. For example, if there is a certification test at the end of a training program, someone who has an accommodation under the ADA does not receive extra points or have a lower passing score. Evidence that a disabled employee is not succeeding, however, may warrant a reconsideration of the accommodation that has been provided.

Another factor to consider with employees with disabilities is the potential impact of stigma. Some disabilities are associated with higher levels of stigma. Examples include, but are not limited to, mental illness and HIV status. This is particularly an issue in development activities because they are more one-on-one, less structured, and/or informal in nature. Stigma can undermine developmental relationships because one party believes that the other is not worthy of the opportunity or is concerned with contagion (physical or social). This is one of the reasons that disability needs to be covered by an organization's diversity training and related initiatives.

Section 508 of the Rehabilitation Act.

While the ADA is the dominant piece of legislation when it comes to providing accommodations for workers, it is not the only one. Section 508 of the Rehabilitation Act

requires that technology used in training be accessible to all trainees.¹⁰ Effectively, making technology accessible to employees with disabilities is the same as reasonably accommodating them. For example, closed-captioning video content can be described either as making it accessible to deaf trainees or as reasonably accommodating a deaf employee. While a more complete discussion of making technology accessible takes place in Chapter 9, it is useful to note for now that according to the Web Content Accessibility Guidelines (WCAG), there are multiple times and ways that accessibility is an issue with technology. The closed-captioning of video content focuses on the issue of perceivability. In addition to perceivability, the WCAG has guidelines for making sure that technology is operable, understandable, and robust.¹¹

Age Discrimination in Employment Act (ADEA)

Just as employers need to be careful about making assumptions regarding disabled employees, they should also be careful that they do not limit training and development opportunities for older workers. Among the reasons that older workers might face discrimination are false beliefs that they lack the receptivity to be trained and/or represent a bad investment. If older employees are being discriminated against in training and development opportunities, then the ADEA places the burden on the employer to show that there is a “reasonable factor other than age” that explains the situation.

The ADEA was originally passed in 1967 and was amended in 1978 and again in 1986. The ADEA differs from other pieces of antidiscrimination legislation because of how the protected class is defined. Whereas the Civil Rights Act protects both men and women within the category of sex, the ADEA only protects older workers. Specifically, the ADEA only protects those workers who are at least 40. Therefore, individuals who are under 40 are not protected by this piece of legislation.

Affirmative Action

While the main goal of EEO legislation is to prevent discrimination from initially occurring, the law also provides for affirmative action, which is intended to promote the inclusion of systemically and/or historically underrepresented groups. Traditionally, affirmative action has been conceived as a way of addressing the underrepresentation of women and people of color. More recently, affirmative action plans have become more expansive with the inclusion of individuals who are disabled or veterans.¹²

Affirmative action plans are not without controversy. Some claim that they result in the hiring or promotion of underqualified individuals, which causes other groups to be discriminated against. Legally, this is not the case. Any plan that operates in that fashion would likely be deemed illegal.

A few basic tenets should be kept in mind that will help organizations address the need for affirmative action without inadvertently causing harm to another protected class. First, affirmative action plans should address a recognized need. If an organization already has a healthy (i.e., representative) level of diversity and does not have a history of discrimination, then there is not a need for affirmative action. Second, while affirmative action plans need to include goals, quotas are illegal. This means that while organizations

need to engage in a good faith effort to hire and promote individuals from underrepresented groups, they should not hire or promote someone just because that person checks specific demographic boxes. Third, organizations need to periodically assess and review their affirmative action plans and progress to determine if any changes are warranted.

Organizational training and development can be either a target or a support for an affirmative action plan. Organizations that systemically and/or historically denied certain groups training and development opportunities need to include those activities in their affirmative action plans. For example, underrepresented groups may be at a disadvantage when it comes to developmental activities like mentoring. Not only is this problematic for the initial selection, but training and development activities are key to organizational advancement. So, when members of underrepresented groups are less likely to be provided with training or mentoring, then they are also less likely to be promoted.

Besides providing previously withheld training and development, there are other ways that training and development can be part of or help support an organization's affirmative action plan. First, there is basic diversity training. While the specifics of diversity training are discussed in Chapter 13, it is important to note here that in more supportive and welcoming organizations, employees will be more inclined to stay engaged, which will help with inclusion and promotion goals. In addition, training, for interviewers and those responsible for performance evaluations, that addresses the importance of standardization and covers rater biases (e.g., similarity bias) will have a beneficial impact on the selection and promotion rates of previously underrepresented groups.

LIABILITY AND THE PROVISION OF TRAINING

The main reasons for providing training should be proactive and positive in nature. This means that you should provide technical training to improve your employees' human capital in order to make them and your organization more efficient, flexible, innovative, and so on. Similarly, you should provide diversity training to promote a more respectful, progressive, and responsive culture. With that said, providing such technical and diversity training serves relatively defensive and protective functions as well. In both cases, the provision of training can reduce an organization's liability by countering claims of either negligence or harassment. However, there is a special case in which the provision could create a situation where an employer becomes liable. This can occur when the training is provided to what an employer considers to be an independent contractor.

Safety and Health

Safety and health represents one of the major categories of employee training. Workplace safety and health is governed by the Occupational Safety and Health Act (OSHA), which is implemented by the Occupational Safety and Health Administration. In order to safeguard worker safety and health, numerous standards have been developed. Some of these standards involve properly training employees. Therefore, if employers do not provide training that is required by an OSHA standard, they can be found in violation of OSHA.

OSHA protects workers against both documented and undocumented hazards. In the case of known hazards, there is the Hazard Communication Standard. As its name states, it requires employers to inform employees if they will be working around a known hazard (e.g., a carcinogen) so that they will be able to properly protect themselves. Even if a hazard is not documented, OSHA includes a **General Duty Clause** as a form of umbrella protection for workers. So even in the absence of a specific standard, if a certain work activity or environment creates a foreseeable threat to employee safety or health, employers are required to take steps to protect their workers. Such protection can take the form of properly training their employees.

Negligent training.

Not meeting the expectations of the General Duty Clause is just one way that an employer can be **negligent** regarding the provision of training. Employers can also be found liable for damages caused by their employees if they did not take the necessary steps to ensure that their employees were properly trained to do a specific task. This can include making sure someone is ready to work without supervision or that an employee has maintained certifications.

Affirmative Defense

While providing training is important to reduce the potential for injury or damages, nothing is absolute. This unfortunately includes the case of employee harassment. Harassment generally falls into one of two categories. First, there is the creation of a hostile environment. Hostile environments are created when an individual or a group of employees says things or takes actions, involving a protected class status (e.g., race or sex), that cause other(s) to feel intimidated or abused in a way that interferes with their ability to properly function within the workplace. Examples of this include racial slurs and sexist comments. Second, there is quid pro quo harassment. This type of sexual harassment involves the exchange of some tangible employment outcome for a sexual favor.

Employers that want to support and promote workplace diversity typically have taken steps to prevent such harassment. These steps typically include providing training to employees so they know how to avoid harassing their coworkers. In addition, these companies have well-defined reporting procedures that employees are also informed (i.e., trained) on how to access and use. Nontraining steps generally include maintaining confidentiality, investigating claims, and appropriately disciplining violators.

Although taking all these steps makes it less likely that someone will be harassed, it doesn't guarantee that harassment won't occur. Unfortunately, some people choose to be harassers regardless of how they are educated and despite the organizational culture in which they work. Assuming that the harasser is not a key manager or officer in the organization, the organization can claim it is not responsible for an individual's rogue action. Citing all the training and related steps it has taken to prevent harassment, the organization makes a case of an **affirmative defense** in order to avoid liability in a harassment case.

Independent Contractors

As this section has discussed, it is generally advantageous for organizations to provide their employees with training and development. But there is one instance when an organization might not want to provide training and development to someone. This is the situation when that someone is considered to be an independent contractor and not an employee. Employers have been increasingly making use of independent contractors compared to traditional employees. One reason for that is because independent contractors are not employees in the legal sense. As such, independent contractors are not owed a variety of benefits, including unemployment insurance and worker's compensation. This makes independent contractors a desirable way for organizations to staff themselves.

When an organization hires someone as an independent contractor, there is often a statement that clearly states the individual's status, and the person may even be required to sign a document stating he or she is aware of his or her status. Despite the existence of such statements and documents, individuals can, and do, challenge their employment status in a court of law. When deciding the appropriate status for that person (i.e., employee or independent contractor), the courts rely upon fact-based tests to make a determination. Although multiple criteria are used to determine whether someone is an employee or an independent contractor, providing someone with training is a factor that would contribute to the finding that the individual is an employee as opposed to an independent contractor.¹³ Such a determination would increase an employer's liability. Therefore, organizations should be careful about providing training and development to individuals they consider to be, and would like to keep as, independent contractors.

CHAPTER SUMMARY

This chapter has covered many of the ways that the legal environment impacts the provision of training and development. Some of the impact is positive, meaning that the legal environment encourages the provision of training and development. For example, OSHA has provisions requiring hazard communication. Similarly, organizations may provide training to avoid charges of negligence and liability in the case that an employee's actions cause damages. This is one of the reasons that organizations provide diversity training, because the provision of such training can be used to establish an affirmative defense in case an employee accuses an organization of discrimination. As such, the positive impact of the legal environment on the provision of training and development focuses on the content of training.

Conversely, the negative impact of the legal environment on training and development focuses on the process side. Here, the legal environment is concerned not so much with what is taught but with who receives training and development. For example, organizations typically only train their employees. Because of that, the provision of training can influence a determination of whether someone is actually an employee and not an independent contractor.

In addition, similar to other functional areas in human resources, organizations need to be aware of the potential of, and avoid, discriminatory actions. The main categories of discrimination include adverse treatment and adverse impact. Treatment cases are generally more overt and intentional and

tend to occur on an individual basis. Impact cases are the consequence of a seemingly neutral policy or procedure that results in a specific group or protected class being made worse off. Impact cases rely on statistics to provide evidence that a policy or procedure is discriminatory. In addition to these main categories, organizations can violate antidiscrimination laws if they retaliate, or take action against someone, for making a claim that discriminatory actions are occurring. This protection extends to

someone regardless of the merits of the initial claim or if he or she is the target or reporter of the discrimination. Although we tend to focus on discrimination in regard to who is selected to participate in training, discriminatory actions can occur at all stages of training. Finally, this chapter has discussed why an organization adheres to the spirit of law (e.g., does not engage in discriminatory actions) even if the organization is not formally covered by the legislation.

KEY TERMS

Adverse impact. A seemingly neutral policy that results in discrimination based on a protected class.

Adverse treatment. Discrimination directed at an individual based on a protected class.

Affirmative defense. A legal argument where an organization provides evidence that it has taken actions to prevent discrimination or harassment to avoid being held liable.

Flow statistic. The primary type of data used to determine if a selection process results in adverse impact.

General Duty Clause. An OSHA requirement that employers reasonably take actions to protect workers against potential hazards.

Jurisdiction. Whether a law applies in a specific location or situation.

Negligent training. If harm results because an organization failed to provide an employee with training, the organization can be held liable for damages.

Protected class. The basis on which a person is covered by a piece of antidiscrimination legislation (e.g., race or sex).

Reasonable accommodation. Action an organization takes to allow an employee to participate on the basis of a disability (e.g., providing closed-captioning for individuals who are hearing impaired) or religion (e.g., scheduling training so it doesn't conflict with a religious observance).

Retaliation. Illegal actions that an organization takes to punish or discourage an employee for/from pursuing a claim of discrimination.

END-OF-CHAPTER QUESTIONS AND EXERCISES

Discussion Questions

1. Who is protected by the Civil Rights Act?
2. What is required to establish a *prima facie* case of adverse treatment?
3. How would your response to alleged discrimination against an LGBTQ employee change, and explain why, if the allegation occurred in Missouri versus Illinois?
4. How is the 4/5ths rule used to determine if discrimination is occurring?
5. What is the difference between flow and stock statistics?
6. If a fellow supervisor told you that she or he was going to discipline an employee for being a troublemaker, because she or he reported that she or he felt a coworker was being

discriminated against, what would you tell that supervisor?

7. What is required for someone to be protected by the Americans with Disabilities Act?
8. If an employee tells you that she or he can't attend a training program because the building where it is held is not ADA compliant, is it okay to just tell her or him to take the online version?
9. If you know someone is going to retire in a year, is it reasonable to turn down a request to attend a training program?
10. How can training and development support an organization's affirmative action plan?
11. What is an affirmative defense, and why is it important?
12. How does the Occupational Safety and Health Act promote employee training?
13. What does it mean for an employer to be negligent in the provision of training?
14. Should an organization provide training to an independent contractor?

Ethical Scenario

Leadership Potential

Samantha is a manager at Managing Expectations (ME), one of the top public relations firms in the city. ME is starting a leadership training program and has asked all department heads, including Samantha, to select an employee with the most potential to be promoted to participate in it. It's not an easy decision for Samantha because she has lots of good employees, so she pulls the most recent round of performance evaluations. Reviewing the evaluations, she eliminates several employees but by the end of the day is having a hard time choosing between Rachel and Simon. Samantha still has time to make the decision, so she decides to sleep on it. That night after dinner, she checks Facebook. Samantha has been careful

not to friend anyone who works under her but has a few friends from work. Scrolling down, she sees that Crystal posted congratulations to Rachel. Curious, she clicks and sees that people are talking about Rachel being pregnant, which is news to her. Back at work, Samantha reads through the evaluations one more time and concludes that Simon would be better for the training program.

1. Do you support Samantha selecting Simon for the leadership training?
2. What are your thoughts on mixing social media and work?

2.1 Comparing Protections

How do the workplace protections where you go to school differ from those that are federally mandated? In order to answer this question, go online and visit the web page for the human rights commission (or equivalent body) in your state. You should also see if there is a commission or ordinance at the county or municipal level, which may have further expanded employment protections. Finally, look up the non-discrimination policy for your institution.

2.2 Discrimination Scenarios

The following hypothetical scenarios, similar to the case of Sally in the text, may be examples of discriminatory behavior. Read through each scenario and then discuss either in small groups or as a class the following:

1. What is the possible form of discrimination (e.g., adverse treatment or adverse impact)?
2. Which law(s) apply to the scenario, and why (i.e., which protected class is involved)?
3. Based on the information provided, would you say that there is evidence of discrimination (be sure to explain why or why not)?
4. If you do not feel there is a legal case, are there any ethical concerns?

Chris

Chris has been with the company for over 20 years. His performance reviews have been consistently excellent. In the past, you have sent him to training programs, and he has come back and shared what he has learned with the rest of the department. There is another one of those trainings coming up, but this time you decide to send Alex. Alex is a recent college graduate and is energetic, and besides, you have overheard Chris talking about joining AARP and getting the senior discount at the movie theater.

Jacob

Jacob has been with the company for 10 years and has fulfilled all his promise as a rising star. When you decided to set up a mentoring program for other high-potential employees, you knew that Jacob needed to be one of the mentors in the program. You went through a careful matching process for all the potential mentor–protégé pairs, and based on your assessment, the best match for Jacob was Alice. When you told Alice, she was excited. However, the reaction was not so positive from Jacob. He informed you that he couldn't mentor a woman because the level of intimacy required was inappropriate based on his religious teachings.

Angela

Over the past couple of years, Fortune 2000 has sent 50 of its associates to an advanced coding course. Associates who successfully complete the course

usually are promoted within a year. Decisions on who to send to the course are based on an aptitude test that is administered every year. For the third year in a row, Angela felt good when she took the test, but she wasn't invited to participate in the training. After making a complaint, she found out that Fortune 2000 had only sent 10 women compared to 40 men to the advanced coding course. The company countered that only 40 women had taken the test in comparison to 160 applicants who were men.

Miguel

Miguel worked as a loan officer for Big Savings Bank for six years and always got above-average performance. One day soon after the new branch manager started, he had a client come in who started talking with him in Spanish. Seeing the customer was more comfortable with Spanish, he continued speaking to her in it. The next day, the branch manager told Miguel that he was being sent to a customer service training course. When he asked why, the manager said he found it was helpful for all his non-native-speaking employees. Miguel told him that it was both insulting and discriminatory to assume that because he is Latino he isn't a native speaker. He also let the manager know that he was born in Boston and is a native English speaker. The manager apologized and canceled the training. Miguel didn't think anything of it until six months later when the promotion to supervisor that his last manager said would be his went to someone else.