

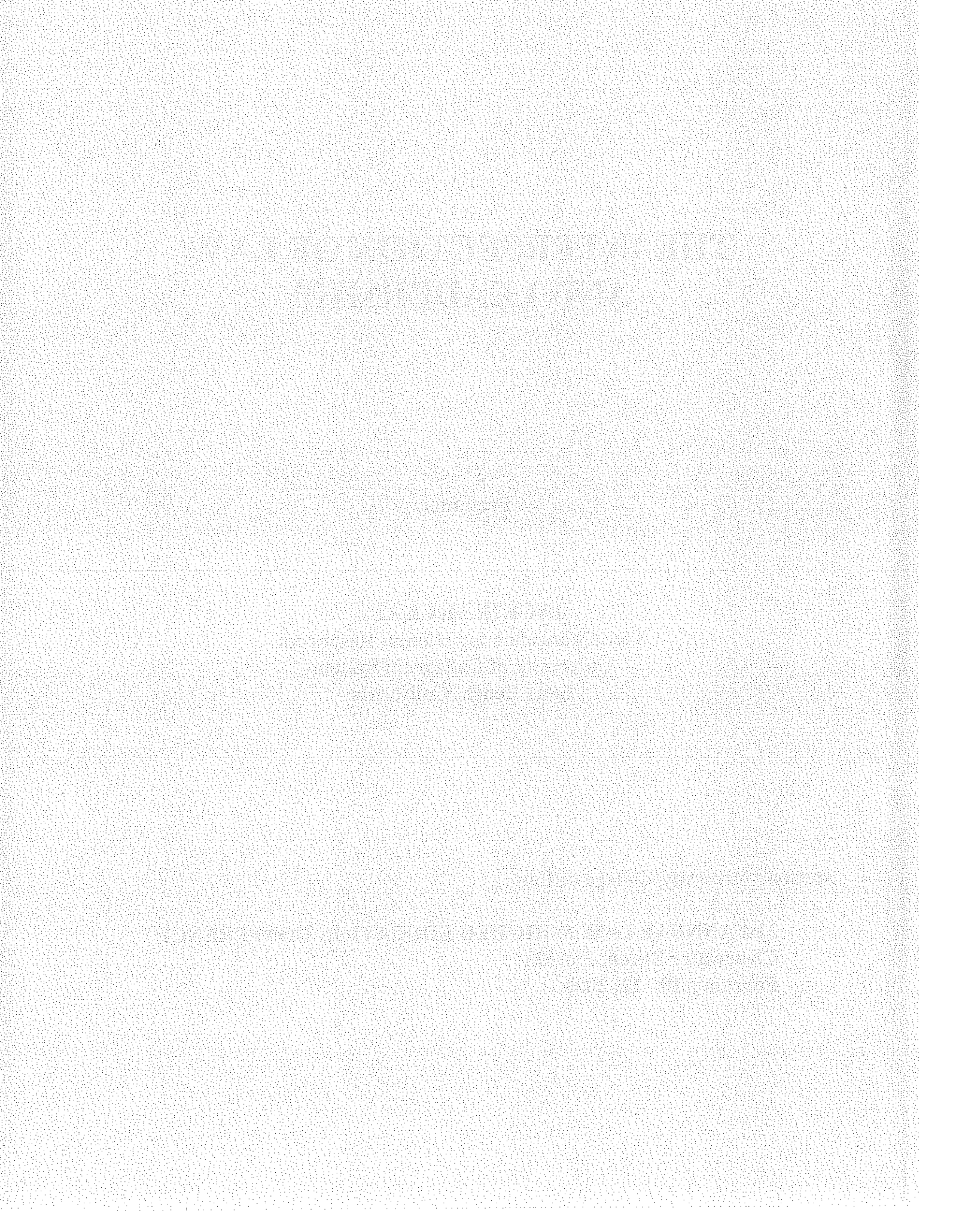
THE INTERSECTION OF LAW AND LEADERSHIP

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21st ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 10 - 12, 2000



Although the facts in this case are presented as occurring in a corporate setting, the basic issues outlined are common to a variety of employment settings including the higher educational institution.

The role of the Human Resources administrator in addressing these issues is somewhat complex. It often seems as though Human Resources personnel spend a majority of our time trying to ensure that our employer avoids employment related litigation or to ensure that if such litigation is filed, the employer has a reasonable chance of prevailing. In light of this fact, it is important to remember that the primary responsibility of Human Resources is to hire, train and retain competent employees while providing a means of removing those who do not perform satisfactorily.

This case presents some interesting questions in both the legal and non-legal HR aspects.

1. Did illegal bias play a role in the promotional decision making at TSM?
 - Was the creation of the positions at this time is evidence of bias?
 - Was the decision to promote the two male workers biased?
 - What was the reason for not placing Worker in the position she sought?
 - Does the employer have a right to refuse to change the responsibilities of an employee because he/she is performing critical tasks exceptionally well?

- Did the title change and salary increase provided to Ms. Worker limit TSM's legal risk in this case?
2. Does an employer have a responsibility to provide promotional or developmental opportunities to a satisfactory employee?
 3. Does an employer have a responsibility to provide a bias free environment even if such bias has no illegal impact on employee status?

I will leave a comprehensive legal analysis of these facts and the relevant case law to other panel members. However, it will be necessary to reference the legal principles when discussing the various considerations for the HR administrator in this case.

1. Did illegal bias played a role in the promotional decision making at TSM.

A. Was the creation of the positions at this time is evidence of bias?

No detail regarding either the job duties or the minimum requirements for the positions is provided for the new positions. However, the position summary sounds identical to the position proposed and defined by worker as a role she wished to fill with the company. Worker had been informed three months earlier that such a position could not be justified.

We do not have any information that would help us identify how the determination was made that **two** staff would be needed to start this

program. This is however a fact that cannot be ignored given the previous statement regarding lack of justification for one position.

Unless changed business circumstances can be demonstrated which would indicate justification for creating two positions now when even one could not be justified only three months earlier, the decision to create the new position in light of the letter to Worker **may** constitute some evidence of intent to discriminate against Worker.

B. Was the decision to promote the two male workers biased?

We are lacking information regarding the organizational level and salary of the new positions. However, since the positions were promotions from program engineers, we can assume that they are above the level of the position worker held when she made the recommendation for the program and asked for the transfer.

The limited career information about the two male workers that is provided does not actually indicate to us whether or not they are qualified for the new positions. However, each has five years worth of experience. That would seem sufficient experience to move to the leadership role if they have the requisite skills, knowledge and ability to perform the duties.

Since the details of the duties of the new position are minimally provided, it is not possible to determine the mix between software and hard ware responsibility. We have been advised that workers with the

company usually have a mix of software and hardware experience but are usually assigned only to one area. While the example is not clear, it would seem logical that such assignments are generally based on the nature of the majority of the employee's experience.

Following the general thinking, these two male workers who are primarily experienced in hardware work would seem like strong candidates if the majority of the responsibility of for hardware development and management.

They would however, not be likely to be assigned to a position that is largely software oriented.

If the position involves a mixture of hardware and software responsibilities then the limited software experience of these two males may not be a problem.

With the limited information available regarding minimum job requirements, it is not possible to know for sure whether the promotions were awarded based on merit or on some other reason which may have included some gender, racial or other bias.

In any case, as a director of HR, I would have issues with the creation of two new positions and the placement in these two positions of any two specific employees without any selection process at all.

If this fact situation were set in an institution of higher education, the employer would be very likely to have a duty to announce the existence of the promotional opportunities. Even if the duty to announce did not exist here, the employer would be vulnerable to legal claims based on application of Title VII, ADA, ADEA and other federal laws in addition to any state or local non-discrimination legislation.

If the positions were part of a departmental internal reorganization, such placement might be appropriate and legal in the limited circumstances where no vacancy exists after the reorganization. However, in this case the positions seem to be created to develop a new program and do not appear to be a part of such reorganization. One indicator of whether this is accurate would be whether someone was hired to fill the old positions vacated by these two males.

There may have been a number of other workers (including Ms. Worker) within TSM who would have been interested in such vacancies. Excluding such workers from the opportunity to be considered for promotional opportunities may lead to legal action if such individuals are members of any protected class. TSM's ability to defend the decision to place individuals without affording others the opportunity to compete presents a significant legal challenge.

This failure to announce is even more relevant with regard to Worker who, upon indicating interest in such a position only three months earlier, was advised in writing by Turner that TSM could not "justify

the creation of such a position". It seems highly unlikely that circumstances would change drastically enough in a three-month period to justify the creation of not *one but two* such positions. Therefore, the failure to announce the positions seems intentionally directed at preventing Ms. Worker from indicating further interest. This will be a difficult fact for TSM to explain with if litigation ensues but more particularly is Ms. Worker decides to sue.

Failing to announce the vacancies creates both possible issues of illegal discrimination and issues regarding the morale of current workers. Even if such legal action is not pursued, the message to employees is clearly that TSM is not seeking to identify the best qualified among its workers for promotional opportunities, but is instead singling out selected individuals. As with Worker, this can lead employees who are not so selected to wonder about their future with TSM. This certainly is not good for TSM whether or not they sustain legal liability from this action. It is important to note at this point that this fact may be particularly true for TSM, which is in a highly competitive technology business. The ability to retain workers can make the difference between success and failure in a market where there are often numerous jobs for every individual with a requisite set of skills.

B. *What was the reason for not placing Worker in the position she sought?*

It is clear from the comments made by Henry Hyatt during his dinner meeting with Ms. Worker, that he is not comfortable with a female in the role that Ms. Worker sought to fill.

While one could argue that his comment regarding *travel* are not gender based since he referred to the adverse impact that extensive travel had in his own family situation; there can be no doubt that gender is a factor in his concerns about *relating to a largely male customer population*. His comments assume those individuals in police and security departments are male and largely chauvinistic. His comments are also paternalistic in that they seek to shelter Worker from a work environment presumed to be difficult for females assuming that she lacks both the inclination and the ability to cope with such issues on her own.

Ms. Worker has already proven her ability to work with the customers through the development and delivery of training programs in the field of enterprise security. The customer base in the corporate security sector can assumed to be similar to the customer base in higher education security programs, which are the focus of the new line of business. Therefore, it does not seem logical that Worker would be lacking the skills to connect or work effectively with this new customer base.

If Hyatt's concern is that the campus environment would be more conducive to instances of sexual harassment, this concern seems without merit. At any rate, it is the responsibility of the employer to

deal with any issue of sexual harassment **if** and **when** it occurs rather than to deny a female employee a promotional opportunity because such harassment **may** occur at some future time.

The comments made by Mr. Hyatt, coupled with the subsequent decision to hire two males with less experience than Ms. worker to fill the role which Worker identified and outlined to him, makes it seem as though gender bias was a factor in deciding not to offer the position to Ms. Worker. Without information that would offer other business reasons for such a decision, it is likely that such a tainted decision could not be sustained if litigation were to be filed in this case.

Once again I would point out that even if there is other rationale for the decision, Mr. Hyatt's comments do not project the image that TSM would desire in a highly competitive technical job market.

It is possible that Mr. Hyatt's biased concerns were not the real basis of his decision not to offer Ms. Worker the opportunity she sought. His real reason may well have been his fear that he could not recruit anyone to replace the excellent job she was doing of developing and running the training program. This thinking brings us to the next question:

C. Does the employer have a right to refuse to change the responsibilities of an employee because he/she is performing critical tasks exceptionally well?

A decision made on the basis of the difficulty in replacing a capable employee presents a different problem for the employer but if they can be substantiated as the basis for the decision may avoid legal liability.

It is easy to understand the desire to keep a successful worker in a specific position. There is nothing illegal about such a decision so long as it is only linked to the satisfactory performance of the employee and the concern about the difficulty in replacing him/her. Therefore, the generally an employer can legally refuse to relocate a satisfactory employee based solely on concerns about ability to replace him or her.

In this case, even though the decision is ostensibly made by Turner, the facts are muddied by Hyatt's comments and the fact that based on Turner's own response he relied on Hyatt's recommendation to provide the title change and raise instead of the new assignment she requested. We cannot say with certainty that difficulty of replacement was either the *only* or the *primary* reason for refusing Ms. Worker the specific promotion she sought. Therefore, that rationale may not provide effective legal defense in the case.

C. *Did the title change and salary increase provided to Ms. Worker limit TSM's legal risk in this case?*

The fact that Turner followed Hyatt's recommendations and changed Worker's title and increased her pay may be argued by TSM as proof

that they did not discriminate against her. The effectiveness of this argument will depend on a number of factors.

The first factor to consider is whether a real promotion occurred. The fact situation indicates that there was no change in Worker's responsibility. Since the new title did not previously exist, we have no indication where it fits in the organizational hierarchy. We have no indication of how it relates in the hierarchy to the positions (which are untitled in the facts) which were filled by the two males. If there is a perception throughout the organization that the level of the position held by Worker was elevated in the organizational hierarchy, then a true promotion occurred even though the duties were not changed. If however, the perception is that the position remained on the same organizational level then a change in title alone does not constitute a promotion.

The next issue is whether the increase in pay coupled with the changed title indicates a promotion. Again we do not really have sufficient information to answer definitively. The increase in pay may have been within the normal pay range of the old title held by Worker and thus have little meaning. If it exceeded the pay range of the old position, that is some evidence that it reflected intent to promote.

I would also want to look at the pay of Worker in her new position compared to the starting pay for the two males in their new positions. If her pay is lower, then even if it reflects a "promotion", it may not

be sufficient to provide any evidence that Worker was not the victim of discrimination in creating and filling the two new positions.

Only if 1) the change in title reflects an actual change in organizational level, 2) the change of pay is outside the pay range of her previous position, and 3) her new pay is at or above the level of the new positions held by the two males is TSM able to effectively use the changes as proof that it did not discriminate against Worker.

Even if this burden is not met, TSM may be able to reduce liability in the damages owed if it is found guilty of discrimination because the amount of wages lost will be less due to the 10% increase she received.

Beyond the legal considerations, even when the employer is willing to provide a revised title and greater financial compensation, it may not be able to retain the employee who is bored with the current work and wishes to tackle new challenges.

The answers to the various questions involved in determining whether bias played a role in TSM decision making would not seem to lead to an unequivocal “yes” or “no”. They would seem to indicate that TSM might have a significant burden of proof to meet in responding to legal bias claims. While many arguments can be raised in defense of TSM’s action, both procedural failures and specific words and actions by TSM administrators provide significant indications that bias was a factor in the decision of

TSM.

2. Does an employer have a responsibility to provide promotional or developmental opportunities to a satisfactory employee?

An employer is generally not legally bound to provide promotional opportunities for its employees so long as it does not fill vacancies that exist in an illegal manner.

Some public employers who are covered by affirmative action plans may, as a part of those plans, have an obligation to promote from within as a means of moving employees into higher levels in the organization where women and minorities are under-represented at higher levels.

These statements notwithstanding, it is generally accepted to be good business practice to provide the opportunity for upward mobility to capable employees within the organization. The tremendous financial and business investment in the selection and development of employees is lost if the employee leaves to seek promotional opportunities elsewhere. The employer is forced to invest in the recruitment, selection and training of two new employees if it loses an employee for failure to provide promotional opportunities.

As mentioned above, we are in an era where technology is an essential aspect of doing business and the current supply of those with the requisite technical skills is limited. In order to fully meet organizational technical staffing needs, the HR professional must be

adept in not only recruiting technical staff, but in developing an environment which is attractive and encourages employee retention. Such an environment provides for employee growth and does not lock an employee into a dead end position solely because the employee does the job well.

The question of *who* determines the nature of that promotional/developmental opportunity is an issue, which this fact situation would seem to raise. Clearly in determining whether an employee is offered one opportunity or another, the considerations outlined above must be considered in answering from a legal point of view.

From the HR perspective, the employer must balance a number of interests. First, the employer will undoubtedly prefer to have the best-qualified individual in the promotional position. This may mean that a valuable employee at a lower level does not get the opportunity. Thus the focus on initial quality must be balanced against the loss or change in morale of the current employee.

More and more of ten the employer may find that a number of employees seek the same promotional opportunity. Obviously not all of them can be satisfied. Thus in addition to providing some alternative to promotion in order to meet the needs of the employees who are not promoted.

In addition to providing for promotions, such an environment may be achieved by providing developmental opportunities in present positions. Unlike this fact situation, such efforts would involve identifying new and challenging tasks that can be performed as part of the existing position. Of course this cannot always be achieved and in such cases the employer may just have to accept that employee turnover is inevitable.

The necessity to avoid such turnover is exacerbated if the employer like TSM is situated in a technological field. Thus, the need to provide promotional and developmental opportunities has risen almost to the level of a requirement for employers in this field.

3. Does an employer have a responsibility to provide a bias free environment even if such bias has no illegal impact on employee status?

Even if we assume that no litigation results from the action of TSM in the current fact situation, I would argue that the company has a serious problem. TSM may be lucky enough to avoid litigation in this case. It may even avoid losing a valuable employee like Ms. Worker in this instance.

However, if the comments made by Henry Hyatt in this case are typical, they are extremely vulnerable to both negative legal and negative business consequences in the future.

Hyatt's behavior is unacceptable whether it rises to the level of illegal gender discrimination or not. In the current culture supervisors who attempt to apply their own set of cultural norms as standards to be met by their

subordinates are looking for trouble whether those norms relate to the appropriate amount of travel for a female or a male.

When such an application of norms involves different expectations based on gender or cultural background, the supervisor may be setting the employer up for a discrimination suit. Even if not arguably discriminatory, such treatment may create an environment viewed as undesirable by certain segments of the workforce.

Ten years ago "Workforce 2000" was a speculative problem to form the basis of hypothetical discussions. Today it is reality. The workforce is largely female. It is largely non-white. The values and cultural norms, which have governed the workplace for much of the 20th century no longer, yield the same results.

Maintaining a bias free environment is much more difficult in this environment. TSM is not very different from many of our institutions in that while the workforce has achieved some gender balance, the leadership is still largely male. While the race of Ms. Worker is given the racial composition of the company as a whole is not provided. If the company is typical, it will also reflect a greater racial balance at lower levels within the organization. It is the responsibility of the administration to ensure that those with supervisory responsibility do not bring personal bias into the workplace.

In addition to the legal liability created by the application of such bias in the workplace, the employer loses the opportunity to benefit fully from the

capability of its workers every time the best-qualified employee is not selected for a project or promotion due to bias by a supervisor.

Employees, without regard to gender or race, are generally more sensitive now to such displays of bias. The perception of bias in management decision making can have a negative impact on employee morale and thus on employee productivity.

Furthermore, consumers –whether picking supermarket or a school- are more frequently now look at both the institution's official record with regard to bias but also the community perception about whether the institution conducts business in a bias free manner.

Providing a bias free environment is no longer only a legal or moral mandate, it has become a business necessity.