Ohio Department of Transportation

July 2010

Equal Employment Opportunity and Affirmative Action

Course Outline

The Division of Equal Opportunity
Equal Employment Opportunity and Affirmative Action

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Abstract

This course is designed to acquaint the manager with current civil rights laws that impact ODOT. The course will also inform managers of ODOT’s policies and proper procedures relating to relevant incidents in the workplace. In addition, this course will explain how the Affirmative Action Program works at ODOT and how to apply the Affirmative Action Plan in the hiring process.

Learning Objectives

The learning objectives for this course are to educate managers about:

- ODOT’s Affirmative Action Program
- Civil Rights Laws
- Current Policies and Procedures
- Proper Documentation Techniques
- What Constitutes Harassment, Sexual Harassment, Retaliation, and Discrimination
- The Process for Responding to a Request for Information from the Division of Equal Opportunity
LESSON ONE:
The ODOT Equal Employment Opportunity and Affirmative Action Program

AISHA POWELL
AFFIRMATIVE ACTION OFFICER

A. What are Equal Employment Opportunity and Affirmative Action?

1. Equal Employment Opportunity (EEO)
   a. Equal Employment Opportunity means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions limited only by their ability to do the job

2. Affirmative Action
   a. Affirmative Action means taking specific actions to recruit, employ, retain, and promote women and minorities for the purpose of eliminating present effects of past discrimination or to prevent discrimination
   b. Affirmative Action is designed to assure equal employment opportunity through employers voluntarily making positive efforts to assure that positions are genuinely and equally accessible to qualified persons

3. The U.S. Supreme Court found two permissible bases for voluntary Affirmative Action by employers under Title VII
   a. To remedy a clear and convincing history of past discrimination by the employer or union
   b. To cure a manifest imbalance in the employer’s work force
4. Goals of affirmation action
   a. Prevent discrimination
   b. Provide access where it has previously been denied
   c. To consider all individuals on the merits of their qualifications instead of making assumptions based on stereotypes
   d. Address stereotypical thinking and biases that still impede employment opportunity

B. Affirmative Action Myths

1. There are eight myths associated with Affirmative Action
   a. Affirmative Action is a form of reverse discrimination
      
      **Reality:** Affirmative Action does not mean giving preference to any group. Affirmative Action means taking steps to ensure that all individuals have access to opportunities, are considered on the merits of their qualifications and are treated fairly and equally in the selection process.

   b. Affirmative Action means establishing a “quota” system for women and minorities
      
      **Reality:** There is a difference between goals or targets and quotas. The use of quotas is unconstitutional. Quotas are rigid, based on population percentages and only require that a person be a member of a particular group. Quotas are only acceptable in rare instances in court-ordered short-term situations to remedy egregious discrimination. Goals are flexible and based on the relevant, available, qualified applicant pool. Ideally, the percentage of women and minorities working in the position should be similar to the percentage of women and minorities qualified for such positions. Affirmative Action is about reaching out to candidates and treating them with fairness and equity. As the United States Supreme Court stated in Johnson v. Transportation Agency, targets are not quotas, but rather reasonable aspirations in correcting the imbalance in the agency’s workforce.

   c. Affirmative Action means applying a double standard – one for white males and a somewhat lower one for woman and minorities
      
      **Reality:** Affirmative Action requires treating all candidates equally by evaluating them all on the merits of their qualifications. Affirmative Action does not require applying a double standard – one for white males and a lower one for women and minorities. In fact, that myth implies that women and minorities are inherently less qualified than white males.
d. Unqualified individuals are being hired and promoted for the sake of diversity/affirmative action

**Reality:** The Code of Federal Regulations states, Affirmative Action programs “should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin.”

e. Affirmative Action may have been necessary 30 years ago, but the playing field is fairly level today

**Reality:** Despite the progress that has been made, the playing field is far from level. Women still earn less than men and African-Americans continue to have twice the unemployment rate of Whites. For every dollar earned by men, women on a whole earn 74 cents, African-American women earn 63 cents and Latina women earn 57 cents. According to the Census Bureau, only 25% of all doctors and lawyers are women. Less than 1% of auto mechanics are women, and women are only 8.4% of engineers.

f. A large percentage of white workers will lose out if Affirmative Action is continued

**Reality:** According to the 2000 Census, there are 1.3 million African-Americans that are unemployed and 112 million Whites that are employed. So, even if every unemployed Black worker in the U.S. were to displace a White worker, only 1% of Whites would be affected. The main sources of job loss for White workers have to do with factory relocations and labor contracting outside the United States, computerization and automation, and corporate downsizing.

g. If other minority groups, such as Jewish people and Asian-Americans, can rapidly advance economically, African-Americans should be able to do the same

**Reality:** This comparison ignores the unique history of discrimination against Black people in America. As of 2009, Blacks have a 389-year history on this continent: 245 involving slavery, 100 involving legalized discrimination, and only 44 involving anything else.

h. Nobody else gets special consideration when applying to a college or for a job, so why should women and minorities

**Reality:** Many people get “special” consideration when applying to college or for a job. Veterans often get preferences on campuses and in workplaces, which tends to benefit men more than women. The children of alumni get preferential treatment over others in admission to college. Friends help friends and acquaintances get jobs. Affirmative Action helps open doors for women and minorities who often do not have those connections.
C. ODOT, EEO and Affirmative Action

1. Federal requirements
   a. To receive federal funding from FHWA, ODOT must have an Affirmative Action program

   Title 23 of the Code of Federal Regulations states that all State Departments of Transportation that receive federal financial assistance in connection with the Federal-Aid Highway Program are required to have an Affirmative Action plan and assure compliance with the equal employment opportunity requirements of federally-assisted highway construction contracts. (*23 CFR §230.303*)

2. State requirements
   a. Each agency shall establish, maintain and carry out a continuing Affirmative Action plan designed to promote equal opportunity in every aspect of agency personnel policy and practice (*OAC §123:1-49-04*)

3. ODOT’s commitment
   a. ODOT has incorporated Affirmative Action and equal employment opportunity into our business plan and policies
   b. In Goal #2 of the Business Plan, ODOT states our commitment to promoting diversity in the workplace so that we have operations that reflect the great diversity of this state
   c. ODOT has an Equal Opportunity Policy Statement that also states our commitment to nondiscrimination and affirmatively attracting and utilizing the talents of all citizens of the state

4. The Affirmative Action plan
   a. Written plan, updated annually
   b. Uses census data to evaluate ODOT’s work force
   c. Targets are set for underutilized groups
   d. ODOT is required to make “good faith efforts” to achieve our hiring targets
   e. The Affirmative Action plan describes our current and proposed efforts to achieve our hiring targets and remedy underutilization of woman and minorities in ODOT’s workforce
A. Using the Affirmative Action Plan

1. The goal is to have a qualified and diverse work force

2. Recognizing the value of diversity
   a. Valuing diversity results in hiring better people and provides a real business benefit
   b. A diverse staff, providing varying talents and points of view, increases the effectiveness and vitality of an organization and can lead to an enhanced reputation
   c. Increased diversity in the workplace creates greater productivity, efficiency, and has a positive impact on the business environment
   d. A diverse workforce at all levels of an organization that reflects the demographics of the public served, increases the public’s confidence in the organization
B. **Knowing Your Utilization Targets**

1. ODOT’s workforce should reflect the area labor market
   a. In *Hazelwood School District v. U.S.* (433 U.S. 299 (1977)), the United States Supreme Court ruled that a plaintiff can present statistical evidence that compares the racial composition of an employer’s workforce with the racial composition of the relevant labor market to establish a case of discrimination in hiring. The court explained that absent discrimination, an employer’s workforce should reflect the composition of the employer’s applicant pool.

2. ODOT’s hiring needs include meeting our utilization targets

3. HR uses the Affirmative Action plan to determine whether there are utilization targets before posting a vacancy

4. Knowing our utilization targets help us identify our recruitment and selection needs

5. Areas with underutilization hiring targets receive a greater recruitment focus by HR

C. **Recruitment**

1. Diverse applicant pool
   a. HR works to ensure that we have a diverse applicant pool for all of our positions so we can find the best candidate for the job

2. Recruitment activities
   a. Central Office and the twelve District Offices participate in activities year round
      i. Activities include
         a) Maintaining a recruitment sources directory
         b) Attending career fairs
         c) Participating in educational programs and providing students with shadowing opportunities

D. **Selection and the “Best Candidate”**

1. Selection criteria
   a. Ask your HR professional if there are utilization targets for a position before you make your recommendation
   b. The “best candidate” may not be the candidate with the most years of experience
c. Candidates must meet minimum qualifications to be considered for the position

d. Look at everything candidates bring to the position

e. A candidate’s ability to provide cultural diversity, serve as a role model, and offer a range of perspectives should be part of the evaluation and selection process

f. Keep in mind that there is a probationary period during which you should evaluate the person’s performance and remove them if necessary

g. To achieve Affirmative Action goals, you may select a qualified female/minority candidate over a qualified non-female/non-minority candidate

h. Our collective bargaining agreement provides that Affirmative Action shall be a valid criterion for determining who shall be awarded a position

i. Diversity is a compelling governmental interest

2. Guidance using the four Affirmative Action selection procedures

   a. Selection among equally qualified candidates

   b. Selection among comparable candidates

   c. Selection among unequal candidates

   d. Selection among qualified and unqualified candidates

3. Remember:

   a. The goal of an Affirmative Action plan is the achievement of genuine equal employment opportunity for all qualified persons. Selection under an Affirmative Action plan should be based upon the ability of the applicant to do the work. Affirmative Action plans do not require the selection of the unqualified, or the unneeded, nor do they require the selection of persons on the basis of race, color, sex, religion or national origin.¹

¹ 29 CFR § 1607.17 (4)
Questions?

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Lesson Three: Civil Rights Laws

LESSON THREE:
Civil Rights Laws

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TRENEÉ PRUITT
SHELBA BRADLEY &
SARAH JOHNSON

Division of Equal Opportunity

Equal Opportunity

Affirmative Action  Civil Rights - Internal  Civil Rights - External
A. Civil Rights Laws

1. Federal laws
   a. Title VI of the Civil Rights Act of 1964
   b. Title VII of the Civil Rights Act of 1964
   c. The Americans with Disabilities Act
   d. The Age Discrimination in Employment Act
   e. The Uniformed Services Employment and Reemployment Act
   f. Title II Genetic Non-discrimination Act 2008

2. State law
   a. Ohio Revised Code Chapter 4112
      i. Race
      ii. Color
      iii. Religion
      iv. Sex
      v. National origin
      vi. Disability
      vii. Age
      viii. Ancestry
      ix. Military status
         a) Past, present, future

B. Executive Order 2007 – 10S

1. Prohibits discrimination based on sexual orientation or gender identity in employment related decisions
   a. Sexual orientation
      i. A person’s actual or perceived homosexuality, bi-sexuality, or heterosexuality, by orientation or practice, by and between adults who have the ability to give consent
b. Gender identity
   i. The gender a person associates with him or herself, regardless of the gender others might attribute to that person

C. Policies

1. Policies set forth processes to follow and should be posted in work areas
   a. They are also available on the Intranet

2. Report any policy violations to the Division of Equal Opportunity and the District Management Team (DDD, BH&R, LRO, etc.) unless the allegations are against one them

3. ODOT’s policies
   a. Anti-Discrimination, Anti-Harassment, Anti-Retaliation
   b. Americans with Disabilities Act
   c. Title VI
   d. Policy Statement
Lesson Four: Enforcement Agencies

A. Enforcement Agencies

   a. Federal governmental agency which enforces the equal employment opportunity laws of the United States
   b. 300 day filing deadline

2. Ohio Civil Rights Commission (OCRC)
   a. The primary function of OCRC is to enforce state laws prohibiting discrimination
   b. OCRC receives and investigates charges of discrimination in employment, public accommodations, housing, credit, and higher education on the basis of race, color, religion, sex, national origin, disability, age, ancestry, or familial status
   c. OCRC has statutory authority to
      i. Initiate investigations of discriminatory practices
      ii. Formulate policies to effectuate the purposes of Section 4112 of the Ohio Revised Code and make recommendations to agencies
and offices of the state or local subdivision of government to
effectuate such policies

iii. Make periodic surveys of the existence and effect of
discrimination because of race, color, religion, sex, national
origin, disability, age, ancestry or familial status on the
enjoyment of civil rights by persons within the state

iv. Receive progress reports from agencies, instrumentalities,
institutions, boards, commissions, and other entities of the state
or any of its political subdivision and their agencies,
instrumentalities, institutions, boards, commissions, and other
entities regarding Affirmative Action programs for the
employment of persons against whom discrimination is
prohibited

v. Prepare a comprehensive educational program, in cooperation
with the Ohio Department of Education, for the students of
Ohio`s public schools and for all other residents of Ohio that is
designed to

a) Eliminate prejudice on the basis of race, color, religion,
sex, national origin, disability, age, ancestry or familial
status; further good will amongst those groups; and
emphasize the origin of prejudice against those groups
and its harmful effects

vi. Mediation is an option

d. 180 day filing deadline

B. Oversight Agency

1. Department of Administrative Services Equal Opportunity Division
(DAS/EOD)

a. The DAS/EOD office guides, directs, assists and monitors the
administration of the State of Ohio agency EEO programs by ensuring
fair and equal treatment of all individuals in the processes which affect
employment. This is accomplished by enforcing EEO-related federal
and state laws and regulations, Gubernatorial Executive Orders as well
as state employment policies and procedures related to civil rights,
Affirmative Action and non-discrimination.

b. The Division of Equal Opportunity is responsible for conducting the
investigation and issuing the findings

c. An internal State Agency enforcement agency
d. 30 day filing deadline

Discussion 1: What would you do?

An employee comes to you and advises that he or she wants to file a charge of discrimination. As a manager, you should:

1. Advise the employee that he or she can take a reasonable amount of time to file a charge of discrimination at the closest enforcement agency.

2. Ask the employee if he or she feels comfortable discussing the matter with you.

3. Discuss the matter with your supervisor or the Division of Equal Opportunity.
Lesson Five: How the Process Works

A. Types of Complaints

1. Incident reports
2. Counseling
3. Formal
4. Technical assistance

Example of an incident

Joe Highway wants to request a religious accommodation. His religion requires him to attend services during working hours. Joe wants to know if he can have a flexible work schedule to accommodate the requirements of his religion.
B. Manager’s Responsibilities

1. Assist in responding
2. Schedule interviews, if needed
3. Gather preliminary information, if requested
4. Report policy violations
5. Be truthful
6. Do not make assumptions
7. Do not retaliate
   a. Specific allegations need to be addressed
   b. Not only you as managers, but you need to make sure co-workers are not retaliating as well

C. Reasonable Accommodations

1. Refer all accommodation requests
   a. All accommodation requests should be referred to the Division of Equal Opportunity so that a legal determination can be made. Some of these requests can be difficult to assess. Staff within the Division of Equal Opportunity is trained in this area of the law and deal with these types of issues often.
   b. Requests for reasonable accommodation forms are available online at the Division of Equal Opportunity’s website
   c. The goal is to handle all accommodation requests consistently, appropriately and legally

Discussion 2: What would you do?

Joe Highway wants to request a reasonable accommodation under the ADA. He claims he takes medication for epilepsy that makes him tired and requires him to get 10 hours of sleep each night. Joe is an account clerk whose starting time is 7:30 a.m. Joe is requesting to have a flexible starting time during epileptic episodes.
D. Documentation

1. What should be documented?
   a. Deficiencies
   b. Performance issues
   c. Positive incidents
      i. Time
      ii. Date
      iii. Description of incident
      iv. Employees involved (including witnesses)
      v. Action taken

2. Where to keep documentation?
   a. Electronic file
   b. Employee file
   c. Daily journal

3. Why keep documentation?
   a. Memories fade
   b. Potential litigation
   c. Record preservation

4. Can be a public record

5. A management tool to be used by you
   a. Do not share what you’ve documented with other managers for comment. This may cause a problem because it could be construed as retaliatory.

6. Keep documentation objective; refrain from being subjective
E. Why Is This Important?

1. Ethical reasons
   a. It’s the right thing to do
   b. Individuals have a right to be treated with respect and dignity
   c. Helps improve morale among employees

2. Federal law impacts federal funding
   a. ODOT receives federal funds, and as the recipient of federal funding, we must obey laws pertaining to Title VI

3. In some Title VII violations in state actions, individual managers can be held personally liable if they are acting outside the scope of their duties

F. Discrimination

1. A prima facie case exists when the employee can prove
   a. Membership in a protected class
   b. Qualifications are met
   c. Adverse employment action
   d. Disparate treatment

Examples of legitimate, non-discriminatory business reasons

1. Operational Necessity:
   Susie ODOT requested training for the first week in October. Susie is a manager and her co-manager was going to be on vacation that week. Susie’s supervisor denied her request because a manager needed to be available in the absence of the other manager.

2. Job Analysis:
   What is job analysis? Job analysis is a concept that has been defined by the EEO Commission, Civil Service Commission, Dept. of Labor and the Dept. of Justice to be a detailed statement of work behaviors and other information relevant to a job.

   Why do we use it? Job analysis is completed and utilized during the interview process. One candidate scores higher than other candidates. The candidate who scored higher is younger than 40, thereby becoming the successful candidate. The over 40 candidate contends he or she was not chosen based on his or her age. The job analysis is a neutral tool.
G. Harassment

1. Hostile work environment: A hostile or abusive working environment based on a protected class

2. Elements of hostile work environment harassment
   a. Unwelcome behavior
   b. Based on a protected class
   c. Sufficiently severe or pervasive
   d. Consideration of facts and circumstances
   e. Includes sexual harassment

3. Sexual harassment
   a. Examples of sexual harassment include
      i. Displaying calendars and pictures of a suggestive nature
      ii. Sexual jokes/innuendo
      iii. Brushing against another’s body in a sexual manner
         a) Title VII prohibits physical conduct of a sexual nature that is severe or pervasive to affect the terms and conditions of employment without regard to one’s sex, gender or orientation, real or perceived of the victim
      iv. Repeated requests for dates
      v. Leering
      vi. Terms of endearment (e.g., honey, baby)
      vii. Grooming questions
   b. Committed by a supervisor or employer through its agents or supervisors
   c. Employer knew of or should have known of the harassment and failed to take immediate and appropriate corrective action
      i. Ohio Administrative Code 4112-5-05 (J) (5) attaches liability for acts of non-employees
   d. Employee must suffer a tangible job detriment
i. Hiring, firing, failure to promote, demotion, substantial change in benefits or duties

e. Actions of non-employees

i. Things to watch for

a) Contractors

b) Consultants

c) Constituents

ii. Take all allegations seriously. Reporting is not discretionary, it is mandatory. As managers, you must advise your immediate supervisor. Ultimately, the Division of Equal Opportunity must be advised of the allegation.

4. Retaliation

a. Illegal under Title VII and ORC 4112

b. Has the potential for “double liability”

c. An employee may prevail on a retaliation claim even though his or her underlying discrimination complaint was unfounded

d. If an employee files a charge of discrimination or harassment, it does not mean you cannot manage that employee. You just need to be careful that you are making employment decisions, including disciplinary action, based on objective criteria. Make sure you are holding each employee to the same standards.

e. Elements of retaliation

i. An employee engaged in an activity protected by Title VII or ORC 4112

ii. Employer knows/knew that an employee filed a charge or lawsuit or participated in a protected activity

iii. Employer thereafter took an adverse employment action against an employee or subjected an employee to severe or pervasive harassment

a) The employment action, or severe or pervasive harassment, must be based on the employee’s participation in a protected activity
Questions?

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Appendix A: Discussion Solutions

Lesson Four: Enforcement Agencies

Discussion 1: What would you do?

- A reasonable amount of time is generally 2 to 4 hours. Employee must go to the closest office of the enforcement agency.

- Giving an employee a reasonable amount of time to file a charge of discrimination does not include time to consult with his or her attorney.

- The employee does not have to disclose that they are going to an enforcement agency or the Division of Equal Opportunity. If he or she discloses it, the employee is not required to provide specific reasons for the visit.

- Employee may use ODOT equipment to pursue a claim. This includes using the phone and making reasonable copies.

- While we are not conducting public records request training, here are a few words about public records. Ohio law does not require the request to be in writing. While we generally prefer the request in writing so there is no misunderstanding about what information is being requested, it is not required. It should be noted that information that is readily available, such as a TO or work rules, does not need to be processed through a public records request. This does not mean that if an employee has a friend that works in personnel, he or she can circumvent the public records procedure by having that employee make copies of personnel files. Those types of requests should be construed as a public records request and handled accordingly.
Lesson Five: How the Process Works

Discussion 2: What would you do?

- Have him explain what type of accommodation he is interested in.
- Have him complete the request for reasonable accommodation form and fax it to the Division of Equal Opportunity.