Creating HR "Mini-Mock Trials" using Free Legal Documents

Abstract

In this session, the presenter will demonstrate how free legal documents, including published court opinions, can be used to teach HR-related legal concepts in a fun and engaging way. The audience will have the chance to participate in a "mini-mock trial," using a real Title VII discrimination case, that is based on the presenter's method.

Introduction

Legal compliance is one of the primary responsibilities of HR practitioners (O*NET, 2020), and the study of employment law is part of the curricula of most HR management programs (SHRM, 2020). However, students often find these concepts to be "dry" and difficult to appreciate out of context. In my HR teaching, I have found a solution to both of these challenges by relying on real employment litigation cases of age discrimination, religious intolerance, and sexual harassment (and more) found in published U.S. federal court opinions. Not only do these cases add realism to classroom examples, but court opinions are also similar to teaching notes in that they provide the "right answer" (i.e., the decision) to a complex problem (Lucero, 2007).

Although there are countless ways that a creative educator can adapt court opinions to enhance teaching, several methods are worth highlighting. Lucero (2007) suggests that published labor arbitration cases (which share many of the same features as court opinions) are valuable for their use as classroom examples and handouts as well as for student activities such as debates and mock arbitration hearings. Farmer, Meisel, Seltzer, and Kane (2012) have used mock trials based on controversial topics and cases (e.g., the Enron scandal) in management courses. In my teaching practice, I have found that the abbreviated quasi-mock trial (i.e., a "mini-mock trial") described below can achieve a high level of student engagement and critical thinking without requiring a significant amount of class time. In this exercise, student teams use a case to simulate discrimination-related litigation. They also practice making arguments, evaluating evidence, and reasoning critically about legal and other HR-related concepts.

Theoretical Foundation/Teaching Implications

In common law legal systems, courts play a central role in interpreting, evaluating the constitutionality of, and closing the gaps left by the statutes passed by the legislative branch. As cases progress through the judiciary, courts issue rulings on various substantive and procedural issues. These decisions are often communicated in the form of written opinions that explain the court's legal rationale, which may become precedents for future cases.

Opinions that courts designate as having precedential value are published in journals known as reporters that lawyers typically retrieve through commercial databases, such as Westlaw and LexisNexis. Although these services are cost-prohibitive to those not affiliated with a law library or legal association, the published opinions of many U.S. federal and state courts are available online at no cost. Educators seeking cases for their classes can search secondary sources such as HR/business law textbooks (e.g., Walsh, 2012), law review articles, news outlets as well as the websites of government agencies (e.g., EEOC), professional associations (e.g., SHRM, ABA), and law firms. Armed with the name of a specific case, they can often retrieve it using Google Scholar. This free digital service has an intuitive search platform and an extensive database of U.S. state appellate/supreme court (1950 to present), U.S. federal district/appellate (1923 to present), and U.S. federal Supreme Court (1791 to present) published opinions. Those wanting even more details about a case can use court docket archives such as clearinghouse.net and courtlistener.com, which often provide free access to the docket sheet (which indexes the case's progress in court) as well as the documents that the parties have filed in court. Such documents may include pleadings, motions, testimony transcripts, court orders, settlements, and jury instructions and worksheets.

I have found that the following types of court opinions often have the most relevant content: decisions on motions for summary judgment by U.S. federal district courts and decisions by the U.S. federal appellate courts and the Supreme Court. Court opinions typically have a similar structure and will provide information such as the name of the court, the parties involved, the priory history of the case (e.g., lower courts' decisions), the dates the case was heard, a summary of the facts and legal issues, and the court's legal analysis and decision. For courts that decide cases as a panel of judges (appellate and supreme courts), there may also be concurring and dissenting opinions authored by one or more of the panel's members.

I have successfully used federal court opinions to teach undergraduates various U.S. anti-discrimination (e.g., CRA, EPA, ADEA, ADA, GINA) and other employment-related statutes (e.g., FMLA, USERRA, OHSA, NLRA). The cases I have used cover a broad range of HR-related topics, including hiring, dress codes, compensation, benefits, discipline/discharge, affirmative action, job descriptions, and homogenous recruiting. One case that is rich in instructional potential is EEOC v. Dial Corp. (EEOC, 2006), which involves a discriminatory pre-employment test at Dial's canned meat factory in Fort Madison, Iowa. In order to reduce injuries in the packing area of the factory, Dial began using its Work Tolerance Screen (WTS) to select applicants for packing area jobs. This test required applicants to carry and load a 35-pound bar onto a platform 30 to 60 inches off the floor. An occupational therapist would observe and make notes about applicants' performance. Before Dial implemented the WTS, 46% of new hires were women. That number dropped to 15% after the company began using the test. In addition, the WTS's pass rate was 97% for men, but only 38% for women. There was also evidence that the occupational therapist (who had hiring authority) had recorded some women as failing the test when their data suggested they should have passed.

Although the company acknowledged that the WTS put female applicants at a disadvantage, Dial argued that this was the result of the biological difference between the sexes and not discrimination. The EEOC (the U.S. federal agency charged with enforcing several anti-discrimination statutes) sued Dial in federal court, and ultimately a jury found that the company had engaged in a pattern and practice of intentional discrimination. Additionally, a judge determined that the use of the WTS was discriminatory as it adversely affects women and cannot be justified on the grounds of business necessity.

The exercise described below uses the EEOC v. Dial Corp. (EEOC, 2006) case. This exercise contributes to effective HR teaching and learning by promoting awareness of U.S. equal employment opportunity law. Mastery of the legal environment is an important skill for managers in general (Bagley, 2008), and HR managers specifically (SHRM, 2020). In order to promote legal reasoning in social science courses, several authors have emphasized the importance of active learning methods (Perry, Huss, McAuliff & Galas, 1996). This activity, with its realistic, hands-on qualities, attempts to facilitate legal reasoning and awareness using such methods.

Learning Objectives

1) Students will learn the legal elements of disparate treatment discrimination on the basis of sex.
2) Students will learn the legal elements of disparate impact discrimination on the basis of sex.
3) Students will practice reasoning with legal concepts.
4) Students will practice developing and communicating arguments.

Exercise Overview

Student Preparation.
Students should have some familiarity with the concepts of Title VII of the Civil Rights Act of 1964, protected classes, disparate treatment discrimination, and disparate impact discrimination.

Groups.
This activity requires three student teams of approximately equal size (5-10 students) to represent each of the following: 1) the complainant (i.e., the job applicants), 2) the respondent (i.e., the employer), and 3) the EEOC.

Materials.
Only one handout is needed for this exercise. This handout, the case summary (Appendix A), describes the material facts of the case copied verbatim from portions of the written opinion of the U.S. Court of Appeals for the Eighth Circuit (EEOC v. Dial Corp., 2006). By design, this factual summary excludes any legal analysis or ruling.

Activity – "Mini-Mock Trial".
This exercise will require roughly one hour to execute. I begin by dividing students randomly into the three teams of approximately equal size to represent each of the following: (1) the complainant (the employees denied jobs at Dial), (2) the respondent (i.e., Dial), and (3) the EEOC. All teams begin by reading the case summary (Appendix A). The three groups then move to different parts of the classroom, where they evaluate the case using different perspectives based on their role. The complainant and respondent teams are required to draft a persuasive argument for their side in one or two paragraphs. Teams also compose two leading questions to ask the opposing side that will support their positions. The EEOC team is told to discuss the case, based on the case summary, and to create a preliminary list of arguments for and against both sides (understanding that their opinion may change).

It is at this point that the complainant and respondent present their **"**oral arguments" to the EEOC. If the facts of the case were not presented clearly by either side, clarification by the instructor is sometimes necessary. After these initial statements, both groups are allowed to make an additional statement countering the arguments of the other side. Beginning with the complainant**'**s team, both groups proceed to take turns asking and responding to the questions that they have prepared. The instructor must ensure that all rebuttals, questions, and responses be grounded in the case summary that students have read. The EEOC team is also allowed to ask each team clarifying questions. Ultimately, the EEOC team delivers the opinion of the court.

Debriefing.
I conclude by sharing with students the court**'**s actual decision and discussing the court**'**s opinion (EEOC v. Dial Corp., 2006). The facts of this case, and the expert testimony described in its summary, provides educators with an opportunity to discuss a variety of HR-related topics (e.g., selection, testing, occupational safety, content and criterion-related validity). It is also an ideal case for comparing disparate treatment and disparate impact theories of discrimination as well as the remedies that are available to successful plaintiffs in Title VII cases.

Session Description

The session will begin with a brief discussion of the importance of helping HR students develop legal astuteness as well as strategies for selecting relevant cases and case documents. The audience will then receive copies of the case summary (Appendix A), and they will told of the overall structure of the activity. After the presenter has provided a brief verbal description of the case summary, two volunteers will demonstrate the "oral arguments" phase of activity using samples of student work. The audience will be invited to play the role of the EEOC team, collectively ruling on the case based on the oral arguments.

After the simulation is complete, the presenter and audience will discuss 1) typical student reactions, 2) possible follow-up assignments, and 3) challenges that may occur when using this activity. I will also review other discrimination cases that can be used for teaching specific HR-related functions (e.g., selection, compensation, benefits, discipline, and discharge). The

audience will be invited to share ways this activity can be adapted to their specific teaching needs.

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APPENDIX A: CASE SUMMARY

IS IT LEGAL?

***Dial is an international company with a plant located in Fort Madison, Iowa that produces canned meats. Entry level employees at the plant are assigned to the sausage packing area where workers daily lift and carry up to 18,000 pounds of sausage, walking the equivalent of four miles in the process. They are required to carry approximately 35 pounds of sausage at a time and must lift and load the sausage to heights between 30 and 60 inches above the floor. Employees who worked in the sausage packing area experienced a disproportionate number of injuries as compared to the rest of the workers in the plant.

Dial implemented several measures to reduce the injury rate starting in late 1996. These included an ergonomic job rotation, institution of a team approach, lowering the height of machines to decrease lifting pressure for the employees, and conducting periodic safety audits. In 2000 Dial also instituted a strength test used to evaluate potential employees, called the Work Tolerance Screen (WTS). In this test job applicants were asked to carry a 35 pound bar between two frames, approximately 30 and 60 inches off the floor, and to lift and load the bar onto these frames. The

applicants were told to work at their "own pace" for seven minutes. An occupational therapist watched the process, documented how many lifts each applicant completed, and recorded her own comments about each candidate's performance. Starting in 2001, the plant nurse, Martha Lutenegger, also watched and documented the process. From the inception of the test, Lutenegger reviewed the test forms and had the ultimate hiring authority.

For many years women and men had worked together in the sausage packing area doing the same job. Forty six percent of the new hires were women in the three years before the WTS was introduced, but the number of women hires dropped to fifteen percent after the test was implemented. During this time period the test was the only change in the company's hiring practices. The percentage of women who passed the test decreased almost each year the test was given, with only eight percent of the women applicants passing in 2002. The overall percentage of women who passed was thirty eight percent while the men's passage rate was ninety seven percent. While overall injuries and strength related injuries among sausage workers declined consistently after 2000 when the test was implemented, the downward trend in injuries had begun in 1998 after the company had instituted measures to reduce injuries.

One of the first applicants to take the WTS was Paula Liles, who applied to Dial in January 2000 and was not hired even though the occupational therapist who administered her test told her she had passed.***

***EEOC and Dial offered testimony by competing experts. EEOC presented an expert on industrial organization who testified that the WTS was significantly more difficult than the actual job workers performed at the plant. He explained that although workers did 1.25 lifts per minute on average and rested between lifts, applicants who took the WTS performed 6 lifts per minute on average, usually without any breaks. He also testified that in two of the three years before Dial had implemented the WTS, the women's injury rate had been lower than that of the male workers. EEOC's expert also analyzed the company's written evaluations of the applicants and testified that more men than women were given offers of employment even when they had received similar comments about their performance. EEOC also introduced evidence that the occupational nurse marked some women as failing despite their having completed the full seven minute test.

Dial presented an expert in work physiology, who testified that in his opinion the WTS effectively tested skills which were representative of the actual job, and an industrial and organizational psychologist, who testified that the WTS measured the requirements of the job and that the decrease in injuries could be attributed to the test. Dial also called plant nurse Martha Lutenegger who testified that although she and other Dial managers knew the WTS was screening out more women than men, the decrease in injuries warranted its continued use.

***Dial argues the WTS was criterion valid because both overall injuries and strength related injuries decreased dramatically following the implementation of the WTS.