



702: Workplace Law Training: A Key Affirmative Defense for Small Law Departments

Michael J. Lotito
Partner
Jackson Lewis LLP

Theos D. McKinney III
Senior Counsel
AstraZeneca Pharmaceuticals LP

Lynn C. Outwater
Managing Partner
Jackson Lewis LLP

Faculty Biographies

Michael J. Lotito

Michael J. Lotito has been serving the legal and human resource needs of companies across the U.S. for nearly 30 years. He is a partner at Jackson Lewis, a law firm that specializes in preventive labor, employment, immigration, and benefits law, representing management.

Mr. Lotito has devoted his entire professional career to representing management interests in employment law. He has worked tirelessly to counsel management on understanding and adhering to the law and in resolving employment issues quickly and fairly.

A top-rated speaker and presenter, Mr. Lotito has keynoted many conferences throughout the world. Most recently he was honored as a member of TEC 200, a designation that places him among the top 1% of all TEC presenters. Mr. Lotito has coauthored several books on the ADA including *The Americans with Disabilities Act: A Comprehensive Guide to Title I*. Additionally, he sits on the board for Sterling Testing Systems, a nationwide pre-employment screening company based in New York. He chaired the Society of Human Resource Management (SHRM) in 2000. Earlier he was chair of SHRM's national legislative affairs committee. He has testified before the U.S. Senate and House of Representatives. He is a member of the California Bar Association and has been elected as a fellow to the ABA.

Mr. Lotito graduated from Villanova University and then Villanova Law School.

Theos D. McKinney III

Theos D. McKinney III is senior counsel with AstraZeneca Pharmaceuticals LP in Wilmington, Delaware. Mr. McKinney defends charges of employment discrimination, negotiates resolutions of charges and lawsuits, and directs outside counsel in the defense of employment litigation. He also counsels human resources and business clients on employment law issues, and works with paralegals and human resource specialists to investigate and resolve internal reports, discrimination, and harassment.

Prior to joining AstraZeneca, Mr. McKinney clerked for Justice Herbert P. Wilkins of the Massachusetts Supreme Judicial Court and was an associate with the firm of Hill & Barlow in Boston.

Mr. McKinney is a member of the executive council of ACC's Labor and Employment Law Committee. He is a den leader with Cub Scout Pack 221 in Philadelphia.

Mr. McKinney graduated, cum laude, from Harvard College and graduated, cum laude, from Suffolk University Law School.


Lynn C. Outwater

Lynn C. Outwater, is the managing partner of the Pittsburgh office of Jackson Lewis LLP, a national workplace law firm with 20 offices throughout the United States. Ms. Outwater is a nationally sought after workplace law substantive expert as evidenced by her appearance on the PBS television program, "On the Issues," a series that explored issues confronting American business today. Ms. Outwater has testified before the house committee on education and the workforce representing both the SHRM and the FMLA Technical Corrections Coalition, a 160-member American business coalition.

Ms. Outwater is the past chair of the labor law committee of the New York Women's Bar Association. She a member of the Pennsylvania Bar Institutes' employment and labor law advisory committee. Ms. Outwater is on the national employee and labor relations committee of the Society for Human Resource Management (SHRM). She has served as legal counsel to SHRM's area 1 board, and was elected to serve as a member of their national consultants forum board and as deputy director for their Pennsylvania state council. She is a faculty member for SHRM's HR generalist and advanced generalist certificate programs. Ms. Outwater was elected to serve as director of SHRM's 2004 Pennsylvania state council. She is also serving on the newly created HR consulting/outsourcing panel at the request of SHRM's national board of directors.

Ms. Outwater co-authored the book, *Minding Your Business: Legal Issues and Practical Answers for Managing Workplace Privacy*. She authored the book chapter entitled, "Medical Screening and Testing," in *Employment Law Deskbook For Human Resources Professionals*.

Ms. Outwater graduated from Fordham University and obtained a JD from Albany Law School and holds a Master of Laws in labor law from New York University School of Law.



**2004 Annual Meeting--
The New Face of In-house Counsel**


**Course 702
Workplace Law Training:**

**A Key Affirmative Defense for
Small Law Departments**

October 26, 2004 |Chicago, Illinois

ACC's 2004 Annual Meeting: The New Face of In-house Counsel October 25-27, Sheraton Chicago

The in-house bar association.™



**2004 Annual Meeting--
The New Face of In-house Counsel**

**The Law of Training:
Building an Affirmative Defense Against Employment Claims**

Presented by:
Michael J. Lotito, Esq. | Jackson Lewis LLP
Lynn C. Outwater, Esq. | Jackson Lewis LLP
Theos D. McKinney III | Senior Counsel, AstraZeneca Pharmaceuticals

October 26, 2004 |Chicago, Illinois

ACC's 2004 Annual Meeting: The New Face of In-house Counsel October 25-27, Sheraton Chicago



Why Train?

- The Legal Case
- The General Business Case
- The Core Business Case

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Why Train – The Legal Case

- Reduce Legal Costs and Avoid Corporate and Individual Liability
 - Median jury award in employment cases is \$250,000 *
 - Attorney fees for defending a claim are substantial
 - Attorney fee awards to prevailing plaintiff's attorneys are substantial

*Source: Employment Practice Liability: Jury Award Trends and Statistics, 2004 Edition, Jury Verdict Research

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Why Train? – The Legal Case EEOC Charge and Litigation Statistics

- Number of EEOC Charge Filings in 2003: 81,263
- Number of Suits Filed by EEOC in 2003: 393
 - An 8% increase from 2002
- Monetary Benefits Paid by Employers in EEOC Litigation in 2003: \$148 million
 - A 282% increase from 2002

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



The Rise In Retaliation Claims

- According to the EEOC Website, since 1992 retaliation claims have climbed steadily.
 - In 1992, of the 72,302 claims filed with the EEOC, 15.3% or 11,096 were retaliation claims.
 - In 2003, of the 81,293 claims filed with the EEOC, 27.9% or 22,690 were retaliation claims.
- According to Jury Verdict Research, the median award for a retaliation claim in 2003 was \$130,000.*

*Source: [Employment Practice Liability: Jury Award Trends and Statistics](#), 2004 Edition, Jury Verdict Research

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Why Train – The General Business Case

- Reduced absenteeism and turnover
- Increased morale and productivity
- Reduced EPLI premiums
- Eliminate other types of third-party interference
- Avoid loss of goodwill

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Why Train? – The General Business Case Return On Investment

- Effective method to sell training
- Quantifies the benefits of training

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Why Train? – The General Business Case Return On Investment

The Benefits of Training

The Costs of Training

x 100 = ROI (%)

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Return On Investment

● Benefits:

- Reduced number of harassment claims
 - \$250,000 – 2003 median jury award
 - \$_____ – in-house investigation
 - \$95,000 + attorneys' fees
- Reduced turnover/ absenteeism, improved productivity
 - Cost savings of \$_____/employee (based on ___# of employees)

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Return On Investment

- Costs:
 - Trainer(s) fee and expenses
 - Time/productivity lost while employees attend training
 - Meeting expense

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Why Train? – Core Business Case

- Identify situations where inappropriate behavior impacted business
- Examine the impacts on the business
- Explain how training will reduce those impacts
- Emphasize that training also provides significant legal benefits

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Training Law

- Burlington Industries v. Ellerth, 524 U.S. 742 (1998)
- Faragher v. The City of Boca Raton, 524 U.S. 775 (1998)

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Ellerth/Faragher

- Affirmative Defense: In cases where harassing conduct does not result in a tangible employment action, an employer can avoid liability or reduce damages if it proves that:
 - The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
 - The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Reasonable Care to Prevent

- Agencies and Courts will inquire into an employer's:
 - Policies
 - Communications
 - HR Infrastructure
 - Training

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Reasonable Care to Correct Promptly

- Courts and Agencies and Courts will inquire into:
 - Promptness of Investigations
 - Thoroughness of Investigations
 - Promptness of Remedial Actions
 - Effectiveness of Remedial Actions

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Preventive or Corrective Opportunities

- Did the employer have a policy with an effective complaint procedure?
- Was the employee aware of it? (i.e., trained?)
- Did the employee fail to use or take advantage of the policy/procedure?

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Courts have found affirmative defense valid when:

- Annual letter from CEO to all employees and manager training. Walton v. Johnson & Johnson Serv., Inc., 203 F. Supp. 2d 1312 (M.D. Fla. 2002).
- Manager attended 20 harassment training sessions over course of employment. Shaw v. AutoZone Inc., 180 F.3d 806 (7th Cir. 1999).
- Employer not only enacted an anti-harassment policy with a complaint procedure, it also conducted full-day training. Burrel v. Crown Central Petroleum, Inc., 121 F. Supp. 2d 1076 (E.D. Tex. 2000).

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Training Law

- Employers who engage in good faith efforts to comply with the law are afforded a “safe harbor” in which they “may take refuge from punitive damages liability.” Kolstad v. American Dental Assoc., 527 U.S. 526 (1999)
- GOOD FAITH EFFORTS = TRAINING

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Courts found a good faith effort to comply with Title VII when:

- Employer offered training on anti-discrimination/harassment, but employee did not take advantage of noted complaint procedure, as reported in the policy. Hull v. APCOA/Standard Parking Corp., No. 99 C 2832, 2000 U.S. Dist. LEXIS 1658 (N.D. Ill 2000).
- Appellate court upheld decision to not instruct jury on punitive damages when employer instituted policies prohibiting discrimination and provided training. Marcano-Rivera v. Pueblo Int'l., Inc., 232 F.3d 245 (1st Cir. 2000).

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



The States and Training

- Department of Health Services v. Superior Court of Sacramento County (McGinnis), 79 P.3d 556 (Cal. 2003).
 - Avoidable Consequences
- Some states have promulgated mandatory training requirements
 - California, Colorado, Connecticut, Hawaii, Illinois, Maine, Massachusetts, Michigan, Oklahoma, Puerto Rico, Rhode Island, Tennessee, Texas, Vermont

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Seeking Summary Judgment

- Affirmative defense – based on a reasonableness standard
- Good faith efforts – fact-based inquiry

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



No FEAR Act

- Requires federal agencies to provide training on all applicable discrimination and whistleblower laws
- Also, requires that managers be provided training in diversity, dispute resolution, and other essential communication skills

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Examples of Training Topics

- Definitions of discrimination and harassment based on all characteristics protected under federal, state, and local laws
- Definition of retaliation

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Topics For Training

- Key components of workplace policies
 - Goals and purposes
 - Statement stressing disapproval of discrimination and harassment
 - Definition of inappropriate conduct
 - Examples of violative conduct
 - Statement of consequences of a violation
 - Complaint procedure
- Requirement that managers support the policies

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Topics For Training

- Investigations
 - Employee accused of misconduct must be given meaningful opportunity to respond. Cotran v. Rollins Hudig Hall Int'l, Inc., 948 P.2d 412 (Cal. 1998).
 - Employers must adhere to appropriate standards and techniques when conducting investigations to ensure results will stand up in court. Lucky Stores, Inc., 65 Cal.App.4th 256 (Cal. Ct. App. 1998).
 - Preferable to have HR or other neutral party conduct investigations rather than line managers. Bierbower v. FHIP Inc., 70 Cal. App. 4th 1 (Cal. Ct. App. 1999).

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Topics For Training

- Union Avoidance
- Recapturing Management Rights In A Union Setting
- Privacy (Internet, e-mail, etc.)
- OSHA
- FLSA
- Reductions In Force

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Other Topics For Training

- Diversity
- Effective Hiring
- Managing Leave and Related Issues (ADA, FMLA, State Worker's Compensation laws)

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Who Should Be Trained?

- Executives
- Supervisors/Managers
- Employees

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



How Should They be Trained?

- Classroom
- Computer based
- Combinations

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Selection Of Trainer

- In-House – Legal
- In-House – HR
- Outsource
 - 57% of respondents in a SHRM 2003 study outsource training and management development programs.
- Combinations

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Other Considerations

- Length of session
- Frequency
- Documentation of Attendance
- Presentation

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Training and the Attorney – Client Privilege

- Where the trainer is an attorney, is the training protected by the attorney – client privilege?
 - Stender v. Lucky Stores, Inc., 56 E.P.D. 40738 (D.C. Cal. 1991).

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago



Training – WIFY?

- Demonstrate proactive approach to business issues to senior leaders
- Strengthen partnership with HR
- Increase visibility to managers and supervisors
- Enhance defensibility of terminations and other adverse actions
- Make your workplace a better place

ACC's 2004 Annual Meeting: The New Face of In-house Counsel

October 25-27, Sheraton Chicago