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Workplace Harassment:

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What is Illegal Harassment?

- Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).

-US Equal Employment Opportunity Commission



Harassment Definition

- U.S. Equal Employment Opportunity Commission Definition:
 - Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
 - Harassment becomes unlawful where:
 - 1) enduring the offensive conduct becomes a condition of continued employment, or
 - 2) the conduct is severe or pervasive enough to *create a work environment that a reasonable person would consider intimidating, hostile, or abusive.*



Harassment Definition

- A work environment that a reasonable person would consider intimidating, hostile, or abusive.
 - Liability:
 - Did the employer have an accessible complaint policy?
 - Did the employer take action to stop the behavior?
- A condition of continued employment.
 - Liability:
 - Did the employee have a sincere belief that putting up with the harassment was a condition of employment?



Types of Harassment

- Sex based
- Color based
- Race based
- Religion based
- National Origin based
- Age based
- Disability based
- Genetic Information based



Range of Possible Unwelcome Harassment

- Offensive jokes, slurs, epithets or name calling
- Offensive objects or pictures
- Physical threats or assaults
- Ridicule, mockery, or put-downs
- Constant or unwelcome questions about an individual's identity
- Undue attention
 - *Rebooting Workplace Harassment Prevention*, US EEOC Select Task Force on the Study of Harassment in the Workplace. (June 2016)



Not Harassment

- Harassing Communists is acceptable under Federal Law. 50 USC 781 *et seq.*:
- As used in this subchapter, the phrase “unlawful employment practice” shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor- management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist--action or Communist--front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.



Sexual Harassment Definition

- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
 1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
 2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
 3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. –*EEOC Compliance Manual*



Types of Harassment - Sex

- **Sex Based Harassment EEOC examples:**
- **Example 1** - Cindy alleges that her supervisor made frequent derogatory comments about women and referred to female employees as "girls." Cindy may allege discrimination based on sex covered by Title VII.
- **Example 2** - Cindy alleges that her supervisor refused to promote her because she refused to engage in sexual relations with him. Cindy may allege discrimination based on sex covered by Title VII.
- **Pregnancy:** Discrimination on the basis of sex includes discrimination because of pregnancy, childbirth, and related medical conditions. For example, an employer must provide leave and benefits for women affected by pregnancy and childbirth on the same terms as it does for other individuals similarly unable to work.

Types of Harassment - Color

- Color Based Harassment EEOC Example:
 - Melanie, a brown-complexioned Latina, works as a sales clerk for a major department store. She applies for a promotion to be the Counter Manager for a major line of beauty products, but the employer denies her the promotion because the vendor prefers a “light skinned representative” to manage its product line at this particular location. The employer has unlawfully discriminated on the basis of color.



Types of Harassment – Race

- Race Based Harassment:
 - Ancestry
 - Physical Characteristics
 - Hair, facial features, height and weight
 - Race-linked illness
 - Sickle Cell, diabetes
 - Culture
 - Name, cultural dress and grooming practices
 - *El-Hakem v. BJY, Inc.*, 415 F.3d 1068, 1073 (9th Cir. 2005)
 - Association
 - *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC*, 173 F3d 988 (6th 1999)
 - “Reverse” racism
 - *Mcdonal v. Santa Fe Trail Transp. Co.*, 427 US 273, 280 (1976)
 - Perception
 - Subgroup



Hypothetical: Racial Animus?

Charles, an African American, files a charge alleging that the employer, a Port Manager, used an interview to discriminate against him in favor of a less experienced White applicant for a Business Manager position. During the EEOC investigator's discussion with the Port Manager, the Port Manager says "we were looking for a clean cut image," and "this is a sophisticated location . . . I have to make sure the people I promote have, you know, the 'soft-skills' we need."

The investigator interviews Charles' most recent employer, who tells the investigator that "customers just loved working with Charles . . . he was one of our most effective and motivated employees."

The investigator also interviews the person hired and finds no basis for believing her "soft skills," or her "image," were any better than Charles's. In addition, the investigator notices that, like the person hired over Charles, the rest of the staff also is White.

Does Charles have a valid claim of discrimination?

What about harassment?



Hypothetical 1: Racial Animus?

- In this example the EEOC concluded that the employer rejected Charles based on racial stereotyping or bias.
 - Relevant factor:
 - The majority of employees were white despite a diverse labor market.
 - The comments made by the manager demonstrated racial animus.



Definition of Religion

- Definition of Religion for EEOC Purposes:
- Moral or ethical beliefs as to right and wrong that are sincerely held with the strength of traditional religious views.
 - Employers must provide reasonable accommodation for an individual's religious practices, such as leave to observe religious holidays, unless doing so would cause an undue hardship.
 - Assuming other employees will ask for an accommodation is not evidence of an undue hardship. 29 CFR 1605.2
 - Title VII prohibits harassment of an individual because s/he is associated with another person of a particular religion.



Types of Harassment – Religion

■ Religion based harassment EEOC

Example:

- Morgana asks for time off on October 31 to attend the “Samhain Sabbat,” the New Year observance of Wicca, her religion. Her supervisor refuses, saying that Wicca is not a “real” religion but an “illogical conglomeration” of “various aspects of the occult, such as faith healing, self-hypnosis, tarot card reading, and spell casting, which are not religious practices.” The supervisor’s statement and refusal to accommodate her on the ground that he believes her religion is illogical violates Title VII.
 - The employer may be subject to discrimination charges unless the employer can show her request would impose an undue hardship.
 - The employer will be subject to harassment charges, undue hardship or not.

Moral: The law applies to religious beliefs even though others may find them “incorrect” or “incomprehensible.”



Types of Harassment - National Origin

- National Origin based harassment EEOC example:
- Thomas, who is Egyptian, is teased by his coworkers about his Arab ethnicity. His co-workers also make derogatory comments about Islam in his presence. Thomas has a claim for three types of harassment: national origin, race, and religious discrimination.
- Definition: Discrimination because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group. *Espinoza v. Farah Mfg. Co.*, 414 US 86, 88 (1973).



Types of Harassment - Age

- Age based harassment/discrimination example:

Breanna is forty and has worked as a reporter at the same television station for twenty years. An anchor position opens, Breanna applies, but doesn't get the job. The hiring manager hires a less experienced candidate because the hiring manager wants a "more youthful look" at the anchor desk.

- Must be 40 or older.
- Does not work in reverse, if the TV station wanted a more distinguished looking anchor that would not be a violation.



Types of Harassment - Disability

- **Disability Based Harassment Example:**

Paul is a tugboat captain who has hearing aids. The engineer on Paul's tug finds it amusing to hide Paul's hearing aid. Paul is unable to find his hidden hearing aids one morning and must slow port entry through heavy fog while he searches for the aid.

- **Disability Definition:** a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.



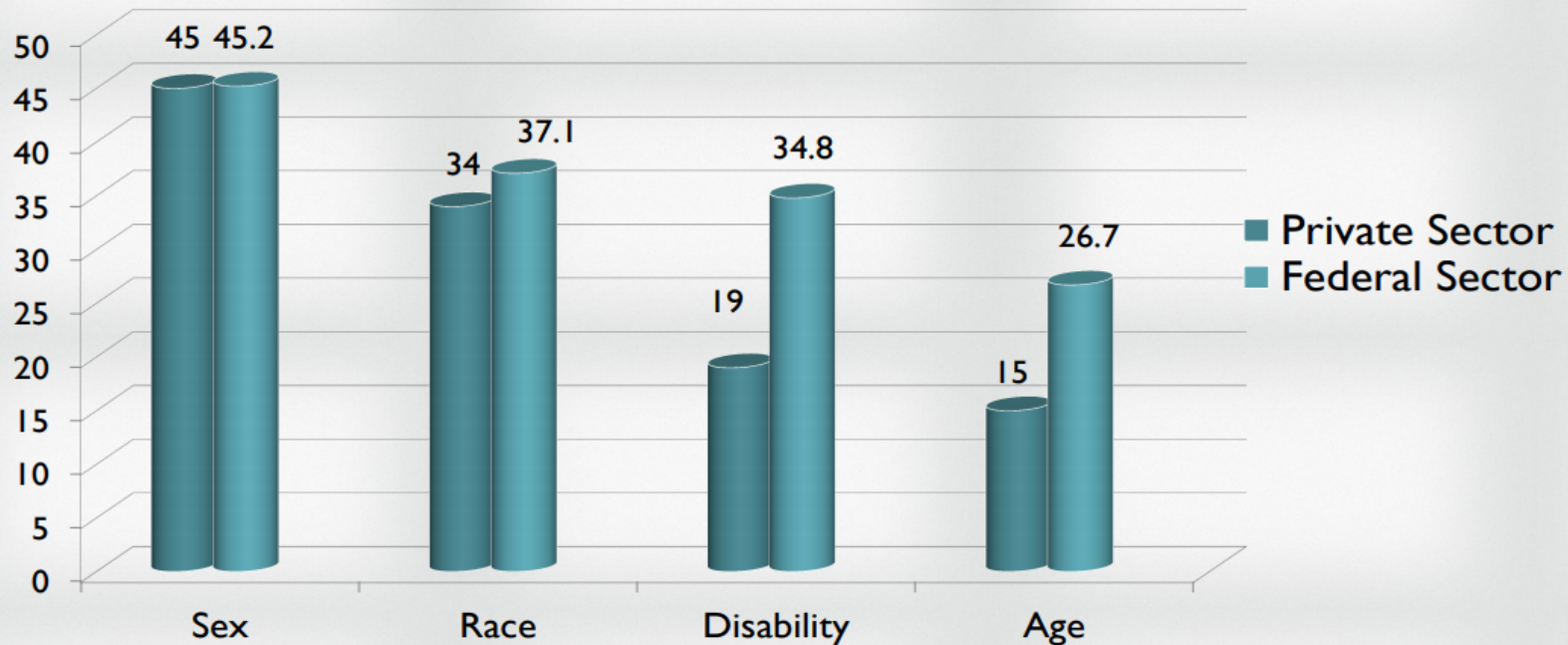
Genetic Information

- Genetic Information Based Harassment
Examples:
- Harassment based on...
 - Family Medical History
 - Information about family genetic tests
 - Requests for and receipt of genetic services
- Title II of the Genetic Discrimination Act of 2008 prohibits genetic information discrimination and harassment.



Federal Harassment Complaints by Category

**Harassment Charges and Complaints by Category
Fiscal Year 2015**



Rebooting Workplace Harassment Prevention, US EEOC
Select Task Force on the Study of Harassment in the
Workplace. (June 2016)



Preventing Harassment Makes Financial Sense

Direct Financial Costs– EEOC Processes

\$698,700,000

Between FY2010 to FY2015, employers paid \$698.7 million during EEOC's pre-litigation enforcement process to employees alleging harassment

- In one year, the EEOC secured \$125 million in the pre-litigation process and \$39 million in litigation.
- This does not include settlements or judgments obtained by private attorneys for alleged harassment victims.

—*Rebooting Workplace Harassment Prevention*, US EEOC Select Task Force on the Study of Harassment in the Workplace. (June 2016)



Who Commits Harassment

- Harasser's can be a supervisor, co-worker, or a non-employee, such as a client or customer.
- The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages. If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that:
 - 1) it reasonably tried to prevent and promptly correct the harassing behavior; and
 - 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.



Customers can create liability?

- The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if the employer knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.



Who can be a victim of workplace harassment?

- Employees are typical victims: Unlawful harassment may occur without economic injury to, or discharge of, the victim.
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.



Hypothetical 1

Mark, a mate on a harbor vessel, has several tattoos of nude women holding firearms. A newly hired Captain implements a dress code that requires that employees have no visible tattoos. Mark says that his tattoos and piercings are religious because they reflect his belief in body art as self-expression and the new dress code is harassment. Does Mark have a claim?



Hypothetical 1: Answer

- NO.

- The new dress code is unwelcome conduct, but it is not based on religion and the Captain does not have to provide an accommodation.
 - It is the motivation of the “harassing” official, not the actual beliefs of the individual alleging discrimination, that are typically relevant in determining if the “harassment” that occurred was because of religion.
 - Additionally, the evidence demonstrates that her tattoos and piercings are not related to any religious belief system. For example, they do not function as a symbol of any religious belief, and do not relate to any “ultimate concerns” such as life, purpose, death, humanity’s place in the universe, or right and wrong, and they are not part of a moral or ethical belief system. Therefore, Mark’s belief is a personal preference that is not religious in nature.
 - *Cloutier v. Costco Wholesale Corp.*, 390 F3d 126 (1st Cir. 2004).



Hypothetical 2

Tupac, an African-American port manager, retains a salvage crew to do some work for the port. Albert Johnson, an African-American, and a diver for the salvage company, has sickle cell anemia. Every day while the salvage crew is working Tupac stands on the dock and yells “Doesn’t one of you have sickle-cell or something?” and laughs uproariously....Harassment?



Hypothetical 2: Answer

- Yes
 - Albert would have a claim of Race based discrimination, because Sickle-Cell Anemia is a disease that primarily impacts persons of African descent. - EEOC Compliance Manual, Section 15: Race & Color Discrimination
 - Because Tupac hired Albert's company, putting up with his behavior would likely be considered a condition of continued employment.
 - Particularly if Albert asked Tupac to stop, or filed a complaint, and Tupac did not alter his behavior.
 - What other claims might Albert have?



Hypothetical 3

Luke and Brian are Irene's supervisors at a public port. Irene is overweight. Irene has been struggling at work and Luke and Brian have been documenting her struggles via email, in a very professional manner, in order to have documentation if Irene is dismissed for poor performance.

Luke and Brian have also been texting each other about Irene, referring to her as "the fat girl," and "the fat chick." Eventually, Irene is dismissed for poor performance and is made aware of the text messages after her termination. Irene files a harassment claim. Does the claim have merit?



Hypothetical 3: Answer

■ Yes and No

- Luke and Brian's text messages are not technically harassment if Irene did not have knowledge prior to her dismissal.
 - BUT harassment claims rarely come without a discrimination claim attached AND
- The text messages are public record and would most likely be discoverable during an investigation or a civil suit.
 - The text messages do demonstrate a work environment that a reasonable person may find hostile, intimidating or abusive. At the very least, the text messages create a burden for the Port to overcome if Irene makes a gender-based discrimination claim.
 - "fat girl" and "fat chick" are terms that constitute sexual harassment when used consistently in a negative manner to refer to an employee.
- Bottom Line: Luke and Brian's employer will probably end up paying something to make a lawsuit or investigation go away.



Hypothetical 4

- Jen is a port administrative employee. At the conclusion of her emails to a labor representative representing port employees Jen writes “have a blessed day.” Jen’s supervisor tells her to stop writing “have a blessed day” at the end of her emails. Jen requests an accommodation to be able to write “have a blessed day” at the end of emails. Jen is told to stop writing “have a blessed day” several times, but refuses and is eventually terminated. Jen files a religious harassment and discrimination claim, arguing that the “blessed day” phrase was part of her religious practice. Valid claim?



Hypothetical 4: Answer

- No.
 - A “reasonable accommodation of an employee’s religion is one that eliminates the conflict between employment requirements and religious practices. However, it is well settled that Title VII requires only reasonable accommodation, not satisfaction of an employee’s desire.” *Anderson v. USF Logistics (IMC), Inc.*, 274 F3d 470 (7th Cir. 2001).



Hypothetical 5

John is a 21 year old materials handler who applies for a promotion. 40-year old Jim is another materials handler who applies for, and gets the promotion John wanted. The hiring manager tells John he was too young for the promotion.

John and Jim continue to work in close proximity and John constantly ridicules Jim for his age, calling him “old man,” and worse things not suitable for print. Jim is legitimately intimidated by John’s behavior and files an age-based harassment complaint with his employer, which the employer ignores.

Does Jim have a valid age-based harassment claim? Does John have a valid age-based discrimination claim?

Hypothetical 5: Answer

- Jim's age based harassment claim is valid.
- John's age based discrimination claim is not.
- The ADEA protects those forty and older, but does not protect younger workers from being passed over due to their age. *O'Connor v. Consol. Coin Caterers Corp.*, 116 S. Ct. 1307 (1996).



Quick Hypotheticals

- Requiring employees to wear t-shirts with offensive language or pictures of body parts?
- Looking at an employee's necklace?
- Touching an employee hip to hip while standing side-by-side?
- Requiring employees to participate in athletic contests “for fun,” that are not part of the job description?
- Asking an employee to take the day off, because the employee appeared worn out?



How to avoid a claim

- Train employees
- Take immediate corrective action
- Have a third party conduct an investigation



Investigation Checklist

- Objective
- Neutral
- Document all steps taken from the point of first contact.
- Prepare a written report using guidelines established by policy. ■ ■

Harassment Policies

1. Simple clear language
2. Confidentiality and protection of complainant
3. Assurance of immediate and proportionate corrective action
4. Clear explanation of prohibited conduct, including examples
5. Clear description of the complaint process with multiple, accessible avenues of complaint and a prompt, thorough and impartial investigation.



Steps to prevent Harassment

- Leadership
 - Leaders must take immediate corrective action when alleged harassment occurs
- Policy
 - Policy must be clearly written and provide multiple avenues to report harassment
- Reporting Procedures
 - Must be readily available to all employees
- Training
 - Employers should conduct harassment training annually



Thank you

Hank Stebbins



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