



EEOC ISSUES PROPOSED HARASSMENT GUIDANCE



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In 2015, over 30% of all discrimination charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) included allegations of harassment. Not surprisingly, the vast majority of those harassment allegations were based on sex and race. On January 10, 2017, as part of its ongoing analysis of the harassment in the workplace, the EEOC issued a proposed enforcement guidance addressing unlawful harassment based upon race, color, religion, sex, national origin, disability, age, or genetic information. The guidance states the EEOC's position on harassment law and provides explanatory examples and suggested practices. This article is intended to summarize the most important parts of the guidance, as well as some of its more controversial provisions.

In explaining how to evaluate whether harassment violates federal law, the enforcement guidance focuses on three components of a hostile work environment claim: (1) covered bases and causation: *Was the conduct based on the complainant's legally protected status?*; (2) hostile work environment threshold: *Was the conduct sufficiently severe or pervasive to create a hostile work environment?*; and (3) liability: *Is there a basis for holding the employer liable for the hostile work environment?*

I. Causation

Federal Equal Employment Opportunity law (EEO) is violated if the evidence establishes that the complainant was subjected to harassment creating a hostile work environment *because of* his or her protected characteristic. The proposed guidelines assert that protected characteristics include sex stereotyping, pregnancy, gender identity, sexual orientation, as well as the other more typical protected categories. Normal evidentiary routes for establishing causation in a sexual harassment claim include: proposals for sexual activities; general hostility toward members of the complainant's sex; and comparative evidence showing how

the harasser treated members of both sexes.

II. Harassment Resulting in Discrimination

For an employer to be liable under an EEO statute for workplace harassment based on a protected trait, the harassment must be sufficiently severe or pervasive to affect a "term, condition, or privilege" of employment. Examples would include: (1) an explicit change to the terms or conditions of employment that is linked to harassment based on a protected characteristic, e.g., firing an employee because she rejected sexual advances; and (2) conduct that constructively changes the terms and conditions of employment through creation of a hostile work environment. Circumstances may include the frequency and severity of the conduct; whether it was physically threatening or humiliating; whether it unreasonably interfered with an employee's work performance; and whether it caused psychological harm. Even a single serious incident of harassment can result in a hostile work environment.

The following are examples of conduct that the EEOC typically finds sufficiently severe to establish a hostile work environment: (1) sexual assault; (2) sexual touching of an intimate body part; (3) physical violence or the threat of physical violence; (4) the use of symbols of violence or hatred towards individuals sharing the same protected characteristic, such as a swastika, an image of a Klansman's hood, or a noose; (5) the use of the "n-word" by a supervisor; (6) the use of animal imagery, such as comparing the complainant to a monkey, an ape, or other animal; and (7) threats to deny job benefits for rejection of sexual advances.

The more directly harassment affects the complainant, the more likely it is to contribute to a hostile work environment. For example, harassment is generally more probative of a hostile work environment if it occurs in the complainant's presence than if she learns about it second-hand. Nevertheless, a complainant's knowledge of harassing conduct that other employees have experienced may be relevant to determining the severity of the harassment in the complainant's work environment.

In terms of pervasiveness, a number of more frequent but less serious incidents also can create a hostile work environment. The focus is on the cumulative effect of these acts, rather than on the individual acts themselves – as most hostile work environment claims involve a series of related acts. Whether a series of events are sufficiently severe or pervasive to create a hostile work environment depends on the specific facts of each

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case, including the frequency of the conduct and whether the actions occurred close together in time.

To establish a hostile work environment, the offensive conduct must be both subjectively hostile (i.e., the complainant perceived the conduct to be severe or pervasive) and objectively hostile (i.e., a reasonable person in the complainant's position would have perceived the conduct to be severe or pervasive). As for subjectivity, a complainant's statement that he perceived conduct as offensive is sufficient to establish this element. The objective hostility of harassment requires: "an appropriate sensitivity to social context" and should be evaluated from the perspective of a reasonable person of the complainant's protected class.

In the EEOC's view, conduct that is subjectively and objectively hostile is also necessarily unwelcome. Therefore, the EEOC disagrees with courts that have analyzed "unwelcomeness" as an element in a plaintiff's prima facie harassment case – which is a significant departure from the existing legal analysis utilized by many courts.

Harassing conduct can affect an employee's work environment even if it is not directed at the employee. For instance, open workplace displays of pornography may contribute to a hostile environment for women, even if the pornography is not directed at them. Offensive conduct that is directed at other individuals can contribute to a hostile work environment even if it occurs outside of the complainant's presence as long as the complainant becomes aware of the conduct during his or her employment and it is sufficiently related to the complainant's work environment.

A hostile work environment claim may include conduct that occurs in a work-related context outside an employee's regular workplace. Occasionally conduct that does not occur in a work-related context can have consequences in the workplace and therefore contribute to a hostile work environment.

III. Employer Liability

The EEOC and the courts have applied one of four standards for liability, based on the relationship of the harasser to the employer, and the nature of the hostile work environment:

1. If the harasser is a proxy or alter ego of the employer, the employer is strictly liable for the harasser's conduct. The actions of the harasser are considered the actions of the employer, and there is no defense to liability.
2. If the harasser is a supervisor and the hostile work environment includes a tangible employment action against the victim, the employer is vicariously liable for the harasser's conduct. There is no defense to liability.
3. If the harasser is a supervisor, and the hostile work environment does not result in a tangible employment action, the employer is vicariously liable for the actions of the harasser. The employer, however, may limit its liability if it can prove a two-part affirmative defense.
4. If the harasser is not a proxy or alter ego of the employer and is not a supervisor, the employer is liable for the hostile work environment created by the harasser's conduct if the employer failed to act reasonably to prevent the harassment or to take corrective action in response to the harassment when it was aware or should have been aware of it.

A. Employer Liability Based Upon a Supervisor's Behavior – No Tangible Employment Action

If the supervisor engages in harassing behavior, but *did not take a tangible employment action*, then the employer can raise an affirmative defense to vicarious liability or damages. The employer must prove both elements of the defense: (1) the employer acted reasonably to prevent and promptly correct harassment; and (2) the complaining employee unreasonably failed to use the employer's complaint procedure or to take other steps to avoid or minimize harm from the harassment.

1. Employer's Duty of Reasonable Care

In showing the employer exercised reasonable care, the inquiry begins by identifying the policies and practices an employer has instituted to prevent harassment and to respond to complaints of harassment. These steps usually consist of promulgating a policy against harassment, providing a process for addressing harassment complaints, providing training to ensure employees understand their rights and responsibilities pursuant to the policy, and monitoring the work place to assure adherence to the employer's policy.

To be effective, an anti-harassment policy should include the following components: (1) the policy defines what conduct is prohibited, and is widely disseminated; (2) the policy is accessible to workers, including those with limited proficiency in English; (3) the policy requires that supervisors report or address harassment involving their subordinates when they are aware of it; and (4) the policy offer various ways to report harassment, including allowing employees to contact someone other than their direct supervisor.

To be effective, a complaint process should include the following components: (1) the process provides for effective investigations and prompt corrective action; (2) the process provides adequate confidentiality protections; and (3) the process provides adequate anti-retaliation protections.

2. Employee's Failure to Use Corrective Opportunities

Proof that the employee unreasonably failed to use the employer's complaint procedure will normally establish the second prong of the affirmative defense. In some circumstances, however, there may be a reasonable explanation for an employee's delay in complaining or failure to utilize the employer's complaint process. If the complainant failed to cooperate in the investigation, the complaint would not qualify as a reasonable effort to avoid harm.

An employee's failure to use the employer's complaint procedure would be reasonable if that failure was based on a reasonable belief that the complaint process was ineffective. For example, an employee would have a reasonable basis to believe that the complaint process would be ineffective if the persons designated to receive complaints were all close friends of the harasser. A failure to complain also might be reasonable if the complainant was aware of incidents in which the employer had failed to take appropriate corrective action in response to prior complaints filed by the complainant or by co-workers.

An employee's failure to use the employer's complaint procedure would be reasonable if the employee reasonably feared retaliation based on the filing of the complaint. An employer's complaint procedure should provide assurances that the

complainant will not be subjected to retaliation. Even in the face of such assurances, however, an employee might reasonably fear retaliation in some instances. For example, if the harasser threatened to discharge the employee if she complained, then the employee's decision to delay reporting the harasser is likely reasonable. Similarly, an employee's failure to complain could be reasonable if she or another employee had previously been subjected to retaliation for complaining about harassment. By contrast, because it may not be possible for an employer to eliminate completely all unpleasantness that an employee may experience in reporting harassment, a delay in reporting will not be considered reasonable if based merely on concerns about ordinary discomfort or embarrassment.

B. Employer Liability Based on Co-Worker/Third-Party Harassment

An employer is liable for a hostile work environment created by harassment by non-supervisory employees or by non-employees if: (1) it failed to act reasonably to prevent the harassment; or (2) it failed to take reasonable corrective action in response to harassment about which it knew or should have known.

1. Notice

An employer has notice of harassment if an individual responsible for reporting or taking corrective action with respect to the harassment is aware of it *or* if the employer reasonably should have known about the harassment. Once an employer has notice of potential harassment, it is required to take reasonable corrective action to prevent the conduct from continuing. Notice to the employer triggers the employer's duty to take corrective action if the notice has provided the employer with enough information to make a "reasonable employer think there is some probability" that an employee is being subjected to harassment on a protected basis. Complaints that a coworker's conduct was "rude" and "aggravating," without further information indicating that the conduct was based on a protected characteristic, would not provide sufficient notice that the conduct was based on the complainant's protected status.

Notice of harassing conduct directed at one employee might serve as notice not only of the harasser's potential for further harassment of the same employee but also of his potential to harass others. An employer has constructive notice of harassing conduct if, under the circumstances presented, a reasonable employer should know about the conduct. Most commonly, an employer is deemed to have constructive notice if harassing conduct is so widespread or pervasive that individuals responsible for taking action with respect to the harassment reasonably should know about it.

2. The Investigation

An investigation is prompt if it is conducted reasonably soon after the complaint is filed. For instance, an employer who opens an investigation into a complaint one day after it is filed clearly has acted promptly. An employer that waits two months, on the other hand, clearly has not acted promptly. In other instances, what is "reasonably soon" is fact-sensitive and depends on such considerations as the nature and severity of the alleged harassment and the reasons for a delay. For example, when faced with allegations of physical touching, an employer that, without explanation, does nothing for two weeks, has not acted promptly.

An investigation is effective if it is sufficiently thorough to "arrive at a reasonably fair estimate of truth." The investigation need not entail a trial-type investigation, but it should be conducted by an impartial party and seek information about the conduct from all parties involved. If there are conflicting versions of relevant events, it may be necessary for the employer to make credibility assessments so that it can determine whether the alleged harassment in fact occurred.

The employer should keep the complainant and the alleged harasser apprised of the status of the investigation, as appropriate, while it is still in progress. Upon completing its investigation, the employer should inform the parties of its determination and the corrective action that it will be taking.

In some cases, it may be necessary, given the seriousness of the alleged harassment, for the employer to take immediate steps to address the situation while it determines whether a complaint is justified. Examples of such measures include making scheduling changes to avoid contact between the parties; temporarily transferring the alleged harasser; or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation. As a rule, an employer should make every reasonable effort to minimize the burden or negative consequences to an employee who complains of harassment, pending the employer's investigation.

3. Corrective Action

The goal of corrective action is to appropriately and in an expeditious manner end the complained of behavior. Similarly, corrective action should be proportionate to the seriousness of the offense. If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent despite prior corrective action, then suspension or discharge may be appropriate.

When an employer conducts a thorough investigation but is unable to determine with sufficient confidence that the alleged harassment occurred, its response may be more limited. An employer is not required to impose discipline if, despite a thorough investigation, it has inconclusive findings. Nonetheless, the employer should undertake preventative measures, such as counseling, training or monitoring.

IV. Conclusion

The EEOC's statistics regarding the frequency with which harassment occurs in American workplaces are attention-grabbing – especially given the amount of time and money that has been invested in addressing this issue over the last 25 years. These statistics reinforce the need for employers to develop and establish appropriate expectations and policies with respect to behavior. Likewise, they reinforce the need for appropriate and effective training, especially for supervisors and managers, as well as timely investigation and resolution of all such complaints, including corrective action when appropriate. Employers are well served to invest the appropriate time, effort, and resources to proactively address the issue of harassment and avoid the negative consequences that can flow from it, including (among other things) liability exposure, lost productivity, a decrease in morale, and a negative effect upon reputation.



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