



United States Equal Employment Opportunity Commission



Issues That Just Won't Go Away: Harassment and Retaliation in the Workplace

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Today's topics:

*The report of the EEOC Select Task Force
on the Study of Harassment in the
Workplace*

*The EEOC's new guidance on retaliation
claims*

EEOC Select Task Force on the Study of Harassment in the Workplace

- Led by Commissioners Chai Feldblum and Victoria Lipnic
- Purpose is to study the pervasive issue of harassment in the workplace and suggest tools employers can use for addressing it.
- Studies show organizational conditions, rather than characteristics of individuals, are biggest indicators of the prevalence of harassment in the workplace (organizational tolerance)



EEOC Select Task Force on the Study of Harassment in the Workplace

- Let's define the problem
 - FY2015 – 31% of private sector charges alleged harassment
 - Prevalence of sex-based harassment
 - 25% of women experience “sexual harassment,”
 - 40% of women experience unwanted sexual attention or sexual coercion, even if they don't label it as “sexual harassment,”
 - 60% of women experience unwanted sexual attention or sexual coercion, or sexually crude conduct or sexist comments in the workplace.



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- Let's define the problem
 - Unreported - Approximately 70% of employees never even complain internally (fear)
 - Humiliation
 - Disbelief
 - Ostracism
 - Blame
 - Damage to reputation
 - Inaction
 - Damage to career
 - Retaliation



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- Let's define the problem
 - Direct Financial Costs
 - \$698,700,000 – paid by employers during EEOC's pre-litigation enforcement process to employees alleging harassment (FY2010 to FY2015)
 - \$125,000,000 paid by employers to employees alleging harassment during EEOC's pre-litigation process, FY2015
 - \$39,000,000 paid by employers to employees alleging harassment during EEOC's litigation process



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- Let's define the problem
 - Indirect Financial Costs
 - Mental and physical health of employees
 - Productivity
 - Reputational harm
 - Job turnover
 - 1994 survey estimated that over two years, as a result of sexual harassment, job turnover cost the federal govt. \$24.7 million.



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- **Chart of Risk Factors**

- **Group factors**

- **Workers in the minority**
 - **Workers who do not conform**
 - **Cultural and language differences**
 - **Young workers**
 - **Significant power disparities**
 - **“high value” employee**

- **Environment factors**

- **Tedious work**
 - **Highly competitive work**
 - **Decentralized**
 - **Isolated**
 - **Tolerate alcohol consumption**
 - **Coarsened social discourse**



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- Check list for employers (Leadership and Accountability)
- **Culture of Respect**
 - Leadership has allocated sufficient *resources* for a harassment prevention effort
 - Leadership has allocated sufficient *staff time* for a harassment prevention effort
 - Leadership has *assessed* harassment *risk factors* and has taken steps to *minimize* those risks
- **Commitment**
 - A harassment prevention *policy* that is *easy-to-understand* and that is *regularly communicated* to all employees
 - A harassment reporting *system* that employees *know about* and is *fully resourced* and which accepts reports of harassment experienced and harassment observed
 - *Imposition of discipline* that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred



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- **Check list for employers (Leadership and Accountability)**
 - *Accountability* for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment
 - Regular *compliance trainings for all employees* so they can recognize prohibited forms of conduct and know how to use the reporting system
 - Regular *compliance trainings for mid-level managers and front-line supervisors* so they know how to prevent and/or respond to workplace harassment
- **Bonus Points**
 - The organization conducts *climate surveys* on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace
 - The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews
 - The organization conducts *workplace civility training* and *bystander intervention training*
 - The organization has *partnered with researchers* to evaluate the organization's holistic workplace harassment prevention effort



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- ***Frontline Management is Key***

- **Frontline managers must be trained on how to respond to reports or observations of harassment in a swift and correct manner.**
- **Frontline managers must be held accountable for their responses to harassment – using discipline and accolades.**
- **The extent of harassment in a manager's division is not necessarily best measured by the number of complaints from that division.**



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- **Training**
 - **Compliance training**
 - **On-going**
 - **Unacceptable instead of illegal**
 - **Change behaviors not attitudes**
 - **Easy to report**
 - **How to respond**
 - **Tailored to specific workplaces**



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- **Training**

- **Civility Training**

- **Teaches employees and management to increase their self-awareness of respectful behavior**
 - **Not focused on status-based characteristics**
 - **Provides skills to control actions and reactions to people and situations**



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- **Training**

- **Bystander Training**

- **Deployed frequently on college campuses to reduce sexual assault.**
 - **Creates a sense of collective responsibility to intervene to stop bad behavior**
 - **Empowers bystanders to intervene by giving them the skills and confidence to do so.**



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- **Bystander Training**

- **Unacceptable behavior**

- **Workers would know what behavior is unacceptable (compliance training)**

- **Collective responsibility**

- **Workers would feel collectively responsible for having a harassment-free workplace**

- **Tools and training**

- **Workers would be given tools and training for intervention, specific to that workplace.**

- **Rewards not retaliation**

- **Workers who stop harassment would be rewarded, not retaliated against.**



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- Other observations

- (Be careful of “zero-tolerance” language)
- Don’t forget social media
- Keep the complaining employee in the loop
- Respond promptly/fairly
- Report to all parties
- Do not retaliate
- Train investigators (often overlooked)
- Remember, everyone is watching (it’s about workplace culture)



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Simple rule:

Workplaces that tolerate harassment have more of it.

Workplaces that are not tolerant of harassment have less of it.





EEOC's New Guidance on Retaliation Claims

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The image features a vertical banner with a stylized cityscape at the top. Below the 'SALSA' logo, there are three polaroid-style photographs: the top one shows a city skyline at night, the middle one shows the Alamo mission building, and the bottom one shows a boat ride on the San Antonio River Walk.



= Retaliation

The Civil Rights Statutes

- Title VII of the Civil Rights Act of 1964
- The Age Discrimination in Employment Act of 1967 (ADEA)
- Title I of the Americans with Disabilities Act of 1990 (ADA)
- The Equal Pay Act of 1963 (EPA)
- Genetic Information Nondiscrimination Act (2008)
- Lilly Ledbetter Fair Pay Act (2009)



Three Parts to Every Retaliation Case



- 1) The protected activity (**opposition or participation**)
- 2) The harm that followed the protected activity
- 3) The connection between the two

What is a Protected Activity?

- o Opposing a practice made unlawful by one of the employment discrimination statutes
- o Filing a Charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute



Opposition

- Must be discrimination and employment related, except ADA opposition
- May be about self or others
- Reasonably interpreted as opposition
- Refusal to obey a discriminatory order
- Religious and disability accommodations
- Discussing compensation may implicate EEO anti-retaliation protections as well federal and possibly state laws
- Good faith
- Employer not related to opposition
- **MUST BE REASONABLE**



Participation

- o Any type of proceeding: Charge, court, hearing
- o Federal Employers: once counselor is contacted
- o Whether allegation valid or not
- o Whether good faith or not
- o Doesn't have to be the person who participated





Sue is experiencing performance issues. She is not getting her work assignments completed in a timely manner. You give her a verbal warning. She then tells you that you are treating her unfairly.

Has she made a protected complaint?



The next day Sue tells you that when she said you were treating her unfairly, she really meant to say that you were treating her unfairly because she is a woman. She points out that you spend all your time assisting John, who she claims also misses deadlines, and have no time for her.

Has she made a protected complaint?



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Three months later, John grows frustrated because he believes you are giving Sue preferential treatment because of her gender. So, he grabs you by the collar, pins you to the wall and protests the discrimination.

Can you fire John, or should you just quit?



You are a supervisor of custodians. Betty, a temporary custodian, learns that she is being paid a dollar less per hour than previously hired male counterparts. She approaches you and says she believes the company is "breaking some sort of law" by paying her lower wages than previously paid to male temporary custodians.

Is she protected?



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You work as a manager for XYZ Nursery. Jane and Bob are two of your employees. One day, you fire Jane, and in response she files an internal EEO complaint and a charge with the EEOC. In support of Jane, Bob goes home one weekend and records a video of himself rapping about how you fired Jane because she is a woman, and then posts it to his FB account. It is quite catchy. It goes viral. 2 million views in two days. Sunday evening your teenage daughter shows it to you on her phone, as she dances along. She can't help it. Bob is dope.

Can you fire Bob?



You are the human resources manager for XYZ Nursery, and after conducting the investigation of Jane's internal EEO complaint, you believe the company has engaged in a pattern and practice of discriminating against its female employees, including Jane. You report this to the president of the company. The next day you are fired.

Are you protected?

...and the end of the story

The day after you are fired, Jane, Bob, and you start your own recording company. Bob records a follow up single about your discharge. It's quite catchy. It goes viral. With the money you make, the three of you buy XYZ Nursery, discharge the management group and hire back (at a higher rate of pay) all the women they fired.

Bob is dope.





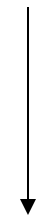
The Harm That Follows the Protected Complaint

Materially Adverse Action

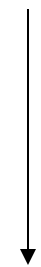
Burlington Northern Santa Fe Railway Co. v White
(June 22, 2006)



Ultimate Employment Act



Adverse Action (discrimination)



Materially Adverse action (retaliation)

Materially Adverse Examples

- Work related actions (discharge, demotion, etc.)
- Disparaging the person to others or in the media
- Making false reports to government authorities
- Filing a civil action
- Threatening reassignment
- Scrutinizing work or attendance more closely than that of other employees, without justification
- Removal of supervisory responsibilities
- Abuse verbal or physical behavior
- Requiring re-verification of work status, making threats of deportation





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An adverse employment action may be an official act or the limiting of an internal grievance or EEO investigation. It doesn't need to qualify as an ultimate employment action, and it can occur after the employment relationship has ended.



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Simply put, the key is whether the adverse action would dissuade a reasonable worker from making or supporting a complaint of discrimination.



You have had enough of Sue's complaining about being treated unfairly because of her sex, so you consider transferring her to another department. If she doesn't like working for you. Maybe she should work for someone else.

Can you do this?



Sue then files an internal EEO complaint against you. An investigation concluded that you did not discriminate against her because of her gender. Vindicated, you consider filing a lawsuit against Sue for defamation of character.

Can you do this?



Thompson v North American Stainless, L.P. (January 24, 2011)

- Applied *Burlington* standards: any action that would dissuade a reasonable employee from making or supporting a complaint of discrimination
- Firing a close family member will almost always meet the *Burlington* standard
- “Aggrieved person” should not refer only to the person who engaged in the protected activity

Retaliation?

- Jane reports that a co-worker, Ron, (non manager) frequently harassed herself and other female co-workers with lewd and threatening language.
- Company investigates and does not substantiate. Closes investigation.
- Jane's car is set on fire. She reports to two managers she believes it was done by Ron. They fail to investigate and chide her for reporting it.
- Corporate receives an anonymous letter stating that employees were afraid to tell what they really knew because they were all very aware of the bad things that happened to people who complained about Ron. The letter recounts specific instances of violence against women at the brewery, including the car fire, and that Ron had even threatened to kill Jane if he was fired because of her. The letter also informed Corporate that Ron had bragged about slashing the tires of another employee, Mary, who had complained about him.
- Corporate did nothing with the letter.



Yes – *Hawkins v. Anheuser-Busch, Inc.*

The Court detailed Anheuser-Busch's failure in responding to Hill's complaint :

Anheuser-Busch ... failed to show that it responded to Hill's complaint of retaliation in any meaningful way. The two members of management to whom Hill reported the fire ... allegedly not only failed to investigate Hill's allegation that Robinson had retaliated against her, but chided her for attempting to make a report. The brewery never bothered to investigate the incident, monitor Robinson, or create a safe environment for harassment complaints. A jury could find that, given what management knew about the fire, the brewery had an obligation to investigate the incident.... [T]he brewery never bothered to investigate Hill's allegation that Robinson was continuing to harass her in retaliation for her report. The serious nature of Hill's allegation could lead a jury to find that failing to investigate the incident and issuing a letter solely to Hill, as opposed to Robinson, was an insufficient response.

There are, therefore, sufficient facts in the record upon which a jury could find that Anheuser-Busch's failure to investigate the complaint of Robinson's violent act of retaliation was both indifferent and unreasonable.



So, How Do We Prove It?

- oComparators
- oClose proximity in time
- oBefore and after





University of Texas Southwestern Medical Center v. Nassar (2013 U.S. Supreme Court)

- **Facts of the case:**

- Nassar was on the faculty of UTSMC and on the staff of Parkland Hospital
- Parkland had an agreement with UTSMC that available positions would be offered first to faculty at UTSMC
- Nassar complained that his supervisor at UTSMC had discriminated against him
- He then quit his faculty job at UTSMC and contacted Parkland to possibly retain his staff position with the hospital
- Chair of Internal Medicine at UTSMC contacted Parkland and reminded it of its agreement with UTSMC; thus, ending Nassar's employment with Parkland
- **The evidence shows that the Chair of Internal Medicine was motivated, in part, by a desire to retaliate against Nassar because of his discrimination complaint**

University of Texas Southwestern Medical Center v. Nassar (2013 U.S. Supreme Court)

- SCOTUS found for UTSMC
- Why?:
 - Tort law = “but for”
 - *Price Waterhouse* and Civil Rights Act 1991 = “mixed motive”
 - Proximate cause v. web of causation
- **Decision = “but for”**
- **Would the decision to adversely harm the employee’s employment have been made even if the employee had not made a protected complaint?**
- **Connection is the key**
 - **Do you have a legitimate, non-discriminatory reason for the action?**



But for?

Pete is a poor employee. He is at step 9 of the company's 10 step progressive disciplinary policy (10 = discharge). Pete makes a good faith complaint of discrimination. This is the final straw, so you discharge Pete the next day.

Was Pete illegally retaliated against?

Connection is the key: Would Pete have been fired if he hadn't made his protected complaint?





ADA Interference Provision

- ADA prohibits “interference” with the exercise or enjoyment of ADA rights.
- Broader than materially adverse
- Examples
 - Coercing an individual to relinquish or forgo an accommodation to which he or she is otherwise entitled
 - Threatening an employee with loss of employment or other adverse treatment if he does not “voluntarily” submit to a medical exam or inquiry that is otherwise prohibited under the statute
 - Issuing a policy or requirement that purports to limit an employee’s rights to invoke ADA protections (e.g., a fixed leave policy that states “no exceptions will be made for any reason”)
 - Subjecting an employee to unwarranted discipline because he assisted a co-worker in requesting a reasonable accommodation



Retaliation?

Jose, another employee in your department, filed an internal complaint of discrimination alleging that you denied him training because of his national origin. The investigation did not reveal that Jose was discriminated against. One week later you discharged Jose for excessive absenteeism. He was fired after his 7th unexcused absence. Agency policy states that employees are only entitled to 5 unexcused absences before firing.

Retaliation?

Diane has not been performing her job well for the past several months, but you have not counseled her because, after all the stuff that happened with Sue, Jane, Pete, John, Bob and Jose, you are scared to do so. After meeting with some of the other managers on Monday, you finally decide to meet with Diane on the following Friday to counsel her about her performance and give her an written reprimand. The day before the meeting, Diane complains to HR that she was harassed because of her race.



MORE EMPLOYER TIPS

- **Written Policies**
 - **Examples of retaliatory practices**
 - **Proactive steps for avoiding actual and perceived retaliation**
 - **Reporting mechanism**
 - **Consequences**
- **Training**
 - **Culture counts**
 - **Supervisors and staff**
- **Individualized support and advice**
 - **For employees who complained, witnesses and *supervisors***
 - **Proactive follow up**
- **Review of employment actions to ensure compliance**





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QUESTIONS

