

HARASSMENT AND RETRIBUTION

EEOC Technical Assistance Program
2016

HARRASSMIENT

Fiscal year 2015

Total charges = 89,385

Harassment charges consisted
of almost 28,000 (31%)

WHAT IS HARASSMENT?

HARASSMENT....

Is any unwelcome verbal or physical conduct.

WHAT IS UNWELCOMIE?

- ◉ Employee did not solicit or invite the conduct.
- ◉ Employee regarded the conduct as undesirable

WHAT TYPES OF HARASSMENT ARE PROTECTED?

- Race
- Color
- Sex
- Age (Over 40)
- Religion
- National Origin
- Genetic Information
- Disability
- Retaliation

WHAT IS WORKPLACE HARASSMENT?

Harassment at Work

+ Protected Basis

= Workplace Harassment

WHAT'S UNLAWFUL HARRASSMENT?

Unwelcome conduct that alters the conditions of employment.

Such as:

sexual advances/pressures for dates;
slurs, comments, slang expressions jokes,
innuendos;
beatings, threats, inappropriate touching,
inappropriate gestures; and
pictures, graffiti.

WHAT IS NOT COVERED?

- Minor Isolated Incidents
- Simple Teasing
- Offhand Comments

WHO IS INVOLVED IN WORKPLACE HARASSMENT?

- Victim(s)
- Harasser(s)
 - Can be supervisor, co-worker, or non-employee
- Victim and Harasser can be same protected class

HARASSMENT AGAINST LGBT (LESBIAN, GAY, BISEXUAL AND TRANSGENDER) INDIVIDUALS

- Title VII of the Civil Rights Act of 1964, as amended makes it unlawful for an employer to discriminate against an employee on the basis of that employee's "sex."
- The statute does not provide a comprehensive definition of what discrimination "because of sex" means.
- The courts have said that sex discrimination includes discrimination because an applicant or employee does not conform to traditional gender stereotypes.

CASELAW

- ❖ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989): discrimination on the basis of gender stereotype constitutes sex-based discrimination.
- ❖ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004): discrimination against transgender individual because of his/her gender non-conformity is gender stereotyping prohibited by Title VII.

PENDING CASES

- *EEOC v. Scott Medical Health Center, P.C.*, (W.D. Pa., No. 2:16-cv-00225-CB, filed March 1, 2016): alleges that Charging Party's supervisor, who knew CP was gay, frequently assailed him with vulgar and offensive anti-gay epithets. CP eventually resigned to avoid the harassment.
- *EEOC v. Pallet Companies d/b/a IFCO Systems NA, Inc.* ("*IFCO*"), (D. Md., No. 1:16-cv-00595-RDB, filed March 1, 2016): alleges CP, a lesbian woman, was harassed by her supervisor because of her sexual orientation and nonconformity with stereotypical gender norms. A few days after CP complained, she was terminated. The complaint also alleges retaliatory discharge.

RESOLVED CASES

- *EEOC v. Deluxe Financial Services Corp.*, (D. Minn. Civ. No. 0:15-cv-02646-ADM-SER, filed June 4, 2015, settled on January 20, 2016). The lawsuit alleged that after the CP began to present at work as a woman and informed her supervisors that she was transgender, supervisors and coworkers called her hurtful epithets and intentionally used the wrong gender pronouns to refer to her. Additionally, CP was not permitted to use the women's restroom in violation of Title VII. As part of a settlement agreement, the defendant agreed to pay \$115,000 in damages to the CP.

RESOLVED CASES

- *EEOC v. Lakeland Eye Clinic, P.A.* (M.D. Fla. Civ. No. 8:14-cv-2421-T35 AEP filed Sept. 25, 2014, settled April 9, 2015). The lawsuit alleged that the employer subjected CP to sex discrimination by firing her because she is transgender, was transitioning from male to female, and/or because she did not conform to gender-based stereotypes in violation of Title VII. The case settled for \$150,000 in monetary damages.

COMMON MISTAKES TO AVOID

- Not taking the harassment complaint seriously enough.
- Mishandling reluctant complainants.

COMMON MISTAKES TO AVOID

- Using poorly trained or untrained investigators.
- Using internal investigators when it's more appropriate to use investigators without ties to the employer.

COMMON MISTAKES TO AVOID

- Failing to maintain neutrality.
- Not documenting the investigation.

COMMON MISTAKES TO AVOID

Failing to understand the
psychological effects of
workplace harassment

COMMON MISTAKES TO AVOID

Failing to advise the complainant of the outcome.

Failing to train lower level supervisors on harassment policy.

***SMITH V. ROCK-TENN SERVICES, INC.,
NO. 15-5534, 2016 WL 520073, (6TH CIR.
2016)***

- Defendant is a corrugated box company.
- Plaintiff is male and was hired in August, 2010.
- Harassment starts in December, 2010, consisting of repeated touching of the buttocks.
- Plaintiff complains about the harassment.
- Defendant's response is neither prompt nor appropriate in light of what it knew or should have known.
- Plaintiff obtains a jury verdict in his favor and is awarded \$300,000.00.
- Sixth Circuit Court of Appeals upholds verdict.

WORKPLACE VIOLENCE

- Most acts of workplace violence occur as some form of verbal or non-verbal threat, bullying, harassment, or physical assault.
- It is important to remember acts of physical workplace violence start as some form of non-physical assault.

WORKPLACE VIOLENCE

- No one can accurately predict violent behavior.
- However, we can learn to recognize some of the indicators of increased risk of violent behavior.

WORKPLACE VIOLENCE

- The following indicators were identified by the FBI's National Center for the Analysis of Violent Crime, Profiling and Behavioral Assessment Unit in its analysis of past incidents of workplace violence*:
 - Direct or veiled threats of harm; These are some of the indicators:
 - Intimidating, belligerent, harassing, bullying, or other inappropriate and aggressive behavior;
 - Numerous conflicts with supervisors and other employees;

WORKPLACE VIOLENCE

- Bringing a weapon to work, brandishing a weapon at work, making inappropriate reference to guns, or fascination with weapons;
- Statements showing fascination with incidents of workplace violence, statements indicating approval of the use of violence to resolve a problem, or statements indicating identification with perpetrators of workplace homicides;
- Statements indicating desperation (over family, financial, and other personal problems) to the point of contemplating suicide;

WORKPLACE VIOLENCE

- Pending or recent layoffs;
- Drug/alcohol abuse; and
- Extreme changes in behavior.

None of these signs should be ignored.

RETAILLIATION

RETTALIATION

- In FY 2015 retaliation charges increased by nearly 5 percent and continue to be the leading concern raised by workers across the country.
- Based on the year-end data retaliation again was the most frequently filed charge of discrimination, with 39,757 charges, making up 45 percent of all private sector charges filed with EEOC.

RETTALIATION

- The statutes enforced by the Commission prohibit retaliation by an employer, employment agency, or labor organization because an individual has engaged in protected activity.
- Protected activity consists of the following:
 - 1) opposing a practice made unlawful by one of the employment discrimination statutes; or
 - 2) filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute

RETTALIATION

There are three essential elements of a retaliation claim:

- 1) protected activity—opposition to discrimination or participation in the statutory complaint process
- 2) adverse action
- 3) causal connection between the protected activity and the adverse action

RETTALIATION

In order to establish unlawful retaliation, a claimant must prove that the employer took an adverse action because of his or her opposition to unlawful discrimination or participation in a complaint, investigation, or lawsuit about discrimination. *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013). That case held that a Title VII retaliation claimant “must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.” This means that the claimant must show that the employer would not have taken the action “in the absence of” the claimant’s protected activity.

AVOIDING RETALIATION

- Have a clearly written non-retaliation policy.
- Provide training on what constitutes retaliation, how make complaints of discrimination, how to make complaints of retaliation and the procedure for redress.
- Follow up with the employees who have lodged complaints.
- In some situations, consider having the complainant report to a different supervisor.
- Carefully review employment actions against the complainant.