

U.S. Equal Employment Opportunity Commission



Workplace Rights

of Applicants & Employees
who experience

**Domestic / Dating
Violence, Sexual
Assault or Stalking**

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Background

- 17 years as EEOC Regional Attorney; office has filed several sexual harassment lawsuits that include violent acts, rapes, etc. (overwhelmingly immigrant victims)
- Northern California, Northern Nevada, Oregon, Washington, Alaska, Idaho and Montana
- Pre-EEOC represented four dozen battered immigrant women; lead drafter VAWA self-petitioning memo for Congress

Victims of domestic or sexual violence

often experience:

- difficulty concentrating at work
- being late to work as a result of domestic abuse
- being assaulted before or at work
- having the abuser come to or stalk the workplace
- being fired or forced to quit due to the abuse

may need protection from harassment (e.g. stalking, threats) while at work

may need accommodations on the job due to a disability caused or aggravated by violence (such as PTSD, anxiety, or physical injuries)

- Time off work to heal, recover
- Safety measures (removing batterer from workplace/shift change/transfer to safer location)



Domestic Violence... Workplace Sexual Harassment... Connecting the dots

- A study of domestic violence survivors found that **74 % of employed battered women were harassed by their partner while they were at work.**
- Increase in Sexual assault at work; Need for movement to address sexual assault by supervisors, co-workers

Switching gears to think about the workplace



Domestic Violence
criminal law enforcement:
target abusers



Sexual Harassment
Civil rights enforcement:
target company for \$\$ and changes



Violence, Control, Balance of Power

Domestic Violence

- **Partner v Partner**
- **Power balance**
HUSBAND often controls \$\$, job, immigration status, language capacity, control over children
- **REMEDY:**
conviction, safety, no real \$\$

Non-work related sexual assault:

- **Perpetrator v Victim**
- **Power balance** can be impacted by immigration status, language access
- **REMEDY:** conviction, safety, no real \$\$ unless tort action

Sexual Harassment

- **Employer v Worker**
- **Power balance**
EMPLOYER controls conditions of work; income for victim's household. Potential retaliation (against victim, family members, co-workers) Impacted by immigration status, language access, isolation
- **REMEDY:** \$\$, termination of harasser, new company policies and practices

Entities with 15 or more employees

- Employee can file
- Third party can file
- Commissioner's charge
- Just gives notice to EEOC
- Begins investigation

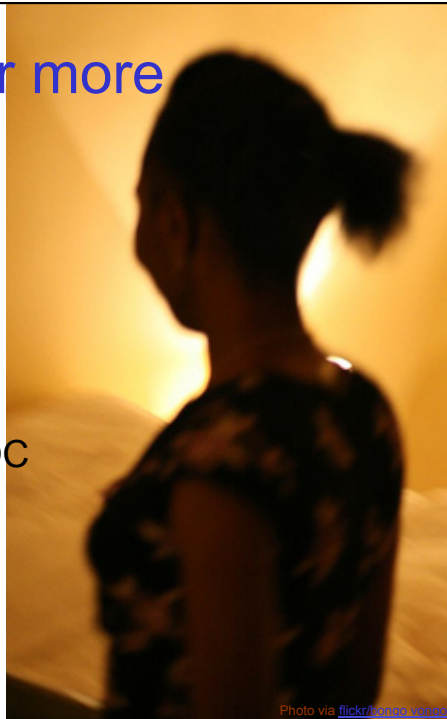


Photo via flickr.com

Federal Anti-Discrimination Laws (entities with 15 or more employees)

- **Title VII:** bars discrimination on the basis of race, color, sex, national origin, or religion, retaliation (1965)
- **Americans with Disabilities Act;** bars discrimination against disabled; requires reasonable accommodations (1992)
- **Age Discrimination in Employment Act; 40+ (1967)**
- **Equal Pay Act;** bars wage discrimination based on gender (1963)

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Title VII – Disparate Treatment Based on Sex

It is illegal to discriminate based on sex (including sex-based stereotypes).

Pre-1965? Legal under federal law! *Mad Men??*

Example 1

An employer terminates an employee after learning she has been subjected to domestic violence, saying he fears the potential “drama battered women bring to the workplace.”



Example 2



A hiring manager, believing that **only women can be true victims of domestic violence** because men should be able to protect themselves, **does not select a male applicant** when he learns that the applicant obtained a restraining order against a male domestic partner.

Example 3



- **Male employee** granted unpaid leave for a court appearance in the criminal prosecution of an assault.
 - **Female employee** denied unpaid leave to testify in the criminal prosecution of domestic violence she experienced.
- **Employer** says: “The assault by a stranger is a ‘real crime,’ whereas domestic violence is ‘just a marital problem’ and ‘women think everything is domestic violence.’”



**Title VII –
Sexual or Sex-Based**

Harassment is Illegal

- **Harasser | Victim** : can be man or woman, opposite or same sex
- **Harasser** can be supervisor, agent of employer, co-worker, or third party
- **Victim** can be someone not directly targeted but nevertheless affected by the hostile work environment

Applies to other protected categories

More Sexual Harassment Complaints

- Sex discrimination claims are 28% of charges (100,000 overall in FY2011; compare 76,000+ in FY2006);
- **Sexual harassment** is 12% of charges (FY2011)
- Compare: estimated 9,120 sexual harassment charges (2006) v. 14,310 (2008); roughly 12,000 in FY2011; is decrease because of economy and retaliation?

What is Sexual Harassment?

- Unwelcome verbal or physical conduct **of a sexual nature**, including
- rape, assaults, battery,
- grabbing, touching, fondling
- sexual advances, requests for sexual favors, demeaning terms, etc.
- *Must be severe or pervasive enough to alter an employee's working conditions that it*
- *creates intimidating, hostile or offensive work environment*

Defense to Hostile Work Environment Sexual Harassment

- If supervisor harasses: employer is liable if it proves that 1) employer took prompt and corrective action, *and* 2) victim failed to complain and take preventive measures
- If co-worker or third party harasses: employer liable if it knew or should have known about harassment and failed to take prompt and corrective action (*Fuller v. City of Oakland*) (9th Cir. 1995)

Sexual Harassment

- Quid Pro Quo: conditioning certain terms of employment, e.g. hire, keeping a job, promotion, getting more hours to work, etc. based on sexual favors
- ***No employer defense to quid pro quo harassment*** (tangible employment action, e.g. demotion, firing, denial of opportunity)

Example 3

An employee's co-worker

- sits uncomfortably close to her in meetings
- makes suggestive comments
- waits for her in the dark outside the women's bathroom and in the parking lot outside of work
- blocks her passage in the hallway in a threatening manner
- repeatedly telephones her after hours
- sends personal e-mails
- shows up outside her apartment building at night

She reports incidents to management: "I feel unsafe and afraid working nearby him."

Management transfers him to another area, but he continues to stalk her and make advances.

She notifies management but no further action is taken.

Example 4

Farm worker faced relentless verbal abuse from male supervisor



- “Men are the bosses - should be allowed to beat women”
- “Women are inferior to men and should submit to their husbands.”
- Comments about her husband’s violence and abuse.
- “My supervisor told me I was less than a man, that my husband should be allowed to beat me, and that I should put up with it because I am a woman.”



Harasser = Male

*This is so embarrassing...
who can I tell?*



Orchard supervisor (male) sexually harassed male workers

- Sexual comments and threats
- Touching and grabbing
- Asked them to look at him urinating in public



When the employer failed to take action despite complaints, one employee quit in fear for his physical safety.

Obstacles to Reporting

Fear - Shame - Worry
for Family - Stigma - Immigration Status - Peer pressure -
Need to Support Family - Retaliation - Not knowing your rights



Photo: Miroslawa Ruda - Poland, April 2012 by Anna Stumiller

- Farmworker
 - **Raped** with shears to throat at first, later repeatedly raped in fields
 - **Threatened**: she, employee-relatives and family in Mexico would be killed if she told anyone about rapes
 - **Filed EEOC charge 362 days** after events; 62 days too late
- Can she still pursue EEOC claims after missing the deadline?
 - Court grants **equitable tolling** citing *Stoll v. Runyon* (9th Cir. 1995)
 - *EEOC v. Willamette Tree Co.* (Oregon) (2011)

Protective Orders Issued

- Barred company's inquiry into immigration status
- Barred company's inquiry into her prior sexual history
- Barred company inquiry into her reasons for not reporting the rapes to the police
- *EEOC v. Willamette Tree*

Key Issues in EEOC Investigation

- **Did harassment occur??**
- **Did Charging Party complain to a supervisor? HR?**
- **Did the employer fail to protect the employee from harassment? Why?**
- Is harasser the top official? No where for CP to go?
- Did employer or its agents threaten CP if and/or after she complained???

EEOC Investigations: Are there Other Victims??

- EEOC can also investigate whether there are other “similarly situated” victims of discrimination or harassment and obtain \$ \$ for them (*EEOC v. Tanimura & Antle*, \$1.855 million; *EEOC v. American Building Maintenance*, \$5.8 million)
- If you believe that other individuals have been harassed and/or retaliated against, alert the EEOC; we can investigate!

EEOC Investigations

- Can interview witnesses including company employees; go on-site
- Can subpoena records, documentation, etc.; employer must cooperate; EEOC can enforce subpoena in federal court; enforcement of subpoena makes existence of investigation public

Proving Harassment

- **Charging Party (CP): is she credible?**
(Do not assume that CP is lying.)
- Emotionally upset?
- Crying?
- Describes details? Physical touching, grabbing? Frequency?
- Verbal harassment? What was said?

Proving Harassment

- Threats by harasser? Manager? Co-workers? Human Resources?
- Post-Traumatic Stress??
- **Any physical injuries? What? Medical treatment?**
- **Need ongoing medical or psychological treatment??**
- **Evidence buttresses credibility to establish liability and damages (every little bit helps; see, *EEOC v. Tanimura & Antle*)**

Proving Harassment

- **Harasser:** is he credible? Who supports his story? Any prior complaints of harassment?
- **What did company do??** Was harasser previously disciplined or not? Position in company – supervisor, manager, co-worker, owner? Company officials ill-trained to handle issue?

Proving Harassment

- **Corroboration through Witnesses:** co-workers, supervisors, actual eyewitnesses? Most egregious harassment happens “behind closed doors”.
- **counselors, doctors: what was observed? What did claimant say? Injuries? Treatment?**
- parents, spouse, other relatives,,
- Other harassed individuals? Did CP complain to anyone about the harassment? Support s her credibility.

Proving Harassment

- **EEOC v. Footaction:** harasser twice threatened to break 17-year-old’s neck if she reported harassment;
- **Mother:** learned of harassment after she found teen curled up in fetal position on the couch after the 2nd neck-snapping threat (after harasser put hand’s on teen’s neck); got teen to talk; reported to EEOC; confirms that some trauma

Proving Harassment

- **Cops:** Was police report filed? (non-conclusive); Note: less than 10% of sexual assault crimes are reported
- **Compare:** “beyond a reasonable doubt” v. “by a preponderance of the evidence, i.e. 51%”
- ***EEOC v. Harris Farms:*** 3 Rapes by supervisor; Deputy sheriff: “victim is lying”; Jury: “we believe her and here’s \$1 million”

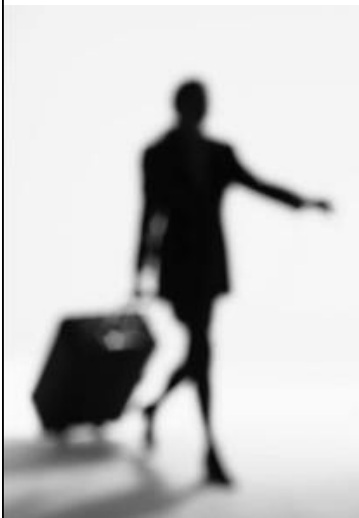
Hurdles in Proving Harassment

- afraid that spouse or boyfriend may not believe her and may harm her or others;
- Immigration status; fear of deportation;
- ***Just because she doesn’t tell someone right away doesn’t mean she’s lying; threats of retaliation or retaliation may chill her out***

RETALIATION

- 37% of all charges in FY2011 (20% increase over FY2008)
- Over 25% of charges are accompanied by a retaliation charge
- Separate cause of action
- Issue: does the adverse action, e.g. termination, demotion, threats to harm or other activity discourage a reasonable employee to file a claim??

Example 5



An employee files a complaint with her employer's human resources department **alleging that she was raped by a prominent customer while during business.** HR tells her not to tell President. Mgr says get the contract; employee reveals rape; president: "you can clear out your desk"

Little v. Windermere Realty (company liable for 3rd party rape, retaliation)

RETALIATION

- **PROTECTED ACTIVITY**
- 1) **opposed to a practice reasonably believed to be unlawful discrimination**
- e.g. complaining, threatening to file a charge, picketing in opposition, refusing to obey discriminatory order; refusing sexual advances
- See *Crawford v. Metropolitan Authority* (employee's description during investigation of harasser's acts was also opposition to harassment)

RETALIATION

- 2) participating in proceedings related to employment discrimination complaint; investigations, trials, interviews, etc.
- Includes filing a charge with EEOC, filing internal complaint, cooperating with EEOC investigation, testifying in depositions, etc.
- **EEOC v. Fry's Electronics** (Renton, WA) (2012) \$2.3 million for supervisor who reported harassment and for victim

REMEDIES

- Injunctive relief: backpay, hiring, promotion, reinstatement, front pay, reasonable accommodation
- Injunctive relief: training for supervisors, no rehiring of discriminating officials, etc.
- Attorneys fees; court costs, etc.

REMEDIES

- **Compensatory damages:** pain and suffering, emotional distress; \$\$\$
- **Key evidence:** Charging Party, family members, co-workers, **counselors**, teachers, **doctors**, etc.)
- Treating physician's notes and records, unless "garden variety"

REMEDIES

- **Punitive damages:** punishing the employer for reckless disregard; didn't investigate; botched investigation; threatened witnesses; *EEOC v. Harris Farms*
- may be the key remedy in retaliation cases;
- Cap on punitive & compensatory damages under 1991 Civil Rights Act: up to \$300,000 per claimant depending on number of employees (does not include back pay or front pay); may be unlimited under state law



ADA – Disparate Treatment or Harassment

- ADA prohibits different treatment or harassment at work based on an **actual or perceived impairment**
- Could include impairments resulting from **domestic or dating violence, sexual assault or stalking.**

Example 6



An employer searches an applicant's name online and learns that she was a complaining witness in a rape prosecution and received counseling for **depression**. The employer decides not to hire her based on a concern that she may require future time off for continuing symptoms or further treatment of depression.

Example 7

An employee has facial scarring from skin grafts, necessary after she was badly burned in an attack by a former domestic partner. When she returns to work after a lengthy hospitalization, co-workers make frequent abusive comments about her skin graft scars, and her manager fails to take any action to stop the harassment.

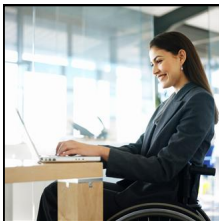


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ADA – Reasonable Accommodation

- Employers, absent undue hardship, must provide **reasonable accommodation** requested for...
 - **Actual disability** - physical or mental impairment that substantially limits one or more major life activities (which include major bodily functions)
 - **“Record of” a disability** - past history of a substantially limiting impairment.
- **Impairment** – “substantially limiting” needn’t be a high degree of functional limitation



ADA – Reasonable Accommodation

- A change in the workplace or in the way things are usually done that an individual needs because of a disability
- May include
 - Time off for treatment
 - Modified work schedules, or
 - Reassignment to a vacant position.

Example 8



Employee w/

- No accrued sick leave
- Employer not covered by FMLA

requests a **schedule change or unpaid leave** to get treatment for depression and anxiety following a sexual assault by an intruder in her home

Employer denies the request because it “applies leave and attendance policies the same way to all employees.”

Example 9



In the aftermath of stalking by an ex-boyfriend who works in the same building, an employee develops major depression that her doctor states is exacerbated by continuing to work in the same location as the ex-boyfriend. As a reasonable accommodation for her disability, the employee **requests reassignment to an available vacant position** for which she is qualified at a different location operated by the employer. The employer denies the request, citing its “no transfer” policy.



ADA – Disclosure of Confidential Medical Information

The ADA prohibits disclosure of confidential medical information.

Example 10



An employee who is being treated for post-traumatic stress disorder (PTSD) resulting from incest requests reasonable accommodation. Her supervisor then tells the employee's co-workers about her medical condition.



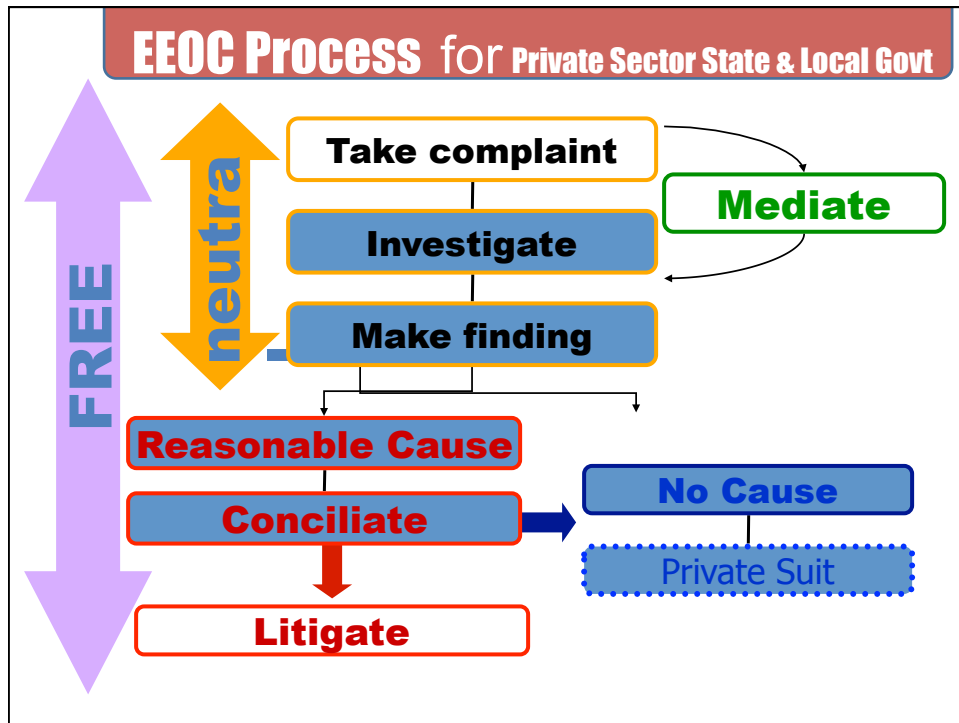
ADA – *Retaliation and Interference*

- The ADA prohibits retaliation for protected activity.
- The ADA also prohibits interference with an employee's exercise of his or her rights under the statute.

Example 11

In the prior example, the employee tells the supervisor she intends to complain to human resources about his unlawful disclosure of confidential medical information. The supervisor warns that if she complains, he will deny her the pay raise she is due to receive later that year.





Tips for workers

- **Know your rights**

- Check your collective bargaining agreement and employee handbook. Call relevant city, county, state and federal agencies and/or the union before the situation gets out of hand. Consult an attorney if necessary. Ask questions!

- **Don't be a harasser!**

- Think about your own comments, conversations, behavior

- **Report discrimination**

- to the company (What is the complaint policy?)
- to the EEOC before the time limit of 300 days

- **Keep records**

- dates, places, what was said or done, witnesses

Tips for Service Providers

■ Partner with EEOC

- Training for your staff to refer cases
- Resource for employment discrimination questions
- Brochures in English, Spanish, Chinese, Vietnamese, Arabic, Punjabi, Tagalog, Korean, Hmong, etc.

■ if you do job placement or referral, be aware: The client is not 'always right' and you may have or share liability for...

- discriminatory hiring, assignment, or wage practices
- unlawful discrimination or harassment at the assigned work site

Additional Resources available at www.eeoc.gov

*--Questions and Answers for Small Employers on
Employer Liability for Harassment by Supervisors,*

*--Policy Guidance on Current Issues of Sexual
Harassment,*

*--Enforcement Guidance: Disability-Related
Inquiries and Medical Examinations of Employees
Under the ADA,*

*--Questions and Answers for Small Businesses: The
Final Rule Implementing the ADA Amendments Act
of 2008,*



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Project SURVIVE helpline number:

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