



The Latest from EEOC on Unlawful Harassment and Health Issues in the Workplace



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EEOC's (new) Enforcement Guidance on Harassment in the Workplace

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Background

- 25 years in the making . . .
- Consolidates all earlier guidance from EEOC on harassment in the workplace (1987, 1990, 1994 and 1999)
- Addresses harassment against LGBTQ+ individuals and on basis of pregnancy, childbirth and related medical conditions
- Not legally binding precedent, but EEOC will follow it, and many courts may give it deference

Something old, something new . . .

Unlawful harassment - what is it?

- Unwanted/unwelcome conduct,
- Connected with work,
- Severe or pervasive, and
- Based on a protected characteristic

Protected characteristics

- Under laws covered by EEOC:
 - Race/color
 - Religion
 - Sex
 - Sexual orientation
 - Gender identity
 - Pregnancy, childbirth, related medical conditions (for example: lactation, using/not using contraception, decisions on abortion, morning sickness)

Protected characteristics (cont'd)

- National origin
- Disability
- Age (40 and over)
- Genetic information (including family medical history)

Protected characteristics (cont'd)

- And many others...
 - List varies widely based on other federal laws, executive orders, state laws and local ordinances

What is NOT harassment?

- Being a jerk (rudeness, incivility)
- Teasing
- Mistreatment because of personality conflict
(so long as those things are not happening because of a protected characteristic)

Problematic conduct hasn't changed

- **Verbal:** Offensive comments; humor, jokes, and teasing about protected traits; rumors about other employees; verbal abuse, insults, threats; propositions or innuendo; flirtation; suggestive or sexist comments
- **Non-verbal:** Gestures, signs, cartoons, pictures, graffiti; paraphernalia; whistling; vandalism; text, email and internet usage; exclusion
- **Physical:** Touching, patting, pinching, brushing the body, assault, rape

What's (sort of) new?

Harassment in today's workplace

- Race/color
 - Traits/characteristics linked to race:
 - Name
 - Cultural dress
 - Accent/manner of speech
 - Physical characteristics (including appearance standards, hair textures/styles commonly associated with racial groups)

Harassment in today's workplace

- National origin
 - Physical characteristics
 - Ancestry
 - Ethnic/cultural characteristics (attire, diet)
 - Linguistic characteristics (accent, lack of fluency in English)

Harassment in today's workplace

- Religion
 - Stereotypes
 - Receipt of accommodations
 - Lack of religious belief
 - Explicit/implicit coercion by employer or other employees to engage in religious practices at work or elsewhere

Harassment in today's workplace

- Sex
 - Pregnancy, childbirth, related medical conditions
 - Lactation
 - Using/not using contraception
 - Deciding to have, or not having, abortion
 - Morning sickness

Harassment in today's workplace

- Sex
 - Sexual orientation/gender identity
 - “Outing”
 - Harassment for not presenting in manner typically associated with person's sex
 - Repeated/intentional use of wrong noun/pronoun (“misgendering”), using pre-transition name (“dead naming”)
 - Denial of access to bathroom or sex-segregated facility consistent with gender identity

Harassment in today's workplace

- Age
 - Encouraging/pressuring to retire
 - Pressuring transfer to a position that uses less technology

Harassment in today's workplace

- “Cross-Bases” issues - harassment based on:
 - Perception that someone has particular characteristic (even if they do not)
 - Individual's association with someone in a different or the same protected class (biracial child, spouse of different race)
 - “Intraclass” conduct - individual's characteristic even if harasser is member of same protected class

“Hostile Work Environment”

- Harassment so severe or pervasive that a reasonable person in employee’s shoes would find it to be abusive
 - Victim does not need to show severe *and* pervasive; it’s “or”
 - One instance can be enough (touching, certain words)
 - Harasser’s status matters
 - Victim need not show harassment led to change in position, pay, hours or opportunities, or that it made them perform worse

The Causation Spectrum

- Explicitly based on protected characteristic(s)
 - Intent irrelevant
 - Conduct need not be directed to complainant or anyone in particular
- Based on stereotypes (positive, negative, neutral)
 - Family responsibilities, suitability for leadership, gender roles, weight/body type, expression of orientation/identity, survivor of gender-based violence

The Causation Spectrum

- Arising from context in which it occurs
 - Context, inflection, tone, local custom, historical usage
 - Code words
- Facially neutral but linked to other conduct that is facially discriminatory
 - Cannot necessarily discount neutral conduct when mixed with facially discriminatory conduct
- Timing
 - The closer to learning of protected status, the more likely harassment

Why does this matter? (liability standards)

Executives	➔	Automatic liability; no affirmative defense
Supervisors	➔	<u>Tangible act</u> – liable; no affirmative defense <u>No tangible act</u> – no liability if reasonable prevention and prompt effective remedial action plus employee unreasonably failed to take advantage of employer’s corrective opportunities
Coworkers	➔	Liable if negligent because it unreasonably failed to prevent, or failed to take reasonable corrective action in response to harassment about which it knew or should have known

What to do now?

- Read the guidance and pay attention to the nearly 80 examples
- Consider different and more expansive state/local laws
- Review policies to ensure they are in line with new guidance
- Train, train, train - early and often

Open questions . . .

- Intersection with Constitutional rights (such as free speech protections), other federal laws (such as the Religious Freedom Restoration Act)
- Legal challenges

Highly recommended reading

- Full enforcement guidance:
 - <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>
- Summary of key provisions:
 - <https://www.eeoc.gov/summary-key-provisions-eeoc-enforcement-guidance-harassment-workplace>

The Latest from EEOC on Health Issues in the Workplace

Work health considerations - EEOC strategic enforcement plan (SEP) and technical guidance

- SEP regarding mental health issues in the workplace
- Visual Impairments
- Intellectual disabilities

EEOC SEP September 21, 2023

- Expands the vulnerable and underserved worker priority to include additional categories of workers who may be unaware of their rights under equal employment opportunity laws, may be reluctant or unable to exercise their legally protected rights, or have historically been underserved by federal employment discrimination protections—such as people with intellectual and developmental disabilities . . .”



Protecting Vulnerable Workers and Persons from Underserved Communities from Employment Discrimination


- With respect to employment discrimination, the Commission views the category of vulnerable workers as including:
 - people with developmental or intellectual disabilities
 - workers with mental health related disabilities

Protecting Vulnerable Workers and Persons from Underserved Communities from Employment Discrimination

- Focus on recruitment and hiring practices and policies that discriminate under the statutes EEOC enforces, including . . . Disability, including:
 - reliance on restrictive application processes or systems, including online systems that are difficult for individuals with disabilities or other protected groups to access

Example Accommodations

- Examples of accommodations that have helped employees with mental health conditions to more effectively perform their jobs . . . provides some of the most effective and frequently used workplace accommodations.



	5	6
rk	9:00am Start work	9:00am
rk	6:00pm Finish work	6:00pm

- **Flexible Workplace** - telecommuting and/or working from home
- **Scheduling** - Part-time work hours, job sharing, adjustments in the start or end of work hours, comp time, or "make up" of missed time

Example Accommodations

- **Leave** - Sick leave, flexible use of vacation time, additional unpaid or administrative leave for treatment or recovery, leaves of absence, or occasional leave for a few hours for appointments
- **Breaks** - Breaks for individual needs rather than fixed schedules, more frequent breaks or flexibility in scheduling breaks, backup coverage during breaks, telephone breaks during work hours to call for support
- **Other** - Food and drink at workstations to mitigate side effects of medications, on-site job coaches

Example Accommodations

- **Modifications**

- Reduction and/or removal of distractions in the work area
- Room dividers, partitions, soundproofing or visual barriers
- Private offices or enclosures
- Location away from noisy machinery
- Reduced noise
- Increased light
- Music or headsets to block out distractions



Example Accommodations

- **Equipment/Technology:**

- Recording meetings and training sessions
- "White noise" or sound machines
- Electronic organizers, software calendars, organizer programs
- Remote job coaching, laptop computers, personal digital assistants and office computer access via remote locations
- Software that minimizes computerized distractions such as pop-up screens

Example Accommodations

• Job Duties

- Modification or removal of non-essential job duties or restructuring of the job to include only the essential job functions
- Dividing large assignments into smaller tasks and goals
- Additional assistance or time for orientation activities, training, and learning job tasks responsibilities
- Additional training or modified training materials

Example Accommodations

• Management/Supervision

- Implementation of flexible and supportive supervision style; positive reinforcement and feedback; adjustments in level of supervision or structure, such as more frequent meetings to help prioritize tasks; and open communication with supervisors regarding performance and work expectations
- Additional forms of communication or written and visual tools, including communication of assignments and instructions in the employee's preferred learning style (written, verbal, e-mail, demonstration); creation and implementation of written tools such as daily "to-do" lists, step-by-step checklists, written (in addition to verbal) instructions and typed minutes of meetings



Example Accommodations

- **Management/Supervision**
 - Regularly scheduled meetings (weekly or monthly) with employees to discuss workplace issues and productivity, including annual discussions as part of performance appraisals to assess abilities and discuss promotional opportunities
 - Development of strategies to deal with problems before they arise
 - Written work agreements that include any agreed upon accommodations, long-term and short-term goals, expectations of responsibilities and consequences of not meeting performance standards

Visual Disabilities

- July 25, 2023: EEOC issued technical assistance regarding ADA and visual disabilities.
 - How to handle voluntary disclosures regarding an applicant's or an employee's vision
 - Safety considerations
 - Example accommodations

Before an employment offer is made

- May an employer ask whether a job applicant has or had a vision impairment, or treatment related to any vision impairment, before making a job offer?
- Does the ADA require applicants to disclose a current or past visual disability before accepting a job offer?

After an employment offer is made

- Are there any other instances when an employer may ask an employee about the employee's vision?
 - Yes:
 - to support the employee's request for a reasonable accommodation needed because of a vision impairment;
 - to enable the employee to participate in a voluntary wellness program;
 - to comply with federal safety statutes or regulations; or
 - to verify the employee's use of sick leave related to a vision impairment, if the employer requires all employees to provide such information (for instance, doctors' notes) to justify their use of sick leave

Safety Concerns

- Direct threat only, except . . .
- What should an employer do when another federal law prohibits it from hiring individuals with vision impairments for particular positions?
 - If a federal law prohibits an employer from hiring or retaining an individual with a vision impairment for a particular position, no liability under the ADA
 - Ensure prohibition actually applies
 - Ensure the law does not contain any exceptions or waivers that apply to the individual with the vision impairment

Example Accommodations

- Screen readers (or text-to-speech software)
 - Software applications that can convert written text on a computer screen into spoken words or a braille display. Allow individuals to quickly review written text
- Optical character recognition (OCR) technology
 - Creates documents in screen-readable electronic form from printed ones,
- Systems with audible, tactile, or vibrating feedback
 - Proximity detectors

Example Accommodations

- Website modifications for accessibility
 - Taking steps to ensure that job applicants and employees can access and timely complete job applications, online tests, or other screening tools
- Written materials in more accessible or alternate formats
 - Large print, sans serif fonts, braille, a recorded format, or an accessible shared document format, including those provided via QR code

EEOC v. All Day Medical Care Clinic, LLC

- All Day Medical Care Clinic, LLC operated five medical clinics in Maryland
- After the scheduling assistant informed employer about her vision impairments and need for accommodation, the employer questioned why she did not raise these issues in her interview, and immediately terminated her
- The employer ignored her later communications asking to remain employed, as well as subsequent overtures from her vocational representative to install and fund the accommodations
- Result?



Intellectual Disabilities

- **Salvation Army, Ann Arbor, MI, 2023:** According to the lawsuit, the organization allowed the individual, who worked successfully as a cashier for five months, to use a job coach during his probationary period. A new manager refused to allow the cashier to have additional job coaching, criticized him for his disability, punished him for minor mistakes, and then fired him shortly after new cashiers were hired.

Intellectual Disabilities

- **JDKD Enterprises, Deptford, NJ, 2022:** Company that owns and operates numerous McDonald's restaurants; worker who is on the autism spectrum. The company fired the long-time worker because of his autism spectrum disorder only two months after the company purchased the restaurants. The employee had worked at several McDonald's restaurants for 37 years and received several awards and praise for his excellent job performance.
- Result?





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