



**What to do about Harassment?
Strategies for Addressing a Common
and Complicated Workplace Problem**

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Fred J. Bissinger

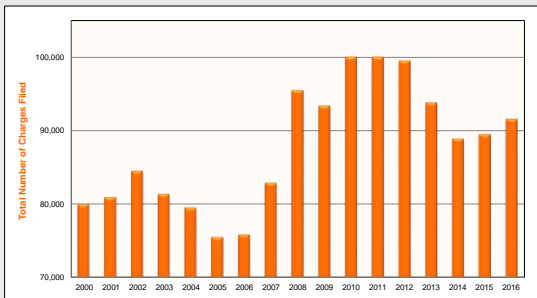
Knoxville Morristown Cookeville Nashville

**I. Background
Information**



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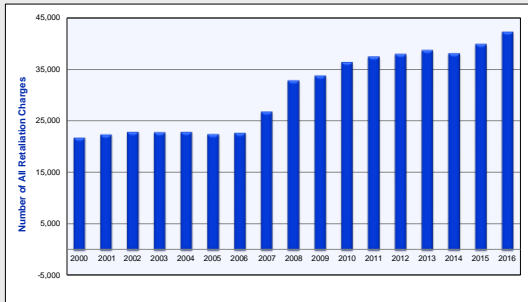
Total Number of Charges Filed



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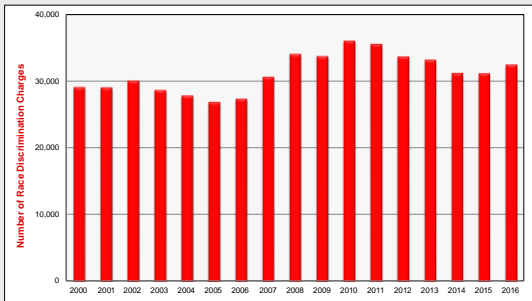


Retaliation Charges



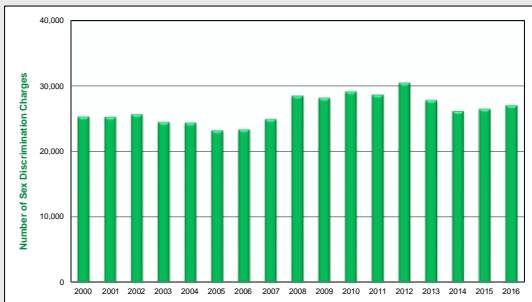
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Race Discrimination



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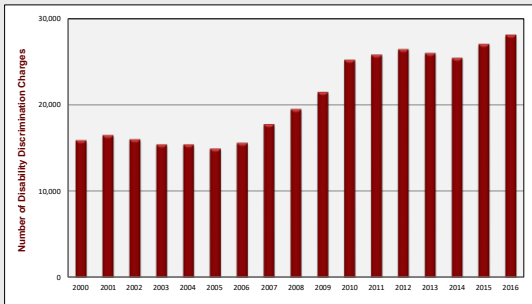
Sex Discrimination



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Disability Discrimination



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EEOC's December 2016 Proposed Guidance on Harassment

- Harassment Charges made in 1/3 of all 90K charges filed in 2015:
 - 45% = Sex Harassment Allegations
 - 34% = Race Harassment Allegations
 - 19% = Disability Harassment Allegations
 - 15% = Age Harassment Allegations
 - 13% = National Origin Harassment Allegations
 - 5% = Religion Harassment Allegations



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II. The EEOC



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From the EEOC

- Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).



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From the EEOC

Harassment is unwelcome conduct that is based on:

- Race
- Color
- Religion
- Sex (including pregnancy)
- National origin
- Age (40 or older)
- Disability
- Genetic information



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From the EEOC

- Harassment becomes unlawful when enduring the offensive conduct becomes a condition of continued employment,

OR



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From the EEOC

- The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.



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From the EEOC

Anti-discrimination laws also prohibit harassment against individuals in **retaliation** for:

- Filing a discrimination charge
- Testifying or
- Participating in any way in an investigation, proceeding, or lawsuit under these laws



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From the EEOC

- Or, opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.



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From the EEOC

- Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality.



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From the EEOC

- To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.



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III. The EEOC's Proposed Guidance



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The EEOC's Proposed Guidance

- Harassment is covered by the EEO laws only if it is based on an employee's legally protected personal characteristics.



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The EEOC's Proposed Guidance

- Was the conduct sufficiently severe or pervasive to create a hostile work environment?
- Was it both subjectively and objectively hostile?
- What conduct is part of the hostile work environment claim?
- What if some of the conduct was not directed at the complainant or occurred outside the workplace?



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The EEOC's Proposed Guidance

The liability standard depends on whether the harasser is the employer's:

- Proxy or alter ego
- Supervisor; or
- Non-supervisory employee, coworker, or non-employee



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The EEOC's Proposed Guidance

An Employer is liable for a hostile work environment created by harassment by non-supervisory employees or by non-employees if:

- it failed to act reasonably to prevent the harassment;
OR
- it failed to take reasonable corrective action in response to harassment about which it knew or should have known.



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The EEOC's Proposed Guidance

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 know about the harassment.



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The EEOC's Proposed Guidance

Corrective Action

- Once an employer has notice of potential harassment, it is required to take reasonable corrective action to prevent the conduct from continuing.



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IV. The EEOC's Enforcement Action



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EEOC Action – 8.17.2017 Press Release

- CHICAGO – Ford Motor Company has agreed to pay up to **\$10.125 million** to settle sex and race harassment for a group of individuals which was investigated by the U.S. Equal Employment Opportunity Commission (EEOC) at two Ford plants, the federal agency announced today.



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EEOC Action – 8.17.2017 Press Release

- In its investigation, the EEOC found reasonable cause to believe that personnel at two Ford facilities in the Chicago area, the Chicago Assembly Plant and the Chicago Stamping Plant, had subjected female and African-American employees to sexual and racial harassment. The EEOC also found that the company retaliated against employees who complained about the harassment or discrimination.



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EEOC Action – 8.17.2017

Press Release

- NEW YORK – A & F Fire Protection Co., Inc., a Massapequa, N.Y.-based sprinkler installation company, violated federal law by creating and tolerating a hostile work environment in which black and Hispanic employees were routinely hit with racial insults and also by retaliating against employees who complained, the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit it filed today.



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EEOC Action – 8.17.2017

Press Release

- According to EEOC's suit, black and Hispanic employees were subjected to repeated racial harassment, of which the company was aware, by supervisors and by co-workers. The workers were called the "N-word," "spics," "jigaboos," and "wetbacks," the EEOC said.



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EEOC Action – 8.17.2017

Press Release

- Further, instead of taking steps to ensure that the harassment ended, the company retaliated against employees who complained by firing them or forcing them to quit.



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EEOC Action – 8.17.2017

Press Release

- In fact, the EEOC charged, upon receiving two EEOC discrimination charges, the company owner instructed a supervisor to fire the employees who had filed the charges, and when this supervisor refused, he also was retaliated against.



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V. Related Litigation/Issues



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Lawsuit – U.S. Third Circuit Court of Appeals

- On July 14, 2017, the Third Circuit issued its opinion in *Castleberry v. STI Group*, Case No. 16-3131 reversing the district court that had granted a motion to dismiss a hostile work environment claim. In the case, two African-American employees claimed they were terminated based on their race and that they were subjected to a racially hostile work environment.



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Lawsuit – U.S. Third Circuit Court of Appeals

- The hostile work environment claim consisted of a supervisor, on one occasion, saying to employees, including the two plaintiffs that if they "nigger-rigged" the fence, they would be fired. They also claim that there were racial comments on a sign-in sheet "on several occasions."



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Lawsuit – U.S. Third Circuit Court of Appeals

- The Circuit Court found that **the single use of a racial slur by the supervisor was sufficient to create a hostile work environment, particularly when it was followed by a threat of termination.**



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Lawsuit – U.S. Third Circuit Court of Appeals

- The court reasoned that the single use of the racially charged term was sufficiently extreme to be "severe" under the "severe or pervasive" standard, at least at the motion to dismiss stage.



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Lawsuit – U.S. Third Circuit Court of Appeals

- This "one bad word is enough" standard is reflected in the EEOC's proposed harassment guidance from earlier this year.



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Lawsuits- U.S. Sixth Circuit Court of Appeals

- Although the Third Circuit held that a single racial epithet could be enough to create a hostile work environment under Title VII, the Sixth Circuit (which includes Tennessee) has held in other cases that multiple offensive racial remarks may not be sufficient.



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Lawsuits- U.S. Sixth Circuit Court of Appeals

- See *Phillips v. UAW Int'l*, 854 F.3d 323 (6th Cir. 2017) (remarks that employer had "too many blacks" and plaintiff was "big and black" too isolated and sporadic to create hostile work environment); *Williams v. CSX Transp. Co.*, 643 F.3d 502 (6th Cir. 2011) (finding no hostile work environment where defendant "call[ed] Jesse Jackson and Al Sharpton 'monkeys' and [said] that black people should 'go back to where [they] came from'" among other racist comments);



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Lawsuits- U.S. Sixth Circuit Court of Appeals

- Reed v. Procter & Gamble Mfg. Co., 556 F. App'x 421 (6th Cir. 2014) (no hostile work environment where plaintiff was subjected to race-based comments and his supervisor stood behind him and made a noose out of a telephone cord); Clay v. United Parcel Serv., Inc., 501 F.3d 695 (6th Cir. 2007) (15 racially-motivated comments over a two-year period were isolated, not pervasive, and therefore not actionable under Title VII).



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Lawsuits- U.S. Sixth Circuit Court of Appeals

- Nonetheless, it is best for employers to have zero tolerance for harassment of employees. Courts are not consistent in what they find is needed for a HWE.



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Lawsuits- U.S. Sixth Circuit Court of Appeals

- In EEOC v. Autozone (6th Cir. 2017), the Sixth Circuit affirmed the dismissal of sexual harassment claims brought by the EEOC against AutoZone behalf of three female employees.
- A store manager was transferred to an AutoZone store in Cordova, Tennessee. Shortly after arriving, he began to make lewd and obscene sexual comments and propositions to one female employee in particular and also made sexual comments to two other female employees.



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Lawsuits- U.S. Sixth Circuit Court of Appeals

- The court found that, even if the supervisor had the power to take adverse action against the plaintiffs, the company had a defense to a sexual harassment claim because the company had posted an effective anti-harassment policy and also included that policy in an employee handbook, which it required every employee to read and acknowledge.



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Lawsuits- U.S. Sixth Circuit Court of Appeals

- In addition, the court found that the company had taken prompt and effective action after learning of the complaints, including moving the store manager out of that store and then terminating him.



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The Uber Sexual Harassment Scenario



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The Fox Debacle



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VI. Current Events/Issues



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White Nationalists Protest in Charlottesville



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Black Lives Matter Protest



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Protest Against Police



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Pro-Planned Parenthood Rally



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Anti-Planned Parenthood Rally



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Protest on Inauguration Day



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Immigration Ban Protest



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Transgender Protest



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What to do about Social Issues

- Social Media Crazyiness
- Political Correctness Run Amok



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VII. Practical Application



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EEOC's "Promising Practices"

- Committed and engaged leadership
- Consistent and demonstrated accountability
- Strong and comprehensive harassment policies
- Trusted and accessible complaint procedures
- Regular, interactive training tailored to the audience and the organization.



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EEOC's Checklists for Investigating Harassment

- Leadership and Accountability
- Anti-Harassment Policy
- A Harassment Reporting System and Investigations
- Compliance Training



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FJB Points of Emphasis

- Language Matters!!!
- Focus on Core Values of Respect and Teamwork
- Lead from the Front (Set the Example)
- Consistently Hold People Accountable
 - Positive and Negative



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FJB's Points of Emphasis

- Update Policies
- Train Supervisors/Managers; EE's
- Monitor the Workplace
- Be Proactive to Address Issues
- Timely/Effectively Investigate
 - Remedial Action



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Conclusion

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