

EEOC Enforcement Guidance on Workplace Harassment: Impact on a Term, Condition or Privilege of Employment

By Stephanie L. Adler-Paindiris, Stephanie E. Satterfield & Joseph C. Toris

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Meet the Authors



Stephanie L. Adler-Paindiris

(Pain-DEAR-is • She/Her)

Principal

(407) 246-8409

Stephanie.Adler-

Paindiris@jacksonlewis.com



Stephanie E. Satterfield

(She/Her)

Principal

(864) 672-8048

Stephanie.Satterfield@jacksonlewis.com



The Equal Employment Opportunity Commission's (EEOC) first updated [enforcement guidance on workplace harassment](#) in 25 years is broken down into the three components of a harassment claim: (1) the covered bases and causation; (2) discrimination respecting a term, condition, or privilege of employment; and (3) liability. We discuss each component in separate articles. This article is on how the guidance addresses the second component, discrimination respecting a term, condition, or privilege of employment.

The guidance does not constitute legally binding precedent, but it does provide "legal analysis of standards for harassment and employer liability applicable to claims of harassment under the equal employment opportunity (EEO) statutes enforced by the Commission." The new guidance supersedes several earlier EEOC guidance documents on harassment.

Impact on a Term, Condition, or Privilege of Employment

In addition to being related to a protected characteristic, the guidance explains that harassing conduct must impact a "term, condition, or privilege" of employment to be actionable. In the absence of an explicit change to the terms or conditions of employment, such as termination or demotion, the harassing conduct must be both subjectively and objectively hostile. This standard requires the harassing conduct to be something a reasonable person would find hostile or abusive and the complaining employee believed to be abusive.

According to the guidance, the gravamen of a hostile work environment claim is the unwelcomeness of the conduct. It is the EEOC's position that part of demonstrating subjective hostility is establishing that the complained of conduct is unwelcome and that, in some instances, unwelcomeness may also be relevant to the issue of objective hostility. The guidance notes that following the 1993 U.S. Supreme Court decision in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, which established the objective and subjective criteria for evaluating hostile work environment claims, some courts continued to analyze the unwelcomeness of the conduct as an element separate from the objective and subjective hostility of the conduct at issue. The guidance states that this approach incorporates an unnecessary step into the hostile work environment analysis.

The subjective element of hostility can generally be established by the plaintiff's own statement that the conduct was hostile or evidence the individual complained about the conduct internally to their employer or to family, friends, or coworkers.

For harassing conduct to be unlawful, it must also be sufficiently severe or pervasive



Joseph C. Toris

KM Attorney

908-795-5220

Joseph.Toris@jacksonlewis.com

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to create an objectively hostile work environment. Conduct can be either severe or pervasive to be actionable. Severity or pervasiveness depends on the specific facts of a given situation and is evaluated based on the totality of the circumstances where no single factor is determinative or required. Sufficiently related harassing acts based on multiple protected characteristics should be considered together in determining whether the conduct created a hostile work environment.

An individual is not required to show either that their performance suffered or that they incurred psychological harm as a result of the harassing conduct in order to establish objective hostility.

The severity of allegedly harassing conduct depends on the particular circumstances of the given situation. The guidance acknowledges that it is not possible to give an exhaustive list of factors used to determine severity. However, it does provide some key factors to be considered:

- Harassment by an employee's supervisor typically has a greater impact on the work environment than similar conduct by someone who does not have supervisor authority. Moreover, the mere fact an alleged supervisor did not have supervisory authority over the individual does not lessen the severity of the conduct if the individual reasonably but mistakenly believed the harasser had supervisory authority.
- While harassment an individual experiences firsthand is generally more probative of a hostile work environment than conduct learned of secondhand, the knowledge of harassing conduct experienced by others may be relevant to determining the severity of the harassment.
- Conduct directed at an individual in the presence of others may add to the level of severity. Conversely, conduct that occurs while the individual is alone with the alleged harasser may add to the severity of the conduct because it occurs in isolation and therefore is potentially more threatening.
- In some circumstances, a single incident can be sufficiently severe to establish a hostile work environment. Such instances would include sexual assault, sexual touching, threatened or actual physical violence, display of symbols of hate such as swastikas or nooses, denigrating animal imagery, and the use of the n-word.

The pervasiveness element of a hostile work environment claims involves more frequent but less serious incidents comprising a series of acts. The pervasiveness element focuses on the cumulative effect of these acts, instead of examining each act in isolation. Additionally, "the impact of harassment must be evaluated in the context of surrounding circumstances, expectations, and relationships." (Internal quotations omitted.) Whether alleged harassment was objectively hostile necessarily depends on the social context from the perspective of a reasonable person of the complainant's protected class. Factors such as the complainant's "personal or situational characteristics" can also impact whether that individual perceives the alleged conduct as harassing.

The guidance reaffirms that there is no “crude environment” exception to Title VII of the Civil Rights Act and the “prevailing workplace culture” does not excuse harassing conduct.

While the EEOC considers the unwelcomeness aspect to be part of the subjective hostility element, the guidance states that in some circumstances, evidence of unwelcomeness may also be relevant to establishing objective hostility. This evidence would include whether the alleged harasser had notice that their conduct was not welcome, such as because the complainant communicated the unwelcomeness to them. Communication of the unwelcomeness of the conduct helps to differentiate conduct that may not be facially offensive, such as flirting or religious discussions, from objectively hostile conduct.

An individual can allege a pattern of harassing conduct as long as the alleged acts are sufficiently related so as to be considered part of the same unlawful practice and at least one of the acts falls within the statute of limitations. Hostile conduct that is independently actionable can be used to establish the unlawful practice as long as it is part of the overall pattern of harassment. Types of conduct that are potentially actionable include:

- *Conduct That Is Not Directed at the Complainant:* Conduct can form the basis of a hostile work environment even if it is not directed at the complainant, such as when the conduct is directed at other members of the complainant’s protected class. However, the degree of impact the conduct had on the complainant will help determine whether a hostile work environment existed.
- *Conduct That Occurs in Work-Related Context Outside of Regular Place of Work:* Conduct that occurs outside of the workplace can contribute to a hostile work environment if it occurs in a work-related context such as offsite training. Use of company communication systems such as email, bulletin boards, instant messaging, videoconferencing, intranet, public websites, company social media sites and other similar technologies can also contribute to a hostile work environment. The guidance states that potentially harassing conduct using these technologies includes passive conduct, such as offensive images visible during a video conference, as well as active harassing conduct.
- *Conduct That Occurs in a Non-Work-Related Context But With Impact on the Workplace:* While employers are generally not responsible for conduct that occurs outside of a work-related context, they may become liable if the conduct has an impact in the workplace that contributes to a hostile work environment. This includes conduct using private phones, computers, and social media. However, the guidance states that posts on a social media, in and of themselves, will generally not contribute to a hostile work environment unless they are targeted at the employer or other employees. The guidance goes on to observe that due to the proliferation of technology, it is “increasingly likely” the “non-consensual distribution of real or computer-generated intimate images” on the internet or through other electronic means will contribute to a hostile work environment if it impacts the workplace. As with conduct that occurs in the workplace, the guidance states that harassment by a supervisor outside the workplace is more likely to contribute to a hostile work environment due to the

supervisor's ability to impact the workplace.

We will discuss how the enforcement guidance addresses liability in an upcoming article.

Related:

- [EEOC Enforcement Guidance on Workplace Harassment: Covered Bases and Causation](#)
- [EEOC Enforcement Guidance on Workplace Harassment: Liability](#)

Employers should review their harassment policies in light of the new guidance.

Please contact a Jackson Lewis attorney with any questions.

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