# *Recent Developments in EEO*

"Harassment"

"Gender Stereotyping"

Part 1 of 4

Presenter

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## Harassment

- More Non-Sex than Sexual Harassment
- Good shorthand definition of EEO harassment?
- Standards or elements of Proof / Obviously needs to be more than just inappropriate
  - *Hillyer v. Interior*, 112 LRP 43566, 0120093623 (2012) (Supervisor placed dog feces on employee's chair / EEOC finds action "highly inappropriate," but not due to protected status or prior EEO activity).

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## Harassment: "Severe"

- *Arganda v. USPS*, 0120122328, 113 LRP 27733 (2013).

• Supervisor exposed himself, urinating in vehicle in front of complainant and stated, "I got it on ice"; alleged conduct states claim of harassment.

• Single incident may state claim of harassment if sufficiently egregious, …"this is one of those cases."

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## Harassment: Sexual

- *Leggett et al v. USPS,* 112 LRP 38181, 0720120019, et al. (2012)

- Group of women were subjected to harassment on basis of sex by coworker, resulting in total damages of $428,000

- The male employee's abusive behavior included, among other things: he told female employees that he always turned down the heat so he could look at their hardened nipples; he told a female employee that she looked "good, bend you over that chair good"; he made comments to a female employee that he wished her sister who was sick with cancer would hurry up and die; he taunted a female employee about her son's sexual orientation; he told a female employee that her "headlights were on" in reference to her nipples (and much more).

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## Harassment: Presence of Employee

- *Juergensen v. Department of Commerce*, 0120101504, 113 LRP 21817 (2013).

- EEOC remands case for hearing (AJ had dismissed without a hearing), finding that re-hiring former employee who had hung a noose in the workplace should have been considered by AJ as to whether this created a hostile work environment.

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## Harassment: Sexual / Attire

- *Willis, Sampson & Bosley v. USPS*, 0120120339, 113 LRP 36654 (2013).

• Complainants alleged sexual harassment by coworker due to his attire, which significantly outlined and occasionally exposed his penis. ("We find this to be inherently sexual conduct, and Complainant found it unwelcome. ")

• EEOC found that management was aware of this, that a reasonable person would find this to be a hostile work environment, and the agency failed to take immediate and appropriate corrective action.

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## Harassment: Race

- *Bryant v. Interior*, 0120091468 (Aug. 31, 2012)

• Supervisory Park Ranger / race harassment

• Harassment included an incident involving two co-workers who wrote derogatory personal attacks against Complainant on material posted in the men's third-floor locker room (i.e., postings about Complainant speaking "Ebonics" and Complainant's challenging of prejudice against African-Americans); left an "Ethnic Expression" catalogue underneath Complainant's office door; placed a warning in Complainant's office mailbox; and others

• EEOC explained that the agency should have taken prompt and immediate action, such as disciplining the coworkers and providing them with anti-harassment training / instead, one employee received only a verbal counseling and the other left the agency but months after the occurrence)

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## Harassment: Disability

- *Complainant v. Social Security Administration*, 114 LRP 9181, EEOC No. 0720110030(11/4/13)

• Complainant was hired as a Service Representative under the Federal Career Intern Program. The Commission found that he was subjected to harassment by coworkers and supervisors because of his mental disability (ADHD), and that the agency had failed to reasonably accommodate him by reassigning him to another facility and ultimately removed him. Among other findings, the EEOC found him to be a qualified individual with a disability, rejecting the agency's assertion that a 100% VA disability rating did not necessitate a finding that he was not qualified for the purposes of the Rehabilitation Act. Remedies included reinstatement with back pay and $40,000 in compensatory damages.

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## Harassment: Sex and Age

- *Meachum and Abbott v. Social Security Administration*, 0720120003, 113 LRP 39351 (2013).

• Supervisory harassment found against two female attorneys on bases of sex and age.

• Male attorneys received preferential treatment and were allowed to disagree with the supervisor in meetings / Complainants were ignored, berated, and treated rudely by the supervisor, and were not allowed to disagree with her. Further, other women over 40 also were treated disrespectfully.

• Awards of $175,000 to both Complainants, and over $124,000 in attorney's fees.

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## Harassment: Race

- *Ferebee v. DHS*, 0720100039 (2012)

• Material handling supply specialist for the U.S. Coast Guard / alleged race (African-American) harassment when a representative with Coast Guard Mutual Assistance subjected him to a hostile work environment

• In EEOC's view, evidence showed that there was a dispute about loan papers and documentation and that representative reacted to complainant as a stereotypical "angry black man", calling base police and stating that "she needed assistance because she was 'afraid' of an 'angry' 'unidentified' individual." / similar incident involving a previous African-American applicant.

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## Harassment: Disability

- *Complainant v. Social Security Administration* 0720110030 (2013)

• EEOC finds both failure to reasonably accommodate and harassment, resulting in complainant's removal.

• The insults and comments directed at Complainant included such comments as: "Take your pill, you're not getting it;" "What's wrong with you, why aren't you getting it;" "Don't give me that, you should know that by now, you had training;" and "Why can't you just pay attention." Other co-workers credibly testified that Complainant was treated like "dog poop," that employees were rude to him, found fault with his work, had disregard for Complainant, talked to him in a "disrespectful" manner, and treated him badly in general.

• EEOC found accommodation could have included more effective mentoring and a transfer to another office

• Commission notes that VA 100% disability rating not determinative as to whether he was a qualified individual with a disability.

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## Harassment: Sexual

- *Munoz v. DHS*, 0120110188 (2012)

• Sex harassment by manager of Customs and Border Protection Officer but affirmative defense proven / Among others, proven claims included that: Port Director took complainant to Hooters for her birthday and made inappropriate, vulgar remarks during lunch; repeatedly commented on her body, hair, and makeup; and told her on a weekly basis that he needed sex and described his sexual acts / conduct had been going on for more than a year before she reported it to higher level management

• After Complainant reported the PD's harassment to management, Agency immediately began an investigation into the allegations; allowed Complainant to go home the next day and take administrative leave; issued a Memorandum of Instruction ordering the PD not to contact Complainant; immediately removed the PD from the Spokane, Washington office where Complainant worked; and, the PD resigned shortly thereafter / Agency acted promptly and effectively in addressing the harassment and therefore liability could not be imputed to the Agency.

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## Harassment: Co-Worker

- *Complainant v. Carolyn W. Colvin, Acting Commissioner, Social Security Administration, Agency, 0120131065,* 114 LRP 6535 *(2014)*

• A teleservice representative for the Social Security Administration alleged that the agency subjected her to discrimination based on race (African-American) and sex (female) when a Hispanic, female coworker grabbed her buttocks and the agency failed to take prompt remedial action.

• The EEOC found that the agency should not be held liable for the coworker's harassment. The EEOC found that the actions were severe enough to qualify as prohibited sexual harassment. However, the agency took immediate and appropriate corrective action. Within two business days of learning of the harassment, management took action in deciding to issue a write-up for the coworker and make the coworker watch a video on sexual harassment. Shortly after that, management changed the representative's break hours to ensure that she would not come into contact with the coworker. Once management learned that the representative was unhappy with having her break hours changed, it changed them back. Shortly after learning of the representative's second encounter with the coworker, management moved the coworker to another office.

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## Harassment: Co-Worker

- *Parker v. Navy*, 0120100303 (2012)

• Race harassment / coworker displayed a hangman's noose in the workplace / EEOC found that the agency was not liable for the incident

• Claim involved a single incident and management's response occurred over the span of a few days / EEOC found the noose incident was sufficiently severe to alter the terms and conditions of the leader's employment and create an abusive work environment

• Agency removed the coworker from her assignment, conducted a thorough investigation, counseled the coworker about her conduct, and ensured that the coworker would never work in the same area as the leader again.

Result?

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## Harassment: Race / Tangible Employment Action

- *Complainant v. Social Security Administration*, 113 LRP 45133, EEOC No. 0720120009(11/24/13)

• A Teleservice Representative at a facility in Saddle Brook, New Jersey, alleged harassment on the basis of race (African-American) due to a pattern of mocking and stereotyping African-Americans for 10 years by the Teleservice Center Supervisor.

• The comments, made on a daily basis, included statements that the supervisor was afraid of African-Americans, that they were more violent than other employees, and that the supervisor would impersonate the character "Buckwheat" and mock their manner of speaking.

• In affirming an AJ finding of a hostile work environment, EEOC noted that the pattern of supervisory harassment included a tangible employment action (lowering her performance appraisal), and that therefore the agency was vicariously liable for the supervisor's conduct.

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## A Supreme Court Case on Harassment

*Supervisory Harassment:*

- *Vance v. Ball State Univ.,* 113 LRP 26073, No. 11-556 (U.S. June 24, 2013) (narrow definition of supervisor / Employee is "supervisor" for purposes of vicarious liability under Title VII only if s/he is empowered by the employer to take tangible employment actions against the victim / not a supervisor if merely manage day to day activities).

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## Gender Stereotyping

- The Background: The Supreme Court's 1989 Decision in *Price Waterhouse v. Hopkins*, 400 U.S. 228 (1989) (Title VII bars "not just discrimination because of biological sex, but also gender stereotyping – failing to act and appear according to expectations defined by gender.").

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## Gender Stereotyping

The EEOC cases:

- *Veretto v. USPS*, 0120110873, 111 LRP 46728 (2011) (Complainant's allegation that he was subjected to a hostile work environment because of his sex (male), by a co-worker because the co-worker learned that Complainant was marrying another man could not be dismissed for failure to state a claim (the agency had dismissed on the basis that the Complainant was really alleging sexual orientation discrimination, which is not covered by Title VII);

- *Castello v. USPS*, 0520110649, 112 LRP 1086 (2011) (Reconsideration granted / sexual stereotyping claim based on supervisor's "offensive and derogatory comment about her[Complainant] having relationships with women.").

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## Gender Stereotyping

- *Macy v. DOJ* (BATF), 0120120821, 112 LRP 20796 (2012) (Transgender woman alleged she was subjected to sex discrimination when she was denied a crime laboratory position after notifying the civilian contractor responsible for filling the position that she was in the process of transitioning from male to female / agency dismissal of gender stereotyping claim reversed / EEOC "conclude[s] that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on ... Sex,' and such discrimination therefore violates Title VII.").

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## Gender Stereotyping

- Couch v. Dept. of Energy, 0120131136, 113 LRP 34982 (2013) (Coworkers repeatedly referred to complainant as "fag," "faggot," and "gay." / EEOC finds Complainant subjected to harassment on basis of sex (gender stereotypes of masculinity).

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## Gender Stereotyping

- *Complainant v. Department of Health and Human Services (CDC)*, 113 LRP 49112, EEOC No. 0120123000, (2013) (A senior service fellow for the Centers for Disease Control and Prevention alleged that the agency subjected her to discrimination based on sex (female) and sexual orientation when a coworker advised her that another coworker said she was a lesbian, lazy, and others would not help her and her team denied her support and she had to work long hours, to meet her deadlines. EEOC reversed and found that considering the incidents together, she stated a viable claim of discriminatory harassment based on sex)

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## Gender Stereotyping

- *Complainant v. Department of Homeland Security, Transportation Security Administration,* 0720130010, 113 LRP 47244 (2013)(A female Complainant and Lead Transportation Security Officer (LTSO) was awarded $100,000 in compensatory damages when two subordinates (TSOs) were spreading false rumors that she was having a sexual relationship with another female TSO and the agency failed to effectively address these rumors)

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## Gender Stereotyping

- *Jameson v. U.S. Postal Service (Pacific Area),* 0120130992, 113 LRP 23467 (2013) (transgender female / agency dismissed claims that her supervisor repeatedly referred to her as "he" should be dismissed because the claims were neither severe nor pervasive / OFO disagreed, holding that improperly referring to complainant as "he" could form the basis of discrimination and/or harassment / "Further, with regard to Complainant's allegation that she was subjected to harassment when her supervisor repeatedly referred to her as "he", we note that supervisors and coworkers should use the name and pronoun of the gender that the employee identifies with in employee records and in communications with and about the employee. Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.").

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## Gender Stereotyping

*Culp v. Department of Homeland Security,* 0720130012, 113 LRP 22009 (2013) (EEOC upheld the AJ's decision that it had jurisdiction to hear the complaint because in effect Complainant was alleging discrimination based on sexual stereotyping / Specifically the EEOC held: "As an example of sex stereotyping in this case, Complainant believes she was discriminated against when she was counseled numerous times for taking her breaks and her lunch with another female, who was also a lesbian, and was told by her supervisor that it was creating an "improper perception." In other words, Complainant is alleging that the supervisor was motivated by his attitudes about stereotypes that women should only have relationships with men, and that two lesbians seen together created an "improper perception" that goes against that gender stereotype. . . . This is sufficient to state a claim that Complainant was discriminated against for failure to match gender-conforming and thus state a claim based on sex discrimination." ).

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## Gender Stereotyping

- *Brooker v. USPS*, 0520110680, 113 LRP 32107 (2013) (EEOC finds ongoing coworker comments that Complainant is gay and frequents gay clubs and bars states a claim of harassment / Commission notes that Complainant is alleging harassment on basis of sex, not sexual orientation, and therefore the claim is covered by Title VII)

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## Gender Stereotyping

- Terveer v. Library of Congress, ___ F. Supp ____, 114 LRP 15517 (D.C. Ct. 2014) (Plaintiff attorney alleged discriminated against under Title VII based on sex when fired because didn't conform to traditional gender roles; claimed fired after being harassed and humiliated by a supervisor who repeatedly quoted biblical passages condemning homosexuality)

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