



22nd Annual EXamining Conflicts in Employment Law (EXCEL) Training Conference

Properly Framing Harassment Claims

Virginia Andreu, EEOC

“Respect • Opportunity • Inclusion”



FRAGMENTATION



- Is the breaking up of a complainant's legal claim into separate factual allegations or incidents.
- For complainants, fragmented processing can be compromise their ability to present an integrated and coherent claim of an unlawful employment practice for which there is a remedy under the Federal EEO statutes.
- For agencies, fragmented processing substantially increases case inventories and workloads when it results in the processing of related matters as separate complaints.
- Fragmentation of EEO claims must be prevented at all levels of the complaint process, including pre-complaint counseling. Agencies are required to evaluate the issues and claims raised in counseling and during investigations and determine how they should be treated.

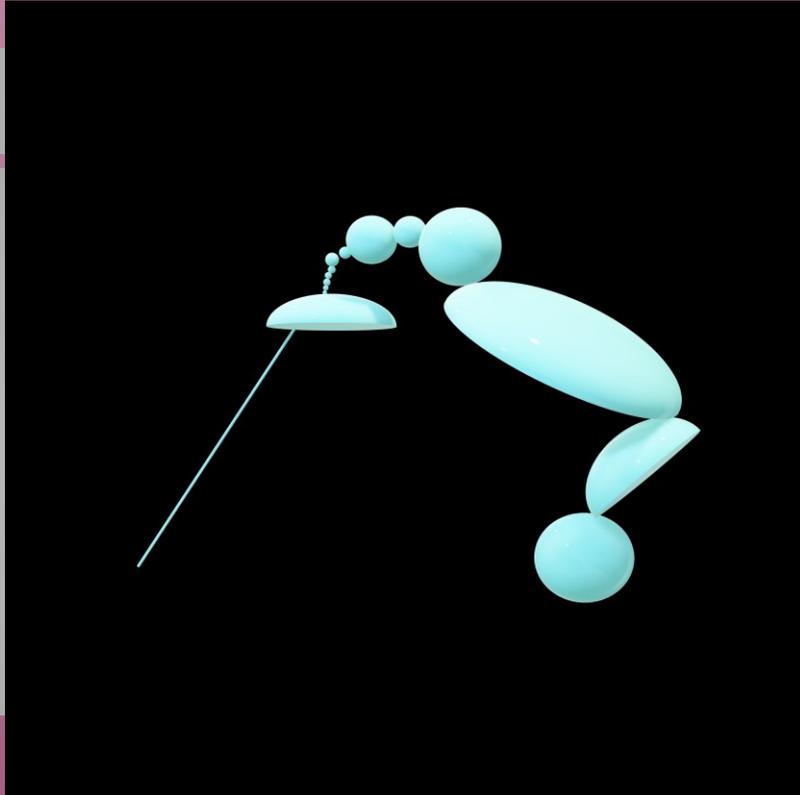
Identifying the claim

- CLAIM refers to an assertion of an unlawful employment practice or policy for which, if proven, there is a remedy under the federal EEO statutes.
- Two components of a claim:
 - Policy or practice being challenged; and
 - Basis (race, color, religion, sex, national origin, age, disability or retaliation)

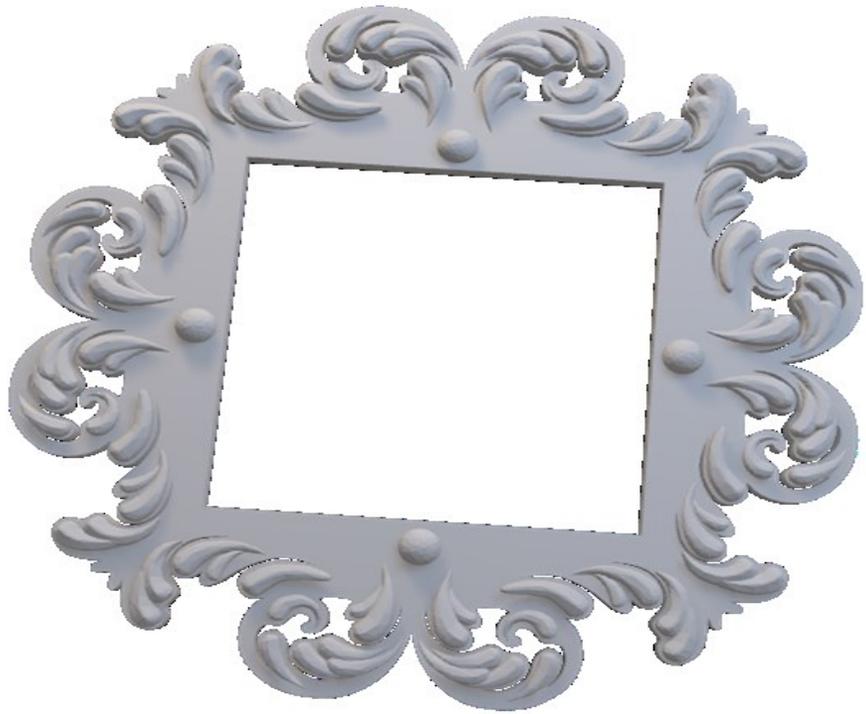
Defining the Claim



- To avoid fragmentation, agencies need to distinguish between the claim and the evidence (factual information).
- EEO Counselors, investigators, and other EEO staff members must ensure that they understand the exact nature of the complainant's concerns so that the employment practice is defined broadly enough to reflect any allegation of harassment.



- Discrete acts, such as failure to hire or promote, termination, or denial of a transfer , they will generally not be independently actionable unless they were timely raised with an EEO Counselor (within 45 days period).
- Untimely discrete acts should be considered as background evidence if they are relevant to the determination of whether acts which were timely raised were discriminatory.



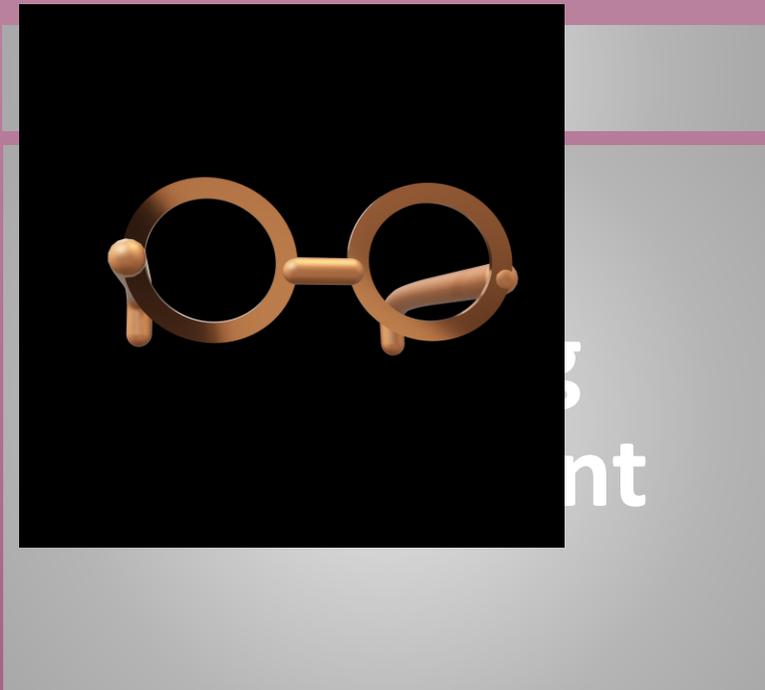
Joe, contacted an EEO Counselor on May 15, 2019, alleging that he was discriminated on the bases of race (Caucasian) an sex (male) when he was not selected for a promotion on three different occasions by his first-line supervisor on: November 20, 2018; January 5, 2019; and most recently on May 1, 2019.

Harassment Claims

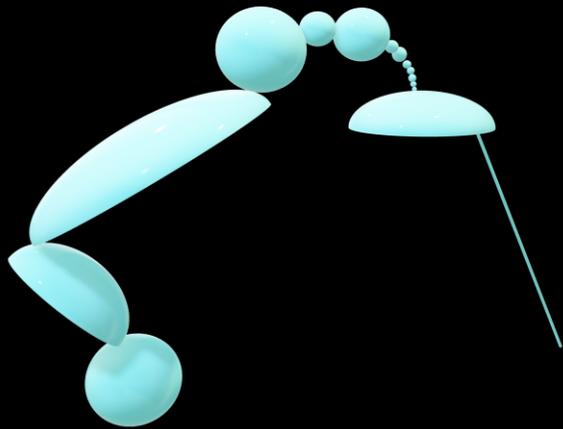


The individual must show that:

- belongs to a statutorily protected class;
- was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class;
- the harassment complained of was based on her/his statutorily protected class;
- the harassment is so objectively offensive as to alter the conditions of the victim's employment. This standard is met when:
 - The conduct results in a tangible employment action, or
 - The conduct was sufficiently severe or pervasive to create a hostile work environment; and
- there is a basis for imputing liability to the employer.

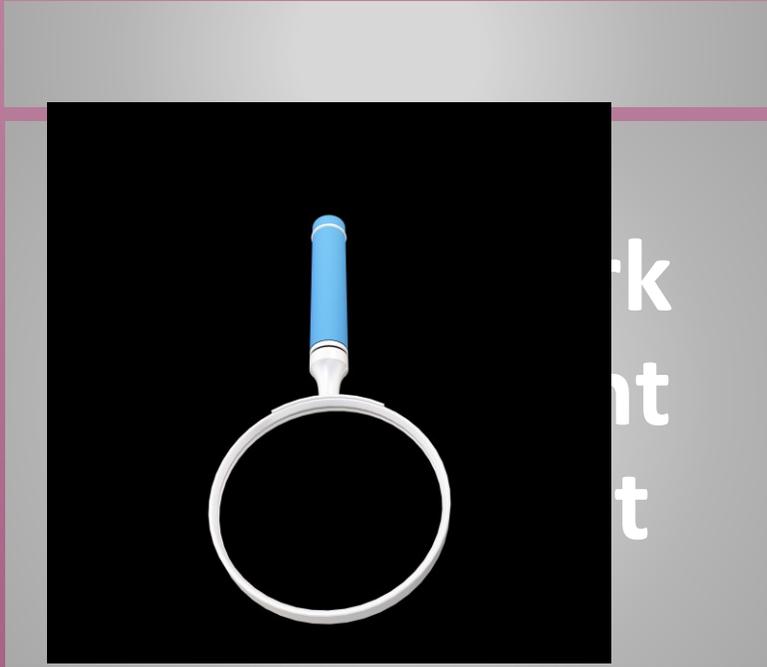


- A tangible, discrete employment action, e.g., hiring, firing, transfer, promotion, non-selection, etc.
- It is actionable, if satisfy the *McDonnell Douglas* three-step evidentiary analysis: complainant must establish a prima facie case; the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its action; and once the Agency has articulated its reason, complainant must show that the Agency's reason was pretextual, that is, it was not the true reason for its action. Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason.
- A finding of a harassment that culminated in tangible employment action is precluded when Complainant failed to establish that any of the actions taken by the Agency were motivated by discriminatory or retaliatory animus (failed to show pretexts).



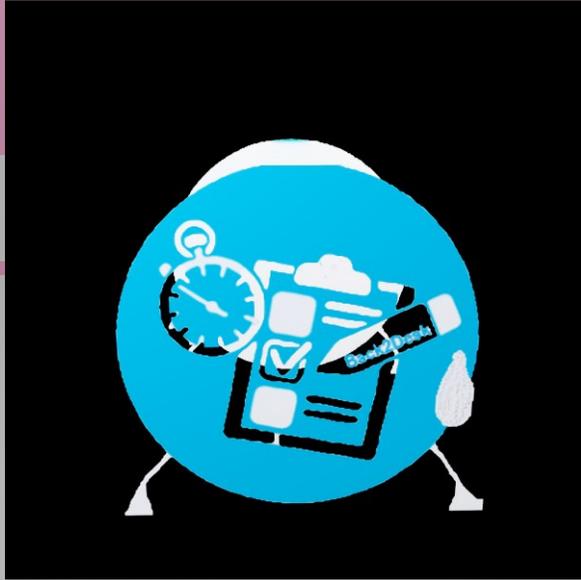
Is actionable if it is:

- Sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create a hostile or abusive working environment.
- An “objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive” and the complainant subjectively perceives it as such.
- Whether the harassment is sufficiently severe to trigger a violation of the anti-discrimination federal laws, must be determined by looking at all the circumstances, including: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.



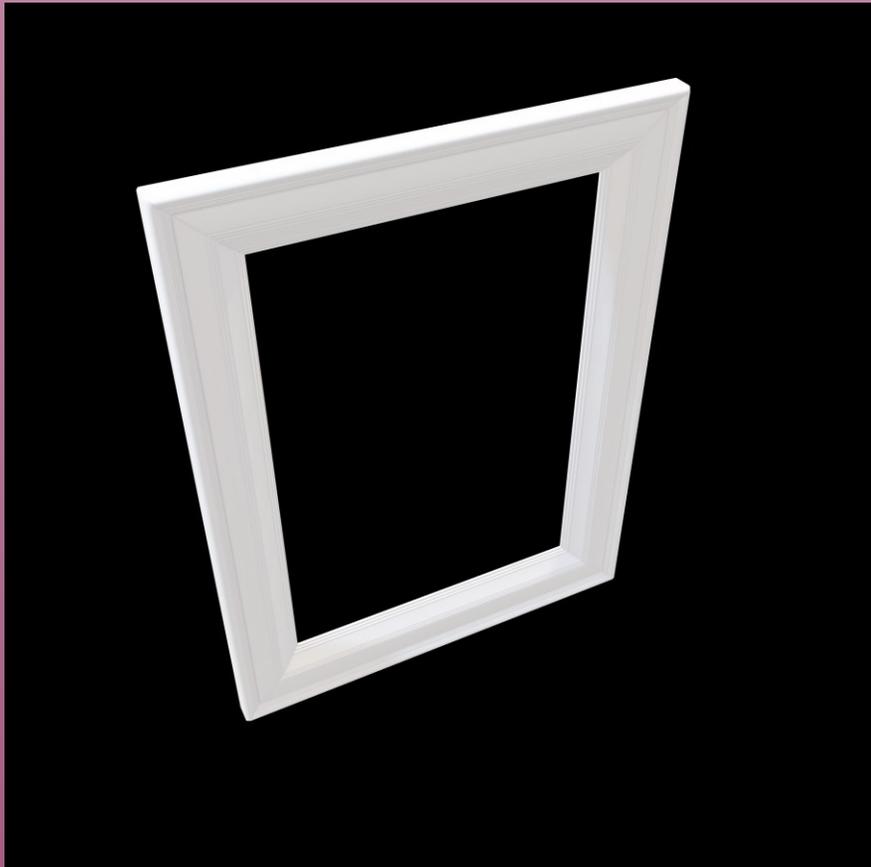


- Agencies fragment harassment/hostile work environment claims by dismissing each factual incident by complainant separately, reasoning that the incident was insignificant; but, considered together, may allow complainant to prove a hostile work environment.
- An Agency should not ignore the “pattern aspect” of a harassment’s claims and define the issues in a piecemeal manner where an analogous theme unites the matter complained of.



Issues

- if the complainant is making a claim of hostile work environment, it does not matter if some of the acts which are alleged to be part of the claim fell outside the 45-day time period as long as at least one act contributing to the claim occurred within the time period.
- All the incidents, whether timely raised or not, which make up a hostile work environment claim “collectively constitute one ‘unlawful employment practice,’” they will all be considered for the purpose of determining liability.
- Hostile work environment claims are based on the cumulative effect of individual acts over a period of time. Therefore, harassment claims, timely or not, must be counseled and investigated as part of the claim.



On March 22, 2019, Harry initiated EEO Counselor contact. Informal efforts to resolve his concerns were unsuccessful. On May 2, 2019, he filed a formal complaint. Harry alleged that the Agency subjected him to discrimination on the bases of sex, age, and reprisal (whistleblowing). Specifically, he alleged he was subjected to harassment by the Agency for “blowing the whistle” on August 27, 2018 concerning government waste and mismanagement.

Also, Harry claimed that he was subjected to a series of related incidents of harassment from July 2018 through December 2018. Specifically, he stated that his “[second-line supervisor’s] final act of harassment and discrimination culminated when he was denied telework. He asserted that after completing the telework training and familiarizing himself with all relevant Agency policies and guidelines about teleworking, he submitted a Telework Agreement to his [first-line supervisor]. Initially, S1 [First-line supervisor] denied his telework request, but after discussing the matter, S1 told him to revise and resubmit the Agreement. On February 28th 2019, Harry submitted his revised Agreement, but on March 1, 2013, via an email, S1 again denied him telework.

The Agency determined that Harry’s complaint was comprised of the following claims: Complainant’s request to telework was denied, and from July 2012 through December 3, 2012, he was subjected to harassment. Agency issued a decision dismissing the entire complaint on the grounds of untimely EEO Counselor contact and failure to state claim.

On April 20, 2018, Complainant contacted the EEO Counselor, alleging that the Agency subjected her to discrimination on the bases of race (Caucasian), color (white) and age (59) when she was subjected to ongoing pattern of harassment based on actions by her supervisor. In support of her claim, Complainant included a 38-page typed document including events from August 17, 2016, until the end of March, 2018, when she was not invited to a meeting. The agency reduced her allegations, and framing her complaint in two separate claims of discrimination and identified them as follows:

She alleged that she was subjected to disparate treatment from September 14, 2016 to February 25, 2018, when: she was denied a promotion, a cash award, training requests and was involuntarily reassigned to other office; and

She alleged that she was subjected to harassment, from June 2015 to April 5, 2018, when: her supervisor did not open her emails; her supervisor denied her promotion request; she received a poor performance appraisal; and her detailed was ended and reassigned to another division.

The agency dismissed claim (1) for untimely counselor contact; and dismissed claim (2), pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. The Agency held that the events alleged in claim (2) were sporadic, isolated incidents that were not sufficiently severe or pervasive to rise to the level of stating a claim of harassment.

Affidavit
Revealed
Agency
December





Claim? Timely?
State a claim?



Tammy contacted an EEO Counselor on June 3, 2019 alleging that she was subjected to discrimination on the bases of sex and age when on: (1) November 6, 2018, she was singled out for talking; (2) on February 21, 2019, management wanted to ride her route with her; (3) on March 2019, her timecard was held because she was a couple of minutes late; (4) in March 6, 2018, her leave request was denied and a “dumb blond” joke was told in the office; and (5) on April 19, 2019, she was called at home after calling in to report her absence from work and was told to provide a release from her physician for return to duty.

In its final decision, the agency dismissed claims 1, 2, 3, and 4 for untimely EEO counselor contact and dismissed all claims for failure to state a claim.



claim(s).

Complainant sought EEO counseling and, subsequently, filed a formal complaint on October 21, 2018. In her complaint, she alleged discrimination on the bases of sex (female) and reprisal when: (1) she was coerced into a sexual affair with her supervisor during which she suffered from severe emotional trauma and humiliation; (2) the Director interfered with complainant's rights to present an EEO complaint; (3) she was issued a Letter of Concern for causing a disturbance at the her work place; (4) her request for sick leave was denied and instead management charged her with absence without leave (AWOL); and she terminated her employment under a constructive discharge due to the intolerable work environment and sexual harassment.

The agency issued a final agency decision on February 20, 2019 (FAD-1) which accepted for investigation claims (3) - (5), regarding constructive discharge and hostile work environment, and dismissed claims (1) and (2), regarding sexual harassment and hostile work environment. On September 13, 2019, the agency issued its final decision (FAD-2) concerning claims (3)-(5) which it accepted for investigation in FAD-1. In FAD-2, the agency found that complainant failed to establish a prima facie case of sex discrimination or retaliation. It further found that complainant failed to demonstrate that her work environment was so intolerable and hostile as to warrant terminating her employment.