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Evolving Workplace Harassment Claims and Theories

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Today's Agenda

- Level set on unlawful harassment
- Single instances of harassing behavior
- Civility/incivility in the workplace
- Revisiting EEOC's Select Task Force Report
- EEOC charge data & current enforcement focuses
- Evolving legal standards for hostile work environment claims
- Class actions on the rise?
- Third-party harassment by customers and non-employees
- Practical compliance and prevention tips

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Level Set on Unlawful Harassment

- Harassment is a form of employment discrimination under Title VII, ADEA and ADA, which all prohibit harassment based on protected characteristics
- Harassment is unwelcome conduct that is based on protected characteristic where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive
- Hostile work environment & quid pro quo theories
- Harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, filing a lawsuit under anti-discrimination laws or opposing discriminatory employment practices based on reasonable belief prohibited

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Title VII is Not a Civility Code, But...

- Supreme Court held Title VII is not a "general civility code for the American workplace" (*Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986))
- Circuits still agree (at present) petty slights and annoyances will generally not rise to the level of illegality unless extremely serious (but *Muldrow*?)
- To be unlawful, the harassing conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people
- However, even isolated or a one-time incident of harassment can give rise to actionable harassment claim if sufficiently severe
 - "Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment' than the use of an unambiguously racial epithet such as [the N word] by a supervisor in the presence of his subordinates."

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Significance of the Single Utterance

- **Example:** On appeal by a pro se plaintiff, Fifth Circuit Court of Appeals (case no. 21-30150) held a manager referring to employee as a "lazy monkey a__ n____" sufficient to state a Title VII race harassment claim
- First, Second, Fourth, Seventh, Eighth, Ninth, and District of Columbia Circuits have recognized that a supervisor's single use of a particular racial epithet may be sufficiently severe to state an actionable claim for a hostile work environment
- Judge Brett Kavanaugh (then a member of the U.S. Court of Appeals for the District of Columbia Circuit) stated this particular racial epithet is "a term that sums up ... all the bitter years of insult and struggle in America, [a] pure anathema to African-Americans, [and] probably the most offensive word in English." 712 F.3d 572, 580

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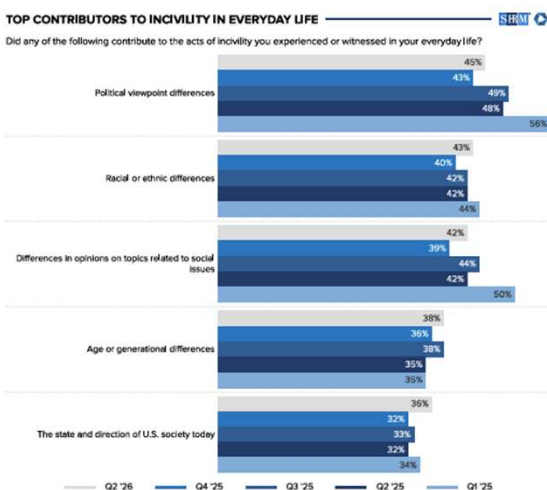
Workplace Incivility Defined & Distinguished

- Civility defined as a cornerstone of workplace culture that fosters respect, empathy and the productive exchange of ideas and opinions
- Incivility defined as “low-intensity behavior that is deviant and ambiguous in its intent to harm” and “subtle in comparison to other forms of mistreatment”
- “Selective incivility” suggests that not all cases of incivility are general or random acts of rudeness, but rather, some are concealed examples of discrimination

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Top Contributors to Workplace Incivility



1. Political viewpoint differences remains biggest driver
2. Racial or ethnic differences
3. Social issues
4. Age/generational differences
5. State and direction of US today

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Impact of Incivility in the Workplace

- **Collaboration:** 20% of survey respondents indicate they refused to work with people who had been uncivil to them, even if they were on the same team
- **Productivity:** Loss of approximately 33 minutes per act of incivility
- **Absenteeism:** 2.2 days away from work to avoid incivility
- **Other impacts:** Higher job stress, psychological distress, lower job satisfaction, higher turnover rates, excessive worry, loss of sleep, cognitive distraction, lower creativity, lower performance on routine and creative tasks, and engage in fewer citizenship behaviors

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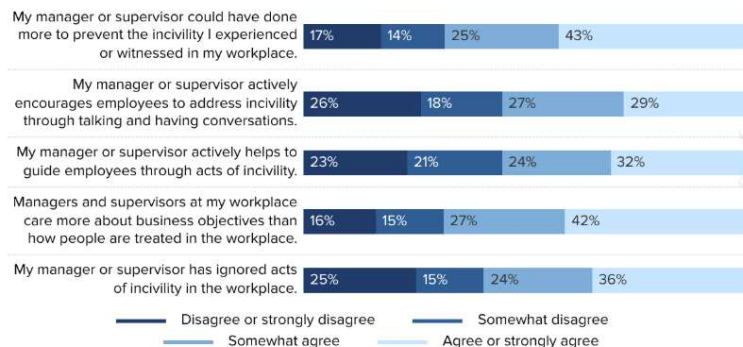
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33% Believe Managers Ignore Incivility

PERSPECTIVES ON THE ROLE OF MANAGEMENT IN INCIVILITY



Thinking about the acts of incivility you personally experienced or witnessed while at work over the past month, select the extent to which you agree or disagree with the following statements.



SOURCE: Q2 2026 CIVILITY INDEX, SHRM, 2026. VISIT [SHRM.ORG/RESEARCH](https://www.shrm.org/research) TO LEARN MORE.

Note: Not all bars add up to 100% due to rounding.

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Example of Incivility Leading to Harassment Claim

- *EEOC v. Bob's Tire Co., Inc.*, No. 1:24-cv-10078, D. Mass
- Donning Immigration and Customs Enforcement hat at work
- Using nicknames for long-term employee such as "poo poo"
- Made masturbation gestures at employees
- Told employees to "suck his d***" weekly
- Grabbed own genitals in response to employees' verbal requests
- Made donkey noises toward an employee and called him "burro"
- Telling employees to go back to their country
- \$250,000 settlement with non-monetary terms

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10th Anniversary of Select Task Force on the Study of Harassment in the Workplace Report

- Issued June 2016
- Archived but available (for now) at <https://www.eeoc.gov/select-task-force-study-harassment-workplace-report-co-chairs-chai-r-feldblum-victoria-lipnic>
- Key themes and recommendations still resonate
 - Workplace harassment remains a persistent problem
 - Workplace harassment too often goes unreported
 - A compelling business case exists for stopping and preventing harassment
 - Leadership and accountability are critical
 - Training must change to incorporate new and different approaches

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Practical Tips

- Maintain multiple, accessible reporting channels, including at least one that bypasses the employee's direct supervisor
- Investigate every complaint promptly, thoroughly, and impartially, and document the process and the outcome
- Apply and enforce your anti-harassment policy consistently across every location and business unit (inconsistent enforcement is both a merits risk and a certification risk)
- Continue to define and train on respectful behavior, and hold leaders accountable for modeling it
- Evaluate managers on preventing *and* responding to harassment, not just preventing it

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Practical Tips (cont'd)

- Protect against retaliation for anyone who reports, complains, or participates in an investigation
- Identify vulnerabilities and risk factors
 - Young workers
 - Monotonous tasks
 - Isolated workspaces
 - Alcohol consumption
 - Power imbalances
- Conduct regular climate surveys and harassment risk audits, ideally under attorney-client privilege, and act lawfully on the data
- Utilize available resources, such as the EEOC's Promising Practices guidance for your industry

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Recission of EEOC Enforcement Guidance on Harassment in the Workplace

- Extensive guidance with 70+ real-world examples and explanations of how to identify and prevent harassment, including online and 3rd party
- Rescinded in its entirety in January 2026 on party lines
- Reasoning: bathrooms and pronouns
- Critiques of rescission:
 - Took “away guidance intended to protect workers from harassment on the job, including instructions on anti-harassment policies, trainings, and complaint processes”
 - Rescinded outside of the established rulemaking process with no public comment or notice period
 - Harassment “harms our workforce and ultimately our economy. Workers can’t afford this - especially at a time of high costs, chaotic tariffs, and economic uncertainty. Women and vulnerable workers deserve so much better.”

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So, is Harassment Enforcement Dead?



**ALL OF THE FOLLOWING INCREASED
IN FY 2025:**

- Receipt of harassment charges
- Resolutions of harassment charges
- Withdrawal with benefits
- Reasonable cause findings (but also no reasonable cause findings)
- Successful conciliations (but also unsuccessful conciliations)

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EEOC Harassment Enforcement Themes since 1/1/25

- Vulnerable populations
 - Subjecting teenage workers to unwelcome touchings or threats of touching (e.g., groping, grabbing around waist, threats of rape, trapping employees in close quarters, crowding them, “unintentional” touching, etc.)
 - Men being harassed and touched (e.g., sexual abuse of teenage male employee by male supervisor)
- Religious harassment (e.g., removal of hijab, antisemitic comments)
- Majority discrimination (e.g., male and female class members)
- DEI-related harassment (e.g., allegedly harassing DEI related training)

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EEOC Class/Systemic Enforcement Since January 2025

- Consent decree monetary value ranges
- Enhanced focus on religion to align with administration priorities
 - \$21M class settlement based on harassment due to Jewish faith, ancestry, Israeli national origin
- Third-party harassment
 - \$1.2M consent decree where male and female employees groped, stalked and subjected to sexual comments
 - \$200,000 class settlement where patrons physical with female entertainers
- Sexual harassment remains priority
 - \$2M settlement with CA/NV hospitality employer in July 2026

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Hostile Work Environment Legal Standard

- Subjective component: employee must perceive the harassment as sufficiently severe and pervasive to alter the terms and conditions of employment
- Objective component: perception must be objectively reasonable
 - A reasonable person would find the environment hostile and abusive
 - Requires asking about:
 - The frequency of the conduct
 - Severity of the conduct
 - Nature of the conduct (threatening, humiliating, etc.)
 - Whether it interfered with the employee's job performance

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Sufficient Facts to Get to a Jury Trial?

- 8 comments over 5 years
- 3 comments overtly referred to Hispanic national origin
 - 2021: co-worker stated that a basin in the sludge room resembled a "Mexican bowl."
 - 2022: co-worker stated that a cleaner had performed poorly "probably because she's Cuban."
 - 2023: co-worker stated that "Mexicans eat the shit out of sand cranes."
- 2 comments implicitly referred to Hispanic national origin
 - Unspecified date: co-worker stated that the "lawn crew," apparently comprised of Hispanics, was "not worth a damn."
 - Unspecified date: co-worker stated that "anybody that can read or write English can" pass a licensing examination.
- 2 comments and 1 incident not referencing race/national origin

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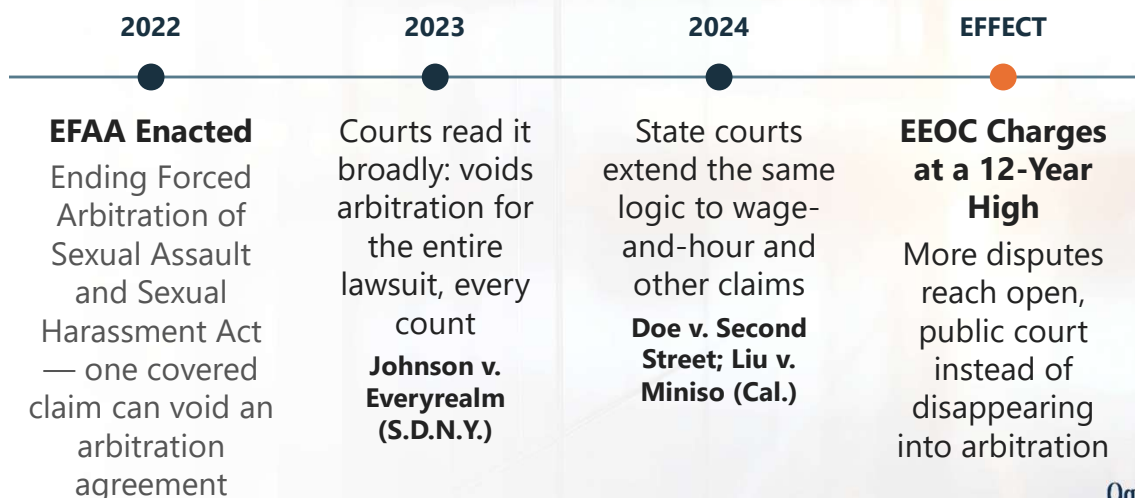
“Steady Barrage” of Comments Required for Hostile Work Environment Harassment Claim?

- 10th Circuit “steady barrage” of discriminatory comments needed
- Recent clarification by 10th Cir. of “steady barrage” formulation
 - Does not signal a uniform, frequency requirement
 - Not demand a ritualistic number-counting exercise the panel wrote
 - More relevant guidepost where the focus is on the pervasiveness of the discriminatory conduct
 - Caution against overreading the frequency implied by standard
- Matter of first impression: discrete, independent discriminatory acts can form part of hostile work environment claim even if not independently actionable

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Why HWE Claims Are Rising Now: Arbitration Doors Are Opening



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What Actually Drives HWE Class Certification

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| <ul style="list-style-type: none"> • CERTIFIED — localized, uniform exposure <ul style="list-style-type: none"> – Single-facility mining operation: pervasive visual and verbal harassment across one worksite – Single-restaurant, single-supervisor case: a 95-member class tied to one location – County public defenders' office: 260 employees harassed by inmates at a single facility (third-party harassment) | <ul style="list-style-type: none"> • DENIED — diffuse, individualized exposure <ul style="list-style-type: none"> – Multi-plant manufacturer: exposure ranged across a wide spectrum, from minor incidents to physical assault, depending on plant and shift – County government employer (7th Cir.): "ambient harassment" alone can't carry commonality – Multi-facility distributor (2025): pay and discipline claims certified, but the harassment claim was denied — evidence was confined to one facility and didn't extend company-wide |
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Case Study: Certification Denied, Then Settled

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|--|---|
| <ul style="list-style-type: none"> • DENIED (Dec. 2025) <ul style="list-style-type: none"> – Sector: a national quick-service restaurant franchisor, ~100 corporate-owned locations in one state – Theory: pattern-or-practice tolerance of harassment through deficient policy, training, and discipline – Proposed class: ~33,000 current and former employees – Every theory rejected — injunctive, damages, and issue-certification subclasses all denied | <ul style="list-style-type: none"> • THEN SETTLED (2026) <ul style="list-style-type: none"> – March: circuit court declines to hear an appeal of the certification denial – April: individual claims headed to 7–10 day jury trial – July: parties settle confidentially and dismiss with prejudice, 16 days before this presentation, without a jury trial |
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The takeaway: *a consistently applied anti-harassment program across every location is a real certification defense — arbitration reform just means you're more likely to actually need it!*

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Harassment by Customers & Third Parties

- Basic elements of a legal harassment claim remain unchanged
- EEOC stance: employer may be responsible for harassment perpetrated by non-employees "where the employer (or its agents or supervisory employees) knows or should have known about the harassment and failed to take prompt and appropriate corrective action."
- Essentially a negligence-based standard
- Majority view holds employers responsible for harassment when they unreasonably fail to prevent third parties from harassing employees
 - Includes courts in First, Second, Fourth, Eighth, Ninth, Tenth and Eleventh Circuit Courts of Appeal

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Recent Court Decisions Adopting Stricter Standards

- Harassment claim based on:
 - Customers touched her inappropriately
 - Coworker grabbed her buttocks once and hugged her inappropriately two or three times
 - Manager called her a "b*tch"
 - Co-owner and general manager told her to wear tight, form-fitting clothes because it looked better on her
 - Requested to change roles or wear less revealing clothing because the customer interactions had made her uncomfortable
 - Management declined both requests
- *Anderson v. Mott Street*, No. 23-2765 (7th Cir. 2024)

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Clear Departure from Negligence to Reckless

- District Court for the N.D. Illinois granted summary judgment on harassment claim then Seventh Circuit affirmed
- Seventh Circuit did not consider the alleged harassment from customers, writing that “without any indication that [Employer] recklessly permitted the behavior, it is not liable for the actions of its customers.”
- Seventh Circuit focused on only the conduct of the plaintiff’s supervisor and coworkers and found that even construing all material facts in the plaintiff’s favor, the conduct was not so severe or pervasive as to alter the conditions of employment

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From Negligence to Reckless to Intentional

- Female sales representative made on-site visit to a client
- Male client manager locked sales rep in his office and repeatedly asked her to date him
- Sales rep declined his advances and asked to leave and she left
- Sales rep reported the incident to her supervisor and client was reassigned to another sales team so she would not need to interact with him again
- Remedy effective - no further harassment occurred
- Sales rep subsequently laid off in mass layoff
- Sales representative sued alleging harassment by a client created a hostile work environment and the company did not take reasonable action to correct the sexual harassment

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Intent to Harass

- District Court for the Eastern District of Michigan granted employer's summary judgment motion on harassment claim, reasoning that employer's reassignment of the client was sufficient corrective action under a negligence theory to avoid liability.
- Sixth Circuit expressly rejected the negligence framework for third-party harassment.
- Sixth Circuit instead held that Title VII "imposes liability for non-employee harassment only where the employer intends for the harassment to occur."
- According to Sixth Circuit, employee must show employer "intend[ed] for the relevant unlawful consequence—here, her harassment—to occur."
- Intent exists "when an actor 'desires' an unlawful consequence from his actions or is 'substantially certain' that it will result."
- Based on these facts, the Sixth Circuit found a jury could not reasonably conclude that employer "desired" employee to be harassed by the client or was "substantially certain" that such harassment would occur.

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Circuit Split Persists

- Supreme Court denied petition for certiorari in April 2026
- The Sixth Circuit's ruling diverges sharply from the EEOC's position, as well as that of almost all other circuits to address the issue
- Employers in Kentucky, Michigan, Ohio, and Tennessee have a higher bar for employer liability set by the Sixth Circuit
- Employers outside Sixth Circuit remain subject to a more employee-friendly standard
- EEOC has urged in briefing in 2026 that courts made clear negligence remains the standard

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Practical Tips on Third Party Harassment

- Prevention remains key, explicitly identify customer/third-party harassment as conduct prohibited within your EEO, non-harassment, and code of conduct policies
- Train third-party-facing employees and their managers, and build anti-harassment expectations into vendor, staffing agency, and contractor agreements
- Bystander training should continue and address customer/third party harassment
- Empower employees to remove themselves from a harassing interaction without fear of discipline

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Practical Tips (cont'd)

- Develop practical, effective escalation processes (*e.g.*, call escalation, incident tracking, client removal) tailored to your industry
- Address third-party risk explicitly where employees are isolated, traveling, or less likely to report
- Modernize investigation plans to account for third-party harassment, and document consistently across locations
- Lean on the evolving standard and controlling law at your own risk!
- But know which standard governs your jurisdiction (negligence, recklessness, or intent) and calibrate response speed and documentation accordingly as well as litigation strategy

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Practical Tips (cont'd)

- Promote awareness with customers through signs and messaging
- Reduce employee's reliance on tips, rating systems, etc.
- Increase accountability of customers and clients for their harassing behavior (example: vendors, guests and employees all read and agree to terms of anti-discrimination policy)
- Establish a formal repeat-offender protocol, coordinate with security or loss prevention to restrict or ban access for known repeat harassers or uncivil third parties
- Encourage employees to report harassment before it becomes severe or pervasive
- Consider sharing status and remedies during and after concerns/investigations

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Thank you!

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