

EXCEL CONFERENCE

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1:30 p.m. – 3:00 p.m.

Is It a Cold or an Epidemic?
Diagnosing Systemic Harassment

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AGENDA

- ▶ Real EEOC Systemic Harassment Cases in Litigation
- ▶ How do you know if you have a Systemic Harassment Issue Looming?
- ▶ Who are the Victims?
- ▶ Harassment – The Law
- ▶ Harassment Policies / Procedures / Investigations
 - Common Mistakes
 - Interviewing Tips
- ▶ Remedies
- ▶ Retaliation



REAL SYSTEMIC HARASSMENT CASES LITIGATED BY EEOC:

- ▶ **Race/ Color**–Holmes & Holmes, A & A Foundries, Albertsons,....



- ▶ **National Origin** –Mesa Systems Global Inhn Pickle, Koch Foods...



- ▶ **Age**–WESODI, RadioShack, Allied Signal...
- ▶ **Disability**–Henry’s Turkeys, Luby’s, Gannett, Banner Health,....

REAL SYSTEMIC HARASSMENT CASES LITIGATED BY EEOC:

- ▶ **Religion**–Townley, Yuma Motel,...
- ▶ **Sex/ Gender/Pregnancy**– Outback,..
- ▶ **Sexual Harassment**– Sonic, IHOP, Pitre, Flemings, CEM, ABM, Spud Seller,
- ▶ **Retaliation**–Albertsons, HBH, Pitre,.....almost all harassment cases...



How Will you Know if you have a Systemic Harassment Issue?

- ▶ Informal complaints
- ▶ Observations
- ▶ Formal Complaints
- ▶ Vague Complaints
- ▶ Exit Interviews
- ▶ Employees requesting transfers
- ▶ Employees quitting
- ▶ Hearing/ Seeing inappropriate behavior
- ▶ Results of real investigations
- ▶ EEOC charges
- ▶ EEOC investigations....



- ▶ DO YOU WANT TO KNOW IF YOU HAVE A SYSTEMIC HARASSMENT ISSUE?
- ▶ DO YOU KNOW?



WHO ARE HARASSMENT VICTIMS?

- ▶ **Can really be anybody!**
- ▶ women, men,.....
- ▶ older (over 40), younger (still must be over 40 under federal law),
- ▶ gay, straight, bisexual, transgendered,.....
- ▶ white, Latino, African Americans, Asian Americans, Native American, Middle Easterners, people of color, light colored, dark colored,.....



WHO ARE HARASSMENT VICTIMS?

- ▶ **Can really be anybody!**
- ▶ pregnant women, women who have terminated pregnancies, women who have children, men who have children,...
- ▶ Catholic, Protestant/ Christian, Muslim, Hindu, agnostic, atheist, theists,
- ▶ persons with disabilities, persons perceived as having disabilities, persons with a record of a disability, persons associated with others with disabilities, people with certain genetic information, people believed to have certain genetic information....



WHO ARE HARASSMENT VICTIMS?

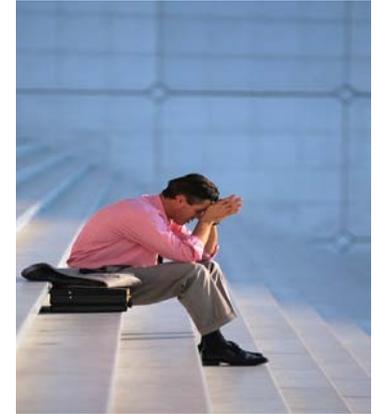
- ▶ people who **oppose** what they believe is discrimination, people who **participate** in internal EEO investigation/ charge filing/ EEOC investigation/ hearings/ litigation/ class fund distribution/ witnesses
- ▶ **IT IS NOT THE VICTIMS's fault....**
- ▶ **Harassment is about abusing power**
- ▶ Can be in the environment and not the target



WHY DO WE WANT TO BLAME THE VICTIM?

▶ What we want to believe:

- Good Things Happen = Good People
- Bad Things Happen = Bad People
- Therefore, if a bad thing happened to you, it must be your fault



▶ What we know:

- Bad things do happen to good people.
- When you start to question the victims actions, statements, etc – remember this.....



DANGEROUS WORDS & EXCUSES

- That kind of behavior is part of growing up.
- He/ she was just joking.
- He/ she is just like that.
- I/they didn't mean any harm.
- It's just a prank that got out of hand.
- That's how they do things where they come from.
- If nobody complained, what's the big deal?
 - Everybody else was okay.
 - What's your problem?
 - Can't you take a joke?
 - You're too sensitive.



MORE DANGEROUS WORDS & EXCUSES:

- You need to learn to handle these things.
 - Just ignore it.
- Oh well, boys will be boys (girls will be girls)
 - They puts their arms around everyone.
 - It's your fault for being.....
 - Why can't you learn to accept a compliment?
 - It's just teasing – no big deal.



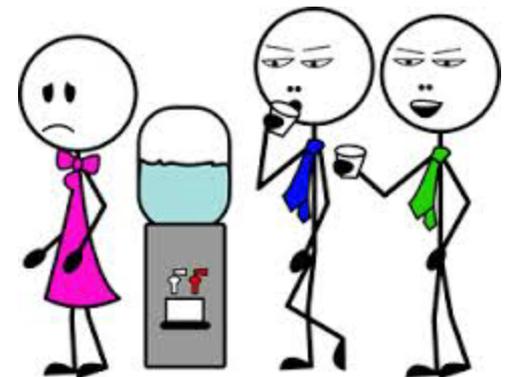
SYSTEMIC HARASSMENT

- ▶ Harassment based on race, color, religion, national origin, sex, sexual harassment, age, disability, genetic information, retaliation is systemic if it creates a hostile work environment based upon a protected basis.
- ▶ In general, harassers do not limit their behavior to one person or one victim.



HARASSMENT

- ▶ Legal basis of a **HARASSMENT** or **HOSTILE WORK ENVIRONMENT** claim is the statutory language – which prohibits discrimination in “the terms and conditions” of employment.
- ▶ **“Terms and conditions”** of employment includes different treatment, harassment, hostile work environment based on race, national origin, sex, disability, religion, age, retaliation, color, and/ or genetic information.



BASIS FOR HARASSMENT CLAIMS:

- ▶ Race
- ▶ Color
- ▶ National Origin
- ▶ Religion
- ▶ Sex/ Gender/ Pregnancy
- ▶ Disability
- ▶ Retaliation
- ▶ Age
- ▶ Genetic Information



EVOLUTION OF SEXUAL HARASSMENT LAW:



- ▶ 1964–Title VII of Civil Rights Act
 - Section 703(a)(1)—nothing is mentioned about sexual harassment—not in the statute.

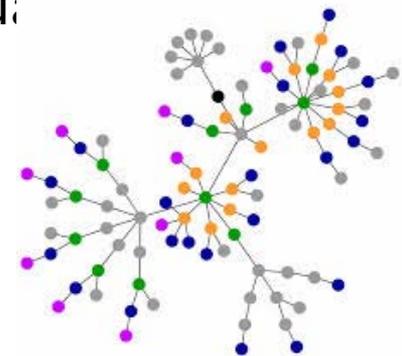
- ▶ 1980–EEOC Guidelines on Discrimination Because of Sex
 - Initial definition of sexual harassment

- ▶ 1986–Supreme Court Decision
 - Meritor Savings Bank v. Vinson—first time USSC recognized sexual harassment as a claim under Title VII.

EVOLUTION OF SEXUAL HARASSMENT LAW:

- ▶ 1990–Policy Guidance on Current Issues of Sexual Harassment
 - Two types of supervisory sexual harassment
 - Hostile environment
 - Quid Pro Quo

- ▶ 1998–Supreme Court Decisions
 - Burlington Industries v. Ellerth and Faragher v. City of Boca Raton
 - Updated types of supervisory sexual harassment
 - Hostile environment
 - Tangible employment action
 - Created Affirmative Defense to Supervisor Sexual Harassment



WHAT BEHAVIORS CAN BE CONSIDERED SEXUAL HARASSMENT

- ▶ Demands for sexual favors for job benefits
- ▶ Unwelcome letters, telephone calls or distribution of materials of a sexual nature
- ▶ Physical assaults of a sexual nature
- ▶ Unwelcome touching
- ▶ Unwelcome sexually suggestive looks/gestures
- ▶ Unwelcome pressure for sexual favors or dates
- ▶ Unwelcome sexual teasing, jokes, remarks
- ▶ Favorable treatment for sexual favors
- ▶ Sending underwear, candy, cards, stalking....
- ▶ LOTS MORE.....only the imagination of harassers limits this....



OTHER FORMS OF HARASSMENT:

- ▶ Harassment based on:
Examples: Derogatory comments, name calling, slurs, pictures, texts, “jokes”, physical threats, photographs, objects, nooses, ridicule, ...
- ▶ Because of:
- ▶ Race/Color/National Origin
- ▶ Religion
- ▶ Sex/ Gender
- ▶ Disability
- ▶ Retaliation
- ▶ Age



UNWELCOME

- ▶ Harassment is unlawful only if it is unwelcome.
- ▶ Unwelcome–
 - Employee regarded the conduct as undesirable and/or offensive and did not want it to happen, and
 - Employee did not solicit or incite it.



DETERMINING WHETHER SEXUALLY TAINTED BEHAVIOR IS SEXUAL HARASSMENT:

- ▶ Use “reasonable person in their shoes” or “reasonable woman” standard
- ▶ Primary criteria
 - Severity OR
 - Frequency
- ▶ Note: A single incident of physical sexual conduct can create a hostile environment.



EMPLOYER LIABILITY FOR HARASSMENT

- ▶ THE STANDARD FOR DETERMINING LIABILITY DIFFERS DEPENDING ON WHETHER THE HARASSER IS A:
 - Co-worker/non-employee
 - Alter ego of the employer
 - Supervisor



CO-WORKER / NON-EMPLOYEE HARASSMENT

- ▶ Liability is not automatic–vicarious liability or negligence standards.
- ▶ Must establish the employer knew or should have known about the conduct or the negligence standard.
- ▶ Employer Defense: Employer must then show it took immediate and appropriate corrective action to correct harassment and prevent its recurrence.



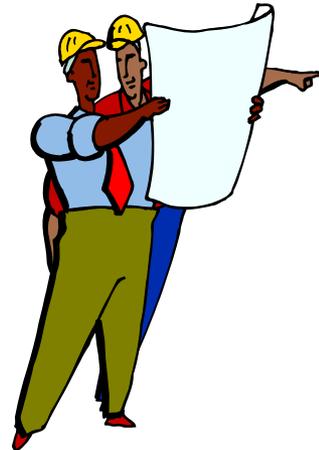
HARASSMENT BY AN ALTER EGO OF THE EMPLOYER:

- ▶ Liability is automatic.
- ▶ Alter ego—someone of sufficiently high rank to be treated as the employer's proxy.
- ▶ Examples—president, owner, partner, corporate officer.



HARASSMENT BY A SUPERVISOR:

- ▶ Liability may or may not be automatic.
 - ▶ Types of supervisory harassment:
 - Tangible employment action harassment:
 - Automatic liability
 - Hostile work environment harassment:
 - Liability not automatic.
 - Employer has the affirmative defense available
- NOTE: negligence theory may be available.



Harassment Investigations



SYSTEMIC HARASSMENT

- ▶ It is time to take charge.
- ▶ Take your personal emotions and pride out of the situation.
- ▶ Get good legal advice about the law, your exposure and follow through with what is best for the organization and what is the best solution to the problem.
- ▶ GET TO THE TRUTH!



TAKE CHARGE

- ▶ Do not ignore the problem. It will not go away on its own!
- ▶ It will actually get worse if you ignore it!
- ▶ No action by employers is a **GREEN** light to harassers and will increase the size of your victim pool.



ACKNOWLEDGE SOMETHING IS NOT WORKING



- ▶ If harassment is an on-going issue in your organization:
 - Is there a commitment from top management to maintain an environment free of discrimination/retaliation?
 - **Will you take strong and appropriate disciplinary action?**
 - Are all supervisors and managers adequately trained in all aspects of EEO?
 - Did you properly fund, staff and respect human resources? Do you listen human resources?
 - Can you identify the toxic person or group?

ON GOING

ACKNOWLEDGE SOMETHING IS NOT WORKING



- ▶ Special Circumstances that Make it More Difficult?
 - What if the harasser is the CEO or Owner of the Company or your boss? What now?
 - What if the harasser is long term employee with good performance otherwise?
 - What if the harasser is a contractor?
 - What if the harasser is customer?



ACKNOWLEDGE SOMETHING IS NOT WORKING



- ▶ Its time to review policies, procedures, and communicate any and all changes to all staff.
- ▶ It is time to take action and discipline or fire the harasser!

Acknowledge

HARASSMENT POLICIES AND PRACTICES:

▶ Some common mistakes:

◦ Policy Problems:

- No policy exists
- Policy is buried
- Policy does not cover all EEOC statutes
- Policy does not describe types of prohibited conduct/potential consequences
- Language chills complaints and threatens employees
- Policy does not have person/ phone number/ hotline to contact
- Policies are not distributed
- Policies are not updated
- Policy does not communicate what a victim should do if they are being harassed—has no procedure



.....

HARASSMENT POLICIES AND PRACTICES (COMMON MISTAKES):



- ▶ Failure to investigate complaints.
- ▶ Failure to **adequately** investigate complaints.
- ▶ Failure to investigate when a manager or supervisor knows about the harassment.
- ▶ Failure to take informal complaints seriously.
- ▶ Failure to discipline harassers.
- ▶ Allow retaliation.
- ▶ Considering complaints “frivolous” or “trivial” without an investigation. EX: “He’s bothering me.”
- ▶ Failure to warn alleged harasser to avoid retaliation (his or her friends too)

HARASSMENT POLICIES AND PRACTICES (COMMON MISTAKES):

- ▶ Seeing third-party harassment by customers or suppliers as “not our problem.”
- ▶ First-line supervisor fails to recognize need for immediate action when inappropriate conduct is reported/observed/suspected.
- ▶ Failure to communicate intent to take action to the complainant.
- ▶ Failure to assure complainant/witnesses they will be protected from retaliation.



HARASSMENT POLICIES AND PRACTICES (COMMON MISTAKES):

- ▶ Failure to emphasize to alleged perpetrator need to avoid any retaliatory action.
- ▶ Transfer the complainant– **RETALIATION!**
- ▶ Delaying the investigation.
- ▶ Victim does not seem cooperative and therefore organization does nothing.
- ▶ Poor quality investigations.
- ▶ Investigator not competent/objective or is perceived as such.
- ▶ Promises of absolute confidentiality to complainant/witnesses.



HARASSMENT POLICIES AND PRACTICES (COMMON MISTAKES):



- ▶ Results / Interviews not recorded / documented.
- ▶ Appropriate witnesses not interviewed.
- ▶ Inadequate corrective action.
- ▶ Failure to advise complainant(s) and alleged harasser of results of investigation.
- ▶ Evaluations for supervisors do not require individual responsibility for assuring a harassment-free environment and equal opportunity for all employees.

WHY CONDUCT EFFECTIVE INTERNAL EEO INVESTIGATIONS?

- ▶ Company says you have to.
- ▶ It gives employers a possible legal defense.
- ▶ Shows you support fairness.
- ▶ Reduces the number of external charges.
- ▶ Resolves actual or perceived problems.
- ▶ Increase productivity and morale.
- ▶ Identify victims of discriminatory practices.
- ▶ Identify effective remedial actions.
- ▶ Limit or avoid employer's liability.
- ▶ It is the **RIGHT THING** to do.



HARASSMENT INVESTIGATIONS

**KNOWLEDGE =
LEGAL DUTY**



QUALITIES OF A GREAT INVESTIGATOR:

- ▶ Neutral – able and willing to hear all sides
- ▶ Trained in EEO Laws
- ▶ Able to think critically
- ▶ Not intimidated by witnesses
- ▶ Able to gather, assess evidence and develop statements
- ▶ Patient and persistent
- ▶ Honesty ~ Independence ~ Great Judgment



TIMING IS EVERYTHING!

- ▶ Delay = liability.
- ▶ Even if the harassment eventually stops.
- ▶ No excuses!
- ▶ Lack of HR staffing.
- ▶ Lack of funds to conduct an investigation.
- ▶ “Overload of cases.”



WHY CONDUCT INTERVIEWS?

- ▶ Interviews are the most critical part of most investigations.
- ▶ Get the Facts: Who, What, Where, When, Why, How.....
- ▶ To acquire information not documented in files...
- ▶ To find out where documentary and other information can be obtained....
- ▶ To corroborate information obtained from others.....



WHY CONDUCT INTERVIEWS?

- ▶ To check accuracy of documents / texts / emails / videos....
- ▶ To get an explanation or interpretation of policies, practices, procedures, documentary evidence....
- ▶ To check credibility of Complainant, Alleged Harassers / Witnesses....
- ▶ To obtain Respondent's position



Characteristics of an Effective Interviewer?

- ▶ Tact
- ▶ Professionalism
- ▶ Patience
- ▶ Focus
- ▶ Empathy
- ▶ Ability to establish rapport
- ▶ Prepared
- ▶ Asks right questions at right time
- ▶ Paraphrases responses
- ▶ Sufficient authority, not subordinate to either party
- ▶ Good Note Taking

BE EFFECTIVE!



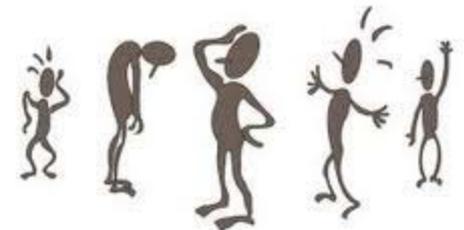
CONDUCTING EFFECTIVE INTERVIEWS:

- ▶ Opening
- ▶ Establish control and rapport – set the stage
- ▶ Body of the Interview
- ▶ Closing
- ▶ Give a brief summary of the interview
- ▶ Review your notes
- ▶ Obtain names of other people to interview
- ▶ Answer the interviewees questions
- ▶ Leave the relationship open for further contact
- ▶ Secure a signed affidavit, when appropriate
- ▶ Explain the next steps, if appropriate
- ▶ Thank the interviewee



NON VERBAL COMMUNICATION:

- ▶ A simple body movement you can use is the head nod to reinforce the behavior.
- ▶ Facial expressions communicate attitude and emotions.
- ▶ Movements of the eyebrows and mouth may indicate puzzlement, surprise or pleasure.
- ▶ Be aware of your expressions and adopt expressions to communicate the attitude that you want the interviewee to see.
- ▶ A look of surprise at interviewee's answer may cause fear of incrimination or judgment.



INTERVIEWING THE VICTIM – PURPOSE:

- ▶ Assure the victim that the allegations will be taken seriously and action will be taken to correct any discrimination that is found.
- ▶ Ask the victim to promptly report any further discrimination or retaliation.
- ▶ Obtain names of witnesses and other possible victims.
- ▶ Obtain copies of any physical evidence.



INTERVIEWING THE VICTIM – GOOD STRATEGIES:

- ▶ Promptly interview the alleged victim in detail.
- ▶ Interview the victim in private, at a time and place that will draw the least attention.
- ▶ Always interview the victim (and other witnesses) in the language in which s/he is most comfortable.



STRATEGY

Interviewing the Victim – Good Strategies:

- ▶ Do not suspend, move, transfer, isolate or in any way affect the complainant in an attempt to stop discrimination or harassment.
- ▶ Be prepared for the victim to tell you anything.
- ▶ Do not make this your only interview with the victim.
- ▶ You may wish to have the victim write a statement of the allegations.



Interviewing the Alleged Discriminating Official (ADO) – Purpose:

- ▶ Assure that if any discrimination or harassment has occurred, it will stop now.
- ▶ Assure that the alleged harasser will not retaliate.
- ▶ Allow the accused party a chance to respond.
- ▶ Obtain witness names and other evidence.



INTERVIEWING THE ALLEGED DISCRIMINATING OFFICIAL (ADO) – GOOD STRATEGIES:

- ▶ Speak with the ADO as soon as you are aware of the allegations.
- ▶ Interview the ADO privately.
- ▶ Assure that the ADO understands that the allegations are being taken seriously.
- ▶ Review the allegations in detail with the ADO.



INTERVIEWING THE ALLEGED DISCRIMINATING OFFICIAL (ADO) – GOOD STRATEGIES:

- ▶ Direct the ADO to keep the investigation confidential.
- ▶ Do not allow the ADO to “face my accuser.”
- ▶ Ask if there have been any prior complaints against the ADO.



INTERVIEWING WITNESSES: WHO TO INTERVIEW

- ▶ Witnesses named by the victim/complainant/accused.
- ▶ Individuals who previously complained about same ADO.
- ▶ Former employees
- ▶ Current employees.
- ▶ Random sampling.
- ▶ Exit Interviews.



INTERVIEWING WITNESSES – GOOD STRATEGIES:

- ▶ Interview each witness separately and privately.
- ▶ Witnesses only need to know as much information as necessary to answer questions.
- ▶ Ask witness to keep investigation confidential.

CONFIDENTIAL

INTERVIEWING WITNESSES – GOOD STRATEGIES:

- ▶ Ask open-ended questions followed by specific questions.
- ▶ Ask witness if he has seen, experienced or heard about discrimination.
- ▶ Ask witness if he knows anyone else to speak to and why.



WHAT EEOC WILL LOOK FOR:

- ▶ Evidence of prompt and appropriate action.
- ▶ Evidence of retaliation prevention.
- ▶ Documents of interviews.
- ▶ Documents supporting conclusion.
- ▶ Evidence of follow-through.



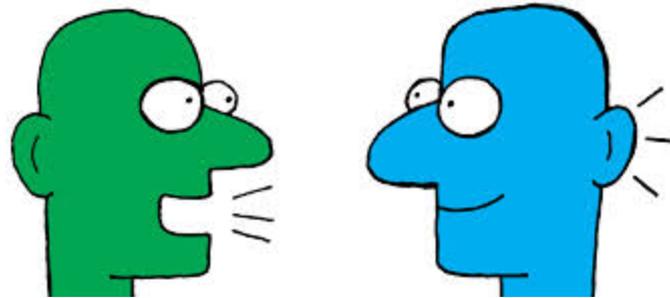
MAKING A DETERMINATION:

- ▶ Base on all available evidence.
- ▶ Allow parties an opportunity to rebut.
- ▶ Lack of witnesses is not sufficient to discredit a victim.
- ▶ Investigator should be able to articulate how credibility findings and final determination was made.
- ▶ **MAKE A DECISION!**



COMMUNICATE THE FINDINGS:

- ▶ Inform complainant, victims and ADO of findings.
- ▶ Inform all parties that you are dedicated to remedying the situation.



REMEDIAL MEASURES MAY INCLUDE:

- ▶ **Stop** the harassment.
- ▶ **Apologies.**
- ▶ Correct the effects of the harassment.
- ▶ Make the employee whole monetarily and otherwise.
- ▶ Ensure the harassment does not reoccur.
- ▶ Do not adversely impact the employee.
- ▶ Prospective relief.
- ▶ **NO RETALIATION!**



REMEDIES:

- ▶ Case by case basis.
- ▶ Make victims **whole**.
- ▶ Restore lost benefits or opportunities.
- ▶ Counseling or referrals.
- ▶ No reference in personnel files of victims.
- ▶ Inform victim of actions you have taken.



REMEDIES:

- ▶ Discrimination policy training.
- ▶ Provide training to managers/employers.
- ▶ Individualized training on harassment, tolerance or anger management.
- ▶ Reiterative non-discriminatory policy.
- ▶ Hotlines.
- ▶ Follow-up.
- ▶ Leadership speaks on commitment



REMEDIES:

- ▶ **Real Appropriate Discipline.**
- ▶ Document disciplinary action and reasons in personnel file.
- ▶ Periodically inquire if further discrimination and/or harassment occurred regardless of your findings.

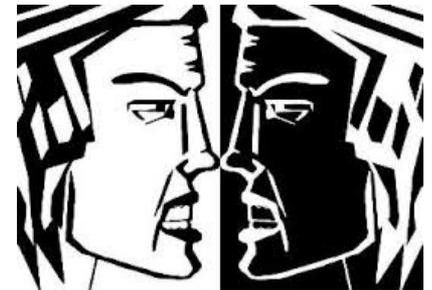


▶ RETALIATION

PROTECTED FORMS OF OPPOSITION:

- ▶ Threatening to file or assist in filing a charge/complaint/grievance/lawsuit alleging discrimination.
- ▶ Complaining about discrimination to management/union/employees or newspapers.
- ▶ Organizing or participating in a group which opposes unlawful employment discrimination.
- ▶ Refusing to obey an order because of a belief that it constitutes unlawful employment discrimination.

Note: Persons protected from retaliatory conduct are not limited to those who protest discrimination against themselves.



UNLAWFUL RETALIATION:

- ▶ Denial of right to oppose discrimination or participate in the EEO process.
- ▶ Harassment and intimidation.
- ▶ Denial of employment benefits.
- ▶ Discharge, discipline, demotion, reassignment.
- ▶ Unjustified evaluations and reports.
- ▶ Acceleration of disciplinary actions.
- ▶ Negative reference of former employee in retaliation for his/her opposition to discrimination or participation in EEO process.
- ▶ Unwarranted contesting of unemployment compensation claim.



THE COST OF HARASSMENT:



- ▶ Adverse publicity.
- ▶ Morale of work force suffers.
- ▶ Wasted time at work by both harassers and victims.
- ▶ Heartache.
- ▶ Giving **GREEN** light for it to spread.
- ▶ Bad business to allow it.
- ▶ Employees initiate other complaints.
- ▶ Time of supervisors and management.
- ▶ Attorney costs.
- ▶ Deposition costs/Experts/Travel/Subpoenas.
- ▶ Court Awards/ Big Verdicts!

THANK
YOU

The image features the words "THANK YOU" in a bold, 3D, light blue font. The letters are arranged in two rows: "THANK" on top and "YOU" below it. The text is set against a black rectangular background that is tilted slightly to the right. The 3D effect is achieved through shading and perspective, with the letters appearing to rise from the black surface. The overall composition is clean and modern.