

## ADA Audio Conference Series April 15, 2014

This session is scheduled to begin at  
2:00pm Eastern Time

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3

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## Captioning



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4

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5

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## Customize Your View



- ▶ Resize the Whiteboard where the Presentation slides are shown to make it smaller or larger by choosing from the drop down menu located above and to the left of the whiteboard. The default is "fit page"



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- ▶ Resize/Reposition the Chat, Participant and Audio & Video panels by “detaching” and using your mouse to reposition or “stretch/shrink”. Each panel may be detached using the ☰ icon in the upper right corner of each panel.

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  2. **By Email** [webinars@ada-audio.org](mailto:webinars@ada-audio.org); or
  3. **Call** 877-232-1990 (V/TTY)

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## Googling Job Applicants

Joe Bontke  
Outreach Manager and Ombudsman  
EEOC Houston

April 15, 2014

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**Woman  
earn only  
78% of what  
men earn**



**WOMEN**  
Like men,  
only cheaper.

IF YOU DON'T LIKE IT,  
HELP US RIGHT IT.

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- The unemployment rate for veterans who served on active duty in the U.S. Armed Forces at any time since September 2001--a group referred to as Gulf War-era II veterans--was 12.1 percent in 2011



**WE'RE STILL FIGHTING  
BUT THIS TIME,  
FOR A JOB**

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Generation X and Y make up over 50% of the workforce.



For the first time ever, there are 5 generations at work at the same time.

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Applicants and is everyone getting the true picture

Google Search I'm Feeling Lucky

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### Can I Google Applicants?

*Yes you can\**

*...\* BUT During this session we want to look at more:*

- *What's legally allowed to search when investigating a candidate*
- *The return on investment of online screening*
- *The current "case history" that might motivate a social media search risk*
- *New tools and methods for analyzing information found*

15

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## What's in your "backpack"

- It's what we "bring"
- It's who I am
- It's my "stuff"



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## Generational Groups

Traditionalists	(prior 1945)
Baby Boomers	(1946-1963)
Generation X	(1964-1980)
Generation Y	(1981-2000)

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## Workplace Dynamics ?

- Define these terms
  - **Team player**
  - Effective communication
  - Appropriate
  - Casual
  - **Person with a disability**

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## Protected Federal Categories

**Race**



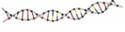
**National Origin**



**Color**



**Genetic Information**



**Religion**



**Disability**



**Sex**



**Age 40+**



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**There are about 540,000 words  
in the English language...**




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**about 5X as many as  
during Shakespeare's time.**




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More than **3,000** new books  
are published every day



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Is Social Media A Fad?

<http://www.youtube.com/watch?v=IFZ0z5Fm-Ng&feature=autofb>

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**The Digital Age**

Welcome to the Virtual World  
of:

- **“Friends”:** Facebook & Instagram  
- Mostly social, but growing business network
- **“Connections”:** LinkedIn  
- “Facebook in a suit”
- **“Followers”:** Twitter  
- Instant messaging on steroids



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There are over **1 billion** registered users of Facebook



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If **facebook** were a country, it would be the **3<sup>rd</sup> largest in the world**

(Between India and U.S.)

And this does not include



or



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### Why employers Google ....

To ensure the best fit between the applicant and the organization

To find candidates with characteristics that will maximize work productivity and minimize costs and liability



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## Internet Never Forgets...

- Stacy Snyder
  - 1<sup>st</sup> Amendment does not cover photos
- Internet records everything and forgets nothing
- Every online photo, Facebook status update, Twitter post and blog entry by and about us can be stored forever



Drunk'in Pirate

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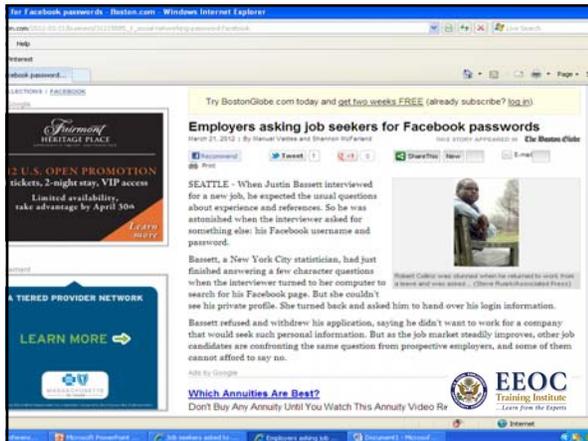
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## Obligations of Employers

- Make the workplace free of unlawful discrimination, harassment and retaliation
- Promptly and confidentially investigate complaints of discrimination, harassment and retaliation
- Where discrimination, harassment and retaliation may have occurred, take prompt and appropriate remedial action (i.e., discipline commensurate with the offense)

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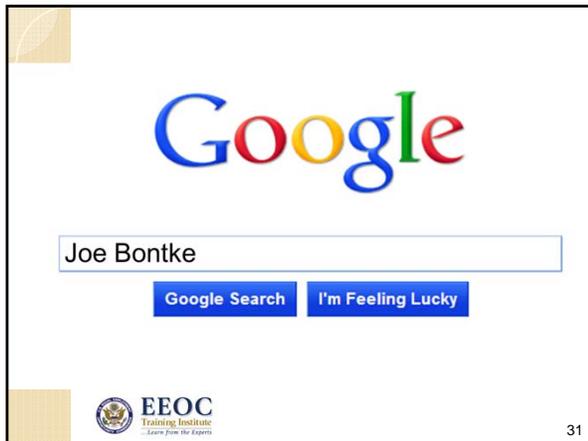
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## Twitter

- 200 million users
- Library of Congress *did you know*
  - will be acquiring and permanently storing the entire archive of public twitter posts since 2006



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## IMPORTANCE OF POLICIES

- "Twoosh" is a word invented to describe Twitter messages that contain exactly 140 characters.
- Our Twitter policy: *(in 140 characters)*  
Be professional, kind, discreet, authentic. Represent us well. Remember that you can't control it once you hit "update."



38

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## HR Statistics

- 75% of U.S. recruiters are required by their companies to do online research of candidates
- 70% of U.S. recruiters report they have rejected candidates because of information found online



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4<sup>th</sup> Amendment \_\_\_\_\_

- **Fourth Amendment**  
(unreasonable searches and seizures)
- **Common Law**
- **Electronic Communications Act of 1986**
- **Federal Stored Communications Act**




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**To Like or Not Like...**

- Does clicking the "Like" button on Facebook constitute "concerted activity"?
  - *Hispanics United of Buffalo Inc. Decision*
- Is a Facebook "Like" constitutionally protected?
  - *Bland v. Roberts*




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**EVOLUTION: O'Connor v. Ortega**

- U.S. Supreme Court first recognized Fourth Amendment privacy protection in pre-Internet 1987.
- Employee's privacy expectations could be shaped and restricted by the employer's policies and practices.
- **HELD:** employee had a legitimate expectation of privacy in his desk and file cabinets.



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**CITY OF ONTARIO V. QUON (2010)**



- ISSUE:** Whether a public employee (a police officer and a SWAT team member) stated a claim for violation of Fourth Amendment rights where the public employer (a police department), reviewed texts sent and received by Quon on his department issued pager.



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**Takeaway**

Every employer, whether public or private, must have clearly drafted policies giving employees notice that they have no expectation of privacy in company electronic equipment, whether this be in emails, phone log details or text messages.



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**ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986**

- Primary federal law addressing privacy concerns is the **ECPA**.
- Exceptions interpreted to mean that if employer maintains its own email system and assumes “provider status,” employer is allowed to retrieve all stored email messages.
- Two types of communications:
  - Messages in transit (happens in seconds – limited opportunity for interception)
  - Stored messages (most typical work scenario)



48

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## Passwords to Avoid

- SplashData's list of the 25 most common passwords found on the Internet.
- Here are the top worst passwords to use:
- 123456
- Password
- 12345678
- Qwerty
- Abc123
- iloveyou (#9), trustno1 (#24), monkey (#17).

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## Federal Stored Communications Act

- **"Wiretapping Act"**
- **Criminal Offense to Intentionally:**
  - (1) Access, without authorization, a facility through which an electronic communication service is provided; or
  - (2) Exceed an authorization to access that facility.



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## TAKEAWAY

Do not gain access to employee's website by either receiving private information through another "friend," or by going through a person on the employee's "friends" list.



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## ISSUES ARISING FROM MONITORING EMPLOYEES (applicants next?)



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## Positive Treatment of Monitoring

**Smyth v. Pillsbury (E.D. Pa. 1996):**  
Upheld firing of employee who transmitted inappropriate emails; Held: Company's interest in preventing inappropriate and unprofessional comments or even illegal activity over email outweighs employee's privacy interests.

53

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## HOT TOPIC – Interference in Union Organizing Activities or “Concerted Actions”



## Employee Rights Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This helpline gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

### Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

### Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

### Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.

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## **NLRB VIEW**

Monitoring employee's social networking activity has the potential of creating a chilling effect on the employees' communications regarding the terms and conditions of their employment, in violation of the NLRA at 29 U.S.C. §157.



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## **KNAUZ BMW (May 24, 2011)**

- NLRB alleges unlawful termination of an employee for posting photos and comments on Facebook that were critical of dealership
- Unhappy with quality of food and beverages at a BMW promotion event
- Again non-union: "concerted activity" because it involved a discussion among employees about the terms and conditions of their employment

56

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## **Best Practice Advise: Create Written Acceptable Use Policies ("AUP")**

By creating and consistently applying policies informing employees that their use of corporate networks, including email access, can be monitored, the employee has waived his/her right to privacy in communications made on the company's network.



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### Basic Contents

- Urge employee to take work-related complaints to HR before blogging or posting about them
- Clarify that discipline will be imposed, up to and including termination, if an employee misuses social networking sites relating to employment or other employees in the context of employment
- Establish a reporting procedure for suspected violations and also reiterate that company's anti-discrimination policies also apply to electronic communications
- Remind employees that computer and email systems are not private and that company may monitor computer, email and/or text messaging usage

58

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### Basic Contents

- Require employees to sign a written acknowledgment form affirming that they have read, understand and will abide by the company's acceptable use policy
- Prohibit unauthorized transmission of corporate trade secrets and other confidential information
- Define discipline to be imposed for transmitting or receiving communications containing pornographic, derogatory, defamatory, sexual, racist or harassing statements
- Define whether email is automatically deleted after a specific time period

59

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### Basic Contents

- Define whether online shopping, surfing, gambling or stock trading is allowed
- Describe when and how the Internet may be used during the workday and/or after work hours on company equipment
- Define penalties for violating the AUP
- Enforce this policy consistently and indiscriminately

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## Permanency of Information

- Viktor Mayer-Schönberger
  - A society in which everything is recorded will forever tether us to all actions, making it impossible, in practice, to escape them.
  - Without some form of forgetting, forgiving becomes a difficult undertaking
- No second chances
  - Worst thing you have done is the first thing people will know about you

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## Ways to Protect Your Image

- Be careful.
  - Do not post anything on any site that you would not want a potential employer to see.
- Be discreet.
  - Set your profile to private and block inappropriate comments that others may make on your profile.
- Be prepared.
  - Regularly check your profile for inappropriate content. Make sure you have an answer ready to explain or counter any "digital dirt" employers may see.

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## When It Becomes Illegal

- When employers base their hiring decision on an applicant's protective status
- When information discovered leads to employer's knowledge of information that would be illegal to use against an applicant in a hiring decision
  - i.e. discovering an applicant was arrested and using that to disqualify
  - **Things you cannot ask in an interview are the same things employer cannot research**

63

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## Questions To Ask When Using Social Media...

- Is it valid?
  - Does the information predict job performance?
  - Is the information job-related?
- Is it legal?
  - No laws have been passed yet
  - Information posted on the internet is considered "public domain"
  - Opens organization up to "perception" of using protected information
- Is it worth it?

64

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## Ways to Protect Yourself...

- Add "off-duty conduct" policy
- Check organization's "cyber reputation"
- Check employees' "cyber reputation"
- Advise caution among employees when posting things on the internet
- social networking policies for their employees while at work, while using employer equipment/facilities, or that will reflect directly on the employer.

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- What is eDiscovery?
  - **The legal discovery of electronic documents and data**
    - eMail, web pages, word processing files, spreadsheets, meta data, databases, backup tapes, cache memory, hard drives, thumb drives, PDAs, firewall/IDS logs, phone call logs, IM transmissions, etc.
  - ⇒ **Anything outside of the traditional discovery of writings or business records on paper is "eDiscovery"**

An **intrusion detection system (IDS)** is a device (or application) that monitors network and/or system activities for malicious activities or policy violations.

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## Unique Problems With Social Networking Activities

- Blurring of lines between “work” and “personal”
- No “filter” or “edit”
- Reach a vast audience
- Immediate public viewing
- Quicker and less “formal” = users are less guarded and careless

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## Background Checks

- Two circumstances employers will meet “job relatedness and consistent with business necessity”
  - The employer validates the criminal conduct screen for the position in question
  - The employer considering at least
    - 1) the nature of the crime,
    - 2) the time elapsed, and
    - 3) the nature of the job ,



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## CRIMINAL BACKGROUND CHECKS

### Individualized Assessment

*Consider each person's record based on the potential risk in the particular position*

#### MITIGATING FACTORS

- Marriage
- Education
- Successful Employment History
- Age at time of release or conviction
- Rehabilitation Efforts

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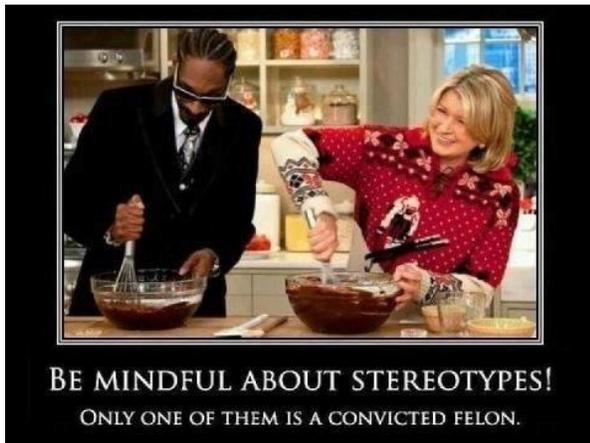
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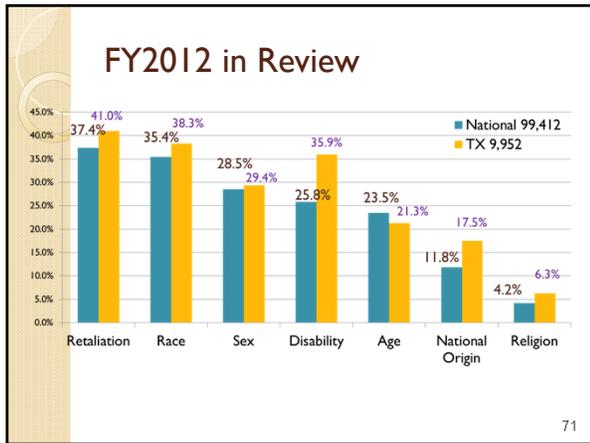
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www.trapster.com

trapster Home TrapMap Traps Blog News Contact Help

Trapster® alerts you to police speed traps and other roadway hazards.

DOWNLOAD TRAPSTER FOR FREE!

- Apple (iPhone/iPad) [Download]
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- BlackBerry [Download]
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Usage Statistics

Total Users	19,179,231
New Users Today	5,242
Traps Reported	6,622,181
New Traps Today	1,899

In The News

- NBC: "Think of it as a community based high-tech early warning system" [Continue](#)
- CNN: "Essentially a cell phone social network that allows motorists to hook up with one another" [Continue](#)

How Does It Work?

Users submit speed trap enforcement cameras, see hazards, that then alert all users in the area. A high level of flashing your headlights alerts owners of potential road to...

© 2013 NAVTEQ

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EEOC Strategic Enforcement Plan (SEP)  
Nationwide Priorities:

**I. Eliminating systemic barriers in recruitment and hiring.**

- **Barriers:**
  - exclusionary practices and policies
  - Steering individuals into jobs based on protected category
  - Restrictive application processes
  - Use of screening tools with adverse impact



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**II. Protecting Immigrant, migrant and other vulnerable workers**

- **Target:**
  - Disparate pay
  - Job segregation
  - Harassment
  - Human Trafficking
  - Discriminatory Language Policies



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**III. Address emerging issues**

- **Issue 1- ADA**
- **Issue 2- LGBT**
  - Coverage under Title VII provisions
- **Issue 3 – Pregnancy**
  - Women being forced onto unpaid leave after being denied accommodations



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## IV Enforcing Equal Pay Act

The next  
Equal Pay Day  
is April 9, 2014.

*This date symbolizes  
how far into 2014  
women must work  
to earn what men earned  
in 2013.*



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## V. Preserving access to the legal system

- **Barriers:**
  - Policies and practices intended to discourage or prohibit the exercise of rights under discrimination statutes or impede EEOC Investigation.

## VI. Combating harassment

- **Basis for harassment:**
  - Race, Color, Ethnicity, Religion, Sex, Age, Disability
  - \*National Education & Targeted Outreach



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A screenshot of the reputation.com website. The page features a navigation bar with links for "Products", "About us", "Resource center", and "Contact us". Below the navigation bar, there are tabs for "Individuals" and "Businesses". The main content area is titled "Promote yourself on the Internet" and includes three columns of text: "Get your own online presence easily", "Monitor and manage your reputation", and "Track your online popularity". At the bottom, there is a call to action: "Call us toll-free today for a free consultation: 888.919.9312".

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What is truth?

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**Finished files are the result of years of scientific study combined with the experience of many years of experts.**

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**Is your perception .... Sometimes your truth?**

- Sometimes we have to take another look at what we think we know



86

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Any Questions, Comments, Concerns or Complaints

Joe Bontke  
EEOC Houston  
Outreach Manager and Ombudsman  
713 651 4994 office  
713 907 2855 cell  
[joe.bontke@eoc.gov](mailto:joe.bontke@eoc.gov)

or

EEOC Training Institute  
[www.eetraining.eoc.gov](http://www.eetraining.eoc.gov)



87

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Thank you for participating in today's  
ADA-Audio Conference Session

The next scheduled session is:

***“Electronic Information & Digital Access: Update on  
Compliance Activities and Enforcement Activities ”***

**May 20, 2014**

[www.ada-audio.org](http://www.ada-audio.org)

877-232-1990 (V/TTY)

88

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